The Challenge of Public Reason: Justified Property Rights and Disability

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The Challenge of Public Reason:
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Abstract:

When is political power legitimate? Public reasons liberals argue that political power is legitimate only when it is supported by reasons drawn from principles of justice that each citizen could endorse. The most well known model for identifying whether a principle satisfies this requirement is John Rawls' idea of an overlapping consensus.

Typical interpretations of the idea of overlapping consensus hold that it expresses a necessary conceptual condition of any reasonable conception of justice. Against this ahistorical view, my analysis shows that Rawls' mature account of overlapping consensus rests on a particular historicist thesis that liberal institutions are necessary for social cooperation given the presumption of moral and religious pluralism. The authority of public reasoning ultimately rests on the widespread consensus about the necessity of liberal institutions, rather than on a consensus on any particular conception of justice. The limits of public reason, on my analysis, are fixed first and foremost by liberal institutions.

Given the prominent historical role of classical liberalism in specifying and defending liberal institutions, one might suppose that classical liberal conceptions of justice would have a central place in any consensus that defines the boundaries of public reasoning. I argue that this appearance is misleading. The work of scholars in disability studies show that conceptions of justice must be sufficiently sensitive to the unique needs and interests of citizens with disabilities. I argue that applying these insights to the idea of public reason shows that classical liberalism can satisfy the requirements of public reason only by unjustly ignoring the perspective of disabled citizens

My dissertation shows that Rawls' model of public reason rests on a nuanced and historically grounded view of the consensus circumscribing public reason. Further, it shows that a historically conditioned concept of public reason and political legitimacy need not imply a drastic retreat from central egalitarian commitments, despite initial appearances to the contrary.

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Chapter 1

The Idea of Public Reason

Public reasons liberals, like John Rawls, Jürgen Habermas, and Gerald Gaus, hold that the moral authority or legitimacy of the most fundamental rules of political society depends on whether those rules are justified by reasons that all reasonable citizens (could) share. Though each endorses some version of this general claim about legitimacy, they draw conflicting conclusions about the range of conceptions of justice that belong to public reason, and the legal rules, political policies, and institutions that are justified by public reasons. So for instance, John Rawls holds that public reasons will tend to justify robust social democratic states in which economic resources are highly regulated and regularly redistributed. Gerald Gaus, on the other hand, believes that public reasons will tend to justify only a political order marked by private enterprise and limited economic regulation. Habermas envisions the content of public reason to be substantial enough to justify a cosmopolitan federation of constitutional democracies, while Rawls and Gaus remain quietly skeptical of extending public reason beyond the borders of the nation-state. Whether the central commitments of public reasons liberalism are broad enough to encompass the different conclusions drawn by each of these philosophers remains a largely unexamined question in the literature on public reason. This dissertation makes some progress towards a resolution of this question.

Through a close examination of Rawls' version of public reasons liberalism, this dissertation aims to show that Rawls' account of public reasons is consistent with a much wider range of disagreement about the principles of basic justice than either he, or many of his interpreters acknowledge. I focus on Rawls version of public reasons liberalism

because it is the most well known account of public reasons liberalism, but also because I believe it is provides the most compelling account of source of the moral requirement connected to the idea of public reason.

At the center of this dissertation is the following question, can strong private property rights and broad protections for liberty of contract be justified by reasons that meet the Rawlsian definition of a public reason. I show that strong protections for private property rights and broad protections for liberty of contract likely can be justified by reasons satisfying the formal definition of public reason developed in Rawls' mature view of public reason. This conclusion undermines Rawls' claim that the values of public reason can only be realized against a background of the egalitarian economic and political institutions typically associated with deliberative democracy.

I conclude by proposing a way of recapturing some of the force of Rawls claim that public reason can be expressed only in a deliberative democracy characterized by broad and significant regulation of property. I draw on recent work on justice and disability to argue that the perspective of citizens with disabilities provides a basis for drawing specific conclusions about the limits of property rights and liberty of contract that can be justified by reasons that all citizens could agree to. Conceptions of justice that do not imply or cannot support these limits fall short of the threshold of reasonability that establishes the range of public reasons. I argue that the logic of core classical liberal commitments make it unlikely that very many classical liberal conceptions will meet this threshold test. It follows that classical liberal conceptions generally fail to provide public reasons. This argument succeeds in showing that classical liberal conceptions of justice may satisfy one set of Rawlsian criteria for public reasons, but they generally fall below

the threshold of reasonability that follows from the specific requirements of reciprocity derived the perspective of citizens with disabilities.

In this introduction I want to distinguish the two most basic claims of public reasons liberalism in order to further clarify which aspect of public reason this dissertation addresses, and additionally to provide a more detailed description of the problem this dissertation addresses.

The idea of public reason rests on two logically independent claims.[1] The first claim is that when exercising, or advocating for the exercise, of coercive political power, citizens are under a moral requirement to provide reasons of a certain kind to other citizens.[2] The second claim is that properly public reasons can be sufficiently distinguished from non-public reasons. Call the first claim the *moral requirement claim*, and the second the *criterion claim*. Some version of each of these claims is essential to any account of public reason, even those developed in opposition to the dominant Rawlsian paradigm.

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[1] In what follows, I will refer to the 'idea of public reason' in an ecumenical way. While the term is certainly associated with Rawls, and he has done more than other recent philosophers to popularize it, the basic features of the 'idea of public reason' are broadly shared by many political philosophers in the broad liberal tradition. I see no reason to use the term exclusively in reference to the formulation of this idea given by Rawls.

[2] Individuals are under such an obligation, in my view, because legal norms are stable only insofar as citizens can adopt what Hart calls the internal point of view towards them (citizens must, in other words, regard legal norms as *justified* requirements, and not simply *commands*). In order for the internal point of view to encompass *all* citizens in a society, the justification must take a particular form, i.e. the justification must be in terms of reasons that are shared by all citizens insofar as they are reasonable. On Hart's view, the content of this shared set of reasons in the rule of recognition, which may or may not have a moral content. Public reasons liberals, by contrast hold that the shared reasons that define the internal point of view of the law must be at least partially moral. The internal point of view is the view that *good citizens* adopt toward the law.

The moral requirement claim holds that individuals are, at least sometimes, morally required to use public reasons.[3] More narrowly, plausible views of public reason must at least establish that individuals are morally required to offer public reasons to others when proposing an exercise of coercive political power. At least three questions need to be answered in connection with explaining the moral requirement claim. Each pertains to how to categorize and understand the moral requirement connected to the idea of public reason. First, what kind of moral requirement is the requirement to use public reasons? Second, who exactly is bound by this requirement and in what circumstances? Third, what moral value grounds the existence of this moral requirement? The brief discussion that follows refers primarily to features of the paradigms of public reason proposed by Gerald Gaus and John Rawls that illustrate some of the different answers public reasons liberals have given to these questions.

First, the moral requirement may be characterized as either a virtue or a duty. Though not a common view, some have characterized the moral requirement to use public reasons in terms of a virtue.[4] On this view, public reason is an excellence of character pertaining to the social role of citizen in a constitutional democracy. Failure to use public reasons may justify some degree of moral criticism insofar as individuals are better citizens when they justify political decisions in terms public reasons, but failure to be a good citizen may not be a moral failure all things considered. The distinguishing

[3] There is, of course, a sense in which this could be a relatively narrow moral requirement. Hobbes identified public reason with the reason of the sovereign, but a Hobbesian account of public reason is not conceptually independent from the obligation to obey the sovereign.

[4] Weithman 2002

feature of this sort of view is the claim that individuals who fail to use public reasons may violate no moral duty.[5]

A much more common view is that the moral requirement to use public reasons is a moral duty, strictly conceived. Among those who hold that the moral requirement to use public reason is a duty, there is widespread disagreement as to the ground of the duty. Rawls sometimes suggests that the duty arises from certain social roles that individuals adopt more or less freely, for example the role of a judge or politician, and perhaps also the role of an active citizen (as opposed to a passive citizen, who is subject to a country's laws but never adopts the internal point of view of its laws). Many however hold the duty to use public reasons is derived from a prior moral duty or principle that binds individuals regardless of their particular social roles. Common candidates include moral principles of justice, respect, or autonomy, as well as more narrowly, principles forbidding unjustified coercion.[6]

Second, the set of persons who are morally required to use public reasons can be conceived in a several different ways. A common view is that the requirement applies to all participants engaged in a normative practice marked by mutual accountability and sanction. As indicated above, all view of public reason hold that that individuals are required to use public reasons when justifying legal norms, though often, the scope of the requirement is held to be much broader. Gaus, for instance, holds that the requirement to use public reasons encompasses the justification of society's entire system of

[5] For a good critical discussion of whether public reason should be conceived as a virtue or a duty see Rawls and Freeman 1999

[6] Jonathan Quong provides an excellent summary of the types of duties and principles that have been invoked to explain the moral requirement to use public reasons, see Quong 2011. Charles Larmore attributes this view to Rawls, see Larmore 2008. Gerald Gaus also seems to endorse something like this view see Gaus 2011

conventional moral norms. Additionally, Rawls sometimes suggests that the moral requirement may apply more strictly to some individuals. So for example, Rawls holds that judges have a stronger moral requirement than other citizens to use public reasons when they decide cases. Such remarks seem to imply that perhaps the vast majority of citizens might be under a fairly weak requirement to use public reasons. In my view, Rawls does not adequately examine the implications of his brief remarks about stronger or weaker requirements to use public reasons.[7]

A further important point is that this moral requirement is explained in terms of individuals described in more or less idealized ways. 'Reasonable persons' who recognize and honor the moral requirement to offer public reasons may be described in ways that emphasize certain moral motives, attitudes, and beliefs, while downplaying others. The different ways of conceiving the beliefs and attitudes of reasonable citizens has led to a long-running debate among public reasons liberal about the how best to characterize 'reasonable pluralism'.

Finally, I already indicated the range of different moral values and principles can be invoked to support the existence of the moral requirement to use public reason. Given the scope of this dissertation there is no need provide more than a brief summary of the most commonly referenced values. Jonathan Quong provides an excellent summary of

[7] Interpreting Rawls' view of the duty of civility as a role-specific duty finds further support in his introduction of the 'proviso' allowing private citizens to introduce non-public reasons into political debate, as long as properly public reasons are introduced in due time. It is unclear whether private citizens themselves bear the obligation of the proviso, since the examples he gives, MLK and Cardinal Bernardin, did not themselves reframe their arguments in term of properly public reasons. Weithman provides an excellent discussion of this point, see Weithman 2002 pp58.

some of the most common possibilities: (a) political autonomy, (b) respect, (c) justified coercion, and (d) justice. [8]

One key objection to theories of public reason liberalism is rooted in general skepticism about the moral requirement to use public reasons.[9] Unlike other moral requirements commonly discussed in political theory, such as the obligation to obey the law, there is no widely held pre-theoretical intuition to support the existence of a moral requirement to use public reasons.[10] Rather the existence of such a moral requirement is generally posited from within a political theory that attempts to reconcile some of the key normative features of a democratic constitutional order with the assumption that religious and moral pluralism is a permanent feature of social life in a constitutional democracy. Consequently, a major theme in the literature on public reason is proposing plausible candidates to a moral requirement that is, in the sense described above, theory-dependent. The need to explain and defend the moral requirement claim however tends to overshadow an equally important set of question about how public reasons are to be identified, or in other words, questions about the content of public reason itself.

There is a distinction between two different approaches that public reasons liberals follow in formulating the criterion claim. One approach holds that a reason is public because it is (or is reasonably believed to be) an implication of a shared set of evaluative premises. The other approach holds that a reason is public because it expresses a normative conclusion that is (or is reasonably believed to be) supported by each individual's non-shared evaluative premises. Rawls' paradigm of public reason is an

[8] See Freeman 2007b, chapter 15, "On the Idea of Public Reason".
[9] See Enoch 2013.
[10] I only mean by this that it is not a widely held belief that individuals have a moral requirement to offer public reasons to one another.

example of the *shared evaluative premises* version of the criterion claim.[11] Gerald Gaus' justificatory liberalism and, in a different way, Jurgen Habermas' discourse theory are examples of the *shared normative conclusion* version of the criterion claim.[12]

Assuming that individuals are, in some way, morally required to justify the normative demands they make to other citizens in terms of public reasons, neither the *shared evaluative premises* paradigm nor the *shared normative conclusion* paradigm are sufficient to identify the content of public reason. The choice between these paradigms is a choice between two intuitively plausible views of how to identify the reasons that citizens share. Each of these paradigms proposes something like a necessary condition for identifying which reasons are public reasons, but the work of determining the content of public reason can only *begin* with the choice between these two paradigms.[13]

Despite conflicting approaches to formulating the criterion claim, theorists of public reasons nevertheless broadly agree that the paradigmatic examples of public reasons are the principles of equal political liberty and equal rights of conscience (the liberties of speech, association, and religion). Any plausible formulation of the criterion claim *must* identify these two principles as public reasons.[14] The agreement among theorists of public reasons on these paradigmatic examples of public reasons should, I think, be relatively unsurprising. Contemporary theories of public reason, after all, aim to

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[11] Though Rawls shares key aspects of the *shared normative conclusion* version as well.
[12] More than anyone else, Gerald Gaus has clarified the distinction between these two paradigms. For an extended discussion of the differences between these paradigms, see Gaus 2003
[13] The contrast between these two paradigms may be slightly overstated, since Rawls anyways, makes use of both ideas in describing the content of public reason. Nevertheless, at the theoretical level one must decide how best to characterize the notion of a shared reason.
[14] There is also an important agreement about what is *not* a public reason, namely, perfectionist ethical and religious principles.

show that liberal rights and liberties can be justified to all reasonable citizens without necessarily drawing on controversial enlightenment notions of moral autonomy. The idea of public reason is supposed to show, in part, how individuals who seek to live in a cooperative society on a basis that all can endorse will support the core protections of a liberal constitution, though not necessarily because those protections express a thick ideal of personal moral autonomy. Given that the primary aim of theories of public reason is to construct a less comprehensive justification for liberal theories of justice, one should expect that familiar liberal principles of justice would be the paradigm examples of public reasons. [15]

These examples provide a common ground on which different versions of the criterion claim are to be formulated. They provide a fixed point in different theories of public reason. A satisfactory formulation of the criterion claim will identify not only the principles expressed in paradigm cases, but also a wider set of principles. The criterion claim enables theorists to identify a wider set of principles to fill out the shared vocabulary that citizens have a morally requirement to use when discussing and debating other claims that can be made about the basic structure.[16] Identifying public reasons

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[15] The selection of these principles as paradigmatic public reasons provide all that public reasons liberals need to argue that an important set of liberal rights and liberties, those that are *essential* to any democratic constitutional order, can be endorsed from within the evaluative standpoints of citizens who hold reasonable, though non-liberal, beliefs about the broader horizon of moral life. I don't mean to suggest that the selection of the principles of equal political liberty and equal rights of conscience is in any way arbitrary or circular, at least not in any way that would undermine the basic thesis of public reasons liberalism. I only mean to claim that different versions of the criterion claim are elaborated with these paradigmatic examples in mind, as opposed to other possible liberal (or even non-liberal) principles, like self-ownership.

[16] There is disagreement in the literature about whether the political philosopher can plausibly specify the set of public reasons on the basis of a theory of public reason. Habermas, for instance, holds that the set of shared reasons must, by and large, be

beyond the paradigm cases is necessary if a theory of public reason is to achieve its goal of showing that institutions of the basic structure can be supported by reasons that all citizens share. Beyond the paradigm cases provided by familiar constitutional protections, political decisions about the most fundamental conventions for property, taxation, and distributive entitlements need to be supported by shared reasons. It is no less urgent that the political rules governing citizens' conventional entitlements to property, and the scope of institutions of taxation and redistribution be resolved in ways that all citizens recognize as, at least, reasonable.

The two paradigmatic public reasons above provide no clear basis for deciding questions of property, taxation, and other distributive entitlements. These questions must be decided on the basis of other principles. These principles are identified by the criterion claim formulated to account for the paradigm cases. A theoretically adequate formulation of the criterion claim may not need to identify only one principle or set of ranked principles as public reasons. Rawls suggests in his mature view of public reason that perhaps the criterion claim identifies a family of such principles. Nevertheless, the criterion claim must rule out some principles in order to function as a criterion for public reason. A question that theories of public reason need to answer then is which principles of distributive justice are ruled out of public reason by the criterion for identifying public reasons?

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determined through a process of actual discussion among citizens. I assume that Rawls is roughly correct to hold that the general boundaries of public reason can be specified in some detail from the standpoint of political theory, even if the complete set of public reasons for any particular society will vary depending on its particular social and political history.

I give a close examination of the range of public reasons identified by Rawls version of the criterion claim in order to arrive at a clearer picture of the institutional schemes of property, taxation and distributive entitlements that can be supported by public reasons. My analysis shows that classical liberal principles of property satisfy Rawls account of the criterion claim, and as a consequence, the set of public reasons it identifies will not uniquely support high liberal views about social justice. I conclude that Rawls' mature view of the *idea* of public reason undermines the claim that the *ideal* of public reason is connected to egalitarian ideals of social justice in any essential way. This represents a sober assessment of the project of public reasons liberalism, as well as a more honest description of the limits that the liberal principle of legitimacy places on both egalitarian and libertarian social ideals.

The idea of overlapping consensus provides something of a necessary condition for public reasons in Rawls' formulation of the criterion claim. This idea, however, is easily misunderstood. In chapter one, I argue on the basis of a comparison of several key passages from Rawls that he develops two distinct ideas of overlapping consensus. I argue that his mature view of public reason is better understood in terms of an overlapping consensus whose focus is on a family of political conceptions. Further, I argue that the distinct features of this version of the idea of overlapping consensus have not be widely appreciated. I argue that this idea of an overlapping consensus supports the claim that reasonable agreement is better understood in terms of a threshold of minimal reasonability rather than through a hypothetical converging consensus.

In the second chapter, I argue the mature idea of overlapping consensus examined in chapter one implies a two dimensional judgment determines whether a conception of

justice belongs to public reason or not. In the first dimension, a conception of justice belongs to public reason only if that conception supports two principles of liberty: equal political liberty and equal rights of conscience. In the second dimension, a conception of justice belongs to public reason only if it supports social minimum as a matter of basic justice. All conceptions in public reason converge in the first dimension, but may diverge widely in the second. I answer two questions to clarify the conceptual space opened by the two dimensional analysis that characterizes Rawls' mature view of public reason. First, do the requirements of first dimension on the two principles of basic liberty *preclude* conceptions that hold that property is a basic liberty from belonging to public reason? Second, how wide a range of disagreement is allowed in the second dimension? Does it include both egalitarian and sufficientarian conceptions of the requirements of basic justice? I conclude that the main implication of Rawls mature view of public reason is that classical liberal views of property are likely to belong public reasons. As a consequence, Rawls' mature view of public reason implies that citizens do not violate their duty of civility by publicly advocating and enacting through the legislative process strong protections for economic liberty.[17]

In chapter three, I propose a way of recapturing some of the egalitarian commitments of the early Rawls. I argue that the criterion of reciprocity provides the ultimate criterion for public reasons, but that Rawls expression of the criterion is far too general to provide guidance on its own about the content of public reason. My suggestion

[17] An important qualification is that this claim contradicts other passages in which Rawls rather explicitly rejects classical liberal and libertarian conceptions of justice on grounds connected to public reason. This conflict can be eliminated by observing that his rejection does not apply to forms of classical liberalism that contain a principle requiring public provision of a sufficientarian social minimum.

is that some distinct requirements of the criterion of reciprocity can be ascertained by considering the perspective of citizens with physical disabilities. Recently, a number of contractualists have argued that reasonable agreement needs be understood in terms of the perspective of individuals with disabilities. I develop this suggestion into a threshold test for reasonability. This test, I argue, shows that the logic of classical liberal commitments seems to commit such conceptions to principles of basic justice that cannot be reasonably accepted from the perspective of citizens with disabilities. The conclusion to draw from this proposal is that in their simplest, most compelling form, classical liberal conceptions of justice will generally fail to satisfy the criterion of reciprocity. Rawls mature view of public reason will therefore tend not to support classical liberal conclusions about property, taxes, and redistribution.

Chapter 2

Two Ways of Modeling Public Reasons through Overlapping Consensus

There is considerable agreement in the literature on political liberalism that the idea of an overlapping consensus denotes the possibility that a single conception of justice is, or at least could be, supported by reasons drawn from distinct moral theories that citizens of a constitutional democracy can be expected to endorse.[18] I will refer to this interpretation as the *model case interpretation of overlapping consensus* (MOC).

I do not deny that a number of passages in Rawls' work support this interpretation.[19] He often seems to have something like this view in mind. My concern is that the literature on political liberalism has largely focused on this particular interpretation and this obscures the fact that Rawls offers a second very different account of the idea of an overlapping consensus.[20] Though rarely examined in any depth, Rawls describes the possibility of an overlapping consensus on a *family* of liberal political conceptions. I will call this the *family of conceptions interpretation of overlapping consensus* (FOC). The

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[18] "The idea of overlapping consensus represents an extraordinary development within traditional social contract theory. It suggests the kind of general agreement on society's principles of justice need not be a *modus vivendi*… Nor does the social contract require that all reasonable citizens in a well-ordered society agree on principles of justice for the same comprehensive reasons." See, Rawls and Freeman 1999, 370

[19] My reference to the model case interpretation of overlapping consensus (MOC) should be taken as representing a tendency among Rawls scholars to focus almost exclusively on only the most simple case of overlapping consensus. This tendency is not without certain advantages, specifically: simplicity and consistency. My use of the term (MOC) need not rest on attributing this precise view to any one person.

[20] This may strike many as overly strong, insofar as the better examples in the Rawls literature mention the alternate account of overlapping consensus in one way or another. This doesn't refute my claim however, since most of the critical analysis of overlapping consensus still rests on what I am calling the model case interpretation (MOC)

existence of these two distinct ideas of overlapping consensus implies two ways of characterizing public reason, the first emphasizing the value of political consensus and the second emphasizing the value of mutual respect.

My aim in this chapter is to provide a close analysis of the distinction between these two accounts in order to show that the FOC view cannot be derived from the MOC. This irreducibility thesis raises several important questions that I will try to answer toward the end of the chapter, most importantly, whether each of the separate views is capable of grounding the idea of public reason, and second, are there grounds to prefer one account of overlapping consensus over the other?

The investigation in this chapter attempts to answer these questions through the following two goals: (1) to explain and justify the distinction between two accounts of the idea of an overlapping consensus and (2) to present the implications of the FOC for the idea of public reason. The major portion of the chapter will be to investigate first goal, while the second goal introduces several ideas investigated in more detail in later chapters.

1. The Idea of Overlapping Consensus

In order to lay the groundwork for the following argument, it is necessary first to explain how the idea of an overlapping consensus might specify the content of public reason.[21] Only then is it possible to see how the two interpretations of overlapping

[21] This connection can largely be examined independently of the problem of 'stability' to which the idea of an overlapping consensus is also connected. Though important, the issue of 'stability' is tangential to the primary concern of this chapter.

consensus outlined in this chapter each imply different ways of characterizing what a public reason is. Later I will try to show that each of these ways of characterizing the content of public reason gives rise to a different way of connecting the egalitarian concerns expressed by justice as fairness to the idea of public justification.

A brief description of the connection between public reason and overlapping consensus is elusive because of the characteristically complicated way in which both of these ideas are developed by Rawls.[22] But this complicated presentation belies the relatively simple intuition underlying the idea of public reason, namely, that each person is owed a justification for the exercise of coercive political power in terms of considerations she recognizes as reasons for her.[23] One of the central claims of Rawlsian political liberalism is that this kind of justification entails a prior normative framework supported by a consensus among reasonable citizens. A public reason on this account is a consideration belonging to, implied by, or otherwise connected with, a normative standpoint affirmed by every reasonable citizen.

Being able to clearly identify public reasons is thus a crucial element of satisfying the duty of civility.[24] In a well-ordered society in which an overlapping consensus obtains, it would seem that reasonable citizens identify public reasons, and also recognize

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[22] There are, for instance, three different perspectives from which these ideas are elaborated: (a) individuals behind the veil of ignorance, (b) reasonable citizens in a well-ordered society, and (c) we, here and now.

[23] See Rawls and Freeman 1999, pp 216-217. Charles Larmore convincingly argue that the moral obligation to offer such justifications is connected to a more general principle of respect for persons, see Larmore 2008. Gerald Gaus's account of justificatory liberalism rejects this connection between publicity and justification, see Gaus 2011.

[24] The explanation of *why* citizens might have such a duty to offer such reasons to each other is another matter. This discussion is concerned only with specifying the range of reasons available to citizens who wish to act in accordance with the requirements of the duty of civility.

them when offered by other citizens, by referring to a single political conception of justice that is the object of an overlapping consensus.[25] In a well-ordered society an overlapping consensus specifies the shared normative grounds on which citizens can justify their claims of basic justice to each other consistent with their duty of civility.[26] Thus the connection between these two ideas is part of a complex idealization involving a number of abstractions.

Given this hopefully uncontroversial, if overly simply, characterization of the connection between the ideas of overlapping consensus and public reason, it is now possible to investigate the two competing accounts that Rawls give of what citizens in an overlapping consensus mutually affirm. The following analysis first examines the primary support for the MOC. I then compare two versions of an argument supporting the claim that an overlapping consensus is a genuine practical possibility in order to bring to light the view I am calling the family of conceptions interpretation (FOC). I finally present several reasons to hold that the FOC is irreducible to the MOC view. The implications of this irreducibility for the characterization of public reason will be examined more closely in the following chapter. I will claim there that the FOC provides a more plausible account of overlapping consensus, and further, that it fails to exclude strong conceptions of property rights from the set of public reasons. This consequence

[25] "In a well-ordered society, then, the public conception of justice [that is the object of an overlapping consensus] provides a mutually recognized point of view from which citizens can adjudicate their claims of political right on their political institutions or against one another." See Rawls 2005 p 9.

[26] While this greatly oversimplifies the role of overlapping consensus, it is accurate to say that the public reason of a well-ordered society would be limited to considerations connected the political conception(s) that is, or are, the object of an overlapping consensus among all reasonable citizens.

places the FOC in tension with the egalitarian concerns of justice as fairness, and perhaps the conception of political equality at the heart of political liberalism

2. The 'Model Case' and the Basis for the MOC

I assume that the following description of an overlapping consensus is recognizable to those familiar with the main debates following the publication of *Political Liberalism*. According to most accounts, a society is said to have an overlapping consensus when all the reasonable comprehensive doctrines in a WOS affirm the regulative conception of justice (in the qualified sense explained above) in that society and each citizen endorses one of the reasonable comprehensive doctrines.[27] Rawls refers to this description of overlapping consensus that as the 'model case'.[28] The 'model case' is an overlapping consensus between two kinds of comprehensive doctrines (liberal and religious) and one pluralistic view.

The 'model case' is the focus of much of the debate about overlapping consensus in the secondary literature.[29] Minimally, Rawls introduces the 'model case' in order to distinguish an overlapping consensus from a modus vivendi. The 'model case' illustrates the logical possibility that a freestanding conception of justice *could* be supported by converging moral arguments and therefore could transcend the instability of the

[27] "Social unity is based on a consensus on the political conception; and stability is possible when the doctrines making up the consensus are affirmed by society's politically active citizens" Rawls 2005

[28] See "The Idea of an Overlapping Consensus" in Rawls and Freeman 1999.

[29] I suspect that the apparently widespread conviction that the idea of overlapping consensus, as well as political liberalism's notion of stability, attempt to answer the same set of questions as the congruence argument in *Theory of Justice* rests on an appeal to the 'model case' and the MOC. Jonathan Quong holds a similar suspicion. See Quong 2011

prudential reasoning characteristic of a modus vivendi by providing a ground for moral motivation.

It is widely recognized that Rawls rejects a Hobbesian answer to the conflict between moral pluralism and social unity.[30] He develops the concept of overlapping consensus (along with other key ideas of political liberalism) in order to show how citizens *might* achieve a limited moral consensus on freestanding political principles in the context of reasonable moral pluralism.[31] The broadly logical possibility that the regulative conception of justice in a WOS could gain the support of an overlapping consensus purports to show that pluralism is not inconsistent with a morally significant form of social unity.

