

Natural Law Lecture 2005

**THE POLITICAL ETHOS OF CONSTITUTIONAL
DEMOCRACY AND THE PLACE OF NATURAL LAW IN
PUBLIC REASON: RAWLS'S "POLITICAL LIBERALISM"
REVISITED**

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I. CONSTITUTIONAL DEMOCRACY: THE HISTORICAL
LEGITIMACY OF ITS POLITICAL ETHOS

*A. Constitutional Democracy and Liberalism: a Specific Political Expression
of the Natural Law Tradition*

The main concern of the following pages, and the principal aim of my argument which runs through all parts of this lecture, is to answer the question: "How in liberal constitutional democracy as it actually exists in most free and developed countries is natural law in the classical sense a *legitimate* and *politically workable* standard of reasonableness and objective moral value?" In order to answer this question, I will have to talk extensively about history (Part One). Moreover, I will develop my argument in a partly sympathetic confrontation with what I consider to be the main and most valid contemporary philosophical theory of liberal constitutionalism: John Rawls's Political Liberalism¹ and its conception of public reason and liberal legitimacy (Part Two). In my view, this theory contains sufficient truth to be worthy of being continuously and fruitfully revisited, but also sufficient *evident* untruth as to be a useful contrast-background for a political-philosophical argument in favor of the relevance of natural law for public reason (Part Three).

The nearly unquestioned framework for normative thinking on political matters today seems to be constitutional democracy of *some* kind. The democratic constitutional state is the expression of a complex ethos, grown in the course of a long history. This ethos forms a specific conception of public reason which is embedded in a framework of pre-political reasonableness that we refer to as "natural law." Being "natural" and, thus, pre-political, it is not to be identified with public reason.

1. John Rawls, *Political Liberalism*, paperback edition (New York: Columbia University Press, 1996; 1st. ed., 1993).

“Public reason” can be defined as the kind of reasonableness by which the basic political institutions of political society, its legal system and, based on them, concrete lawmaking—legitimately imposed by coercive state power on the multitude of citizens—can be justified in a way that is able to command general consensus and that therefore will not undermine but rather promote social cooperation and assure stability of these basic political and legal institutions. It is the reasonableness that refers to the political common good of human society.

As I propose to point out in the following, natural law reasons belong to public reason insofar as they *precede* public reason and, thus, shape it in a fundamental way. They, however, cannot claim to be *public* reasons, adequate for constitutional democracy, only because they are *natural law* reasons, that is, because they are open to anyone’s understanding. This is impossible because, first, natural law embraces more than what is politically relevant and can be reasonably enforced by legal coercion; and secondly, because natural law is not positive, written law. Public reason is based in, and expressed by, political institutions and a positive legal system which define the publicly endorsed standards and rules of justice by which citizens in a constitutional democracy make binding political decisions which are legitimately enforced by the coercive apparatus of the state.

As I will argue, rather than providing properly public reasons, natural law works as a standard of public reason’s own intrinsic practical truth, though this standard may be controversial and must therefore achieve legitimacy partly in and through the political process itself, as a valid standard of “truth” within that society. Thus, though natural law *as such* cannot claim to be *public* reason, the correspondence of public reason with natural law, as far as it is politically relevant, is nonetheless a condition for public reason to be fully reasonable. With this I do not mean to say that the “truth” of natural law reasons depends on their public acceptance, but only that their recognition as politically legitimate reasons does. The more such public recognition corresponds to the requirements of natural law, the more such recognition is reasonable.

By speaking of “*constitutional* democracy” I deliberately avoid the more familiar term of “liberal democracy,” though during the last two hundred years constitutionalism has been promoted mostly and on the whole very successfully by the political movement that from the early 19th century has been called “liberalism.”² Yet 19th century continental liberals have not always been very keen on promoting democracy. Only in consequence of the

2. See the classical work by Guido de Ruggiero, *Storia del liberalismo europeo* (Bari: Laterza, 2003), first published in 1925, and translated into English by R.G. Collingwood as *History of European Liberalism