The 'model case' implies that the key features of overlapping consensus are (a) all reasonable comprehensive doctrines contain distinct moral reasons that converge in support of the same political conception of justice, and (b) insofar as each reasonable citizen endorses one of these reasonable comprehensive doctrines, the obligations imposed on her by basic structure will not be alien to her conception of the good.[32] These two features are characteristic of the view I refer to as the MOC.

On this view, an overlapping consensus exists when all reasonable doctrines endorse the *same* political conception of justice that unifies and regulates the basic structure. The content of this agreement satisfies the need "to specify a point of view from which all citizens can examine before one another whether or not their political institutions are

[30] That answer depends on the sovereign power suppressing dissent about which principles ought to regulate the institutions of the basic structure.
[31] This still leaves an explanatory gap between ideal theory and our endorsement here and now.
[32] Whether each citizen's commitment to these obligations is final is another question.

just."[33] Thus the MOC implies that the normative standpoint citizens are required to adopt in order in offering public justifications to each other is constituted by shared *principles* of justice.[34] Below, I argue that the FOC suggests that there are good reasons to think that Rawls came to think that describing the shared normative standpoint in this way is too restrictive. I suggest that the FOC implies a more general description of the normative standpoint appropriate for public justification.

Before examining the FOC, however, I would like to provide some justification for my claim that the view of MOC is something of an orthodox view in the literature. I cannot hope to survey the entire literature on overlapping consensus to show that, on balance, the MOC is the most common. Rather, I will offer some support for this claim by presenting three noteworthy, though incompatible, accounts of what kind of condition overlapping consensus places on the justification of conceptions of justice, each of which seems to rest on the MOC. Joshua Cohen and T.M. Scanlon endorse different versions of a more general justificatory interpretation, namely, that overlapping consensus provides a condition on the *justification* of conceptions of justice. Samuel Freeman, by contrast, holds a version of a more general *practical* interpretation, which holds that an overlapping consensus characterizes the consequences of *applying* norms of justice that are independently justified.[35] Despite broad disagreement about what normative value an overlapping consensus achieves, each of these three views implies that the content of an overlapping consensus is a single conception of justice supported by independent considerations of several comprehensive doctrines. This goes some way to support my

[33] See "The Idea of an Overlapping Consensus" in Rawls and Freeman 1999
[34] This need not entail that this is a sufficient condition for stability.
[35] Habermas also holds that overlapping consensus does not provide a justificatory condition on conceptions of justice. See Habermas 1995

claim that the MOC amounts to an orthodox view among Rawls scholars. It should be noted that my claim does not entail that the MOC is the only interpretation of overlapping consensus found in the literature. I only mean to show that it is prominent enough among sympathetic Rawlsians to justify my claim that it is the orthodox view.

In an early defense of Rawls' idea of overlapping consensus, Joshua Cohen endorses a weak version of the justificatory thesis. While overlapping consensus provides part of an answer to the question "what sorts of constraints on realizability are constitutive of ideal justice", overlapping consensus is not quite a necessary condition for a conception of justice. Satisfying the "pluralistic consensus test" which establishes the possibility of an overlapping consensus is one consideration, among several, that "count in favor of the correctness of a conception of justice". Cohen gives a rather explicit endorsement of the MOC. He claims that a "society features an overlapping consensus on the norms of justice if and only if it is a morally pluralistic society with a *consensus on norms of justice* [emphasis added] in which each citizen… supports the consensual norms as the correct account of justice."[36]

T.M. Scanlon endorses a relatively strong version of the justificatory thesis. Justification for principles of justice according to Rawls proceeds through the original position argument. But principles in the original position are chosen in part because they could be the ground of a certain kind of social stability. The possibility of an overlapping consensus is relevant to the choice made by individuals in the original position because it is part of Rawls' modification of the account of stability in light of reasonable

[36] See "Moral Pluralism and Political Consensus" in Cohen 2009.

pluralism.[37] On Scanlon's view, *Political Liberalism* describes general normative conditions for a stable society "organized around *some* political conception of justice", which the principles of justice as fairness are said to best satisfy. If the concept of overlapping consensus is connected to the earlier argument for justice as fairness in this way, then it is clear that the content of an overlapping consensus must be a single conception of justice.

Finally, unlike Cohen and Scanlon, Samuel Freeman endorses the thesis that overlapping consensus is connected to the application of a conception of justice. He holds that overlapping consensus is not constitutive of ideal justice, but rather is an element in "the most fundamental part of non-ideal, partial compliance theory." On his account, overlapping consensus is essentially a "conjecture" about the range of conceptions of the good that would tend to gain adherents in a society well-ordered by a liberal conception of justice.[38] An overlapping consensus promotes stability insofar as its existence is a sign that a sufficiently large proportion of citizens in a WOS endorse conceptions of the good that support the principles of justice that guide the basic institutions in that society. Ultimately, Freeman views the possibility of an overlapping consensus as a consequence of applying freestanding principles of justice, rather than as providing any independent evidence for the correctness or reasonableness of such a conception. Like Cohen and Scanlon however Freeman holds that overlapping consensus is the idea that "comprehensive views could and likely would affirm justice as fairness

[37] See Scanlon's "Rawls on Justification" in Freeman 2003
[38] See "*Political Liberalism* and the Possibility of a Just Democratic Constitution" in Freeman 2007a.

[or some other single conception] as reasonable and/or true based on its own reasons and resources"[39]

3. The Family of Conceptions Interpretation of Overlapping Consensus

As I mentioned above, the *family of conceptions interpretation* of overlapping consensus (FOC) is not completely ignored in the literature. The fact that Rawls refers to the FOC in *Political Liberalism* and in several subsequent articles is, in fact, widely recognized. The oversight in much of the literature about overlapping consensus lies rather in failing to recognize that this view rests on fundamentally different grounds than the MOC and represents a different concept.[40] I will take up the issue of this significance of this difference in a later chapter.[41] The most complete account of the FOC is found in *Political Liberalism*, but to see how these grounds are distinct from those supporting the MOC, I will compare the relevant passages in *Political Liberalism* with an earlier version of the same argument. By comparing the two versions, a clearer picture of the FOC is possible. This comparison helps to identify the distinct set of reasons supporting the FOC and thereby helps to clarify the way that it is not merely a partial realization of the MOC as it often seems to understood in the literature.[42]

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[39] See "*Political Liberalism* and the Possibility of a Just Democratic Constitution", Freeman 2007a p 191.

[40] Paul Weithman's recent book on Rawls is emblematic of much of the literature in this regard: "I am simply trying to lay out what I take to be the basic stability argument … [so] I am confining my inquiry to an overlapping consensus on justice as fairness rather than on a family of liberal political conceptions", see Weithman 2010 p 277.

[41] I will argue that the FOC provides a very different basis for public reasoning than the MOC. This basis is much less clearly egalitarian than the MOC.

[42] Despite Rawls suggestion that it might be understood this way.

3.1 The Political Sociology of an Overlapping Consensus

The possibility of an overlapping consensus on a family of political conceptions is introduced in §6-8 of Lecture IV in *Political Liberalism*. This section modifies an argument previously published in "The Idea of an Overlapping Consensus". Both the original and the modified versions of the argument address the same objection to the practical plausibility of an overlapping consensus. This objection holds that there are no "political, psychological, or social forces either to bring about an overlapping consensus… or to render one stable", and therefore, the idea is unrealistically utopian.[43]

The first version of this argument attempts to undermine the force of this objection by answering the question "how might an overlapping consensus on *a liberal conception of justice* develop from its acceptance as a mere modus vivendi."[44] Rawls suggests that this question can be answered by describing how the institutional context of a WOS might provide moral reasons to support a liberal conception of justice to individuals who already have prudential reasons to support the *institutions* of a liberal basic structure implied by that conception.

Rawls uses an idealized moral sociology to describe a process of social evolution beginning with a modus vivendi on a liberal basic structure and ending in an overlapping consensus on a single liberal conception of justice, such as justice as fairness. This

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[43] See Rawls 2005, pp 158 – 172; and Rawls and Freeman 1999, pp 440 - 446

[44] This same objection is found in Rawls article "The Idea of an Overlapping Consensus". However, there it is clear that Rawls thought the model case would be sufficient to refute this claim. The MOC, as mentioned earlier, seems to be implied by the model case. That the MOC is implied by the argument that an overlapping consensus develops from a prior CC is less convincing

idealized sociology is based on three assumptions. First most citizens (practically speaking) do not affirm "fully comprehensive doctrines", or at least, they usually have not conclusively decided what their comprehensive doctrine requires for all aspects of social life.[45] Second liberal *institutions* tend to secure significant moral values for citizens who consequently support such institutions on those grounds.[46] Third, each citizen already has sufficient prudential reason to support the same liberal institutions as all other citizens, and this basic structure is unified and regulated by a political conception of justice.

These assumptions provide the basis for a bootstrapping argument. The social forces establishing the possibility that an overlapping consensus might develop from a modus vivendi are connected to the operation of existing liberal institutions. Liberal institutions work to secure significant moral values for citizens and those they care about, which is only clear to citizens with the passage of time living under liberal institutions.[47] Furthermore, given the three assumptions above, citizens already have sufficient, if contingent, practical reasons to support liberal institutions but are also unlikely to have conclusive practical reasons to reject liberal principles outright. Therefore, citizens may come to affirm the liberal moral *principles* unifying and regulating the basic structure of their society as "congruent with, or supportive of, or else not in conflict with" their

[45] This is in a number of ways the most surprising assumption, since a standard reading of Rawls holds that citizens holding comprehensive doctrines pose the core challenge to liberalism.

[46] More specifically, these moral interests are the "public good" secured in a stable, and reasonably just constitutional democracy. The public good of a such a regime is expressed in three values it secures and promotes: (a) basic rights and liberties, (b) public reason, and (c) cooperative virtues.

[47] There is a close resemblance between the bootstrapping argument and the psychology of reciprocity presented in section III Rawls 1999a.

comprehensive moral conception because of the political (moral) values secured and promoted by liberal *institutions*. They may come to endorse the morality of liberal *principles* through the good that liberal *institutions* accomplish. According to Rawls, "it is possible for [citizens] first to affirm the political conception and to appreciate the public good it accomplishes in a democratic society" and only subsequently to examine whether a commitment to liberal principles based on these grounds is consistent with their broader moral commitments.[48]

In "The Idea of an Overlapping Consensus", this idealized moral sociology is used to support the claim that citizens would come to affirm the same *liberal political conception* that unifies and regulates the institutions of the basic structure. This argument is supposed to establish the possibility of something like the 'model case' of an overlapping consensus. The *institutions* of a liberal basic structure provide citizens with freestanding reasons to support the procedural and substantive *principles* of liberal justice that unify and effectively regulate those institutions. If successful, this bootstrapping argument shows that there are (or at least might be, given favorable conditions) social and psychological forces sufficient to support the development of an overlapping consensus *given the institutional context of a WOS*.[49] This is enough to minimize the force of the original objection that overlapping consensus is utopian in the wrong kind of way.

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[48] This claim is more clearly expressed in "The Idea of public Reason Revisited", see Rawls 1999b p 160: "Hence, it is possible for citizens first to appreciate the good those principles accomplish both for themselves and those they care for, as well as for society at large, and then to affirm them on this basis."

[49] In other words, this response to the objection holds that the 'model case' of overlapping consensus could come about in a society whose institutional structure is already unified and regulated by a single political conception of justice. Needless to say, this response to the objection depends upon the highly idealized context of a WOS.

3.2 The Political Sociology is Insufficient to Support an Overlapping Consensus

The modified version of the argument found in *Political Liberalism* uses the same ideal sociology to explain the possibility of a limited kind of consensus that Rawls introduces in §6 – 8 of Lecture IV. This kind of consensus, which Rawls terms a *constitutional consensus*, is distinct from both a modus vivendi and an overlapping consensus. It lies at an intermediate point in a process of social evolution ending in an overlapping consensus.[50]

Unlike the original version, the argument presented in *Political Liberalism* does not hold that the "public good" secured by liberal institutions is sufficient to bring about an overlapping consensus. One explanation for the more modest position expressed here is that in both the original and modified versions the "public good" that grounds the moral affirmation of liberal principles is secured largely through the procedures and guarantees expressed in a political constitution. Issues of distributive justice (narrowly understood) are relegated to a marginal role in this explanation. Thus freestanding reasons derived from the "public good" achieved by liberal institutions support only that *part* of a political conception of justice that is specified by a democratic constitution but they do not provide direct support for liberal distributive principles.

The introduction of the idea of a constitutional consensus may express an attempt to clarify an ambiguity in the original argument. There Rawls makes clear that

[50] It is important to note that a constitutional consensus is itself a minimal moral consensus. Procedural elements of liberal justice embodied in a constitution, such as the democratic process, are endorsed *as principles*, and not merely for prudential reasons. Significantly, it does not seem to include a consensus on the scope of basic agency rights, beyond those necessary to secure freedom of political speech and association.

constitutional institutions are the primary source of the "public good" grounding the bootstrapping strategy. A fuller explanation of why Rawls found it necessary to modify the early argument is not needed here. All that needs to be seen is that the argument in *Political Liberalism* expresses a more modest conjecture about the capacity of liberal *institutions* to be the source of freestanding moral reasons supporting liberal *principles* of justice. This change requires him to provide an additional explanation to show how an overlapping consensus might develop from the more limited constitutional consensus, and so to complete the explanation of how an overlapping consensus might develop from a modus vivendi.

The distinction between these two arguments can be further sharpened by examining two changes introduced in Lecture IV of *Political Liberalism*.[51] The first change is to the content of the modus vivendi agreement initiating the social process that ends in an overlapping consensus. In the original version, the institutions supported by a modus vivendi encompass the entire basic structure, which *ex hypothesi*, is already regulated by a single political conception of justice. The original explanation, therefore, assumes that broad support for a unified set of political *and* distributive institutions among citizens already exists, though this support is grounded on contingent prudential considerations rather than on principled moral considerations. [52]

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[51] I will argue that if one endorses these modifications, then there are few convincing reasons to hold onto the MOC at all.

[52] "Now let's suppose that at a certain time, as a result of historical events and contingencies, the principles of a liberal conception of justice have come to be accepted as a mere modus vivendi, and that existing political institutions meet their requirements." Rawls and Freeman 1999, p 441. A political conception will include principles of distributive justice, given the completeness condition on political conceptions.

The argument in Lecture IV of *Political Liberalism* expresses a more modest assumption. Here Rawls assumes that the range of the institutions supported by a modus vivendi includes only the political institutions embodied in a liberal democratic constitution. This reading is suggested by the following passage from *Political Liberalism*:

> "Suppose that at a certain time, because of various historical events and contingencies, *certain* [emphasis added] liberal principles of justice are accepted as a mere modus vivendi, and are incorporated into existing political institutions".[53]

The fact that this passage refers to "certain liberal principles of justice" rather than to a "liberal conception of justice" as in the original version and the fact that the remainder of the argument elaborates on the public good secured by a constitutional regime supports a reading of this assumption that excludes liberal principles of distributive justice from the initial modus vivendi agreement.[54] In other words, the initial assumption does not entail that citizens support one and the same set of distributive institutions (narrowly understood), let alone the same principles of distributive justice. The modified version of the argument, therefore, appears to abandon the notion that the full range of institutions implied by a liberal conception of justice *could* be the object of a prudential agreement among citizens.[55] At the very least, the modified version appears to hold that this assumption would be too unrealistic to ground a plausible response to the original

[53] See Rawls, 2005 p 159.
[54] Rawls rejects the idea that principles of distributive justice ought to be fixed by a political constitution, with the notable exception of a guaranteed social minimum.
[55] It is difficult to conclusively attribute this view to Rawls, though I think the fact that he altered the argument for publication in *Political Liberalism* strongly suggests that he may have held such a view.

objection.[56] This change arguably attempts to express a more historically informed account of the range of institutions that citizens might be expected to agreed to as a means of ensuring the end to civil strife (modus vivendi).

The second change is connected to the first. If the initial assumption is only that each citizen has prudential reasons to support the constitutional institutions of a liberal basic structure, then the bootstrapping argument cannot completely explain how an overlapping consensus might develop from a modus vivendi. That is because the bootstrapping argument conjectures that the morally attractive features of liberal institutions could be the source of freestanding moral reasons to individuals who *already* have independent prudential reasons to support those institutions. It does not make the stronger claim that individuals might come to view liberal institutions as a source of moral reasons apart from any consideration of their prudential interests.

3.3 Additional Social Forces are Needed to Complete the Development of an Overlapping Consensus

The earlier version of the bootstrapping argument is capable of providing a complete explanation for the possibility of an overlapping consensus only because of the assumption that citizens already have prudential reasons to support a liberal basic structure.[57] It succeeds insofar as citizens already support liberal institutions of

[56] This objection is that no realistic social process could bring about or sustain an overlapping consensus. Considerations of realism therefore should carry a lot of weight in this argument.

[57] A key feature of this argument must be that the liberal basic structure is unified and regulated by a political conception of justice, and citizens know this.

procedural *and* distributive justice out of self-interest. But if citizens only have prudential reasons to support the procedural institutions of liberal justice articulated in a democratic constitution, then the bootstrapping argument on its own cannot fully explain the possibility of an overlapping consensus. Another account is needed to show how further consensus about distributive institutions and the remaining substantive principles of liberal justice might develop from an agreement on political procedures. The second change in the argument is the additional explanation introduced to fill the explanatory gap opened by the first change.

The account of how a constitutional consensus might transition into an overlapping consensus is based on three requirements of democratic lawmaking. These three needs are (a) the need for democratic coalitions, (b) the need for constitutional interpretation, and (c) the need for resolution of non-procedural issues of basic justice. These needs are connected to the fact that a constitutional consensus is too narrow an agreement to ground judgments about the entire basic structure of society that can be shared by all citizens. A constitutional consensus will prove inadequate to provide the shared moral resources necessary for the practice of constitutional democracy. Below is a brief survey of the problems that generate these needs.

(a) Long-term success in a constitutional democracy requires individuals and groups to build majority coalitions. In a pluralist society citizens need to "move out of the narrow circle of their own views and to *develop political conceptions* [of justice]… so as to put together a majority" since only a permanent supermajority could pass legislation without consulting or gaining the support of a broader group citizens.[58] In order to gather

[58] See Rawls 2005 p 165.

lasting support from other citizens who may not share the same views about the non-political realm of values individuals and groups will find it *rational* to establish a "common currency of discussion and a deeper basis for explaining the meaning and implications of the principles and policies each group endorses."[59] Since a constitutional consensus provides the initial ground for this "common currency of discussion" this claim primarily implies that insofar as the legitimacy of democratic law requires citizens to build lasting coalitions with other citizens, it will appear rational for each group of citizens to develop a substantive account of distributive justice based on values and commitments shared with other citizens.

(b) A constitutional consensus will also prove too thin to support two essential practices of constitutional interpretation. These practices likewise tend to make it rational for citizens to develop and adopt freestanding conceptions of justice so that their interpretations of what the constitution requires, or ought to require, can be presented to other citizens as predictable, consistent, and clearly determined by shared principles and values.

For similar reasons, the practice of declaring a statute constitutional or unconstitutional (by whatever institutional mechanism) will often require appealing to the values and ideals that underlie the constitution.[60] Judges (or whomever is charged with this practice) will be motivated to justify their decisions in terms that other citizens may accept as, at least, reasonably just. They may, therefore, develop freestanding conceptions of justice to provide order and predictability to their judgments.

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[59] *Ibid.*

[60] "In a constitutional system with judicial review… it will be necessary for judges… to develop a political conception of justice in the light of which the constitution, in their view, is to be interpreted and important cases decided." *Ibid*.

On the other hand, citizens wishing to amend the constitution will also be forced to appeal to the deeper values expressed in their constitution in order to justify their demands to change it. Freestanding political conceptions may provide citizens with the resources to show other citizens how such a change in the constitution is consistent with the moral values and ideals embodied in the constitution. In both cases, a consensus on the procedural requirements of liberal justice is unlikely to prove sufficient and a deeper basis of agreement expressed by political conceptions of justice will be needed.

(c) A constitutional consensus does not determine how the basic liberties should be protected outside the political process nor what level of material well-being, if any, should be publicly guaranteed to all citizens. These questions are connected to the justice of the basic institutional structure taken as a whole. Citizens will need to find a reasonable basis for legislating about these issues or else they will remain potent and destabilizing sources of conflict. Political conceptions of justice provide citizens with a shared normative perspective to resolve these conflicts.

Each of these needs (a) – (c) contributes to an explanation of why citizens might find it "rational" to develop and publicly refer to conceptions of justice that are metaphysically neutral, that refer primarily to institutions, and that are broadly consistent with the fundamental procedural elements of constitutional democracy. However they do not provide a convincing explanation for the possibility that citizens might come to *agree* that some single conception of justice is the most reasonable. Even if there is a consensus on which moral principles are expressed in the constitution and the considerations mentioned above make it rational for citizens to develop political conceptions of justice, the expectation that these two conditions are sufficient to generate

an agreement on distributive justice seems to conflict with the most fundamental assumptions of political liberalism. If political philosophy should reject the expectation of consensus on perfectionist moral principles, what reason is there to expect that free and fair conditions of rational discussion could produce consensus on distributive justice?[61]

3.4 Two Kinds of Overlapping Consensus: (a) Full and (b) Family

The recognition that agreement about the most reasonable conception of justice appears to conflict with the value of mutual respect grounding the acknowledgement of the burdens of judgment may be the reason that Rawls ultimately describes two possible ways a constitutional consensus may develop into overlapping consensus:[62]

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[61] That this worry would not apply to constitutional liberal principles is clear from the fact that citizens already have prudential reason to support the institutions that embody those principles.

[62] One difficulty with my claim that there are two distinct possible outcomes is that Rawls seems to say that a "full overlapping consensus" on one conception of justice may only be "approximated". This seems to suggest that rather than two distinct outcomes, he holds that the idea of an overlapping consensus provides an ideal that may be "at best only approximated". But the notion that such an approximation is sufficiently similar to the ideal is difficult to maintain for two reasons. First, if the imperfect realization of a full overlapping consensus is sufficient to secure stability for the right reasons, what further values is achieved by a full overlapping consensus? Second, if, as Rawls suggests, the imperfect realization of an overlapping consensus can be attributed to reasonable disagreement about the requirements of distributive justice, then the imperfect realization is a consequence of the burdens of judgment. Such disagreements would then be as intractable as disagreements about comprehensive doctrines. But linking disagreements about justice to the burdens of judgment in this way seems to undermine any reasonable expectation of a closer approximation to the ideal. This last comment does not necessarily imply that considerations of distributive justice would transgress the boundaries of public reason in the same way that appeals to salvation or moral perfection would.

> "I have for simplicity assumed all along that [overlapping consensus'] focus is *a specific political conception of justice*, with justice as fairness as the standard example. There is, however, another possibility that is more realistic and more likely to be realized. In this case the focus of an overlapping consensus is a *class of liberal conceptions that vary within a certain more or less narrow range* [emphasis added]."[63]

The first possibility is that all citizens come to endorse the very same conception as most reasonable, or what Rawls in this section calls a "full overlapping consensus". Although such an outcome is consistent with the general description of the 'model case' it rests on very different grounds. According to the 'model case', each individual ultimately affirms the same set of principles as every other individual for reasons that are internal to the comprehensive doctrine she endorses. So comprehensive liberals, religious believers, and value pluralists all affirm the same conception as most reasonable but for unique reasons. But in *Political Liberalism*, individuals are said to affirm the same conception as all others on the basis of freestanding reasons ultimately connected to the 'public good' produced by an existing liberal constitution.

Rawls does not sufficiently explain how the process of social evolution connecting a constitutional consensus to an overlapping consensus might end with an agreement on a single conception of justice. He only speculates that a limited number of liberal political conceptions could be accurately based on the underlying values of a democratic constitution.[64] Further, a "fully overlapping consensus" is possible only if the basic structure of a society does not encourage deeply opposed social and economic interests.

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[63] See Rawls 2005 p 164

[64] "How specific is the consensus, or how wide is the range of the liberal conceptions defining it? ... One [consideration] concerns the range of views that can plausibly be elaborated from the fundamental ideas of society and person found in the public culture of a constitutional regime." See Rawls 2005 p 167

The second possibility, then, is that citizens agree on that some family of conceptions of justice are all sufficiently reasonable to the be the basis for terms of fair cooperation, but they disagree on what the *most* reasonable conception is. Since Rawls links this possibility to conflicting social and economic interests, it is safe to assume that the primary division between conceptions in the family of liberal conceptions is on the question of acceptable range of distributive inequalities.[65] Their most significant disagreements are likely to be focused on what the most reasonable principle of distributive justice is.

This possibility suggests that citizens agree on a set of reasonable principles of distributive justice, but disagree about which is the most reasonable.[66] This possibility seems to imply that citizens hold that liberal constitutional principles are grounded in significant moral values and ideals, give priority to these values over other social values, and yet still disagree about how these values should apply to a range of distributive questions (narrowly understood). If each citizen endorses some reasonable principle of

[65] The political procedural principles of a political conception would *already* be the subject of consensus given the constitutional consensus. Thus the development of an overlapping consensus is largely a question of what principles of distributive justice citizens will endorse as a consistent extension of the values, ideals, and principles of the constitutional consensus.

[66] Rawls prefers to use the idea of family resemblance to describe this class, so my claim that citizens agree on the criteria defining a 'reasonable principle of distributive justice' is slightly stronger than Rawls own suggestion. Part of the attraction of the idea of a family resemblance is it allows Rawls to avoid determining the content of this class through an a priori argument. I think his argument requires a more precise specification of this class, as Rawls himself implicitly acknowledges by defining 'political conception of justice' in the way he does. I investigate this idea more thoroughly in presenting Rawls definition of a political conception and its relation to public reason.

distributive justice,[67] then it is possible for citizens to view the exercise of political power in the name of any one of these principles as reasonably just (in other words, an approximation of what justice requires).

This analysis supports the following understanding of the way in which political conceptions belong to a family.[68] Two features characterize this family: (a) each conception must support the list of basic (constitutional) liberties and give them priority over other social values, and (b) each conception must support a principle of distributive justice that specifies the application of the political values and ideals underwriting the constitution to issues of distributive justice. If all reasonable citizens recognize each conception in this family as sufficiently *reasonable*, then an overlapping consensus is achieved. The possibility of an overlapping consensus on a *family of conceptions* implies that each citizen endorses some principle that supports the basic liberties already articulated in the constitution, and judges distributive justice on the basis of 'political values' underlying the constitution. Rawls held that a consensus on a family of conceptions so defined is the "more realistic and more likely to be realized" outcome of the ideal sociological process just described.[69] What this greater realism should mean is left undetermined. I will return to this question in more detail when discussing the implications of the FOC.

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[67] A reasonable principle of distributive justice can be defined as having the following two qualities: (a) it is consistent with the constitutional consensus and (b) it specifies how political values apply to distributive questions.

[68] Presumably Rawls is using the idea of a family relation in order to avoid the appearance of the philosopher determining the boundaries of an overlapping consensus ahead of time. This false modesty is betrayed by his definition of 'liberal political conception of justice'.

[69] See Rawls 1999b p 164.

4. The Distinction between MOC and FOC

A brief summary may bring some needed clarity to the distinction I am trying to draw between the MOC and FOC. It is central to this distinction that evidence for the MOC view of overlapping consensus is provided primarily by the description of an overlapping consensus given in the 'model case' containing two (or three) comprehensive doctrines and one indeterminate view. The most important implication of the 'model case' is that an overlapping consensus exists if and only if the political conception of justice that regulates their WOS is supported by unique reasons drawn from these three (or four) incompatible doctrines. Consequently, citizens will find that they have weighty moral reasons to affirm this political conception of justice and comply with the obligations it implies insofar as the conception is supported by reasons internal to the comprehensive doctrine they endorse. The MOC just is the view that 'overlapping consensus' designates a state of affairs in which reasons drawn from a society's influential comprehensive doctrines support one political conception of justice that unifies and regulates the basic structure of that society.[70]

But the analysis above shows how the argument for the claim that the political sociology underlying the claim that the idea of an overlapping consensus describes a genuine practical possibility does not provide much support for the 'model case'. As we saw, the argument first developed in "The Idea of an Overlapping Consensus" (and then significantly altered in *Political Liberalism*) shows how the public good secured by a liberal basic structure could support a "fully overlapping consensus" on a single

[70] I emphasize that the MOC is neutral with regard to the role that an overlapping consensus plays in the justification of principles of justice.

conception of justice. But this conclusion rests on the assumption that citizens, by and large, endorse the pluralist view. The conjecture at the center of this argument (namely that a unified liberal basic structure secures such important and undeniable public goods that citizens living in such a society would affirm its underlying political conception on *this* basis) explicitly rests on the assumption that citizens hold few strong beliefs about the political implications of their moral view. So according to this argument, the practical possibility expressed by the idea of an overlapping consensus is not that comprehensive doctrines might conceivably support the very same political conception of justice, but rather that liberal institutions are capable of generating sufficient support among citizens for liberal principles independently of any reference to a comprehensive doctrine (liberal or otherwise).[71]

Now the conclusion of the original version of this argument holds that the political conception is completely supported by reasons derived from the great public good secured by liberal institutions.[72] Comprehensive doctrines, presumably, provide some secondary considerations in favor of the principles underlying these institutions. But if the reason-giving role of the comprehensive doctrines is minimized in this way, then the relation between a fully overlapping consensus and the 'model case' is only superficial. A fully overlapping consensus is similar to the 'model case' insofar as each citizen endorses the same conception of justice. In more fundamental sense, however, it departs

[71] In other words, the order of explanation is reversed. Liberal institutions (the conceptions of justice they imply) *bring about* reasonable pluralism, and not vice versa.
[72] There is an ambiguity here in Rawls' argument. Rawls does not clarify whether the order of explanation matches the order of justification. It is unclear, in other words, whether citizens' most fundamental reasons for supporting the political conception are given by the "public good" achieved by liberal institutions, or whether their comprehensive doctrine provides the ultimate warrant for the political conception. I am assuming the former view, since there is some evidence that Rawls rejects the latter view.

significantly from the 'model case' since it implies that liberal institutions on their own provide each citizen with sufficient reason to endorse the political conception.[73] According to the 'model case', reasons drawn from a comprehensive doctrine do the work of justifying the political conception and its obligations to citizens, though few detailed reasons are given to explain why citizens would seek to accommodate their comprehensive doctrines to the political conception where they conflict, rather than vice versa.[74] Despite these differences, one might still maintain that the sociologically grounded account of a fully overlapping consensus and the 'model case' only emphasize different aspects of one and the same idea of an overlapping consensus.

It is unclear, however, that such a move can reconcile the conclusion of the version of this argument found in *Political Liberalism* with the 'model case'.[75] The conclusion of that argument not only minimizes the role of comprehensive doctrines in providing converging justifications for a political conception, but it also conflicts with the claim that citizens in an overlapping consensus must agree on the same political conception of justice. To see this second point, one must remember in *Political Liberalism* Rawls drops the claim that the "public good" achieved by liberal institutions is sufficient to provide

[73] Another way to look at this is that this argument explicitly assumes that most citizens effectively have an unsystematic view of the moral good, which is the pluralistic view in the 'model case'. Thus this explanation implies either that no one actually endorses a comprehensive doctrine, or that no one has clear beliefs about what their comprehensive doctrine requires of political institutions.

[74] The relation between comprehensive doctrines and the political conception is a complicated question. Rawls denies that comprehensive doctrines alone provide , this often seems to be the view of those who endorse the MOC through the 'model case'.

[75] Although Rawls seems to suggest that there is no tension between the 'model case' and the conclusion of this argument. See Rawls 1999b pp 169-171.

citizens with a justification for a political conception of justice. Rather Rawls argues that this "public good" justifies only that a liberal *constitution* is a requirement of justice.[76]

The public good secured by a liberal constitution in other words provides each citizen with reasons to support just that part of a political conception of justice that grounds the constitutional protection of a scheme of basic rights and broadly democratic political procedures. *Political Liberalism* argues that each reasonable citizen might integrate these principles into a broader conception expressing a unified view of social justice because of internal dynamics of the democratic lawmaking process. However it is not obvious how the democratic process tends to promote *agreement* on any unified account of social justice. That possibility is implausible even if some aspects of the democratic process make it rational for citizens to develop political conceptions of justice to effectively communicate their convictions about basic justice to other citizens. Consensus among citizens on the most reasonable political conception is simply not a plausible outcome of the democratic process given the obstacles to rational agreement connected to the burdens of judgment. Therefore the argument that a plausible political sociology grounds the idea of an overlapping consensus ultimately does not support the conjecture that either the 'model case' or a fully overlapping consensus express realistic possibilities. Rather, this argument provides stronger support for the family of conceptions interpretation (FOC), which is characterized by a specific agreement on the particular constitutional protections and procedures that must be implied or otherwise supported by *any* reasonable

[76] Roughly, one could say that the "public good" gives reason to citizens to support the principles of equal basic liberties and the priority of those liberties over other social values. It is difficult to say whether this gives citizens a reason to endorse Rawls' strong understanding of the lexical priority of liberties.

conception of justice, and a much less specific agreement on the requirements of distributive justice.[77]

The distinction between the FOC and MOC therefore can be parsed in the following way. According to the FOC view, the idea of an overlapping consensus does not preclude disagreement about which conception of justice is the most reasonable. The central element of an overlapping consensus on the FOC view is the specific list of rights and liberties and the democratic procedures guaranteed by their political constitution. Citizens may disagree about which principle(s) of justice justifies *that* list, as well as which principle of justice provides the most reasonable basis for establishing the range of acceptable inequality. Insofar as their agreement is deeper and wider than the constitutional consensus, it must be characterized by the conditions that define the set of reasonable conceptions of justice, each member of which provides an account of social justice consistent with the constitution and its underlying values that all can acknowledge as reasonable.

By contrast, the account of overlapping consensus connected to the MOC holds that all citizens in an overlapping consensus agree on which principles of justice are the most reasonable. Therefore it is difficult to see how an overlapping consensus focused on a family of liberal political conceptions can easily be characterized as merely an imperfect realization of the 'model case' under non-ideal conditions, as Rawls and his followers often seem to suggest. The FOC allows for a wider range of principled disagreement about the requirements of basic justice than is compatible with the MOC. Rather it seems much more plausible to view the FOC as articulating a distinct idea of overlapping

[77] Much more needs to be said about how specific an agreement is required on distributive issues.

consensus. The possibility of two distinct conceptions of overlapping consensus raises a number of important questions for the general theory of political liberalism, but I will focus mainly on its implications for the relation between public reasoning and the egalitarian concerns that motivate justice as fairness.

5. Two Objections to the Irreducibility Thesis

So far I have argued that two distinct conceptions of overlapping consensus can be elaborated from Rawls' various descriptions of the idea.[78] I will call this my irreducibility thesis. Below I present two objections that may be raised against this thesis, and some reasons to think that these objections are not fatal.

The first objection is that the passages most clearly expressing the idea of an overlapping consensus on family of conceptions admit of another interpretation, which does not entail that this possibility represents a completely distinct idea. Such an interpretation might point out that the passages describing an overlapping consensus on a family of conceptions suggest that an overlapping consensus on a family of conceptions expresses practical limits on the realization of a "fully overlapping consensus" on a single political conception. The practical limits of realizing this ideal of consensus on a single conception of justice are derived from the range of conflicting social and economic interests that are encouraged or supported by a given set of liberal institutions. The wider

[78] Strictly speaking, I have presented three views, an overlapping consensus expressed by the model case, a fully overlapping consensus on a single conception of justice, which is connected to the political sociology, and an overlapping consensus on a family of conceptions. I have for simplicity sake only explicitly examined the model case and the family of conceptions view, since a fully overlapping consensus supported by the political sociology is an unconvincing possibility.

the range of these conflicting interests the more likely that agreement on one conception will be elusive, since even reasonable citizens motivated by fairness will not freely adopt a conception of social justice that radically undermines the social and economic position they possess. According to such an interpretation, there is no distinct idea of consensus associated with the family of conceptions view. Rather the family of conceptions view only expresses an approximation of the ideal of an overlapping consensus on one conception of justice.

This strategy, however, parses the distinction between a consensus on a family of conceptions and a consensus on a single conception only in terms of the political sociology of reciprocity. It ignores the distinct grounds of an overlapping consensus given by the model case, and views the difference between an overlapping consensus on one conception and on a family of conceptions as a difference between an ideal and an approximation of that ideal, rather than as a difference in kind.

This is significant because, as I have shown, the idea of an overlapping consensus on a family of conceptions rests on a different set of assumptions than the model case. The political sociology grounding the former assumes that individuals generally fix their beliefs (or perhaps more accurately their intuitions) about what justice requires by reference to existing institutions and not first through their comprehensive doctrine. The model case on the other hand suggests that citizens affirm the same political conception (and thus agree that its requirements are reasonably just) on the basis of reasons that are internal to their distinct comprehensive doctrines.

Under criticism, Rawls came to see that the model case description undermines the notion that the political conception can be justified apart from the comprehensive reasons

that lead citizens to support it. However, though he denied that the model case had this implication, he never modified his description of the model case to adequately respond to this objection. It seems to me that the description of the model case *does* carry the implication that citizens endorse the same conception on the basis of converging comprehensive reasons. But citizens' comprehensive doctrines need not be the primary ground of their endorsement of a political conception of justice according to the political sociology grounding the FOC view. As an interpretive matter then the view of overlapping consensus derived from the model case needs to be distinguished from the view connected to the political sociology of reciprocity.

Additionally, though Rawls' use of the idealized political sociology is meant to support the possibility of consensus either on a single conception or a family of conceptions, it provides little plausible support for the possibility that consensus on a single conception would develop from a prior constitutional consensus. This is because the political sociology supposes that citizens' intuitive beliefs about justice are connected to existing institutions. Presumably, these beliefs condition the process of reflective equilibrium that leads reasonable citizens to endorse *some* political conception of justice in the first place. Even if such a reflective equilibrium is achieved in part through the exchange of reasons characteristic of a deliberative democracy (as the political sociology implies), there is little reason to hold that this process should generate consensus on a single conception of social justice that is consistent with acknowledging the burdens of judgment.

The reason for being skeptical about this possibility is that the range of citizens' intuitive beliefs are only constrained by the explicit institutional forms articulated by the

constitution, which are fundamentally about specifying political procedures and protections. Given the assumptions of the political sociology, there is no similar constraint on the range of citizens' intuitive beliefs about distributive justice. Consequently, while citizens can be expected to form a fairly limited range of intuitive beliefs about the content of constitutionally guaranteed rights, there is not a basis for presuming a similarly narrow the range of intuitive beliefs about distributive justice.

In the absence of settled institutions to constrain the range of intuitive beliefs, reasonable citizens can be expected to endorse a much wider range of conflicting beliefs about distributive justice, such that an expectation of a consensus on any given principle of distributive justice appears to deny any reasonable disagreement about distributive justice. This consequence seems contrary to the underlying commitment to reasonable pluralism that grounds the idea of political liberalism.

The irreducibility thesis provides a clearer explanation of the reason for discrepancies in Rawls' descriptions of an overlapping consensus. However it does so by denying the possibility of a unified account of the idea of overlapping consensus. This is a cost that political liberals should be willing to incur, if their goal is to provide a plausible theory of political justification for liberal societies divided by reasonable pluralism, rather than to engage in scholastic debates about Rawls.

But aside from the issue of interpretive fidelity, there may be a stronger case against the irreducibility thesis based on Rawls' account of public justification.[79] According to one common interpretation, the public justification of an institutional policy or law

[79] The significance of the idea of public justification in contemporary debates about liberalism can hardly be overstated. Further, it is important to note that Rawls uses the term "public justification" to refer to the justification of *principles* of justice.

proceeds within limits set by a conceptually prior consensus on the most reasonable political conception of justice.[80] This means that public justification does not require consensus at the level of individual laws or policies. Rather the ideal of public justification only requires that each citizen be given, and be prepared to give, considerations to support laws or policies that are implied by, derived from, or otherwise connected to, principles of justice that each affirms as the most reasonable basis of social cooperation.[81] This moral requirement grounds both the *idea* and the *ideal* of public reason.

Given that an agreement on the most reasonable principles of justice premised upon a broader consensus about the moral good is not just unlikely in a liberal society, but contrary to the basic character of such a society, a more limited kind of consensus must be the basis of the ideal of public justification.

The idea of an overlapping consensus provides a basis for public justification that is more consistent with well-founded expectations of social life in a liberal democratic society. But if reasonable citizens belonging to an overlapping consensus disagree about

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[80] "…justification is addressed to others who disagree with us, and therefore it must always proceed from some consensus, that is, from premises that we and others public recognize as true; or better publicly recognize as acceptable to us for the purpose of establishing a working agreement on the fundamental questions of political justice." See Rawls and Freeman 1999, p 394

[81] This account of public justification is opposed to other views of public justification, such as those of Habermas or Gaus, in which a law or policy itself is the proper object of justificatory consensus. The distinguishing feature of Rawls' idea of public justification is its emphasis on the normative significance of a shared normative standpoint in providing the limits of public justification. This does not require agreement on all political outcomes, as models like Habermas' and Gaus' seem to require. Further, my characterization here elides over the important distinction between justification to individuals, and justification to reasonable individuals. This should not change the fundamental point, which is that Rawlsian public justification rests on a conceptually prior consensus on principles, rather than aiming at consensus as the outcome of public deliberation in particular cases.

which principles of justice are most reasonable (which is the view entailed by the FOC), then the ideal of public justification resting on a shared conception of justice seems to fall apart. Without an agreement on which conception of justice is the most reasonable, citizens lack sufficient resources to ground a set of shared premises, undermining the possibility of the public justification as practice of reasoning according to shared considerations. Therefore, an overlapping consensus on a family of conceptions may represents a distinct account of overlapping consensus, but it does so at the cost of undermining the link between overlapping consensus and public justification.[82]

This is a significant if indirect objection to my claim that the FOC cannot be reduced to some version of the MOC. This objection rests on the claim that the possibility of public justification requires prior agreement on the most reasonable principles of justice. Therefore an overlapping consensus on a family of conceptions (which implies disagreement about which principles of justice are *most* reasonable) is incapable of delivering an agreement sufficient to ground this ideal.

Showing how an overlapping consensus on a family of conceptions might yield a shared normative standpoint that is consistent with the demands of public justification can minimize this objection. In the following section, I examine two recent arguments that support the claim that disagreement about the most reasonable principles of justice is consistent with the requirements of public justification. It is especially important to

[82] This possibility is opposed to the view that a consensus on a family of conceptions represents an approximation under empirical conditions of the idea of consensus on a single conception of justice. On this view, the consensus on a family of conceptions might simply represent an acknowledgement that the ideal of public justification can only be approximated under empirical conditions.

counter this objection because in doing so, it is possible to give a better account of what public justification might demand in a non-well-ordered society.

The second objection rests on the claim that disagreement between citizens about the *most* reasonable conception of justice is inconsistent with the ideal of public reason. But this assumes that possibility public reason is conditioned by a prior consensus on the most reasonable conception of justice. Recent publications by Rex Martin and Jonathan Quong undermine this rather widespread assumption among political liberals about how public reason must be characterized.[83] A brief, if relatively uncritical, examination of these arguments provides undermines this assumption, and without it, the second objection loses most of its force.

Martin and Quong approach the claim that public reason requires agreement on the most reasonable conception of justice from slightly different theoretical perspectives. Martin's analysis is closely related to my own analysis of the relation between a prior constitutional consensus and an overlapping consensus, and emphasizes the institutional preconditions of public justification. On the other hand, Quong's analysis rests on more abstract concerns about how to characterize the ideal of justification to reasonable citizens. Quong develops a conclusive argument against the assumption underlying the second objection so I will begin by examining his argument.[84] Martin's analysis of the significance of institutional preconditions for public justification shows how close

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[83] See Martin, Rex "Overlapping Consensus" and Jonathan Quong "On the Idea of Public Reason" in Mandle and Reidy 2014. One might want to distinguish *rawlsian political liberalism*, from a more general theory *political liberalism*. Martin and Quong do not endorse *rawlsian political liberalism* if this term is restricted to a species of *political liberalism* expounded by John Rawls.

[84] Not incidentally, Quong's analysis also weakens the general interpretive case for the MOC as a plausible view of overlapping consensus.

attention to the relation of overlapping consensus and public justification provides clarifies how the moral requirements of public reason can be satisfied without the idealizing assumption of a well-ordered society.[85]

In another place, Quong argues that an overlapping consensus on the most reasonable principles of justice is not sufficient to establish a common basis for public justification about justice. Even if citizens judge the same principles of justice most reasonable *because* each finds those principles to be congruent with her comprehensive doctrine, they may still be unable to reason according to common standards when debating the more precise requirements of those principles.[86] Though the judgment of each citizen converges on the same principles, which in this sense embody a common standpoint, the underlying moral values and ideals that support each citizen's judgment are not be shared. On a common view of overlapping consensus, these values and ideals would be drawn from citizens' comprehensive doctrines.[87] But if the resources for interpreting the principles of justice are provided by comprehensive doctrines, then citizens clearly lack a shared basis for reasoning about justice, even though each endorses the same principles as most reasonable.

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[85] The fact that Quong seems committed, at least in theory, to the ideal of a WOS shows how his version of political liberalism does not represent a sharp break with Rawls' version of political liberalism. However, I would argue that his commitment to characterizing the ideal of public justification by reference to a WOS leaves it quite unclear what the demands of public reason might be under non-ideal conditions.

[86] If I understand Quong's criticism correctly, even if the justification for principles of a political conception at the *pro tanto* stage rests on democratic values and ideals, and each citizen supports those political principles for comprehensive reasons, there still will not be a sufficiently shared normative standpoint between citizens to ground the practice of public reason. See Quong 2011 pp 161 – 191.

[87] The view of overlapping consensus that Quong criticizes is roughly the same as the view I have referred to as the "model-case". Further, this view is implied by Cohen's pluralistic consensus test. See "Moral Pluralism and Political Consensus" in Cohen 2009

According to Quong, an overlapping consensus cannot provide the common currency for public justification as long as it is viewed merely as the focal point of converging comprehensive reasons. The fact that citizens endorse the same principles would not, on its own, provide a sufficient basis for public reasoning.[88] It is at least as important that citizens agree on the underlying political values and ideals that the principles of justice specify.[89] This is in part why Quong proposes that the content of an overlapping consensus be reconceived as a set of political values and ideals supported in one way or another by all reasonable comprehensive doctrines.[90] Not only is agreement at this more general level key to ensuring that principles of justice are interpreted according to shared values, but agreement at that level is a "more plausible candidate for an overlapping consensus between comprehensive doctrines."[91]

Given that fundamental liberal ideas, such as fair cooperation and citizenship, are "all the common normative ground there is to be found in a well-ordered liberal society", an overlapping consensus on the *principles* of justice, though perhaps desirable, proves to be an unnecessarily demanding condition on the practice of public reason.[92] On Quong's

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[88] At least insofar as the idea of public reason is conceived in broadly Rawlsian terms. There are a number of other models of public reason, among which, the justificatory liberalism of Gerald Gaus and the universal pragmatics of Jurgen Habermas are perhaps most widely known.

[89] Quong seems to think that standard Rawlsian accounts of overlapping consensus perhaps assume that agreement on principles also secures agreement on the underlying political values as well. It this is true, the Quong's analysis only clarifies that this assumption is unwarranted, and that public reasoning only requires a consensus on political values, not necessarily on principles of justice. Gerald Gaus makes a related point in "The Turn to Political Liberalism" Mandle and Reidy 2014.

[90] "I claim that it is this fundamental idea of society as a fair system of social cooperation between free and equal citizens (or something close to it) which should be the subject of the overlapping consensus." See Quong 2011 p 182.

[91] *ibid* 185

[92] *ibid* 183

view, all that is required for the practice of public reason is that reasonable comprehensive doctrines support the fundamental ideas on the basis of which various political liberalisms, such as justice as fairness, are elaborated. These values imply a generalized account of political liberalism, which is specified by particular conceptions of justice, such as justice as fairness.[93]

Reconceiving the object of an overlapping consensus as these ideas is therefore not strictly consistent with the claim that the object of an overlapping consensus is a family of conceptions, since the focus of consensus according to Quong is the basic liberal values. This account of overlapping consensus illustrates how disagreement about the most reasonable principles of justice could still be consistent with political liberalism's basic requirement that public justification proceed in terms of premises shared by all reasonable citizens.

One need not fully endorse Quong's version of political liberalism to see that his criticism of the "comprehensive support for principles" position, or what I have called the 'model case', is conclusive. An overlapping consensus in which citizens endorse a limited set of political principles on the basis of comprehensive reasons would not be an adequate basis for the practice of public reasoning envisioned by political liberalism (i.e. a practice characterized primarily by agreement on the terms of justification though not necessarily on the outcome of justification). This conclusion is enough to undermine much of the force of the objection above.

[93] Agreement on this general definition of liberalism can satisfy two central theoretical functions of an overlapping consensus (a) its role in ensuring congruence, and (b) its role in the public justification of coercive political power.

In a recent anthology, Rex Martin offers another argument for the same conclusion. This argument, however, emphasizes the important sociological assumptions underlying the claim that an overlapping consensus is a practical possibility and embodied in the idea of a constitutional consensus.[94] Quong's otherwise commendable account is largely silent about the sociological background presumed by the idea of overlapping consensus. Like Rawls, Quong focuses on the capacity of comprehensive doctrines to jointly support the object of an overlapping consensus, though they specify that object in different ways. As with Rawls, this is intended to be a useful simplification, since "there are less doctrines than citizens". However prioritizing reasonable comprehensive doctrines over reasonable persons emphasizes one aspect of the question of whether historically enduring moral and religious communities are congruent with basic liberal commitments. This simplifying assumption exaggerates the agency of the doctrines themselves.

A more relevant question is whether reasonable *citizens* will adopt conceptions of the good that are congruent with basic liberal commitments. Part of the answer to this question will certainly be found in the fact that the practical requirements of reasonable comprehensive doctrines are generally congruent with basic liberal commitments. But it is important to keep in mind that, for Rawls anyways, a settled liberal constitution is also a source of weighty moral reasons for reasonable citizens. The main weakness of the 'model case' is that it only obliquely acknowledges this assumption in guise of the pluralist view. That sort of view, as Rawls' political sociology makes clear, provides the most plausible ground for the claim that an overlapping consensus is a realistic practical ideal. This lies in background of Martin's view.

[94]See Mandle and Reidy 2014, p 284.

Martin does a better job than Quong of showing how the institutions of constitutional government provide the background conditions for interpreting the content of an overlapping consensus. Given this background, Martin argues that an overlapping consensus is *best* understood in terms of a family of conceptions, and moreover, that this is consistent with the idea of public justification connected to the idea of stability for the right reasons.

First, Martin argues that a consensus on a single conception of justice (such as justice as fairness) is not a natural outgrowth of a constitutional consensus. The history of modern constitutional democracy shows that continued debate about which principles of justice are most justifiable seems to be an enduing feature of healthy democracies. The absence of political parties representing different specific political conceptions is most often a sign of political dysfunction. The "rise of egalitarian democracy … has altered the shape of liberal theories, moving them away from the ideal of a single agreed-upon principle or closely integrated set of principles toward a family of rather variegated liberal principles."[95] An agreement on a single conception would therefore seem to violate Rawls' deep commitment to realism.

A constitutional consensus, properly understood, expresses an agreement between citizens on the "public political conception of justice (of the sort formed by the family of liberal principles with certain generic features in common)", or in other words, it

[95] *Ibid* p 286. He continues by observing that this "family of principles [has] certain generic features in common and offer[s] varying and even competing interpretations not merely of policy issues but also of the constitutional and institutional essentials in the various liberal polities and even of the fundamental ideas of a democratic public political culture as such."

expresses their agreement on principles of "generic liberalism."[96] An overlapping consensus builds on a prior constitutional consensus by lending those general principles "moral credentials of the sort afforded by a comprehensive critical moral theory."[97] On Martin's view, an overlapping consensus, should one exist, would not need to be focused on a specific conception of justice such as justice as fairness. An overlapping consensus that builds on a prior constitutional consensus is more plausibly understood in terms of the principles of generic liberalism.

Second, Martin argues that an overlapping consensus whose content is given by the principles of generic liberalism can still satisfy the justificatory ideal connected to the notion of stability for the right reasons (which should not be confused with institutional stability *simpliciter*). Martin appears to hold that the ideal of stability for the right reasons requires justification of the public political conception at two distinct levels: (a) a limited, freestanding moral justification afforded by the ideals of citizenship and fair cooperation, and (b) a "critical moral justification" afforded by distinct comprehensive doctrines. Each of these levels roughly corresponds to one of the two kinds of consensus. Securing both levels is a necessary condition for the full justification of a political conception, which shows that a society ordered according to that conception is capable of being stable for the right reasons. Given that freestanding justification is conceptually prior to the "critical moral justification," and that it is unlikely to center on a public

[96] *Ibid* p 287; Martin executes an important terminological change, which I follow in my comments. When he refers to the "political conception of justice" that is the object of overlapping consensus and public justification, he means the principles of generic liberalism, and not any more specific political conception like justice as fairness.
[97] *Ibid* p 289

political conception more specific than the principles of generic liberalism, full justification seems likely *only* for the principles of generic liberalism.

Both Martin and Quong conclude that an overlapping consensus on a single conception of justice (like justice as fairness) cannot accomplish the goal of public justification connected to the idea of stability for the right reasons: Martin because a narrow consensus on a specific conception of justice violates the conditions of realism spelled out in the connection between a constitutional consensus and an overlapping consensus, and Quong because such a consensus is not deep enough to ensure that the practice of public justification proceeds through a shared normative standpoint. Despite their different concerns, Quong and Martin both conclude that disagreement about the most reasonable conception of justice does not conflict with political liberalism's idea of public justification. Further they both agree that Rawls' account of generic liberalism provides the most specific point of agreement possible, given an honest account of reasonable pluralism.

To conclude, the objection to my irreducibility thesis presented above rested on the claim that disagreement about the most reasonable conception of justice conflicted with the goal of public justification at the heart of political liberalism. Recent work by Martin and Quong provides some reasons to think that an overlapping consensus may be *better* able to meet the goal of public justification if it is interpreted as including disagreement about the most reasonable conception of justice. Their arguments undermine the claim

on which the objection is based, and so, my irreducibility thesis does necessarily fail for the reasons expressed in the objection.[98]

6. Conclusion

This chapter provides some defense for two important claims. The first is an interpretive claim about the meaning of "overlapping consensus". I have provided evidence that the various descriptions of the content and justification for this concept given by Rawls lead to two irreducible interpretations. Further, I have tried to show that an overlapping consensus on a family of conceptions of justice cannot be derived from the idea of an overlapping consensus on a single specific conception of justice.

But there is a second claim I hope can be defended on the basis of the interpretive claims made in this chapter. Those claims provide two important reasons that political liberals should adopt the FOC view of an overlapping consensus over the MOC view. First, the FOC view provides a more plausible view of the consequences of reasonable pluralism for justification through public reason. Assuming, even ideally, that reasonable citizens will converge in judgment on the most reasonable principles of justice seems to violate the conditions that give rise to reasonable disagreement in the first place. But according to the FOC view, disagreement about the most reasonable conception of justice may still be expressed within a shared normative standpoint established by some minimal conditions of reasonability for conceptions of justice and a prior agreement on the institutions of a political constitution. Citizens may disagree about the *most* reasonable

[98] The irreducibility thesis can satisfy conditions of justification expressed in the idea of public reason.

conception of justice, but given that citizens mutually endorse the same minimal conditions that any reasonable conception of justice must satisfy, their disagreement here need not give rise to the problems of alienation and coercion as their disagreement about comprehensive doctrines would tend.

Second, the FOC view can be grounded in a plausible historical hypothesis about the effects of liberal institutions. The political sociology which grounds the account of the FOC view speculates that the morally significant effects of liberal constitutions justify the liberal principles of justice that citizens *believe* to be expressed by the constitution. But a political constitution is rarely explicit about the specific (liberal) principles of justice it expresses. A political constitution is open to a certain amount of interpretation in this regard. The FOC view, I think, better captures the fact that existing democratic constitutions are indeterminate in this way. As Martin convincingly argues, the historical evidence we possess about the development and historical trajectory of existing constitutional governments suggests that deep disagreement about the principles of justice that ground existing constitutions is likely to persist indefinitely.

More theoretically, the FOC view implies that the particular *constitutional* elements of the basic structure are open to justifications from a number of reasonable conceptions of justice. Given that all minimally liberal constitutions guarantee freedom of speech and association, it is unreasonable to expect that citizens will all agree that their particular constitution is justified by one and the same conception of justice. As a consequence, even given the institutional features of a well-ordered society, an overlapping consensus on the *most* reasonable conception of justice such as envisioned in the MOC seems to violate the basic features of reasonable pluralism.

For these two reasons, the family of conceptions view of overlapping consensus provides a more defensible account of the idea of overlapping consensus than the model conception view. Further, I have shown how the FOC may still provide a basis for characterizing public reason and through it the idea of political justification connected to the liberal principle of legitimacy.

Chapter 3

Sisters, Cousins, and Great Uncles:
Who Belongs to the Family of Liberal Conceptions?

"[The] content of public reason is given by a family of political conceptions of justice, and not be a single one. There are many liberalisms and related views, and therefore many forms of public reason specified by a family of reasonable political conceptions." – *The Law of Peoples*

In the previous chapter, I argued that models of public reason based on Rawls' idea of overlapping consensus should reject a widely held interpretation of the idea of an overlapping consensus. According to this interpretation, an overlapping consensus is characterized by a converging consensus of all reasonable comprehensive doctrines on the very same principles of justice. Models of public reason that draw on this interpretation identify public reasons by reference to a single conception of justice that is supported in different ways by the main comprehensive doctrines in a society. This conception provides the content of the society's political morality and its shared public reason. This brief summary expresses, perhaps, the most commonly held view of Rawls' account of public reason. I argued in the previous chapter that this view is not the only way to interpret Rawls' idea of an overlapping consensus, and in fact, it overlooks the significant changes that Rawls made to this idea in *Political Liberalism* and several essays published after its publication.

The competing model of overlapping consensus I presented in the last chapter is based on a close reading of §6-8 of Chapter IV in *Political Liberalism*. In these passages, Rawls presents for the first time, and in the greatest detail, the idea that a constitutional

consensus provides a precondition for the possibility of an overlapping consensus. A constitutional consensus is shallow and narrow. A constitutional consensus is shallow because not all reasonable citizens may view the political rights granted in the constitution as supported by principles of justice or as derived from a (moral) conception of the person, and it is narrow because it is only a consensus on the rights and procedures that must be granted to enable a functioning democratic political process that provides adequate protection for the rights of the minority.

On this modified view, an overlapping consensus can only develop in a society in which comprehensive doctrines lend some support, or at least do not outright conflict with, the political guarantees of a liberal democratic constitution. Reasonable citizens adopt political conceptions of justice in order to justify their policy preferences to each other on the basis of what they sincerely take to be the best (most reasonable) interpretation of the moral values and principles expressed in the procedural guarantees they all already endorse. An overlapping consensus occurs when a set of these political conceptions (at the extreme a single conception) becomes widely recognized by all citizens as a *reasonable* (if not entirely just) basis for organizing the entire basic structure.[99] The modified view of overlapping consensus proposed in these sections no longer implies that all citizens hold that one and the same political conception of justice is the most reasonable. The object of their overlapping consensus is now described by

[99] This essentially means that in an overlapping consensus, reasonable citizens do not view the political conceptions that guide the basic structure as deeply conflicting with their comprehensive moral commitments. This explains Rawls persistent use of the phrase "or else not in conflict with" to describe the support given political conceptions by comprehensive doctrines.

Rawls as a family of freestanding liberal conceptions of justice, with an overlapping consensus on a single conception taken to be a limit case.

The main consequence of these modifications to the idea of overlapping consensus is that the limits of public reason can no longer be understood in terms of the *most* reasonable conception of justice. Rather, the limits of public reason must be understood in terms of a family of reasonable political conceptions of justice. A model of public reason based on the modified account of overlapping consensus is consistent with robust disagreement among reasonable citizens about which principles of justice are the most reasonable. But disagreement about the *most* reasonable principles of justice need not undermine the possibility of public reasoning as long as there is consensus among reasonable citizens on the composition of the family of conceptions of justice.[100] This would mean that while citizens disagree about the *most* reasonable conception of justice, they agree on which conceptions of justice are reasonable in a minimal sense. This seems to imply that citizens recognize a criterion of *bare reasonability* that determines the content of the family of conceptions.

Achieving a clearer view of *bare reasonability* is an important step in developing a more complete account of the changes that Rawls made to the idea of public reason after the publication of *Political Liberalism* than has currently been offered in the literature to date. The modest goal of this chapter is to show that idea of bare reasonability supported by textual evidence from *Political Liberalism* and elsewhere serves to exclude libertarian views of property from the family of conceptions of justice.

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[100] The idea that public reasoning is based on a prior consensus and is therefore shared by all citizens can be modified so that the idea of shared reason means roughly, "supported by a principle that citizens recognize as satisfying some minimal threshold of reasonability."

The analysis further shows that Rawls makes contradictory claims about whether classical liberal views of property fall within the range of bare reasonability. In the next chapter, I attempt to clarify whether interpreting the family to include classical liberalism provides a more plausible view of public reason or whether Rawlsians are broadly correct that the limits of public reason exclude most classical liberal views of property. The hope is that by examining how wide a range of liberal views about property rights can be accommodated by Rawls description of the family of reasonable conceptions, some further clarity can be achieved about the distributive implications of the of idea public reason.[101]

This chapter is motivated by the suspicion that the ideal of deliberative democracy connected to the idea of public reason may express a much weaker commitment to distributive equality than is often thought to be the case. A similar concern is raised in a number of early criticisms of Rawls. Critics such as Bernard Williams, Susan Moller Okin, and Brian Barry were deeply skeptical of the claim that the difference principle, or *any* comparably demanding principle of egalitarian distributive justice, could be supported by comprehensive doctrines in an overlapping consensus.[102] These criticisms are largely rejected in the subsequent literature because they are rightly viewed as misrepresenting the idea of overlapping consensus in ways that Rawls later clarified.[103] The underlying worry that the distributive implications of the political liberalism may be significantly less egalitarian than Rawls and his followers seem to believe recurs in a slightly different way given my analysis of the model of public reason that follows from

[101] In one sense, this chapter continues a broad debate about the continuity of the two main periods of Rawls thought.
[102] See Williams 2014; and Barry 1995; and also Okin1993.
[103] See "Reply to Habermas" in Rawls 2005.

FOC view. Without a clear account of the boundaries of the family, it is unclear just what principles of distributive justice can be excluded from public reason. This chapter argues that within the broad framework of public reason that follows from the FOC view, there is no conclusive reason to think that forms of high liberalism have an exclusive claim to public reasoning about distributive justice.

This chapter analyzes the status of economic freedom and property in public reason as a way of examining the limits of public reason that derives from the family of conceptions view of overlapping consensus. If conceptions that support giving a high, or even nearly absolute, value to economic freedom and property rights belong to, or at least are not clearly excluded form, the family, then there seems to be little reason to think that the ideal of public reason implies any significant commitment to distributive equality. On the other hand, if conceptions of justice in the family endorse the view of economic freedom and property characteristic of high liberalism (that freedoms of speech, association, and conscience must be given priority over economic freedom and property), this would establish a provisional link between the value of public justification expressed in the idea of public reason and some of the basic commitments of high liberal views of distributive justice.

These reflections support the conclusion that political liberals may be too hasty is excluding classical liberal principles from public reason. Many forms of classical liberalism can accommodate the restriction of private property and economic liberty to support publicly provided social insurance that guarantees citizens do not fall into deep poverty because of disability, unemployment, or retirement. This feature of most forms of classical liberalism suggests that political theorists like John Tomasi and Gerald Gaus

may be correct in claiming that the distributive commitments of high liberalism do not set the boundaries of public reason, even on recognizably Rawlsian grounds. Acknowledging that at least some recent forms of classical liberalism meet a plausible criterion of *bare reasonability* may lead to a more plausible account of the idea of public reason.

1. Family Traits

A model of public reason needs to provide a way of distinguishing public from non-public reasons in order to be a useful guide for our judgments about which exercises of political power are reasonable. Further, the set of public reasons it distinguishes must at least be capable of supporting citizens' beliefs about the content of constitutional protections, and the requirements of basic (distributive) justice.[104]

The family of conceptions view of overlapping consensus (FOC view) undermines a widely held view about how to draw the distinction between public and non-public reasons. The FOC view assumes that reasonable citizens are unlikely to reach, or simply cannot reach, a consensus about the *most* reasonable conception of justice. Consequently no single conception of justice is able to provide the ultimate criteria for distinguishing public reasons from non-public reasons. Rather, the distinction between public and non-public reasons is drawn on the basis of a closely related group of conceptions of justice. If public reasons are still to be characterized in terms of a prior agreement, then a *consensus* on a family of conceptions must imply that central features

[104] Completeness requires that "the values specified by [the political conception of justice] can be suitably ordered or otherwise united so that those values along give a reasonable answer to all, or to nearly all, questions involving constitutional essentials and matters of basic justice" See, "Reply to Habermas, Rawls 2005 p 386

of conceptions in the family are the object of a consensus, including (perhaps) a view about the criteria that distinguish *barely reasonable* from *unreasonable* conceptions of justice. A largely overlooked question in the recent literature is whether there is textual evidence on which to develop a Rawlsian account of the distinction between *barely reasonable* and simply *unreasonable* conceptions of justice.

Few attempts have been made in the secondary literature to examine the broader consequences of the more inclusive model of public reason that follows from the modified FOC view in which some citizens regard the conceptions of justice endorsed by other citizens as *barely reasonable*, though *insufficiently just*. Recent scholarship suggests at least two ways to interpret the FOC view, and consequently, two slightly different ways of developing a criterion to distinguish *barely reasonable* from *unreasonable* conceptions of justice.

Jonathan Quong argues that the best way of maintaining the normative significance of consensus given the modified idea of an overlapping consensus on a family of conceptions is to presume citizens reach consensus on features of justice that are more abstract than conceptions. On his interpretation, citizens agree on the fundamental ideas of political liberalism. Different conceptions in the family reflect plausible differences in the way that citizens interpret these fundamental ideas. One weakness of this view is that it largely overlooks the fact that Rawls came to view a consensus on a written constitution protecting certain fundamental political rights as a necessary condition for the possibility of an overlapping consensus. Moreover, Quong fails to investigate very deeply whether there are any limits on the interpretation of these ideas that might establish a range of *barely reasonable* conceptions of justice.

Rex Martin gives a slightly different interpretation of the family of conceptions. He argues that consensus on a general idea of liberalism is sufficient to characterize the common features of the family.[105] The range of the family of conceptions is limited by a generalized idea of liberalism that is expressed in the central features of liberal constitutions. Conceptions of justice that belong to the family of conceptions specify this general idea and provide justification for the essential features of a liberal democratic constitution that originally served a purely pragmatic function. Though Martin's view is more sensitive than Quong's to the constitutional context that Rawls came to believe was a necessary condition of an overlapping consensus, Martin's analysis still leaves the issue of *barely reasonable* conceptions largely unexamined.

Despite their differences, both these interpretations suggest that that although Rawls came to doubt that public reason could be grounded in a consensus on the most reasonable conception of justice given the causes of reasonable disagreement, he maintained his belief that some consensus about justice was possible, even if he no longer characterized that consensus in terms of one specific political conception. The FOC view suggests that political conceptions of justice belonging to the family specify values and principles that reasonable citizens support on the basis of converging reasons drawn from incompatible comprehensive doctrines. The consensus of reasonable citizens is therefore properly characterized at a more abstract level.

Both Quong and Martin, however, fail to fully examine whether a consensus on abstract principles and ideas connected to justice provides a sufficient basis for an account of minimal reasonability. An account of minimal reasonability is necessary

[105] See "Overlapping Consensus" in Mandle and Reidy 2014.

because without some way of identifying whether a given conception is sufficiently reasonable, it seems doubtful that a thoroughgoing distinction can be maintained between public and non-public reasons.[106] A clear account of this distinction is to answer whether permissible social inequalities.

The analysis below develops an account of *bare reasonability* for conceptions of justice from some of Rawls' mature reflections on public reason. I argue that this account is sufficient to identify a range of reasonable principles of property and economic liberty. A narrow focus on property and economic liberty may provide only a partial account of *bare reasonability* of a conception of justice. However, if this account is sufficient to show that at least some *prima facie* liberal views of property are *unreasonable*, then some further insight into the content of the family of conceptions, and consequently of public reason, has been achieved. Narrowing the range of conceptions that could belong to an overlapping consensus on a family of conceptions will contribute to a full investigation of the implications of the Rawlsian idea of public reason for questions of basic (non-constitutional) justice.

The analysis below considers three types of liberal views of property: High or Egalitarian Liberal, Classical Liberal, and Libertarian. I understand these principles to differ mainly according to the degree of protection for property rights and economic liberties deriving from ownership that the principle supports.[107] Libertarian principles of

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[106]There is some risk is attempting to characterize a threshold of reasonability. A plausible account of the threshold should remain incomplete and open to revision, since the democratic process may reveal insights that suggest a wider or narrower range of reasonable conceptions of justice. A theory of 'reasonability' should try to avoid .

[107] Perhaps a more characteristically Rawlsian way of viewing the problem is to ask whether all three interpretations of justice as fairness: *natural liberty*, *liberal equality*, and *democratic equality* meet the threshold of *bare reasonability*, or whether one or more

property hold that ownership rights covering all the incidents of property are basic liberties that deserve the highest level of institutional protection (constitutional entrenchment). High Liberal principles of property hold that, at most, some central incidents of property are basic liberties that that deserve the highest level of institutional protection (constitutional entrenchment). High Liberal principles generally hold that the other incidents of property may be limited in order to secure gains in other social values, like equality or welfare. Classical Liberal principles, like Libertarian principles, give a high priority to protecting all the incidents of property. Unlike Libertarian principles, Classical Liberal principles do not share the view that the incidents of property may never be limited to secure gains in equality or welfare. Thus, Classical Liberal principles of property occupy something of a middle ground between Libertarian and High Liberal principles of property.

These principles can be arranged according to a decreasing degree of protection for property rights and economic liberty. Libertarian views occupy one end of the range. They support near absolute protection for all incidents of property rights and economic liberty against any limits connected to other social values. High liberal views occupy the other end of the range. Such views often support restrictions on property and economic liberty to promote other social values, like equality or fairness. Classical liberal views fall somewhere in between the near absolute protection of property supported by Libertarian

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of these interpretations falls below the threshold. The weakness of this way of posing the question is that Rawls explicitly acknowledges that conceptions of justice that bear no relation to justice as fairness might also belong to the family of conceptions.

views, and the highly qualified, and often extremely narrow, protection of property supported by High liberal views.[108]

Whether an overlapping consensus focusing on a family of conceptions encompasses all three kinds of liberal views of property or just a subset of them, will have a direct implication on the range of redistributive institutions that can be supported by public reasons. If each of these principles is contained in at least one conception belonging to the family, then public reasons may support both the highly redistributive basic structure implied by High liberal views, and the night-watchmen state envisioned by Libertarian views. This seems to be an implausible account of public reason since it implies that almost any institutions of property can be justified by public reasons. Consequently, public reason could justify *both* extremely egalitarian and anti-egalitarian basic structures.

A more plausible model of public reason could be developed on the basis of a clearer account of the threshold of *bare reasonability* that principles of property rights and economic liberty must meet. This may resolve what could be a troubling implication of the family of conceptions view of overlapping consensus, which is that public reasons may justify any remotely liberal convention governing property rights and economic liberty. More importantly, an account of the threshold of *bare reasonability* in terms of principles of property would make possible a more precise account of the range of

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[108] In this analysis, I explicitly avoid the question of whether the princple grounds property rights and economic freedom in claims about individual's *natural rights*. It is clear that such claims are not sufficiently political. Natural rights liberalism, whether libertarian or not, is not a *political* conception of justice, since it derives liberal basic rights from a non-political conception of the person. Nevertheless excluding conceptions (or in this case principles) because they are insufficiently political does not eliminate the possibility that the offending principles of such conceptions could be stated in terms of political values.

principles of distributive justice that belong to the family of conceptions, and therefore whether the balance of public reasons tilts in an egalitarian direction.[109] The analysis in the next section presents three ways that Rawls characterizes the common features of members of the family of conceptions in order to begin to develop a threshold notion of *bare reasonability*. This threshold is then shown to be sufficient to exclude Libertarian principles of property from the family.

2 Freestanding Principles of Property

Rawls describes the common features of the family of conceptions of justice in several different ways. First, the family consists of any conception of justice that can be constructed from the twin foundational ideas of political liberalism: persons as free and equal citizens, and society as system of mutual cooperation. In other words, all conceptions belonging to the family must be capable of being represented as outputs of a model of political construction that specifies political liberalism's basic ideas of society and person. Second, members of the family represent different specifications of a more general concept of liberal justice. Understood this way, each member of the family specifies principles of the same general concept of liberal justice. Third, the family consists of conceptions of justice that satisfy the criterion of reciprocity.[110] Rawls does

[109] The question is what conventions of property are justified by liberal conceptions of justice, and so conventions of property that deny individuals *all* property rights and economic liberty need not be addressed here. Such conventions are manifestly illiberal, and therefore, are not justified by any plausibly liberal conceptions of justice.
[110] Introduction to the second edition of *Political Liberalism* "Any conception that meets the criterion of reciprocity and recognizes the burdens of judgment" may belong to the family of freestanding conceptions. See, Rawls 2005 p xlix.

not make clear whether these ways of describing the members of the family are independent of each other, or whether some may be derived from the others.[111] On my reading, Rawls derives the first two from the criterion of reciprocity, which provides the ultimate criterion for distinguishing conceptions of justice that can provide public reasons from those that cannot.

However, a full analysis of the relation between these accounts is not necessary to develop a provisional account of *bare reasonability*. My account of bare reasonability draws mainly on the second description, and turns to the first for clarification, and the third to resolve a conflict in Rawls' descriptions of a reasonable social minimum. I also draws on the ideas of a 'constitutional consensus' and 'constitutional essentials' for clarification of several points. Finally, I show that this provisional account of *bare reasonability* is sufficient to exclude Libertarian views of property fall from the range of reasonable principles of property.

The second description of the family holds that members of the family specify three principles of a general idea of liberal justice. According to Rawls, members of the family of reasonable concepetions:

(i) "specifies certain rights, liberties, and opportunities (of the kind familiar from democratic regimes);"

(ii) "assigns a special priority for these rights, liberties, and opportunities, especially with regard to claims of the general good and of perfectionist values;" and

[111] Some evidence suggests that Rawls may have thought that the abstract idea of liberalism could ultimately be derived from the criterion of reciprocity, which would therefore provide the fundamental normative value specified by the family of conceptions. The passages in which he describes the family of conceptions does not provide clear evidence that this is the case, however.

(iii) "affirms measures assuring all citizens adequate all-purpose means to make intelligent and effective use of their liberties and opportunities."[112]

I will refer to this concept of justice as *generalized liberalism*.

The idea of *generalized liberalism* along with the first and third way of describing the family of reasonable conceptions imply a threshold criterion of reasonability. Below I shows that in order to specify the idea of general liberalism a conception must fall between two extremes with regard to the protection of property. At a minimum, a conception must support the constitutional protection of incidents of property that are necessary for the exercise of political rights and liberties. At the maximum, a conception must not support protections of private property that undermine the public provision and guarantee of a minimum level of resources for all citizens.[113]

The analysis below presumes that Rawls' idea of a family of conceptions of justice is neither a focal concept whose precise boundaries are contested, nor a family

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[112] See, Rawls 2005 pp 223; and also pp 375 and xlviii; "Public Reason Revisited" in Rawls 1999b p 141; and Rawls 1999b pp 14 and 49.
In the introduction to the paperback edition, the third condition is modified to read "it affirms measures assuring all citizens, **whatever their social position**, adequate all-purpose means to make intelligent and effective use of their liberties and opportunities." Close examination of these three conditions in the critical literature has been relatively sparse. One explanation might be that the manner in which Rawls specifies the content of the family of liberal conceptions may seem less important than his claim that liberal conceptions only articulate political values. Another explanation might be that the common features of liberal freestanding conceptions are not all that significant if one holds that the idea of an overlapping consensus requires agreement on a single conception. The common content of freestanding conceptions of justice becomes relatively more interesting if, following Rawls suggestion, an overlapping consensus does not require that citizens agree on the most reasonable conception of justice, but only that they agree on a family of reasonable conceptions of justice. Consequently, "Citizens will differ as to which of these conceptions they think the most reasonable, but they should be able to agree that all are reasonable even if barely so." See, Rawls 1999b p 14.

[113] Both the minimum and maximum derive from Rawls description of "constitutional essentials", an indication of the importance of a constitutional consensus.

resemblance concept whose members bear only a haphazard relation to each other. Rather, the idea of a family of conceptions is defined by a few necessary, but not sufficient, conditions regarding reasonable protections for private property. On my interpretation, Rawls' account of the family of reasonable conceptions is sufficient to exclude libertarian views of property. However, his account of the family supports conflicting views about whether classical liberal view of property are reasonable or not. To anticipate a point presented in more detail below, Rawls' various descriptions of the family of conceptions admits of a stronger and weaker interpretation of the maximum, but still reasonable, level of protection for private property. On the stronger interpretation of this condition, it is unlikely that classical liberal principles fall within the range of bare reasonability established by the two propositions. On the weaker interpretation, classical liberal principles are likely to fall within the range of *reasonable* conceptions and therefore to belong to the family of conceptions. I present some reasons for thinking that Rawls remained uncertain about whether an overlapping consensus on a family of conceptions included Classical Liberal principles. Which interpretation provides a better model of public reason overall requires further argument. A full analysis of this question will come in the following chapter.

3. Generalized Liberalism and Property

The analysis in this section draws heavily on Rawls' description of members in the family as specifications of the idea of *generalized liberalism*. It will therefore prove

helpful to restate the three conditions of this concept. A conception of justice specifies the idea of generalized liberalism if and only if it:

(i) "specifies certain rights, liberties, and opportunities (of the kind familiar from democratic regimes);"
(ii) "assigns a special priority for these rights, liberties, and opportunities, especially with regard to claims of the general good and of perfectionist values;"
(iii) "affirms measures assuring all citizens adequate all-purpose means to make intelligent and effective use of their liberties and opportunities."[114]

Justice as fairness is the paradigm specification of the idea of generalized liberalism, and so it might seem that its treatment of property might be shared by all reasonable specifications of *generalized liberalism*. This supposition is misleading for the following reasons.

Justice as fairness might provide a paradigm for other reasonable conceptions of justice because members of the family converge to support its account of the basic liberties. If other members of the family relate to justice as fairness in this way, then each conception in the family supports the same constitutional protections for property rights as justice as fairness. On this view, reasonable conceptions of justice identify the same narrow class of incidents of property for constitutional protection as justice as fairness. Rawls work supports at least three distinct accounts of why reasonable conceptions other than justice as fairness might adopt its account of property and basic liberties. Two of these accounts seem to violate the basic assumptions about pluralism which motivate political liberalism in the first place. The third provides a plausible, historically informed explanation for the convergence of reasonable conceptions on a similar view of which incidents of property count as basic liberties.

[114] See Rawls 2005 pp 223, 375 and xlviii, and Rawls 1999b pp 14, 49, and 141.

First, it is possible all conceptions adopt Rawls' view about the moral significance of ownership. In *Theory of Justice,* Rawls introduces a distinction between personal and productive property in the discussion of basic liberty. [115] Rawls leaves the basis of this distinction vague, but it clearly anticipates the basic features of Margaret Radin's personality theory of property.[116] Radin argues that some items of property are valued fundamentally as constituent parts of a person's identity. The value of personal property is fundamentally independent of whatever exchange value the item might also have. Radin's view sheds some light on what Rawls might have meant in claiming that the right to own "personal property" counts among the basic liberties, while the right to own productive resources does not. According to Rawls, protection of the right to own "personal property" provides a "material basis for personal independence and self-respect" in a way that the right to own productive property is not. Ownership of items whose value is primarily fungible is *not* essential to the sense of self-respect, security, and independence that is needed to develop and exercise the capacities of citizenship.

The problem with this account is that the distinction between personal and productive property is not implied by the idea of generalized liberalism. Consequently, there is no strong reason to suppose that conceptions of justice that specify generalized liberalism will all rely on this distinction. This distinction is but one plausible way of

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[115] See Rawls and Kelly 2001, p 114. This approach would not rule out the possibility that some conceptions might support stronger protections for private property as a matter of best economic policy, even if not as a matter of basic right.

[116] See "Property and Personhood" in Radin 1993. It is probably the case that Rawls is drawing on the pragmatist and Hegelian traditions in the same way as Radin. See especially, Rawls lectures on Hegel in Rawls and Herman 2000 p 341 - 344, in which Rawls seems to approve of Hegel's view that "our property rights are based not on our desires and wants, but on our status as persons".

identifying which incidents of property ought to count as basic liberties.[117] The crucial point is that it is far from obvious that the personality theory of property provides the *only* reasonable basis for identifying incidents of property that ought to be protected as basic liberties. The idea of generalized liberalism provides no reason to exclude the possibility that some reasonable conceptions might use other ideas of ownership and property to identify incidents of property as basic liberties, for instance, a freestanding form of Lockean just acquisition and transfer, or a purely conventionalist view, such as that recently defended by Thomas Nagel and Liam Murphy.[118]

A second explanation of why reasonable conceptions might share one account of the incidents of property that count as basic liberties can be developed from the general account of basic liberty found in of Rawls' account of political constructivism. He holds that each basic liberty corresponds to a social condition that individuals need to develop the moral capacities and attitudes needed to successfully adopt the role of free and equal citizens. For example, a citizen is not free if she is not able to adopt and act on the conception of the good that she believes is best or true. But she only possesses this ability if she is protected from coercive efforts to get her to perform religious practices she rejects. This is how the conditions needed to realize citizenship justified the protections of religious liberty. In general, this is how Rawls derives the protection of basic liberties from idea of citizenship. The social conditions required for citizenship can also justify a

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[117] One might argue that individuals just assign irrationally high exchange values to their personal items, and that this should not imply that a completely different order of values is at work, or at least, that this fact about the way people value items with personal significance should not be reflected in political institutions. Perhaps, political institutions ought to reflect only exchange value because it can be objectively determined, whereas the non-fungible value attached to ownership of a personal item will always remain arbitrary and subjective.

[118] Murphy and Nagel 2002.

basic liberty to own some items of property. However, Rawls' view of the social conditions that are necessary for citizenship remains informed by the distinction between personal and productive property. Individuals need to be secure in the ownership (possession, use, and exclusion of others) of the material extensions of their personality, for example a house or a wedding ring, in order to develop and maintain a sense of themselves individuals.[119] On this view, the incidents of ownership that count as basic liberties only extend to those objects in which one's interests are directly tied to one's identity, and does not obviously extend to one's market interest in the exchange value of those items.

This second account is vulnerable to a similar sort of criticism as the first. In order for other conceptions to share the same view what incidents of ownership count as basic liberties as justice as fairness, all conceptions share the same view of the social conditions that realize the social role of the free and equal citizen. To clarify, Rawls' political constructivism derives the scheme of basic liberties from the social conditions necessary to realize the idea of the person as citizen. Whether a conception of justice can be elaborated in terms of this idea of the person establishes that it is a form of political, rather than comprehensive, liberalism. A key part of this elaboration is the identification of basic liberties by reference to the idea of free and equal citizen, rather than through reference to a broader set of moral facts. But the social role of the citizen can be interpreted in ways that make ownership of property central feature of the idea of free and equal citizen. Perhaps an individual's ability to develop a sufficiently detailed sense

[119] Presumably, all forms of political liberalism share this feature with justice as fairness. The political conception of the person grounds the political constructivism whose outcome is justice as fairness and the other forms of political liberalism.

of the good life requires a robust set of constitutionally guaranteed liberties of ownership and contract.[120] There is little reason to think that all conceptions in the family converge on the same view of the relation of liberties to own property and the role of citizens.

Rawls presents the particular scheme of basic liberties presented alongside justice as fairness in terms of both these accounts. The idea that all conceptions in the family share this scheme of basic liberties seems to imply that all conceptions would endorse either the personality theory of property expressed in the distinction between personal and private property, or Rawls' interpretation of the social conditions necessary to realize the role of the free and equal citizen. But the sources of disagreement that generate the burdens of judgment weigh heavily against assumption. Recognizing the consequences of the burdens of judgment seems to undermine the idea that the list of basic liberties of justice as fairness provides a paradigm whose content other conceptions in the family share.

A third account of why reasonable conceptions might converge in support of justice as fairness' view of the basic liberties of property is suggested by Lecture IV of *Political Liberalism*. In that lecture, Rawls argues that an overlapping consensus is possible only on the basis of a prior consensus on which political liberties and procedures must be protected in order to enable an ongoing democratic political order.[121] It is not entirely clear what the basis of such a consensus would be. On the one hand, Rawls strongly suggests that liberal political forms may be supported on a more or less pragmatic basis. In a closely divided pluralistic society, only the protections offered by a

[120] See Tomasi 2012.
[121] This consensus includes familiar liberal protections for the rights of the minority as well as majoritarian political procedures.

liberal constitution can minimize the risk of the oppressive use of political power. On the other hand, some comprehensive doctrines may place a high value on social cooperation and civil peace, and may support liberal forms of government insofar as they achieve those moral values though they may fall short of justice in other ways. Finally, liberal comprehensive doctrines will support liberal constitutional forms as expressions of the requirements of justice. The core feature of a constitutional consensus is that individuals in a pluralistic society without a shared basis for endorsing political basic liberties, nevertheless find that they have converging moral and non-moral reasons to support the political basic liberties. The question here is whether the converging reasons that citizens have for constitutionally entrenching the protection of *political* basic liberties can be extended to support a similar level of protection for liberties to own, acquire, and dispose of property.

As shown earlier, justice as fairness justifies the constitutional protection for the ownership of 'personal property' insofar as protecting some of the incidents of 'personal property' supports the development of the moral capacities of citizenship. Rawls' justification for this claim draws on a moralized conception of citizenship that is not necessarily shared by reasonable citizens who may nevertheless have moral and/or pragmatic reasons to support the constitutional protection of political basic liberties and democratic procedures. This moralized idea of citizenship provides the shared grounds for the explication of political conceptions of justice, but a constitutional consensus is not necessarily grounded on any shared moral ideas. The idea a constitutional consensus implies that even in the absence of *shared* moral commitments, it is possible for reasonable citizens to have converging reasons to endorse *political* guarantees of a liberal

constitution. Whether all the reasons supporting these political protections are ultimately drawn from any principle of justice is unlikely, as Rawls ultimately came to realize.

Converging support for the constitutional protection of the political basic liberties plausibly extends to support for *some* constitutional protections for liberties to own and dispose of property. Protections for liberties of conscience will not be of much value to citizens, if citizens do not have the liberty to *exclude* other individuals from physical spaces (houses or churches), items, and records of communications that those citizens are also at liberty to *occupy* and *use*. The idea that ownership of physical objects and spaces must be given some protection in order to fully realize the protection of the liberties of conscience is sufficient to conclude that a constitutional consensus includes at least some protection for liberties of ownership and property. Justice as fairness provides a plausible index for which incidents of ownership are most likely to be covered by such an extension. If I am correct, conceptions in the family that reject the personality theory of property and Rawls' interpretation of the social conditions required by the idea of citizenship support the same minimal constitutional protections for ownership and property as justice as fairness on the basis of the likely content of a constitutional consensus.[122]

My analysis suggests that political conceptions overlap on one set of political liberties and that an important range of incidents of property will be protected by extension, namely those needed to secure spaces and objects necessary for the exercise of

[122] This is no trivial consequence, since the threshold of minimal protection for property cannot be met by purely conventionalist views of property, like that expressed by Nagel and Murphy. Such views argue that since all property rights are generated by the state, that the state can legitimately regulate or limit them in any way it deems fit. This view does not

political liberties and liberties of conscience. The importance of other incidents of property may remain an issue on which conceptions in the family differ. Some conceptions may give much more weight to commercial and productive ownership than justice as fairness, perhaps holding that a broad range of economic liberties deserve constitutional protection.[123] Nevertheless, based on a shared commitment to protecting political basic liberties, it is safe to suppose that all conceptions in the family are committed to constitutional protections for at least those incidents of property picked out by the first principle of justice as fairness.

Citizens' agreement on the political basic liberties may establish a minimum level of protection for property that all conceptions in the family must meet. With few exceptions, however, liberal views of property do not fall below the threshold set by the list of basic liberties presented alongside justice as fairness.[124] Consequently agreement on the set of political basic liberties does not give sufficient reason to rule out any of the three general types of liberal views of property mentioned above from being expressed by some conception in the family.

All three views fall within the range of views of property expressed by *some* conception in the family only if all three views of property fall within the upper bound of the range. Since all conceptions in the family specify the third condition of *generalized liberalism* mentioned earlier, all conceptions support some principle that guarantees each

[123] Whether some conceptions in the family hold that a wider range of protections for property are warranted, does not imply that those protections are constitutionally essential.

[124] A notable exception would be the conventionalist view defended by Thomas Nagel and Liam Murphy in Murphy and Nagel 2002. This is a clear example of a liberal view that rejects the very idea that property is a basic liberty. Such a view would fail to support the minimum level of protection for property implied by the idea of generalized liberalism.

citizen "adequate all-purpose means to make effective use of their basic liberties and opportunities" through the basic structure.[125] Call this third condition the *social minimum condition*. Below I explain how the *social minimum condition* establishes an upper bound on the range of views of property expressed by conceptions in the family.

In order to fall within the range of bare reasonability defined by the conditions of *generalized liberalism*, conceptions of justice must be consistent with the institutional implications of the *social minimum condition*. This means that no specification of generalized liberalism can endorse either of the following claims: (a) the only legitimate role for the basic structure is the protection of the basic constitutional liberties, or (b) taxation is only legitimate for the production of public goods construed in a very narrow sense.[126] In order to satisfy the *social minimum condition*, conceptions of justice must support the existence of a scheme of redistributive taxation, given realistic assumptions about institutional design.[127] In general, a conception of justice that prohibits any restriction of economic liberties and property through redistributive taxation cannot fully specify the conditions of generalized liberalism, and for that reason would fall outside the boundaries of *bare reasonability* that derived from the idea of *generalized liberalism*.

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[125] See Rawls 2005, p 223

[126] The narrow construal of public goods I have in mind is the one that corresponds to the legitimate aims of a Nozikian minimal state which exclude taxation to support redistributive institutions.

[127] One must keep in mind that the minimum threshold protection of property is consistent with the possibility that some member of the family of freestanding conceptions support a high degree of protection for the liberties of private property for reasons other than those of basic liberty (*efficiency* for example). This threshold criteria is consistent with the possibility that a libertarian-type principles of property rights could be justified by reasons drawn from the family of freestanding conceptions. What is crucial is that whether the threshold is preempts the possibility that any member of the family of freestanding conceptions protect private property from any redistributive taxation.

[128]Libertarian views of property are characteristically committed to both (a) and (b). There is no way that I can see to maintain a strong commitment to (a) and (b) without also rejecting the primary institutional implication of the *social minimum condition*, i.e. the existence of a scheme of redistributive taxation.

Even without any specification, the *social minimum condition* provides sufficient reason to think that libertarian views of property fall outside the range of reasonable conceptions of justice. Closer investigation of what counts as an "adequate" level of resources may be able to ground a more precise account of the degree of redistributive taxation that all conceptions must be capable of supporting. In any case, some account of the minimal degree of redistributive taxation that reasonable conceptions support is necessary to achieve a clear view of the upper limit of the range of views of property that conceptions in the family can express. An account of this limit is necessary to determine whether conceptions in the family are free to express classical liberal and high liberal views of property. Unfortunately, Rawls provides two conflicting interpretations of the level of (as well as what kinds of) resources that is necessary to secure an "adequate" social minimum for each citizen. For this reason, it is unclear whether conceptions in the family express classical liberal and high liberal views of property, or only high liberal views. This ambiguity is significant because it effects whether the content of public reason can accurately characterized as an extension of the egalitarian commitments of the

[128] The significance of this implication is that they clarify Rawls' somewhat obscure rejection of libertarian conceptions of justice. On the one hand, such conceptions often rest on metaphysical ideas of self-ownership, and so are insufficiently political. But even if this obstacle could be overcome (perhaps if the idea of self-ownership could be interpreted in terms of political values), the social minimum condition provides the idea that the degree of protection for property supported by libertarianism could satisfy the limits on public reason proposed by Rawls' understanding of freestanding conceptions of justice.

early Rawls or represents a break or retreat from those commitments as many have argued. The next section takes up these questions in more detail.

4 The Requirements of the *Social Minimum Condition*.

The previous analysis shows that that libertarian principles of property fall outside the range of reasonable accounts of property established derived from the idea of *generalized liberalism*. It remains to be seen whether both classical liberal and high liberal accounts of property fall within this range. The analysis below assumes that specifications of *generalized liberalism* cannot preclude the possibility of redistributive taxation, since this is a necessary means of securing an 'adequate social minimum'. Specifications of generalized liberalism must provide some support for restricting economic liberty through redistributive taxation, in order to guarantee that each citizen has access to a minimum level of resources.[129]

The idea of an *adequate* social minimum is subject to a several plausible interpretations. Different interpretations are likely to hold that the *social minimum condition* requires that citizens be guaranteed different levels of resources. More egalitarian interpretations will obviously guarantee a much higher level of resources to each citizen than others. Egalitarian interpretations will therefore require a greater degree of redistributive taxation. High liberal views of property may be consistent with such an egalitarian interpretation, since they hold that most incidents of property are not basic

[129] It seems uncontroversial to say that the minimum level of resources required to satisfy the social minimum condition will correlate with a minimum degree of restriction for economic liberty through redistributive taxation.

liberites, and therefore can be restricted for gains in equality or general welfare. By contrast, classical liberal views hold that most incidents of property are basic liberties and deserve a high level of protection, whether through legislation or constitutional entrenchment.[130] Classical liberal views therefore support a (significantly) smaller degree of redistributive taxation than high liberal views.

Determining whether these two views of ownership and property are both consistent with the *social minimum condition* requires a clearer picture of the line between a reasonable and an unreasonable social minimum. Which views of property are consistent with the idea of *generalized liberalism* depends on the level of resources required by the least demanding, yet still *reasonable*, interpretation of the social minimum condition.

A clear view of the requirements of the social minimum condition is important, since the content of the family of liberal views will remain unclear as long as the requirements of the social minimum condition remain vague and unanalyzed. Without some clarity about which conceptions of belong to the family, citizens will be unable to recognize when other citizens satisfy their obligation to use public reason. Such mutual recognition is necessary for public reasoning to be a means of mutual assurance that motivates public reasons liberalism in the first place. If, as I have shown, Rawls' mature view of public reason rests on the idea of a family of political conceptions that specify the abstract features of *generalized liberalism*, a full account of citizens' obligation to use

[130] There is some reason to think that classical liberals might reject a distinction between 'basic' and 'non-basic' liberties to property, so I avoid the use of this distinction to describe the view. Freeman argues that the fact that many classical liberals support some restriction of these liberties to provide a social minimum shows that they do not really hold that liberties to property are 'basic' in the robust sense that Rawls uses the idea of 'basic liberty.' See Freeman 2011

public reason is possible only if the boundaries of reasonable interpretation of those features can be established well enough to determine which of the three liberal views of property belong within the family.

Remaining within the model of Rawls' account of public reason, there are two strategies one could use to determine the requirements of the social minimum condition. The first strategy would be to develop an idea of the least demanding set of resources required by the social minimum condition by working backwards from the paradigm provided by justice as fairness. The second strategy would be to examine one of the other descriptions of the common features of the family of reasonable conceptions of justice to see whether those accounts provide any indication of the requirements of the social minimum condition.

The first strategy is unlikely to provide much clarity about the least demanding, yet still reasonable, interpretation of the social minimum condition, since the social minimum supported by justice as fairness is both (a) complex, insofar as it involves a number distinct principles and types of resources, and (b) quite a bit more demanding than could be expected of the least demanding interpretation of the social minimum condition. So for instance, justice as fairness requires the basic structure to provide each citizen with *fair* equality of opportunity. This guarantee is logically independent of any consideration of what level of income and wealth each citizen should be guaranteed, if any at all. Fair (as opposed to formal) equality of opportunity means more than the absence of legal obstacles. It requires that citizens have access to an expansive set of educational and employment training resources (possibly on an ongoing basis) so that each is able to participate as an *equal* in the market for labor and also in public

deliberation about the common good. These educational and training resources should certainly count as part of the social minimum required by justice as fairness, even though they are unconnected to a guaranteed level of income and wealth. Does the least demanding interpretation of the social minimum condition require such a generous provision of educational resources to all citizens? If so, the range of liberal views of justice that could satisfy its requirements is implausibly narrow. Justice as fairness, in other words, supports a social minimum that is too far above a plausible threshold between *reasonable* and *unreasonable* interpretations of the social minimum condition, and includes too wide a range of resources to provide clear view of the minimal requirements of the social minimum condition.

The second strategy appears slightly more promising than the first. Passages in which Rawls links reasonable conceptions of justice to the criterion of reciprocity provide some indication of the conceptions that Rawls thought could satisfy the requirements of the *social minimum condition*. The main problem revealed in my analysis of these passages is that they do not yield a consistent view of what these requirements might be. The passages examined below suggest on the one hand that a robust set of social democratic institutions is required to satisfy the social minimum condition. On the other hand, they suggest that a guaranteed basic income satisfying a rather meager sufficientarian standard might also satisfy the social minimum condition. Ultimately, the analysis of these passages shows that Rawls did not fully resolve the tensions within his mature views about the basis of public reason.

In order to reveal the tensions within Rawls' mature view of public reason, and to further examine the requirements of the social minimum condition of generalized

liberalism, I turn to Rawls claim that reasonable conceptions of justice satisfy the criterion of reciprocity. The *criterion of reciprocity* provides an account of reasonable conceptions of justice that is more fundamental than the conditions of *generalized liberalism*.[131] The criterion requires that the principles and ideals contained in reasonable conceptions of justice must support only constitutional institutions that all individuals can accept in their capacity reasonable citizens, rather than as "dominated, manipulated, or under the pressure of an inferior social or political position."[132] Conceptions of justice belong to family of conceptions based on whether they only support constitutional institutions that satisfy the criterion of reciprocity.[133] The criterion of reciprocity also applies at a second level to limit the laws and policies that may be pursued within a constitutional framework that satisfies the criterion of reciprocity. The application of the criterion of reciprocity to matters of legislation and policy does not seem to be a strict requirement of the minimal reasonability of a conception of justice.

On my reading, the criterion of reciprocity limits the content of the family of conceptions by identifying a set of core liberal constitutional institutions. Applying the

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[131] This characterization is parallel to the three necessary conditions that characterize the family of freestanding conceptions in terms of a *generalized liberalism*. There is an obvious tension that arises from characterizing the family of freestanding conceptions in two ways. Rawls does not sufficiently clarify how the two characterizations are related, though he sometimes indicates that *generalized liberalism* derives from the *criterion of reciprocity*. I do not attempt to investigate this question here. For an analysis that suggests that the conditions generalized liberalism derive from the criterion of reciprocity, see Langvatn 2016.

[132] See Rawls 2005 p *xliv*. The criterion of reciprocity bears a close resemblance to Scanlon's principle of reasonable rejectability, and other formulations of the basic contractualist principle.

[133] Rawls says the criterion of reciprocity claims "our exercise of political power is proper only when we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions" and that "Political conceptions to be reasonable must justify only constitutions that satisfy this principle." Rawls 2005 p *xlvi*.

criterion of reciprocity to the questions of basic political order identifies the institutions that all reasonable citizens can accept without being dominated or coerced. These features are what Rawls elsewhere calls "constitutional essentials". The criterion of reciprocity identifies the liberal institutions that provide the content for the constitutional consensus that prefigures an overlapping consensus on a family of conceptions of justice, for example, individual rights protections and democratic political procedures. Assuming with Rawls that a social minimum is an essential feature of liberal constitutions, closer analysis of the criterion of reciprocity may reveal what guaranteed level of resources provides a threshold that all reasonable conceptions of justice must meet.

To summarize a bit, the criterion of reciprocity requires conceptions in the family to support only constitutional arrangements that (a) provide some guarantee that each citizen will not fall below a certain level of resources, and (b) protect that guarantee from being revoked by normal legislative (majoritarian) procedures. It would be unreasonable either to propose or accept a constitutional arrangement that did not achieve both of these ends. The particular level (and kind) of resources that must be guaranteed by every constitutional arrangement satisfying the criterion of reciprocity can therefore serve as a threshold that no reasonable interpretation of the social minimum can fall below. However, as I show below, Rawls held conflicting views about the level and kind of resources that must be given constitutional protection according to the criterion of reciprocity.

In one passage from the "Introduction to the Paperback Edition of *Political Liberalism*", Rawls claims that a conception of justice that "substitutes for the difference principle, a principle to improve well-being subject to a constraint guaranteeing for

everyone a sufficient level of adequate all-purpose means" satisfies the criterion of reciprocity.[134] Rawls elsewhere calls this conception the principle of restricted utility.[135] Such a social minimum would aim to provide a level of resources to "permit [citizens] to lead a decent human life, and to meet what in [their] society is seen as citizens' essential needs."[136] If "essential needs" is construed narrowly in terms of food, clothing, and shelter, this kind of social minimum could be provided for through a basic income guarantee. This passage suggests that the criterion of reciprocity may only require a constitution to guarantee a basic income to each citizen that is sufficient to keep them from suffering from the direst forms of material poverty and nothing more.[137] It is not hard to find classical liberal accounts of property that support publicly providing such a social minimum. Providing cash transfers to needy individuals at the level imagined not need impose significant restrictions on liberties of private ownership or property.

The passage cited above indicates that Rawls believed that a guaranteed basic income sufficient to meet a set of very basic human needs meets whatever minimal level of resources is required to satisfy the *criterion of reciprocity*. Elsewhere, however, Rawls strongly criticizes the social minimum guaranteed by the principle of restricted utility. In *Justice as Fairness: Revisited* for instance, Rawls argues that the sufficientarian social minimum associated with the principle of restricted utility cannot prevent the worst-off citizens from becoming deeply alienated from the social and political system. Preventing

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[134] See Rawls 2005 p xlix; Strictly speaking, he claims that the principle of restricted utility satisfies the three defining criterion. I see no reason not to draw the implication that the principle of restricted utility satisfies the criterion of reciprocity.
[135] See §38 in Rawls and Kelly 2001.
[136] *Ibid* p 128
[137] Even though elsewhere Rawls expresses deep skepticism that this standard satisfies the requirements of justice.

the worst-off citizens from falling into the direst forms of material poverty may keep them from violently rebelling against the social system, but it cannot prevent them from "grow[ing] distant from political society, and retreat[ing] into [their] social world."[138] A social minimum that is sufficient to protect citizens against the most pressing kinds of humanitarian need may still be insufficient to prevent the worst-off citizens from developing into a permanent lower-class. He argues that a social minimum that does not aim to prevent the development of a permanent lower-class and their alienation from the social system cannot be reasonably accepted by all citizens. This implies that the social minimum of the principle of restricted utility cannot satisfy the criterion of reciprocity.

This criticism of the principle of restricted utility seems to be reflected in a passage in *The Law of Peoples* in which Rawls argues that the "the criterion of reciprocity… requires a basic structure that prevents social and economic inequalities from becoming **excessive** [emphasis added]."[139] It is not clear from the passage how 'excessive' inequality is to be measured, nor what precise range of goods this claim concerns. A list of five institutions Rawls cities as necessary means of preventing "excessive and unreasonable" inequalities indicates, at least, that the range of goods in question is wider than income and wealth. These institutions are: (a) equal access to educational and employment opportunities, (b) institutions to guarantee a "decent distribution of income and wealth", (c) public institutions that guarantee employment, (d) institutions providing basic health care to all citizens, (e) public financing for elections *and* sources of public information.[140] This list suggests that a conception of justice

[138] See Dworkin 2000 p 128
[139] See Rawls 1999b p 49
[140] *Ibid* p 50

satisfies the requirements of reciprocity only if it supports specific institutions that limit unequal distribution of income, wealth, educational opportunities, stable employment, health care, and access to the political process.

Excessively unequal distribution of any of these goods is not necessarily objectionable from the sufficientarian standpoint adopted by the principle of restricted utility. Sufficientarian principles aim to guarantee a baseline level of resources to all citizens, but they do not require that those resources be distributed equally, or even that *access* to any of these goods beyond some minimal level be distributed equally. Even so, many of the institutions above could be justified in terms of a sufficientarian principle using humanitarian need as the baseline. Most obviously a sufficientarian social minimum could justify the main redistributive institutions falling under (b) and (d). Sufficientarian principles also seem capable of justifying at least the central features of the educational institutions falling under (a), since only an extremely narrow definition of basic humanitarian need would not justify providing some baseline educational resources to all citizens.[141]

But even if a sufficientarian principle using a modestly inclusive idea of humanitarian need could justify the central features of (a), (b), and (d), it is difficult to see how a sufficientarian principle could justify the institutions implied by (c) and (e). These institutions have no clear relation to the underlying concern with insuring citizens against material poverty that motivates sufficientarianism. These institutions are better

[141] In general, sufficientarianism aims to secure citizens against a level of material poverty that impairs basic human functioning. Sufficientarianism requires the provision of educational resources and opportunities only insofar as some level of cultural knowledge is necessary to achieve the level of functioning that is minimally sufficient for a decent human life.

understood as preventing or minimizing the development of attitudes of alienation among those citizens who are least advantaged by the social system. Rawls' critique of social-welfare capitalism is based on the fact that social-welfare programs, even where sufficient to satisfy citizens' most basic humanitarian needs, often fail to provide the worst-off citizens with sufficient resources to secure the social bases of self-respect, which leads to social alienation.

For example, periods of unemployment subject citizens to material insecurity. From a sufficientarian standpoint, this is the only morally salient feature of unemployment. However, by depriving individuals of a role in the productive system, periods of unemployment also deprive individuals of an important source of self-respect. Long-term periods of unemployment can lead citizens to develop a belief that the social system does not need or value their cooperation. The institutional requirements of (c) do not merely compensate individuals for periods of unemployment, but actually guarantee them productive employment through the political structure. The goal of protecting citizens from falling into material poverty as a result of unemployment does not seem to justify (c), since simple cash transfers could accomplish that goal just as well. A better justification of (c) is provided by the goal of securing each citizen equal access to an important basis of self-respect found in productive employment. Citizens who are gainfully employed by the social system see their talents, skills, and willingness to work rewarded by the social system. Gainful employment undermines the development of attitudes (such as despair, hopelessness, worthlessness) that contribute to a sense of alienation from the social system.

Similarly, if the political process is not sufficiently isolated from sources of private power, like income, wealth, and social class, the outcomes of the process will inevitably reflect the interests of the better-off classes. Excessively unequal influence over the outcomes of political processes may promote the belief that the political process itself is tilted to protect the interests of the better-off classes, and citizens in the lower class may see no point in participating in public deliberation at all. They may ultimately come to privately reject the legitimacy of the political process, though given enough material security, they may not try to violently overthrow the political structure. To this end, public funding for elections and independent sources of information about public affairs is a necessary (if not sufficient) measure for ensuring that the political process is not captured by those with greater private power.[142] But lack of influence over the political process is not a direct concern of sufficientarian principles, since influence over the political process is not a resource that citizens directly need to satisfy their basic humanitarian needs.

If reciprocity requires that conceptions of justice support a social minimum that is generous enough to prevent the development of marginalized social classes, it seems likely that a basic income guarantee sufficient to provide for citizens' basic material needs may not satisfy the criterion of reciprocity after all. The main problem is that a basic income guarantee that uses a narrow idea of 'humanitarian need' as the measure of guaranteed income may not be sufficient to prevent the development of a large underclass of socially and economically alienated citizens.

[142] The capture of the political process by private power is a central concern for Rawls.

This section began with the observation that the specification of generalized liberalism must support an "adequate" social minimum, but that the idea of an "adequate" social minimum can be interpreted in a number of different ways. A clearer idea of what counts as the least demanding, yet still reasonable, interpretation of an "adequate" social minimum is necessary to determine whether classical liberal and high liberal views of property are consistent with *social minimum condition*. By examining passages in which Rawls explains the criterion of reciprocity, I developed two conflicting interpretations of what counts as an "adequate" social minimum. On the one hand, Rawls suggests that a basic income guarantee at a level sufficient to meet a very basic set of humanitarian needs satisfies the criterion of reciprocity. Members of the family of conceptions of justice must support a constitutionally guaranteed social minimum providing citizens with at least this level of resources. On the other hand, he also seems to indicate that the criterion of reciprocity requires a social minimum that guarantees a wide range of resources apart from income, and that a conception must support a number of specific institutions that work to prevent "excessive" inequalities of income and other resources.

It is my view that classical liberal views of property are generally consistent with the first interpretation but not the second. A redistributive tax scheme providing a guaranteed basic income is envisioned, in various forms, by many classical liberal theorists. Such a scheme could exist without imposing significant restrictions on private liberties of property and ownership. By contrast, if political conceptions satisfy the criterion of reciprocity only if they support a broad range of institutions that aim to minimize the social and economic alienation of citizens, such conceptions will need to

restrict the private liberties to own property in ways that classical liberal views are unlikely to support.[143]

Ultimately, Rawls' is not of one mind about the requirements of the social minimum condition. Consequently, there is no conclusive answer as to whether Rawls thought that an overlapping consensus on a family of conceptions of justice included classical liberal views about property. Conversely, there is no conclusive reason to suppose that the ideal of public reason can be realized on in the institutional contexts of Rawls' preferred economic regimes, property-owning democracy and liberal socialism.

5 Conclusion

I have argued that the FOC view of overlapping consensus requires a reappraisal of the idea of public reason. Most interpretations of the FOC view in the literature suggest that the view implies that reasonable citizens reach a consensus about justice at a more abstract level than a conception of justice. On these interpretations, citizens endorse either the fundamental ideas of political liberalism, or a general account of liberal justice expressed by three conditions. Even if these interpretations are correct, the literature leaves largely unaddressed the problem of how the boundaries of the family are to be established. Identifying public reasons by reference to a family of liberal political conceptions of justice, rather than through a single conception that gains the consensus of all reasonable citizens, appears to require that citizens broadly agree on what counts as a

[143] For instance the transfer of wealth between generations is thought be many to be source of unjust social inequality. A tax on wealth transfers between generations may do something to remedy the injustice, but it would arguably come at the cost of limiting the scope of private authority over property.

barely reasonable conception of justice. If a consensus on the abstract features of all political conceptions of justice does yield criteria sufficient to distinguish *barely reasonable* from *unreasonable* conceptions of justice, then the FOC view seems unable to ground a meaningful distinction between public and non-public reasons.

To illustrate this problem, I focused on the justification of different institutions of property and redistributive taxation through public reasons. If an overlapping consensus on a family of liberal political conceptions of justice is broad enough to include conceptions of justice that express libertarian, classical liberal, and high liberal views of property rights, then just about any degree of protection for property, or conversely, any amount of redistributive taxation, can be supported by public reasons. This would make the idea of justification by public reason empty, at least with regard to the relation between institutions of property and redistributive taxation. This chapter develops an account of how Rawls may have approached defining the range of liberal views of property that conceptions in the family may express. I develop an account of the boundaries of this range by examining the main constitutional institutions that Rawls believed that all conceptions in the family would support. On one end of the range, the political basic liberties that all conceptions in the family support include a narrow set of liberties to property. This establishes a threshold that all conceptions in the family must support. On the other end, a constitutionally guaranteed social minimum implies a set of restrictions on liberties to property that all conceptions in the family must also support. The views of property that members in the family can express fall within a range established by the institutional protections implied by the political basic liberties and the institutional restrictions required by the guarantee of a social minimum. Ultimately, this

account supports the claim that no conception in the family expresses a libertarian view of property, but that the textual evidence supports conflicting views about whether any conception in the family expresses a classical liberal view of property.[144]

A constitutional consensus is limited to the "right to vote and freedom of political speech and association, and whatever else is required for the electoral and legislative procedures of democracy".[145] These political liberties provide a kernel that conceptions in the family have in common. I argued that it is plausible that the scope of these political basic liberties and a commitment to rule of law covers *some* incidents of property as well.[146] Some degree of constitutional protection for property is therefore a common commitment of all conceptions that belong to an overlapping consensus.[147] The idea of a constitutional consensus provides a way to describe a threshold level of constitutional protection for property for all conceptions in the family. Conceptions belonging to the family can therefore be expected to hold that incidents of property directly connected to the protection of political rights and liberties are beyond the scope of revision or restriction through normal (majoritarian) legislation. The protections for property that are implied by the idea of a consensus on political basic liberties establish a threshold for the

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[144] This assumes that it is obvious that some member(s) of the family express high liberal views of property, typical of conceptions like justice as fairness.

[145] Rawls 2005 p 159

[146] One could argue that the freedom of association is empty without at least the right to exclude others from a private residence. Further, some protection of personal property (one's house and personal items) is connected to due process rights and guarantee of the rule of law, both of which plausibly fall under the other requirements of the "electoral and legislative procedures of democracy".

[147] The constitutional protection of property that can be derived from the idea of a constitutional consensus is not expansive. I argued that constitutional protection of "personal property" connected to justice as fairness provides a plausible account of the *degree* of protection for property that follows from a consensus limited to democratic political rights and procedures.

range of views of property that can be expressed by conceptions belonging to the family. All views of property that are expressed by the conceptions in the family must support at least the constitutional protections for property that is entailed by the protection of the political basic liberties.

I argued that justice as fairness provides a plausible model for identifying the incidents of property that need to be protected in order to secure democratic political rights and procedures. The incidents falling under what Rawls calls 'personal property' can be seen as implications of the constitutional protection for political association and speech, and the idea of due process under the rule of law. Using justice as fairness as a model in this way does not imply that other conceptions necessarily endorse the personality theory of property, nor the thick moralized interpretation of citizenship that Rawls deploys to argue that basic liberty only extends to protect a narrow set of incidents of property. The point is rather that the incidents categorized as 'personal property' are arguably necessary for liberal democratic political procedures in a way that economic rights and liberties that might also be connected to property are not.[148]

In any case, the constitutional protections for property that can be derived from the idea of a constitutional consensus are not expansive and fall far short of the level of protection envisioned by classical liberal and libertarian views of property. Though these views can support the minimal degree of protection for property that seems necessary to secure democratic political procedures, they also support a much broader range of strong institutional protections for property. In other words, all three types of views of property

[148] Gerald Gaus strenuously denies this as an empirical matter. See Gaus 2011 pp 509 - 529

considered do not fall below the threshold for reasonable views of property expressed by conceptions in the family that can be derived from the idea of a constitutional consensus.

I argued that analysis of the principle of reciprocity might indicate where to find maximum end of the range. Rawls claims that constitutions satisfy the criterion of reciprocity only if they contain some provision guaranteeing each citizen a minimum level of resources. This condition cannot be met by libertarian views of property that reject the very possibility of redistributive taxation. If institutional protections for property express the absolute (or near absolute) value given them by libertarian conceptions, then the possibility of redistributive taxation is severely undermined, if not made entirely impossible. I argued that this is sufficient to show that libertarian views would definitely fall outside the range of views of property that defines membership in the family of conceptions.

Whether the two remaining liberal views of property fall within the range defined by the implications of a constitutional consensus and the criterion of reciprocity can only be completely determined given a more precise account of the lowest level of resources that satisfies the requirements of the criterion of reciprocity. I showed that Rawls adopts conflicting accounts of the level (and types) of resources needed to satisfy the criterion of reciprocity. As a consequence, a strictly interpretive approach seems unable to support any general conclusion about whether Rawls' preferred economic forms are uniquely supported by the content of public reason, or whether economic forms that he explicitly rejects, such as welfare-state capitalism, and laissez-faire capitalism, might also be supported by public reasons. Whether this ambiguity is an acceptable consequence for a theory of public reason is open to question. It certainly runs contrary to the assumptions

that public reason expresses a slightly more rarified commitment to a Rawlsian perspective on distributive justice.

The conclusions of this chapter indicate the need to go beyond the limitations of trying to interpret Rawls in order to support the claim that institutions supported by public reasons will express some meaningful egalitarian distributive values. In the next chapter I will examine one way in which the underlying values of the idea of public reason might provide some support for the claim that classical liberal accounts of property are *less* reasonable than high liberal accounts of property.

Chapter 4

The Audience of Public Reason

The previous chapter argued that Rawls' mature account of public reason is unable to provide a clear answer to whether conventions that extend strong protections for private property rights can be supported by public reasons. The problem arises because the two methods of identifying public reasons that characterize Rawls' mature view do not clearly rule out the possibility that at least some classical liberal conceptions of justice belong to public reason.

The argument rested on four claims. First, Rawls' mature view of public reasons holds that the criteria for identifying public reasons is provided by the idea of an overlapping consensus on a *family* of political conceptions.[149] Second, each conception in this family satisfies the *criterion of reciprocity* and specifies the three conditions of *generalized liberalism*, in addition to being grounded in political values. Third, strong protection for extensive private property rights is supported by public reasons if there is at least one classical liberal conception of justice that jointly satisfies these two criteria, and at least some citizens sincerely believe that conception to be the most reasonable conception in the family.

Fourth, there are no convincing reasons to hold that a conception combining a significant (through not absolute) commitment to protecting extensive private property rights with the guarantee that the basic structure protects each citizen against (deep) material poverty

[149] This claim is more fully explained and defended in the first chapter of this dissertation.

does not satisfy the formal conditions of *generalized liberalism*. Consequently, Rawls mature view of public reasons appears to imply that the institutional and distributional schemes supported egalitarian-liberalism do not have a monopoly on the legitimate use of public political power determined by the boundaries of public reason. On my analysis, a basic structure shaped by classical liberal commitments appears to have an equal claim to *legitimacy* as the more redistributive basic structure preferred by egalitarian-liberals.

My analysis of the fourth claim led to the conclusion that though classical liberal conceptions of justice seem to specify the three principles of *generalized liberalism*, it is unclear whether Rawls believed that such a conception could satisfy the criterion of reciprocity. The reason for this is that Rawls expresses contradictory views about whether sufficientarian distributive principles satisfy the criterion of reciprocity. Since it is unlikely that a significant commitment to extensive private property rights could be combined with a more egalitarian social minimum, there seems to be no definitive answer to whether Rawls' mature view of public reason includes classical liberal conceptions or not.

In order to provide a more satisfactory answer this question, an analysis of the criterion of reciprocity is necessary. According to Rawls' clearest expression of the criterion of reciprocity, it requires that "citizens offering [a conception of justice]… reasonably think that citizens offered [it] might also reasonably accept [it]."[150] The idea of reasonable acceptability specifically means that a person's (hypothetical) acceptance of a conception of justice must not depend on her being in an inferior, dominated, or marginalized social position. Reciprocity demands that the person making the proposal

[150] See Rawls 2005 p xlii

sincerely believe that the acceptance of her offer is consistent with the status of the other as a free and equal citizen. This explains why the paradigm cases of violating the criterion of reciprocity are violations of basic rights, like freedom of religion.[151]

A complete and theoretical analysis of the requirements of reciprocity is neither desirable nor necessary for the purposes of my argument. It is not desirable because such an analysis of reciprocity is open to the criticism that public reason provides an arbitrary theoretical excuse for excluding certain views from democratic deliberation. By proposing a complete account of the range of acceptable, 'reasonable' views, it rightly appears that the theorist of public reason is attempting to limit the range of genuine outcomes of democratic deliberation to fit her preferred conception of justice. A complete theoretical analysis of reciprocity is not necessary because all I aim to show is that a hypothetical conception of justice expressing three paradigmatic classical liberal commitments is not reasonably acceptable from the standpoint of all reasonable citizens, nor given the predictable consequence of institutionalizing it, would it be reasonable to believe that all citizens could accept it in the absence of being in an inferior social position.

Specifically, this chapter investigates the following question, could reasonable citizens with physical disabilities reasonably accept a classical liberal conception of justice whose social minimum took the form of a universal basic income (CL + UBI). This hypothetical conception includes three principles. First, the basic structure should favor extensive private ownership of resources. Second, the basic structure interfere

[151] This is most clearly explained in Rawls' example of Servetus and Calvin. The reasons Calvin gives to Servetus justifying his execution are not reasons that are consistent with Servetus' free and equal citizenship.

minimally with private contractual agreements. Third, the basic structure should limit is redistributive institutions to a single institution, a universal basic income (UBI) set at a level that is sufficient to satisfy citizens basic needs.

I argue that in order for citizens with disabilities to *reasonably accept* a conception of justice as providing fair terms of cooperation, the basic structure implied by that conception would need to sufficiently protect their distinct interests in, and needs for, employment, mobility, and health care. These three interests, at least, are central to realizing social conditions under which citizens with physical disabilities could genuinely develop the capacities of citizenship. The protection of these interests would be among the necessary social conditions of citizenship for individuals with physical disabilities. If these interests are not sufficiently protected by the basic structure, citizens with physical disabilities could not reasonably accept such a conception. My analysis shows of the hypothetical CL + UBI scheme shows that it will predictably fail to adequately protect these interests. Furthermore, my analysis suggests that significant regulation of private property rights, aggressive anti-discrimination rules, and rather demanding subsidies for health care, is required for any conception of justice to be reasonably acceptable to individuals with physical disabilities. While this may not ultimately rule out all classical liberal conceptions of justice, my argument provides some reason to think that classical liberal conceptions that remain centrally focused on private property, liberty of contract, and sufficientarian assistance schemes will find, on reflection, that their views are not reasonable or fair from the standpoint of citizens with disabilities, and for that reason fall outside the bounds

1. Making Citizens with Disabilities Present for Public Reasoning

In the last twenty years, political philosophers have become increasingly aware that common ways of theorizing about justice often lead to distorted judgments about the injustices faced by individuals with disabilities. Beginning with the publication of Amartya Sen's seminal article "Equality of What", the idea that primary goods or resources provide the best lens through which to identify unjust distributive inequalities has come under criticism for ignoring the way in which citizens with disabilities often require a greater share of resources to achieve parity of function with other citizens. Principles of justice that use a primary goods metric, Rawls' justice as fairness is an example, are unable to provide a principled explanation for why citizens with disabilities may deserve a greater share of resources than other citizens as a matter of justice.[152] By bringing attention to the perspective of citizens with disabilities, Sen and other capabilities theorists have argued (convincingly I believe) that a plausible conception of distributive justice, even one that rejects equality as a distributive ideal, must be responsive to the unique needs and interests of citizens with disabilities.

More recently, Martha Nussbaum has used the perspective of individuals with disabilities to construct a more general objection to the contractualist approach expressed in Rawls' argument for justice as fairness. Nussbaum provides the best example of this

[152] Martha Nussbaum and other capabilities theorists, for instance, point out that standards of distributive justice that focus on the distribution of primary goods and resources often fail to account for the different capacities of citizens to use those resources. Citizens with disabilities may require more of a given resource to achieve a similar level of function. See "Disabilities and the Social Contract" in Nussbaum 2006 pp 96 - 154; See also, Kittay 2011, 1999

kind of criticism, though Eva Kittay has developed a substantially similar criticism in early work. Nussbaum points out that Rawls explicitly excludes the perspective of citizens with mental and physical disabilities from the procedure that determines which principles of justice should regulate the basic structure. Consequently, individuals behind the veil of ignorance do not choose principles of justice that reliably protect the non-standard interests and needs of citizens with disabilities. Further, the distributive principle they do choose (specifically the difference principle) cannot be extended in any principled way to resolve questions about how the basic structure should relate to citizens with disabilities, since this would require a further consideration and agreement on the principle of extension. Thus, Rawls' conception of justice only provides indeterminate answers to whether individuals with disabilities raise legitimate claims to unjustly treatment when their unique needs and interests are not protected by the basic structure, or whether those claims are not claims of justice at all but rather claims to public charity. Nussbaum ultimately concludes that contractualist arguments cannot adequately explain why citizens with disabilities must be protected from various kinds of inequalities and discrimination as matter of basic justice, rather than as a matter of public charity.

In response to this kind of objection, some have argued that Rawls' contractualist methodology can be modified to include the perspective of individuals with disabilities.[153] The central idea is that 'reciprocity' need not be understood narrowly in terms of mutual advantageous cooperation, but can extend to include a broad range of pro-social interactions that are not necessarily mutually advantageous in a narrow economic sense. Appealing to a wider idea of reciprocity enables contractualists to

[153] See Stark 2007; and also Becker 2005.

represent the perspective of citizens with disabilities (perhaps even severe mental impairments) in a way that the idea of reciprocity as mutual advantage cannot. Whether this response to the objections developed by Kittay and Nussbaum ultimately proves compelling is not necessarily important for my argument. The important point is that many followers of Rawls accept the basic claim underlying Nussbaum's criticism of Rawls, specifically the claim that the voice of citizens with disabilities must be allowed a role in (modeled) deliberations about justice.

These debates provide several insights that can be used to specify the idea of the threshold of reasonability for conceptions of justice. First, Nussbaum's criticism of the original position seems easily extended to the idea of public reason. The constituency of who is *owed* public reasons certainly includes citizens with disabilities, since they engage in most if not all of the cooperative activities and relations that characterize the core meaning of citizenship.[154] This on its own may not imply that the idealized constituency whose overlapping consensus establishes the *content* of public reason includes citizens with disabilities, but I see no reason why individuals with *physical* disabilities should not be part of this constituency. Individuals with physical disabilities are just as capable of developing the moral capacities of citizenship as any other individual. It makes sense then to presume that if an overlapping consensus among reasonable citizens exists, some of those citizens will have physical disabilities. I am unsure whether this line of thought can be extended to require that individuals with severe mental disabilities be represented

[154] They work and play, learn, teach, develop friendships, start families and businesses, and run for political office, among other things. An exhaustive list of activities that characterize citizenship may not be possible, but this list seems to identify many of the key activities and relations that would intuitively be found on such a list. All these activities are typical of the lives of citizen with disabilities.

in the constituency of public reason. Whether such an extension is required, however, does not need to be resolved here. All that I aim to show is that several specific conclusions about the requirements of the criterion of reciprocity can be drawn by paying close attention to the fact that the group of reasonable citizens whose agreement constitutes an overlapping consensus will include at least some citizens with *physical* disabilities. These conclusions will prove enough to develop a more specific account the threshold of reasonability.

Second, whether one finds Sen's criticism of the primary goods metric conclusive, or whether one believes that a primary goods metric can in fact accommodate Sen's criticisms, the broader point illustrated by this debate is that standards of distributive justice should be sensitive to the unique injustices faced by citizens with disabilities. The notion of distributive injustice need not be confined to the idea of unjust inequality, which rests on a comparative judgment between individuals. Distributive injustice can be characterized in terms of non-comparative principles as well, such as sufficiency or priority. The point is that whether distributive justice is thought of in terms of equality, sufficiency, or priority, Sen provides compelling reason to think that the that the standard of distributive justice cannot be fixed once and for all by reference needs and interests of individuals without disabilities. Judgments about just treatment for individuals with disabilities should not be left to ad hoc, intuitive extensions of principles that are ultimately justified by the needs and interests of non-disabled individuals.

The criterion of reciprocity states that a conception of justice is fair if and only if "citizens offering [it]… reasonably think that citizens offered [it] might also reasonably

accept [it]."[155] Nussbaum's inclusivity objection to the original position suggests that whether a conception satisfies the criterion of reciprocity should depend, at least in part, on whether it is reasonable to believe that citizens with (physical) disabilities might "reasonably accept" its terms as fair terms of cooperation. Sen's criticism of primary goods suggests that it is *reasonable to believe* that citizens with disabilities can "reasonably accept" a conception of justice only if it is clear that the conception protects the non-standard needs and interests of citizens with (physical) disabilities. These conclusions can help to develop a specific account of the requirements of the criterion of reciprocity given a plausible account of the non-standard needs and interests of citizens with disabilities. The following section develops an account of the non-standards needs for access to employment, health, and mobility for individuals with disabilities. Using this account, I then examine whether a CL + UBI conception sufficiently protects these needs and interests, and find that it fails to do so.

2 Non-Standard Needs and Interests

In order to specify the requirements of the criterion of reciprocity on the basis of the two insights above, I need to identify a set of non-standard needs that individuals with physical disabilities have that it would be *unreasonable* not to provide for through the basic structure. The point is not to identify a set of non-standard needs whose protection is a matter of basic justice according to a conception of justice that *some* citizens regard as the most reasonable. Rather, the crucial point is to identify a set of non-standard needs whose protection any reasonable citizen with a (physical) disability would regard as an

[155] Rawls 2005 p xlii

essential component of a minimally reasonable basic structure. Before attempting to characterize this set, I will briefly examine Ronald Dworkin's well-known method of identifying the requirements of basic justice for citizens with disabilities in order to illustrate why typical ways of identifying the requirements of justice for citizens with disabilities do not provide a plausible basis for specifying the minimal requirements of the criterion of reciprocity.

Dworkin argues that society owes individuals with disabilities additional resources because disabilities are a form of "bad brute luck" that prudent individuals would insure against, if given the opportunity. His argument rests on a distinction between "option luck" and "brute luck" on the one hand, and between "person" and "circumstance" on the other.

The first distinction is between two kinds of risks that may impact, positively or negatively, the resources an individual controls. A risk one deliberately undertakes results in "option luck". A risk that is not deliberately undertaken results in "brute luck". An individual whose resources are negatively impacted by the unsuccessful risks she deliberately undertakes has no claim to unjust, unfair, or unequal treatment. Society owes her no compensation as a consequence of her "bad option luck". On the other hand, some forms of "bad brute luck" give rise to a social obligation to compensate individuals. An individual whose resources are negatively impacted by risks that she did not deliberately undertake may have a claim to unjust, unfair, or unequal treatment as a result. Whether she does depends, in part, on whether individuals would generally find it prudent to insure against that risk, if given the opportunity.

The distinction between person and circumstance provides a way of distinguishing between forms of "bad brute luck" that individuals would generally find it prudent to purchase insurance for and those that they would not. An individual's beliefs and attitudes about the good life are aspects of her person. Dworkin argues that even if an individual came to regard elements of her person as a form of "bad brute luck" (if for instance, she possesses fewer resources because of her strong desire to surf for four hours every day, rather than work), few people would think it prudent to purchase insurance against the risk of developing a strong preference for surfing. By contrast, individuals generally think it is prudent to purchase insurance against the risk that their circumstances, by which Dworkin means the mental and physical resources that provide the means to live out a conception of the good life, will be a significant negative impact the resources they are able to control over their life. Physical disabilities are the central example of individual circumstances that it would be prudent to purchase insurance against at a market rate. On Dworkin's view, individuals with disabilities have unique needs and interests in virtue of the *unequal* mental and physical resources they possess as a consequence of 'bad brute luck' that most people would find it prudent to insure against. Ultimately, disabilities correspond to a deficit in resources that can be partially ameliorated through a social insurance scheme.

Whatever the merits of Dworkin's hypothetical insurance argument are, there are two relatively obvious reasons not to use 'individual circumstances caused by bad brute luck' as the criterion for identifying a set of non-standard interests whose protection would provide a standard of minimal reasonability from the standpoint of individuals

with disabilities.[156] Dwokin's criterion is both too particular and too comprehensive to serve as a basis for clarifying the requirements of reciprocity.

The criterion is too particular in the sense that it cannot be cleanly separated from Dworkin's broader argument for equality of resources. Dworkin defines 'disability' in terms of a kind of undeserved inequality of mental and physical resources in order to defend the idea that a commitment to equality of resources requires a social responsibility to provide additional resources to individuals with mental and physical disabilities. The criterion he uses to identify disabilities entails that the primary justice claims that citizens with disabilities may raise in regard to the basic structure are claims relating to unjust inequalities of resources. This definition proves too narrow, I think, to capture the dimension of inequalities of recognition that also seem central to typical claims to unjust treatment that individuals with disabilities also make.[157]

In other words, the 'individual circumstances caused by bad brute luck' criterion for identifying the non-standard interests of individuals with disabilities seems tailored to Dworkin's resource egalitarian idea of distributive justice. I see no reason to think that the criterion of reciprocity entails Dworkin's claim that disability is most fundamentally a form of resource inequality. There are other plausible views about disability, for example,

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[156] There are other less obvious reasons not to use Dworkin's model. Most prominent among these is that Dworkin's hypothetical insurance model rests on a particular contestable view of disabilities. Dworkin's account seems to define disability as an impairment or lack of normal function that negatively impacts an individual's resources or welfare. This view is opposed to the social model of disability, which holds that impairments do not necessarily have a negative impact on welfare or resources, rather, it is social discrimination against certain kinds of bodies and conditions that negatively impacts welfare or resources. Therefore, using Dworkin's account has the additional difficulty of resting on a contestable account of 'disability'.

[157] For an illustrative discussion of the distinction between 'recognition' and 'redistribution' see Nancy Fraser contribution to Fraser and Honneth 2003.

that disability is a distinct form of social discrimination involving both inequality and misrecognition, or that disabilities are a kind of inequality in valuable functionings or capabilities. It makes little sense, I think, to rely on any one of these views to draw the line between reasonable and unreasonable conceptions of justice, as if the criterion of reciprocity itself entailed only one view about disability. If there are any general claims about the non-standard needs and interests of individuals with disabilities that support particular conclusions about the requirements of reciprocity, they cannot, I think, draw too deeply on any one view about disability.

Dworkin's criterion is also too comprehensive in the sense that it grounds a complete account of the issues of distributive justice that are raised by disabilities. This is a desirable aim for a theory of distributive justice, but it is not necessary to adopt a particular metaphysical account of disability nor to adopt a complete theory of distributive justice to determine whether there are any conclusions about the requirements of reciprocity that can be drawn from the interests of citizens with disabilities. A defensible approach to identifying the implications of fully including the perspective of citizens with disabilities into the constituency of public reason would not rely on any particular or comprehensive account of disability or distributive justice, but would focus on what institutions would generally need to provide or protect in order to ensure that citizens with disabilities could develop as free and equal citizens.

I believe that at least three conclusions follow from holding that the perspective of citizen's with (physical) disabilities must in part determine whether it is reasonable to believe that "citizens offered [a conception] might also reasonably accept [it]." Citizens with disabilities have unique needs and interests related to employment, mobility, and

health care. If the needs and interests of citizens with disabilities give rise to any distinct claims on the basic structure, it is relatively certain that claims regarding employment, mobility, and health care are likely among them. Only brief reflection is needed to see how the public rules that govern employment, mobility, and the distribution of health care resources uniquely impact the ability of individuals with disabilities to inhabit the role of an active citizen who cooperates in the reproduction of political society over time. Emphasizing the idea that the basic structure is responsible for securing at least some of the social conditions that individuals with disabilities need to acquire the capacities of active citizenship grounds a general claim about where the threshold of reasonability lies if the perspective of citizens with disabilities is fully included in the constituency of public reason. This general claim is derived from the fundamental ideas that ground all conceptions of justice in an overlapping consensus, that of free and equal citizens and fair terms of mutual cooperation.

Whether the unique needs of individuals with disabilities connected to employment, mobility, and health care can also be grounded in an account of capabilities, equality of resources, or non-discrimination can remain an open question.[158] The central claim of my argument is that if a conception of justice generally rejects or is in some way inconsistent with the idea that the basic structure bears some responsibility for protecting the interests of individuals with disabilities arising from their unique needs for employment, mobility, and health care, citizens with disabilities are unlikely to judge that that conception establishes fair terms of cooperation. Moreover, given the predictable consequences of rejecting the basic structure's responsibility for satisfying these needs

[158] I think it is an open question whether or not it is possible to reduce the justice claims of citizens with disabilities to one type of explanation.

and interests, it would be *unreasonable* to believe that citizens with disabilities *could* accept such a conception as providing fair terms of cooperation. The rest of this section provides a brief explanation of the core needs and interests in employment, mobility, and health care that are unique to individuals with disabilities. In §4 I provide some reasons to think that a hypothetical CL + UBI scheme does not sufficiently protect these core needs and interests.

In the United States, individuals with disabilities have a much higher rate of unemployment than the general population. While it seems unlikely that there is a monocausal explanation for this phenomenon, it seems undeniable that discrimination plays a prominent role in the unemployment rate of citizens with disabilities. Employment discrimination against of citizens with disabilities may take a number of forms. It may be due to hiring practices that exclude citizens with discrimination. It may also be due to the fact that citizens with disabilities voluntarily exit the workforce because employers do not generally offer terms of employment that accommodate the needs of their non-standard bodies. In either case the explanation for the higher rates of unemployment is not the existence of formal barriers to equality of opportunity, but rather to the prevailing fact that employers overtly or covertly discriminate against citizens with disabilities.[159]

[159] The discrimination faced by individuals with disabilities is different in several notable ways from other forms of discrimination. Most importantly, racial minorities and women often face barriers to employment that originate outside the terms of employment. The combination of a commitment to meritocracy in the labor market, and a robust effort to educate and develop talents equally might resolve much (though not all) of the employment discrimination faced by racial minorities and women. But at least one cause of unemployment among citizens with disabilities is the absence of accommodations in the terms of employment, such as work-from-home arrangements or more flexible work hours.

Many physical disabilities make it difficult for individuals to navigate a built environment designed for standard kinds of bodies. The use of a wheelchair makes buildings without elevators or ramps inaccessible. Individuals who are blind may need signage in braille. Individuals with achondroplasia may not be able to access counters, light switches, and sinks placed at 'normal' heights. Individuals whose disabilities prevent them from driving may need some form of reliable public transportation in order to leave their home for work or to access services they need. If a society's built environment is *generally* inaccessible to individuals with disabilities, there is good reason to think that those individuals will be unable to fully participate in the civic life of the society. At the most fundamental level of civic activity, if the physical locations where the core activities of civic life take place are not accessible to those with disabilities, then the opportunity to participate in civic life is unequally distributed. There is a real sense in which a society that does not see fit to require that buildings be accessible to all citizens actively denies citizens with disabilities the activities that constitute civic identity, like voting, attending public meetings, or participating in the court system. If public spaces are generally inaccessible to those with disabilities, individuals with disabilities may also find it difficult to participate in economic dimensions of public life, or even to find proper long-term housing. The problem of mobility and accessibility of physical spaces compounds the problem of discriminatory employment practices.

Many physical disabilities also involve unusually high medical costs. Some physical disabilities require complex, recurring medical treatment that can be extremely expensive. If citizens with disabilities are made to bear the same proportion of the costs of medical treatment as citizens with more normal medical needs, citizens with

disabilities may find that their incomes are dramatically impacted by the larger overall medical costs of their medical needs. A social minimum is likely to appear 'adequate' from the standpoint of a citizen with disabilities only if it ensures that she is able to afford health care resources that are sufficient to care for her medical needs and that the cost of those resources to her will not be so great as to throw her into poverty.[160] If either of these two conditions are not met, the lives of many citizens with disabilities will likely be shaped by insecurity, poverty, ill-health, and dependency. The basic character of such a life is inconsistent with the claim that the basic structure secures the "necessary social conditions" for individuals with disabilities to fully develop as free and equal citizens.

The unique needs for employment, mobility, and health care identified above do not rest on any particular standard or metric of distributive justice. Rather, I believe that they can be derived from the fundamental civic interests of citizens with disabilities, to secure gainful employment, to freely access the built environment, and to secure necessary but expensive medical resources without falling into poverty or dependency. These needs can be derived in a rather straightforward way from the social conditions necessary for citizenship without the mediation of any particular theory of disability or distributive justice. In order for the basic structure to provide conditions for individuals with disabilities to occupy the role of a citizen, it seems relatively uncontroversial to say

[160] I think it is important to note that I am claiming that the distribution of health care resources to individuals with disabilities may appeal reasonable without necessarily being committed to equality of resources. Citizens with disabilities will likely judge a principle for distributing health care resources unreasonable if it denies them routine, if expensive, medical resources or the provision of medical resources is prohibitively expensive. I don't think it necessary to presume that citizens with disabilities must be committed to some version of equality of resources, or capabilities theory that provides them with additional health care resources with aim of equalizing resources or welfare. One could imagine a reasonable sufficientarian standard that recognized several different standards of sufficiency.

that the basic structure must support the efforts of individuals with disabilities to achieve employment, access built spaces, and secure affordable health care. I believe that the interests generated by these three needs must play an indispensible part in the rational life plan developed by *any* reasonable individual with a disability. To deny this, would imply that citizens with disabilities might generally develop ideas of a flourishing life that bears no essential connection to the goods of employment, public activities, or health. This generalization strikes me as implausible. Just as the basic and undeniable interests at the center of any religious citizen's rational life plan correspond to the rights of toleration and association, the core interests in achieving employment, mobility, and health care will play a central role in the rational life plan of citizens with disabilities because of the fact that their needs for these goods may require that the basic structure treat them differently than other citizens.

3 The Features of a CL + UBI Conception of Justice

The following sketch of the main features of a CL + UBI conception of justice is necessary in order to examine whether or not these interests can be sufficiently protected by a CL + UBI conception. The conception has three parts. The first is a principle that the basic structure should support private ownership of property including economic resources. The second principle is that the basic structure should generally respect voluntary contractual relations. The third principle is that the basic structure should provide a *universal basic income* to insure that every citizen has resources sufficient to provide for her basic needs.

The CL + UBI view is a species of what is somewhat ironically called 'bleeding-heart libertarianism', which attempts to wed the vocabulary of social justice to the empirical paradigm of neo-classical economics and the normative paradigm of classical liberalism. I prefer the term 'reasonable classical liberalism' for this general type of view, which is broader than the CL + UBI conception. There are a number of political philosophers whose views can be classified as examples of reasonable classical liberalism, and who endorse, in more or less explicit terms, versions of the three principles characteristic of CL + UBI. Perhaps the most prominent advocate of this form of classical liberalism is Gerald Gaus' "justificatory liberalism". Others, like John Tomasi, and Kevin Vallier, have followed, each in their own way, the path first broken by Gaus.[161] I refer to these views to illustrate what I take to be the core claims of my hypothetical CL + UBI conception without necessarily reducing this conception to any one of the examples just cited. Their existence indicates that there are a number of reasonable classical liberal views that conceive of themselves as members of the family of conceptions that define public reason. Below, I give a brief explanation of each of the principles.

The first principle is not to be confused with stronger principle libertarian principles that hold that the basic structure must respect rights to property that are discrete, detailed, and whose existence is logically prior to political institutions. Such libertarian principles generally rest on comprehensive moral claims about self-ownership or natural rights, and therefore are not properly public reasons. Furthermore, it is doubtful

[161] Furthermore, many have argued that *Theory of Justice* can plausibly support a recognizably classical liberal basic structure. See Barbara Fried's "The Unwritten Theory of Justice: Rawlisan Liberalism versus Libertarianism" in Mandle and Reidy 2014; see also Loren Lomasky's "Libertarianism at Twin Harvard" in Paul, Miller, and Paul 2005;

whether any such libertarian principle is consistent with the idea of social responsibility for basic needs that is one of the conditions of *reasonability* for a conception of justice.[162] By contrast, the reasonable classical liberal principle of property holds that the exact shape of individual property rights is determined by the conventions of the basic structure, but that widespread private ownership of property is to be preferred to public ownership because of the way that private ownership better supports the value individual liberty. Tomasi goes so far as to claim that a general right to private property is a basic liberty, in the Rawlsian sense.

Gaus' "justificatory liberalism" provides what I think is the clearest justification of this principle from within the set of commitments that characterize the broadly Rawlsian approach to public reason. Gaus argues that free and equal persons concerned with justifying the exercise of public power to one another in terms that all endorse may find that a compelling answer to the problem of public justification lies in simply minimizing the exercise of public power to regulate the use of resources rather than in seeking a way to justify a more active use of public power to all persons. Free and equal persons may come to see that by minimizing the number of public regulations on the use or ownership of resources and devolving the authority to make those decisions to individuals, eases the burden of justifying to all reasonable individuals how resources are to be regulated and distributed. Free and equal persons, according to Gaus, will therefore agree to give broad authority over the ownership and use of resources to individuals in their private capacities in order to exclude most economic questions from the scope of

[162] Samuel Freeman provides the clearest account of why rejecting any social responsibility for providing for citizens basic needs shows that libertarian views are unreasonable. See Freeman 2001.

public justification.[163] Thus, Gaus finds that a robust but undifferentiated right to private ownership is one of the most fundamental points of convergence among reasonable persons committed to justifying the basic structure to each other in ways that are consistent with the principle of reciprocity.

The second principle is closely tied to the first, and the two are, perhaps, not fully distinct. They may simply correspond to different parts of the bundle of entitlements that constitutes the idea of 'full ownership'. Nevertheless, it is possible to partially distinguish a person's authority over the use of resources when the use does not impact others from her authority to make enforceable promises to others regarding the transfer, use, or alienation of those resources. The reason I would like to distinguish these different types of authority is that each corresponds to different ways in which private economic decisions may significantly impact the lives of citizens with disabilities.

The second principle states that voluntary contractual arrangements between individuals ought to be generally, though not universally, respected as expressions of personal liberty. The view is aptly expressed by Tomasi's claim that genuine respect for individual liberty entails respect for the decisions individuals make in shaping the material and economic dimensions of their lives. To satisfy this principle, the basic structure must generally respect and in some cases enforce the decisions that individuals make regarding the use of their labor and the exchange of goods. This does not imply that the basic structure must enforce any and all contractual arrangements, as some libertarian

[163] See Gaus 2011 p 374: §18.3 "A deeply pluralistic social order can effectively cope with many of its disagreements about what evaluative standards to adopt by establishing a system of private property."

interpretations of the principle of liberty of contract would have it. It does represent an endorsement of, roughly, the economic theory behind *Lochner*.

The universal basic income (UBI) principle is a condensed way of expressing two logically distinct claims. The first is a general normative claim that a resource sufficientarian standard exhausts the basis structure's responsibility for citizens' material circumstances. In other words, a resource sufficientarian principle is the most reasonable standard of distributive justice for free and equal citizens. This implies that the basic structure only bears responsibility for preventing the worst forms of abject poverty, but is not responsible for securing broader material equality among citizens, nor is it responsible for maximizing the resources or welfare of members of the lowest social class beyond the level of sufficient to satisfy basic needs. The point is that the normative justification of a UBI rests on a specific account of just distribution. I assume that this is the only plausible standard of distributive justice for reasonable classical liberals who accept that the basic structure bears some responsibility to prevent poverty.

The second claim is that a UBI scheme is a better means for realizing the resource sufficientarian standard than other plausible institutional schemes, with the most important comparison being to means-tested social insurance schemes. There are two dimensions in which proponents of a UBI claim that it is better than means-tested social insurance schemes for realizing the normative goal of resource sufficientarianism. First, proponents claim that a UBI is a more *efficient* use of public resources than means-tested social insurance schemes. The fact that a UBI is universal and recurring means that fewer

resources need to be devoted to determining who is qualified to receive it. [164] The smaller administrative footprint needed to operate a UBI scheme also means that, theoretically, it could be supported by a lower rate of taxation.[165] Second, proponents claim that providing income to people, rather than an allowance that can only be spent on food or shelter or some other resource, *increases individual freedom*. [166] Providing individuals with income increases their freedom to choose what mix of resources best reflects their preferences, priorities, and desires. The comparative advantage of the UBI in these two dimensions (greater efficiency and greater individual freedom) makes it attractive from the standpoint of a reasonable classical liberal who is committed to both the social responsibility for providing basic needs, and the securing the broadest possible range of individual choice for each person.

A brief explanation of the institutional features of a universal basic income scheme should suffice to complete a general description of the CL + UBI conception I wish to examine.[167] A UBI makes direct income payments at a fixed rate to all citizens

[164] This is the claim that Milton Friedman famously made when he proposed a negative income tax. See Friedman and Friedman 2002.
[165] The theoretically lower rate of taxation that may be possible given a UBI scheme is a significant point. Classical liberals will generally favor less taxation because they believe taxation is inherently coercive (though sometimes justified). If UBI schemes require less taxation than other comparable mechanisms for securing resource sufficientarian goals, classical liberals will judge UBI schemes to be less coercive generally, and therefore, preferable to other mechanisms for that reason.
[166] One of the most prominent advocates of a UBI, Phillip Van-Parijs argues that the UBI should be preferred to other institutions primarily because it increases individual freedom.
[167]See, Parijs and Vanderborght 2017, for a wide-ranging summary of the history of UBI proposals alongside careful consideration of the normative and empirical arguments for such proposals.

regardless of need, employment status, earned income, or wealth. [168] Unlike familiar means-tested insurance mechanisms that have been in place in various forms since the early modern period, a UBI is not conditional on a person's need or employment status. Individuals receive income whether or not they seeks additional employment or need the income to remain above the poverty line. This distinguishes the UBI from the means-tested public assistance programs that many states have adopted in various forms since the 17th century. Under these programs, public assistance is conditional on demonstrating that one meets criteria of eligibility, which are most often require that one's poverty or need is a matter of 'bad brute luck', to use Dworkin's phrase. Moreover, public assistance programs often come in the form of vouchers that can only be spent on food, housing, or health insurance, rather than income that can be spent on anything, and assistance is terminated as soon as the individual no longer meets the eligibility requirements.[169] UBI schemes therefore do not generate poverty traps, in which an individual find that earning an additional dollar of income makes him ineligible for further benefits which costs him much more than the additional dollar earned.

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[168] There is a family of proposed institutional arrangements that can plausibly be called a UBI. There is no need to delve into the details of various proposals here. For my purposes, the general idea of a UBI includes negative income tax proposals which for technical reasons one might want to distinguish from a UBI on the basis of whether the scheme *pays* individuals an income, or *offers* them an equivalent amount through a tax refund. The technical differences are important but less significant, I think, than the fact that both realize a commitment to a resource sufficientarian normative standard by providing unconditional assistance to each person. For a technical description of the difference, see Parijs and Vanderborght 2017.

[169] This leads to a situation in which those who receive assistance through one program or another must constantly prepared to defend their eligibility. Moreover, these programs often have the perverse effect of trapping people at a certain income level, since the costs of losing assistance by pursuing a higher paying job, for instance, are often much higher than the additional employment income.

Two further features of UBI schemes deserve to be mentioned. First, it is often claimed that UBI schemes could largely replace all of or most of the patchwork of programs that characterize existing social insurance schemes. Most of the public assistance schemes typically found in existing social welfare states would be redundant if the basic structure contained a UBI. There would be little need for unemployment or retirement insurance, since individuals would receive a minimum income regardless of employment status.[170] Poverty relief programs that provide food, shelter, and income supports would also be redundant, if the income from the UBI was sufficient, on its own, for individuals to purchase these goods for themselves. Finally, a UBI could also (feasibly) eliminate the need for publicly provided health insurance as long as the income from a UBI was set high enough to allow individuals to purchase health insurance plans offered in private markets. The advantage of the UBI from the perspective of the reasonable classical liberal is that the goal of resource sufficientarianism could be achieved in the absence of intrusive, conflicting, and inefficient government bureaucracies, and perhaps in a way that costs less than the comparable social welfare schemes.[171]

The second feature is that a UBI scheme provides individuals with income, rather than vouchers that can only be used to purchase food, shelter, or health insurance. The advantage of this is two-fold. First, this allows individuals to pursue and acquire a range of goods and services that best match their own beliefs about their needs and preferences.

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[170] Perhaps some extremely cautious and well-off individuals would buy individual disability, unemployment, or retirement insurance plans in order to maintain a higher than average level of expense. There would still be no need for universal enrollment in such insurance programs if there was a UBI.

[171] Cost estimates from UBI schemes vary widely and depend heavily on how generous the scheme is.

Second, it is argued that giving individuals the freedom to choose the basket of basic goods and services they require to satisfy their basic needs will increase the ability of market forces to bring down the cost of necessary goods over time.

To summarize the explanation of my hypothetical CL + UBI conception, let us first say that a reasonable classical liberal conception must support the general claim that society bears some responsibility for ensuring that each citizens' basic needs are met.[172] This commitment may not be fully specified by reasonable classical liberals like Gaus, Vallier, or Tomasi, but that should not imply that such a commitment is not a central part of the reasonable classical liberal program. As I have argued, it is one feature that distinguishes 'reasonable classical liberalism' from its unreasonable relatives, natural law classical liberalism and libertarianism. One explanation for why reasonable classical liberals like Gaus, Tomasi, or Vallier do not greatly elaborate on the content of their commitment distributive justice is that they are more centrally concerned with establishing the conceptual space for their type of view. It seems clear to me, however, that a resource sufficientarian standard of distributive justice is the most plausible candidate for reasonable classical liberals to endorse.[173]

In my view, all reasonable classical liberals conceptions of justice will hold that in addition to protecting the principles established by a constitutional consensus (political

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[172] This actually makes it questionable whether Milton Friedman and Friedrich Hayek should count as reasonable classical liberals, since neither provide a principled explanation for why the basic structure must secure a social minimum. Both seem to offer their respective alternatives to social-welfare programs more as a political concession than a genuine endorsement of a principle of justice.

[173] This is my own view. Jason Brennan has argued that a resources prioritarian reading of the difference principle may support broadly classical liberal commitments to private ownership and unregulated free markets for the purely historical reason that such arrangements have done a better job of increasing the basket of goods possessed by the worst off in society than other systems, see Brennan 2007.

equality and liberties of conscience), the basic structure must also (1) generally support and protect the widespread private ownership of all resources, (2) generally respect and enforce voluntary contractual arrangements, and (3) provide each citizens with resources sufficient to meet her basic needs. Given a general commitment to (3), the question is whether a reasonable classical liberal would judge that familiar means-tested social insurance schemes best achieve this end, or would judge that a UBI is a superior mechanism for achieving the end of resource sufficientarianism. I believe there is clear reason to suppose that the deepest commitments of classical liberalism, to maximizing free choice, private ownership, and market production, support the conclusion that reasonable classical liberal conceptions are better expressed by a UBI scheme. The strongest argument for a UBI from a reasonable classical liberal standpoint is that resource sufficientarianism is the goal of both UBI and means-tested social insurance schemes, but the UBI has a number of advantages in terms of both efficiency and individual freedom over means-tested social insurance. So while my hypothetical CL + UBI scheme may not be endorsed in all its details, the logic of reasonable classical liberalism pushes in this direction. Given the outline of this view, the question posed in the next section is whether *it is reasonable to believe that citizens with disabilities could reasonably accept* such a conception of justice as providing fair terms of cooperation.

4 CL + UBI Conceptions of Justice Cannot Protect the Core Interests of Citizens with Disabilities

A brief restatement of the three core interests of citizens with disabilities and the three basic features of the hypothetical CL + UBI conception provides a framework for the analysis in this section. Citizens with disabilities have distinct needs and interests: (I1) in securing gainful employment, (I2) in freely accessing the built environment, and (I3) in securing necessary but expensive medical resources. The hypothetical CL + UBI conception of justice contains three main principles: (P1) basic structure should support private ownership of property including economic resources; (P2) the basic structure should generally respect voluntary contractual relations; (P3) the basic structure must provide citizens with the resources to satisfy basic needs, and the best way to achieve this end is a *universal basic income*.

The hypothetical CL + UBI conception satisfies the criterion of reciprocity if and only if "citizens offering [the conception]… reasonably think that citizens offered [it] might also reasonably accept [it].[174] This requires on the one hand that citizens with disabilities are able to reasonably accept the conception; that they are able accept it, that is, in their capacity as free and equal citizens, not as members of a marginalized class. On the other hand, it requires that those who propose the CL + UBI conception as the most reasonable terms of cooperation "reasonably think" that it could be reasonably accepted by citizens with disabilities. In what follows, I give reasons to think that the CL + UBI conception satisfies neither of these conditions.

The first step in this argument is to provide some reason to think that citizens with disabilities could not "reasonably accept" a CL + UBI conception. Citizens with disabilities are cognizant of how the social conditions they require to develop and adopt a

[174] Rawls 2005 p xlii

rational conception of the good life include unique needs related to employment, mobility, and health care. Their ability to develop the two moral capacities of citizenship therefore depends on the basic structure recognizing and protecting in some general way their unique interests. Institutionalizing each of the principles of the CL + UBI scheme leads to predictable social consequences that conflict with these interests. Citizens with disabilities will therefore be unable to reasonably accept CL + UBI schemes in light of the predictable consequences of institutionalizing them.

Principle (1) guarantees that the basic structure provides strong protection for private ownership of resources. It is not necessary to specify the precise bundle of entitlements that this principle entails, since the relevant implication of this principle is minimal regulation on the use, transfer, or modification of privately owned resources. One consequence of institutionalizing this principle is that the basic structure must give private individuals broad authority over the built environment. The physical environment of the society will be deeply influenced by the individual preferences, desires, and plans of private citizens.

It is undeniable that many citizens will decide that it is too expensive, difficult, or aesthetically unpleasing to install ramps, elevators, signs in multiple formats, etc in buildings they own. An unconditional commitment to (P1), therefore, predictably excludes citizens with disabilities from accessing goods and services, employment, and housing on terms that are equal to citizens with average mobility needs. Citizens with disabilities will rightly judge that this principle generally fails to protect their unique interests in mobility (I2). Citizens with disabilities cannot reasonably accept (P1) unless they know that the basic structure's general commitment to private ownership is

constrained by a strong regulatory system requiring private owners to build or alter their property in ways that protect their interests in accessing society's physical environment.

(P2) guarantees that the basic structure respects the terms of private contractual arrangements. This principle is problematic from the standpoint of citizens with disabilities because of its general implications for the labor market. A basic structure committed to (P2) generally avoids regulating the labor market, except perhaps for public safety. Empirically, citizens with disabilities are unemployed at a twice the rate of citizens without disabilities. The cause of this greater rate of unemployment is at least partially due to social practices of exclusion. Exclusion from employment can take many forms that cannot be ameliorated by a strong commitment to formal equality of opportunity, which only requires non-discrimination. Explicitly discriminatory hiring practices may be only one source of this discrepancy. The fact that prevailing terms of employment generally lack provision for medical leave, or flexible scheduling, or modification of the work environment, surely contributes to this as well. In other words, social exclusion may be embedded in the terms of contract that prevail across the labor market, if those terms are difficult or impossible to satisfy for citizens with disabilities who are otherwise qualified for employment.[175]

First, if the predictable consequence of unregulated freedom of contract is the exclusion of citizens with disabilities from the employment, could citizens with disabilities "reasonably accept" this principle as consistent with their status as free and equal citizens? I believe the clear answer to this is 'No'. A conception of justice

[175] This is not to say of course that citizens with physical disabilities are unjustly excluded from being steel workers. But many jobs do not require physical attributes that citizens with disabilities may not have.

proposing fair terms of cooperation cannot, it seems to me, effectively exclude a whole class of otherwise cooperating citizens from one of the primary dimensions of cooperative activity. This is not to say that (P2) forbids citizens with disabilities from participating in the labor market. This is only to say that allowing employers offer any terms of employment without regard for how that might exclude citizens with disabilities from jobs they might otherwise be willing and qualified to do is inconsistent with regarding those citizens as free and equal partners in cooperation.

Second, if an unconstrained form of (P2) is unlikely to be reasonably acceptable to citizens with disabilities, would a more modest version of (P2) suffer from the same problem? In other words, if (P2) is constrained by fair equal opportunity (Rawls' term for the substantive interpretation of equality of opportunity) or a more narrow principle of non-discrimination, would this be reasonably acceptable to citizens with disabilities? Employers would be free to offer any terms of employment as long as those terms provided fair equality of opportunity, and/or did not discriminate (explicitly or implicitly) on the basis of physical disabilities.[176]

This proposal may address the primary concerns that citizens with disabilities may have in being excluded from an unregulated labor market, but it is hard to see how this is a stable or attractive constraint on (P2) from the standpoint of classical liberalism. The classical liberal who views freely arranged, mutually agreed upon exchange relations as an expression of a (nearly) basic liberty is unlikely to endorse a constraint of this sort on principle (P2). So for example, in a telling passage in *The Order of Public Reason*, Gerald Gaus argues that the basic structure should respect free contractual relations, even

[176] Perhaps classical liberals who endorse the equal opportunity principle already anticipate this application of principle (B).

if these agreements exploit workers. Gaus holds that the state should not attempt to prevent citizens from choosing exploitative employment in hierarchical firms, except perhaps in the most extreme cases. Workers, he argues, may prefer the wage in an exploitative work environment, to little or no pay under non-exploitative conditions. But even if one accepts Gaus' view that the basic structure should not prevent workers from choosing to work under such condition, his reasoning cannot be extended to the case of individuals with disabilities. If citizens with disabilities cannot find employment because employers are generally unwilling to offer terms of employment that match their unique needs and interests (or actively discriminate against them), this cannot plausibly reflect a choice on the part of citizens with disabilities to hold out for better employment terms.

Further, the extension of fair equality of opportunity to citizens with disabilities may, in fact, be a very demanding principle that (perhaps) *requires* employers to offer flex-time, medical leave, or costly physical accommodations (like accessible computers or workstations). Such a principle may belong to the most reasonable conception of justice, but it seems unlikely that classical liberals would accept this kind of broad constraint on (P2).

(P3) holds that the basic structure is responsible for guaranteeing each citizen sufficient resources to satisfy basic needs in the form of a fixed, recurring unconditional basic income payment (UBI). Given the wide range of institutions that can be classified as UBI schemes, it is difficult to draw any general conclusions about whether citizens with disabilities can reasonably accept (P3). Instead, I propose to examine two considerations, one general and one specific, that are likely to dominate any judgment citizens with disabilities are likely to come to regarding (P3). The more general

consideration is whether the level of guaranteed income alone would adequately protect citizens with disabilities against material poverty. The more specific consideration is whether the level of guaranteed income alone would enable citizens with disabilities to access expensive, but necessary, medical services and resources. The following analysis of these considerations shows that the form of a UBI that is most consistent with classical liberal commitments is unlikely (on its own) to provide sufficient income to achieve both of the following goals, protecting citizens with disabilities from falling into poverty and providing citizens with disabilities with enough income to access greater than average amounts of health care resources.

The first concern assumes that the level of guaranteed income is person-insensitive, or in other words, that each citizen is guaranteed a level of income that is sufficient to meet the basic needs of an *average* citizen. Citizens with disabilities would clearly be aware that their identical basic needs might require a greater than an average amount resources to satisfy.[177] They will rightly judge that the income from a UBI mainly (or only) protects citizens whose basic needs are averagely expensive from falling into poverty.

The second concern is more specific version of first, derived from the third from the core needs and interest of citizens with disabilities. Citizens with disabilities predictably require more expensive and unusual medical services and resources to achieve health outcomes that are equal to other citizens. Assuming that the level of

[177] The need for mobility is a perfect example, since for the average citizen, especially in urban areas this need may require next to no resources. But for citizens with physical disabilities, this need may be extremely costly. Motorized wheelchairs, private transport, orthotics, and modified vehicles are just some of the additional resources that citizens with disabilities may need to be mobile.

income each citizen receives from the UBI is calculated in part so that each can purchase health insurance privately,[178] citizens with disabilities will likely find that a greater share of their guaranteed income goes toward health care resources for at least two reasons.[179] First, citizens with disabilities are more likely to purchase broader, more expensive insurance coverage than the average citizen.[180] This cannot be dismissed as expressing a greater than average aversion to risk on the part of citizens with disabilities. Rather, it reflects a greater than average amount of health care services and resources often required for citizens with disabilities to achieve equal levels of health.[181] Second, citizens whose disabilities require long-term, regular care may also find that proportionately more of their income is devoted to co-pays and other expenses related to regular treatment. The exact size and impact of these greater than average health care costs is an empirical question that largely depends on the medical system as a whole and the nature of the citizen's disability. However, the existence of these additional, recurring, and perhaps expensive costs can be expected to determine whether citizens with disabilities accept that (P3) sufficiently protects their unique interest in securing necessary but expensive medical resources (I3).

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[178] This assumption is consistent with the primary reasons underlying classical liberal support for a UBI scheme. A UBI eliminates the need to maintain large, bureaucratic administrations to administer programs, like disability, retirement, and health insurance, that can be more effectively and efficiently run as private enterprises. Arguably, a UBI eliminates much of the rationale for buying disability and retirement insurance. Health insurance would still likely be widely purchased.

[179] This assumption is consistent with the general aim of reducing the scope of public administration that motivates classical liberalism's commitment to UBI schemes.

[180] An additional issue is that citizens with disabilities may be charged more for the same coverage. This can be resolved through regulation of the private insurance market.

[181] This is not simply a matter of citizens with disabilities needing more expensive medical interventions. Citizens with disabilities often need access to long-term medication, mobility and communication aids, and regular therapy that are simply not needed at all by average citizens.

Put another way, by proposing that citizens with disabilities should accept a guaranteed income tied to a person-insensitive standard of the average costs of basic needs, its advocate must be committed to saying something like the following:

> You should accept as fair a basic structure that provides everyone with enough resources to protect the average citizen from falling into poverty, even though you and I expect that it is likely that this income may not meet your basic needs, most especially your greater than average need for health care resources, and consequently that you may not be protected from falling into poverty.

I see no reason to think that citizens with disabilities could generally accept such a proposal, unless denying it left them with no guaranteed resources at all. In other words, their acceptance of this proposal is contingent on their inferior bargaining position, and would therefore would not satisfy the criterion of reciprocity. [182]

One final qualification is necessary. The idea of a UBI is not strictly inconsistent with providing certain classes of citizens with additional income to cover costly basic needs. The suggestion that a UBI might be part of a broader *refinement* and *perfection* of normative commitments expressed in social welfare states is unlikely to be supported by classical liberal proponents of a UBI. Classical liberals like Milton Friedman find UBI-

[182] Even though UBI schemes are committed to providing a person-insensitive level of income to each citizen, it does not follow that citizens with disabilities cannot reasonably accept any UBI proposal. The reason for this is a UBI could be one element of a broader set of institutions that protect citizens against poverty. A proposal that combined a UBI with additional income for citizens with disabilities (perhaps through familiar means-tested social insurance programs) might largely answer the worry that the UBI would not provide sufficient income for citizens with disabilities to meet their basic needs. Whether citizens with disabilities could reasonably accept principle (3) likely depends on the particular features of the UBI in question, specifically, whether the total level of income guaranteed by the basic structure to citizens with disabilities reflects the often greater than average expense of their basic needs.

type schemes attractive in part because they hold out the promise of rejecting the regulatory ambitions of the welfare state by minimizing the range of goods and services produced or guaranteed by the state. It is not strictly inconsistent for a classical liberal to support an UBI with the qualification that certain classes of individuals might also receive additional income. Nevertheless, classical liberals will tend to support a UBI in its simplest, least qualified form, as a standard income provided to all citizens intended to replace other forms of compulsory social insurance. In this form, however, citizens with disabilities cannot reasonably accept a UBI.

The analysis so far provides three distinct reasons that a CL + UBI conception fails the test of reasonable acceptability when the perspective of citizens with disabilities is taken into account. This may be sufficient to show that this conception does not satisfy criterion of reciprocity, but I think the case against the CL + UBI conception can be made stronger by briefly considering several reasons that it is not 'reasonable to think' that such a conception is "reasonably acceptable" to citizens with physical disabilities. In a relatively uncomplicated sense, one could "reasonably think" that conception is "reasonably acceptable" if realizing that conception in the basic structure did not severely undermine the ability of some citizens to participate as free and equal citizens. There is likely to be reasonably disagreement in many cases about whether a conception's realization undermines the ability of some class of citizens to full and equal participation. There are other cases, where disagreement is not longer reasonable. There is no *reasonable* disagreement about whether a conception of justice that extended full protection of the law only to members of the Roman Catholic Church is reasonably

acceptable to all citizens in a society marked by religious and moral pluralism. Such a conception denies the moral equality of citizens.

My analysis focuses on the fact that the social conditions that citizens with physical disabilities require to develop the moral powers of citizenship differ in important way from those of average citizen on account of their fundamental interests in significant regulation of rights of private property and contract, and their different needs for health care resources. Because these interests are fundamental to the ability of citizens to construct lives that are marked by a minimal degree of autonomy, relatively free from dependency, ill-health, and long-term unemployment, and in which their status as a free and equal citizen is more than formally realized, the failure to protect these interests cannot be causally set as peripheral to the question of whether a conception can be "reasonably accepted" by citizens with disabilities.

5 Conclusion

The argument in this chapter is guided by the claim that Rawls' mature view of public reason implies a notion of 'minimal reasonability' that neither he nor he subsequent defenders have adequately explained. Further, since the formal qualities of minimal reasonability are partially expressed in the idea of *general liberalism*, there is strong reason to suppose that many classical liberal conceptions of justice are capable of providing public reasons since they no less than the egalitarian liberal conception preferred by Rawls specify the idea of a reasonable conception expressed as the three conditions of *generalized liberalism*. Rawls, however, does not provide a completely

consistent account of when conceptions that are less egalitarian than justice as fairness are no longer reasonable. Given the difficulty in deriving a consistent view about minimal reasonability from Rawls' expressed views, I suggest in this chapter that the distinct interests contained in the perspective of citizens with physical disabilities might provide a lens for specifying the requirements of the *criterion of reciprocity*. By connecting the notion of 'reasonable acceptability' expressed in the criterion of reciprocity with the standpoint of citizens with disabilities, I argued that a hypothetical classical liberal conception of justice expressing the formal qualities of *generalized liberalism* would not satisfy the criterion of reciprocity. While the argument above does not categorically rule out the possibility that a Rawlsian approach to public reason excludes all classical liberal conceptions of justice, it provides strong reason to think that the threshold of minimal reasonability derived from Rawls mature view of public reason favors conceptions of justice that lend support to at least some significant regulations on private property rights and liberty of contract and endorse significant redistributive institutions in order to protect social values of inclusion, non-discrimination, and social equality.

Chapter 5

Concluding Remarks

Rawls made significant alterations to his account of public reason after the publication of the first edition of *Political Liberalism*. The historicism of this mature account of public reason is generally underappreciated. In his mature work, Rawls characterizes political consensus as a practical achievement emerging from particular political problems. A political consensus on a liberal institutional framework should therefore be viewed as the outcome of distinct social struggles for religious toleration, political franchise, and economic fairness. Classic liberalism has played a historically important role in identifying the moral principles expressed in basic liberal constitutional protections, and therefore, it may appear that such conceptions of justice ought to continue to play a role in the public reasoning of liberal societies. This appearance is misleading. My analysis shows that the disability rights movement provides a compelling reason to develop a more inclusive account of the audience of public reason which is more sensitive to the interests and agency of citizens with disabilities. Further, it shows that classical liberalism faces an insurmountable challenge from citizens with disabilities, whose interests and agency as citizens are not adequately protected by its principles. A Rawlsian account of public reason that is sensitive to citizens with disabilities' struggle for equal rights will contain sufficient resources to exclude classical liberal principles of property.

The concluding reflections in this chapter further elaborate the following three claims. First, Rawls' proposes that public reasoning is grounded in a prior consensus on

the moral necessity of liberal institutions that protect individuals' social status as free and equal citizens. The formal criterion for identifying public reasons is drawn from a consensus that certain liberal institutions are required to enable individuals to live as free and equal citizens. The authority of public reasoning rests on this consensus, rather than a consensus on any particular conception of justice. The ongoing success of liberal institutions at resolving social conflict gives further plausibility to the moral arguments that support them.

Second, the formal criterion for identifying public reasons is given by a family of conceptions of justice, each of which specifies three conditions, which together define what I called generalized liberalism[183]. These abstract conditions can be specified by a number of different conceptions of justice. If generalized liberalism expresses the form of a public reason, there appears to be reason to suppose that public reasons may be invoked to support classical liberal ideals of private property. This suggests that the values of public reason are largely unable to resolve deep conflicts about the injustice of distributive inequality.[184]

Third, the appearance that the idea of public reasoning might justify a wide range of distributive inequalities is plausible only given a set of assumptions about the audience of public reasoning that there is good reason to reject. Recent work in the field of disability studies provides compelling reason to reject abstract descriptions of the audience of public reason that exclude citizens with disabilities.

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[183] I borrow this term from Rex Martin, see Mandle and Reidy 2014

[184] This consequence is most clearly expressed in two articles by Samuel Freeman, see Freeman, 2001 ; and Freeman, 2011

Connecting these three claims provides evidence that Rawls' model of public reason ultimately rests on a much more nuanced and historically grounded view of the consensus that circumscribes public reason than is often taken to be the case. Furthermore, this historically conditioned concept of public reason and political legitimacy is not a drastic retreat from the egalitarian commitments expressed in justice as fairness, despite some initial appearances to the contrary. Under the criticism of disabilities scholars, many contractualists have begun to develop more inclusive forms of contractualism. Applying these insights to the idea of public reason shows that classical liberalism can satisfy the requirements of public reason only by overlooking or ignoring how the perspective of disabled citizens informs which principles of justice could be acceptable to all citizens.

1. Consensus in Rawls' Mature Account of Public Reason

Rawls' claim that public reasoning in a pluralistic society always occurs within the boundaries of a prior consensus has stuck many as puzzling. How, they ask, can citizens *agree* on a conception of justice, if each genuinely endorses a moral or religious point of view that is deeply incompatible with those endorsed by other citizens? It appears to many either that Rawls' idea of reasonable pluralism is not defensible, or that Rawls' model of public reason is incoherent. The resolution lies in the historical and institutional premises that Rawls relies on to defend the 'realism' of the consensus that provides a necessary condition for public reasoning.

I argued in Chapter One that Rawls relies on a particular interpretation of the historical development of liberal-democratic societies that is scattered across several of his final published discussions. My analysis of Rawls model of public reason shows that reasonable non-liberal citizens must only adopt a moral commitment to support the specific liberal institutions that guarantee the social conditions that ensure each individual the opportunity to develop a public identity as a citizen. Participation in public reasoning is not conditioned on a prior endorsement of liberal conceptions of justice, or liberal moral values like autonomy

I showed that Rawls' model of public reason rests on citizens' widely held and ongoing practical commitment to institutional features of liberal-democratic constitutional forms. Rawls stipulates that three features of liberal-democratic constitutions in particular define this practical commitment: protections for (a) fundamental political and personal liberties, (b) equality of opportunity, and (c) some form of social insurance. These features of existing liberal-democratic regimes provide the basis for the consensus that grounds public reasoning. Any conception of justice whose principles can support each of these features *in some way*, and is sincerely endorsed by some reasonable citizen, I would argue, presumptively belongs to public reason on this model. Consensus among citizens on one and the same conception of justice is simply not a requirement of public reasoning. The paradigmatic features of liberal-democratic institutions establish a threshold of *minimal reasonability* that defines the content of public reasoning. Citizens' satisfy their duty of civility when they support their political claims by reference to some conception of justice that meets the threshold requirements of minimal reasonability provided by (a) – (c).

The suspicion that Rawls' model of public reason rests on deep metaphysical commitments to liberal principles of justice fails to appreciate the historical and pragmatic interpretation of liberal-democratic history that Rawls relies on to explain why non-liberal religious and moral perspectives could arrive at a consensus on liberal constitutional norms. The history of liberal institutions shows that such a consensus is possible. Liberal institutions represent a successful (if imperfect) resolution to problems of social instability posed by intolerance and inequality. One need not endorse liberal values to accept that liberal institutional forms secure toleration, equal opportunity, and material security more regularly than other institutional arrangements.[185]

Even so, one may still worry that Rawls' model of public reason functionally excludes the voices and viewpoints of citizens who do not, or cannot, endorse the shared premises of public reasoning that can be drawn from a commitment to liberal institutional forms. For such citizens, the outcome of public reasoning will not be rationally compelling because they have no reason to endorse its ultimate premises. For some, this shows that Rawls' model drifts too far from the Kantian roots of the idea of public reason. Public deliberation is only *rational* according to these critics if its audience is unlimited and the deliberation presumes no authority or limit other than the "unforced force of the better argument", i.e. reason itself.[186]

I draw attention to this kind of criticism to show how a consensus on liberal institutions expressed in Rawls' mature account of public reason provides a way of

[185] This should not be understood as an unqualified judgment about the absolute superiority of liberal-democratic constitutionalism over all comparable institutional forms.

[186] This worry is expressed by Onora O'Neill in her article "Autonomy and Public Reason in Kant, Habermas, and Rawls". See O'Neill 2015 pp 137 – 152.

responding to this kind of criticism. Much of the force of this objections rests on the suspicion that the Rawlsian model of public reason demands too much of non-liberal (specifically religious) citizens. In order to engage in public reasoning, so the objection goes, Rawls' model appears to demand that such citizens draw on principles and values that do not reflect their deepest and sincerely held moral commitments. But this misconstrues what Rawls' mature model of public reasoning actually requires of citizens. The essential requirement is that citizens come to view (a) – (c) as genuinely moral constraints on their own political demands, and not merely as social conventions whose breach violates no serious moral obligation or value. Religious citizens do not have to adopt any deep metaphysical commitment to moral autonomy as a precondition of public reasoning. They merely have to support basic rights of conscience and political participation, equal opportunity, and publicly provided social insurance. The degree to which public reasoning requires non-liberals to adopt liberal premises as a condition of participation in morally binding public deliberation is consequently less drastic than non-liberal critics of Rawls often assume. The injunction to non-liberals amounts to: do not reject the constitutional status of basic rights of conscience, equal opportunity, and social insurance in your public deliberations. In my view, the demands of Rawls model are much easier to meet than is often taken to be the case, though it remains true that some citizens may not be able to meet even this bar. Some may want to push this point further and claim that even requiring citizens to find a moral reason to support (a)- (c) demands too much of non-liberal citizens. In response, I would ask what grounds we have for thinking that a citizen who can find *no* morally compelling reason to support protection

for religious liberty, for instance, is genuinely interested in fair cooperation given the moral and religious pluralism that characterize (most) contemporary societies?

Further, describing the limits of public reasoning in terms of a consensus on institutional structures serves to further explain the central role that the idea of persons as free and equal *citizens* plays in Rawls' model of public reasoning. It is plausible to read (a) – (c) as necessary institutional conditions for individuals develop the capacity to inhabit the role of a free and equal citizen. In other words, public reasoning expresses a shared commitment not to undermine the social conditions that enable others to develop and act as free and equal citizens. These protections may have arisen in historically contingent ways, as pragmatic resolutions to social struggles that characterize the emergence and development of liberal constitutional orders, but this contingency need not preclude or undermine the moral value of the institutions that define democratic citizenship. History provides ample evidence that societies genuinely seek to protect the institutional status of individuals as free and equal citizens are comparatively more just than other political forms, and that the most conspicuous political injustices of liberal societies are mainly (though not exclusively) due to the unequal extension or enforcement of the basic institutional protections accorded to citizens. Consequently, non-liberal citizens may develop a genuine and compelling moral commitment to the idea of democratic citizenship through a commitment to (a) – (c) because (1) under modern social conditions, liberal constitutional forms have done a better job of tracking the

requirements of justice when compared to other political forms, and (2) the existing alternatives to liberal constitutional forms do not promise any gains in justice.[187]

2. Generalized Liberalism

Conceiving the shared basis of public reasoning as originating in a consensus on typical constitutional protections explains why treating persons as free and equal citizens is also central to public reasoning. Constitutional protections for equal basic liberties and opportunities, and the general principle of social insurance define the central meaning of citizenship in a constitutional democracy. The ideal of citizenship may be deeper and broader than the distinct protections expressed by (a) – (c). It is deeper insofar as the role instantiates moral values such as mutual respect, equality, and liberty. It is broader insofar as the moral values and social status associated with the role of a citizen can be applied to social norms and institutions beyond the central constitutional protections (a) – (c).

The ideal of the person as citizen bridges the gap between what Rawls calls a constitutional consensus and an overlapping consensus, where the former is focused on core institutions of a liberal democracy, and the latter encompasses these institutions as well as the values expressed in and through them. An ideal of the person as citizen provides a plausible way to explain the development of "depth and breadth" that characterizes the emergence of an overlapping consensus, that does not rely on

[187] This idea could be further fleshed out in terms of Amartya Sen's and Gerald Gaus' recent arguments development of the idea that comparative judgments ought to be given a greater role in our basic judgments of justice. See Sen 2009 and Gaus 2016

presuming the emergence of a consensus on a liberal conception of justice or a vaguely defined set of political values. The ideal of the person as citizen provides a shared basis for public reasoning that both liberal and non-liberal individuals can endorse. An individual's role as a citizen can serve as an independent source of rich and weighty obligations. Finally, this role is centrally connected to (in fact produced by) the institutional protections typically enshrined in the constitutions of liberal democracies, which I argued above, liberal and non-liberal individuals have compelling historical reason to endorse.

But if the shared basis of public reason is characterized in this way, public reasoning need not be limited by a single conception of justice. This does not imply that public reasoning imposes no constraints on the claims citizens may raise with regard to the basic structure. In fact, Rawls suggests that a citizen reasons publicly as long as she justifies her political claims on the basis of a conception of justice that contains two sets of principles: one set that specifies and orders the basic "rights, liberties, and opportunities" that define citizenship, and another affirming that public responsibility for ensuring that each citizen has "adequate" means to exercise and take advantage of the liberties and opportunities afforded to her as a citizen. [188] I called this form of a public

[188] Rawls 2005 pp 223; See also pp 375 and xlviii; "Public Reason Revisited" in Rawls 1999b p 141; and Rawls 1999b pp 14 and 49.
In the introduction to the paperback edition, the third condition is modified to read "it affirms measures assuring all citizens, **whatever their social position**, adequate all-purpose means to make intelligent and effective use of their liberties and opportunities." Close examination of these three conditions in the critical literature has been relatively sparse. One explanation might be that the manner in which Rawls specifies the content of the family of liberal conceptions may seem less important than his claim that liberal conceptions only articulate political values. Another explanation might be that the common features of liberal freestanding conceptions are not all that significant if one holds that the idea of an overlapping consensus requires agreement on a single

reason "generalized liberalism". Each of these conditions can be derived in a relatively straightforward way from the constitutional protections (a) – (c) that define the central institutional meaning of citizenship.[189]

However, generalized liberalism does not obviously distinguish between high liberal and classical liberal views of private property and fair distribution. In other words, typical features of classical liberal conceptions of justice met the threshold of minimal reasonability that is required for public reasoning. As a consequence, political liberalism appears to represent a dramatic retreat from the high liberal egalitarianism that marked Rawls' early writing. Public reasons may be cited in support of both the highly redistributive and regulative economic structures implied by justice as fairness **and** the minimally redistributive and regulative economic institutions preferred by typical of classical liberals. Citizens would not violate the duty of civility by proposing, enacting, or continuing to support measures that protect broad private authority in property and contractual relations, and minimize the public's responsibility for insuring material security to all citizens above a sufficientarian baseline. A basic structure that permitted extreme material and social inequality above some baseline of material well-being would

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conception. The common content of freestanding conceptions of justice becomes relatively more interesting if, following Rawls suggestion, an overlapping consensus does not require that citizens agree on the most reasonable conception of justice, but only that they agree on a family of reasonable conceptions of justice. Consequently, "Citizens will differ as to which of these conceptions they think the most reasonable, but they should be able to agree that all are reasonable even if barely so." Rawls 1999b p 14.
I argue in another chapter that this is a more defensible understanding of the idea of overlapping consensus and better expresses his last presentations of the basis of social unity that can be expected in liberal constitutional democracies.

[189] This assumes that social insurance is functionally a necessary condition of citizenship in a contemporary constitutional democracy.

have a justified claim to the moral allegiance of all citizens, just as more egalitarian high liberal conceptions.

At least some prominent Rawlsians have accepted this apparent consequence of Rawls' later descriptions of public reason. In several articles, Samuel Freeman has worked to distinguish classical liberalism from natural rights libertarianism in part to show that the constraints of public reasoning can accommodate the views of a diverse group of liberals.[190] I find Freeman's argument unconvincing, in part, because it does not adequately appreciate the way in which broad private ownership allows the social status of some citizens to be held hostage to the good will of other citizens. If an individual's institutional identity as a free and equal citizen is contingent on the benevolence of other citizens, then she is, to that extent, neither free nor equal.

3. Disability and the Value of Citizenship

In Rawls' later work, the shared basis of public reasoning appears to imply that classical liberalism and high liberalism have equal standing with respect to the conditions of public reasoning. Both conceptions deserve to be regarded by those who reject them as unjust, but minimally reasonable. This implies that social inequality of various kinds may give rise to claims of *injustice*, but not to justified claims of *illegitimacy*. In other words, even if classical liberal conceptions of property were unjust, as long as they belong to public reason, they would provide a morally proper basis for enacting and enforcing legally binding rules.

[190] See Freeman 2001 and 2011

The kind of basic structure preferred by classical liberals would grant broad private authority over property, which over time generates significant material and social inequalities. Generally, the operation of unfettered markets and private property tends to reproduce inequality across generations. This ultimately tends to produce a class system in which citizens who are born into the worst off classes develop dramatically different expectations of the opportunities, positions, and levels of satisfaction they are rationally able to pursue or expect to achieve, despite their talents or efforts. Rawls' early reflections on *justice* express his conviction that the basic unfairness of such a class system proved that the institutions typically supported by classical liberals are deeply unjust and should be rejected on those grounds. Nevertheless, Rawls' description of *public reason* and *legitimacy* seems to accept some forms of classical liberalism as a reasonable basis for legitimate, if not fully, just legal rules.

The apparent reversal of Rawls' views about classical liberalism can be further explained by connecting my analysis of the family of conceptions with the related idea of *pro tanto* justification. In the "Reply to Habermas", Rawls argues that the idea of an overlapping consensus requires that a "political conception of justice [be] worked out first as a freestanding view that can be justified *pro tanto* without looking to, or trying to fit, or even knowing what are, the existing comprehensive doctrines [in a society]."[191] Fundamentally, *pro tanto* justification of a conception of justice establishes that it specifies shared political values, but also, that its principles provide reasonable answers to a sufficiently broad range of questions about basic justice.[192] A conception that is

[191] Rawls 2005 p 389
[192] He describes this kind of justification in the following way: "the political values specified by [the conception] can be suitably ordered, or balanced, so that those values

justified *pro tanto* is sufficiently reasonable to propose as a basis of fair social cooperation because it is freestanding and complete.

The passages in *Political Liberalism* and elsewhere in which Rawls discusses the possibility of an overlapping consensus on a family of reasonable conceptions of justice provide a strong reason to draw a connection between the idea of *pro tanto* justification and the threshold of reasonability that establishes the boundary of the family of reasonable conceptions. On my view, a conception is justified *pro tanto* only if it specifies the principles of generalized liberalism, and therefore, belongs, or could belong, to a family of reasonable conceptions. Such a formal explanation of the *pro tanto* justification of a conception of justice is likely to be satisfied by at least some classical liberal conceptions. Thus the charge that Rawls intentionally or inadvertently abandoned his early normative criticism of classical liberalism may seem justified.

Something like this view seems to underlie a series of articles by Samuel Freeman.[193] He defends a fundamental distinction between classical liberalism and libertarianism. Further, he argues that classical liberalism is a minimally reasonable conception, and implies that it could be justified *pro tanto* and belong to a possible overlapping consensus. Such a formal view of public reasoning overlooks the normative implications of *who* is owed public reasons. A fundamental condition of what counts as a public reason is that the consideration could be reasonably acceptable to other citizens. The core meaning of 'reasonably acceptable' is that the consideration could be accepted by someone in light of her identity as a free and equal citizen. In chapter 3, I argue that

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alone give a reasonable answer by public reason to all or nearly all questions concerning constitutional essentials and basic justice." Rawls 2005 p 386

[193] Freeman 2001 and 2011

individuals with physical disabilities are equally capable of the core functions of citizenship, and therefore, their unique perspective must be accounted for in establishing whether a consideration is 'reasonably acceptable' to persons as citizens. My analysis shows that individuals with physical disabilities require unique social protections and material conditions in order to successfully develop the basic moral and attitudinal requirements of citizenship. Further, I explained why the typical features of classical liberalism are unlikely to provide principled reasons for ensuring that individuals with disabilities are provided with these protections and conditions. It follows that individuals with disabilities could not reasonably accept classical liberal conceptions in their capacity as citizens. Citizens with disabilities would likely reject the most central features of classical liberalism on the grounds that they grant other individuals broad authority to determine the shape the physical and economic environment in ways that exclude and alienate citizens with disabilities from their civic identity. Such private authority over the conditions of citizenship is inconsistent with a principled protection of the social and institutional conditions of citizenship for individuals with disabilities.

4. Public Reason and Democratic Equality

I have argued that typical features of classical liberalism are unable to sufficiently guarantee core social and material conditions that individuals with disabilities minimally require to develop as citizens. Classical liberal conceptions of the scope and weight of private authority to make decisions about property implies that equal inclusion of citizens with disabilities in public buildings and spaces is a question that is properly left to the

discretion of the owner. Perhaps other citizens generally recognize the needs and interests of citizens with disabilities, and spontaneously work to include citizens with disabilities in various ways. Nevertheless, it is hard to imagine that citizens with disabilities *could* accept as consistent with their status as free and equal citizens a principle that held that their ability to access publicly accessible spaces is contingent on the good-will of other citizens. Similarly, classical liberalism's support for broad private authority over contractual employment relations leaves citizens with disabilities no recourse if the prevailing terms of employment offered by employers functionally excludes them from the labor market. One need not think that employers' have an unlimited duty to provide accommodations for employees with disabilities. It is sufficient for the claim I wish to make to show that granting employers complete (or nearly complete) authority to determine the terms of employment conflicts with the equal status of citizens with disabilities. Finally, most contemporary forms of classical liberalism do support the idea of social insurance, generally through a commitment to sufficientarianism. The institutional mechanism that best balances classical liberalism's competing demands of private ownership and sufficientarian social insurance is a universal basic income. But the form most consistent with classical liberalism's commitments to private property is a universal basic income in which all citizens are provided with an income sufficient to keep the *average* citizen from falling into poverty. Given several assumptions about social insurance forms that would likely be supported by classical liberals (specifically the rejection of means-testing and maximal privatization of the health care industry), a level of income sufficient to keep an *average* person from falling into poverty would not be sufficient to keep someone with complex medical needs from falling into poverty.

Citizens with physical disabilities may reasonably accept sufficientarianism expressed in some other institutional form that is more responsive to their unique needs and interests. However, the institutional form that best balances classical liberalism's competing commitments to private ownership and sufficientarianism is a universal basic income providing for the needs of an average citizen. This form of social insurance is not reasonably acceptable to citizens with disabilities because it does not provide them with an equal guarantee of freedom from material poverty

My analysis of Rawls' account of public reason has a number of similarities to the relational egalitarianism Elizabeth Anderson has developed in a number of articles and books over the last twenty years. While there are several points on which her views and mine overlap, there is an important sense in which our views emphasize different implications of the central ideas of relational egalitarianism.

Anderson develops her view of relational equality largely as a response to luck-egalitarian views, such as those of G.A. Cohen, Richard Arneson, and Ronald Dworkin. They each hold versions of the thesis that only undeserved material inequalities are unjust. Typically, these views hold that inequalities of income and wealth (and other scarce goods) are unjust if they are entirely (or primarily) due to natural talents and abilities that are unequally distributed, rather than to deliberate choices.

Anderson criticizes this type of view for misunderstanding the "point of equality" and for distorting the normative ground of existing egalitarian social movements.[194] Luck-egalitarians fail to adequately grasp that the "point of equality" is to reject the "justice or necessity of basing social order on a hierarchy of human beings, ranked

[194] See Anderson 1999, 2010, 2013, 2017

according to intrinsic worth."[195] According to Anderson, *unjust* material inequalities reflect or are caused by conceptually prior inequalities of "authority, status, or standing", rather than in facts about what material goods one deserves. By defining unjust material inequalities in terms of undeserved material inequalities, luck-egalitarians are forced to construct counter-intuitive and misleading theories to explain the injustice done to the poor surfer who refuses to work for a living, or the aesthete with extravagantly expensive tastes. An exclusive focus on moral desert and responsibility obscures the true ground of actual political claims to unjust treatment, which lies in relations between individuals that fail to express equal authority and respect.

Anderson's criticism of luck-egalitarianism rests largely on the claim that luck-egalitarian principles cannot serve as "principles for adjudicating the claims of free, equal, reasonable, and mutually accountable persons make on each other, with respect to what they owe to each other."[196] This is a requirement for any intersubjectively justified principle of justice. She accuses luck-egalitarians (rightly, I think) of proposing that everyone has a duty of justice to correct inequalities that no one hand a hand in producing and for which no one bears responsibility. Such a principle cannot provide the basis for intersubjective claim making since that requires that someone is responsible for an injury or wrong to another. Luck-egalitarianism does not satisfy the basic requirements of contractualist justification, and for that reason cannot be the ground of intersubjectively justified claims of justice. In the terminology I have used, luck-egalitarianism falls outside the boundaries of public reason because it is not a member of the family of reasonable conceptions.

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[195] Anderson 1999 pp 312
[196] Anderson 2010 p 5

But while Anderson goes on to argue that her preferred conception of justice "democratic equality" is the *most* reasonable basis for citizens to make claims on each other through the basic structure, I have pursued a slightly different question. I agree with Anderson that luck-egalitarianism cannot be intersubjectively justified, and so is not a part of public reason. However, luck egalitarianism is not the only, or even the most plausible, alternative to democratic equality. Over the last decade, a number of classical liberals have argued that the demands of contractualist justification are better met by principles of justice that support widespread private ownership of property, a strong presumption in favor of the private production of goods and services, and minimal commitments to redistribute property.

My dissertation draws on the Rawls later work on public reason in order to assess the merits of these recent forms of classical liberalism. Anderson does not explicitly address the question of whether other conceptions of justice deeply opposed her view of relational equality might also satisfy the formal requirements of intersubjective justification, or to use slightly different terminology, whether such views might belong to public reason. My argument provides reason to think that the simplest and most logically consistent forms of classical liberalism are excluded from the "family of conceptions". This conclusion supplements "democratic equality" by showing that if public reasoning is responsive to the perspective of citizens with disabilities, that classical liberalism in its simplest and most logically consistent form fails to be intersubjectively justified, and for that reason is excluded from public reason. By contrast, Anderson shows that "democratic equality" protects the unique interests of citizens with disabilities in way that is consistent with their status as citizens.

5. Conclusion

I argue that the idea of public reason in the work of John Rawls is underpinned by a widely overlooked historical thesis about liberal institutions. The "realism" of an overlapping consensus, and therefore, the possibility of public reasoning, rests on the empirical possibility that society's competing moral and religious doctrines have the moral resources to justify basic liberal constitutional institutions. These institutions give rise to a particular social role, that of free and equal citizen. In the reflections above, I have indicated how this historical thesis about the pragmatic value of liberal institutions could be the source of a morally significant commitment to treating others as citizens. This commitment need not draw on any particular moral or religious viewpoints or principles, but can nevertheless serve as a ground for the contractualist principle at the heart of public reason, namely the principle of reciprocity. Further, a commitment to a historically conditioned ideal of citizenship will entail a commitment to the basic liberal institutions that give reality to the ideal. Finally despite some initial concern that this historically informed account of public reasoning might provide an extremely permissive view about the content of public reason, I argue that the obligation to protect and support the status of others as free and equal citizens is inconsistent with granting broad private authority over property and contract.

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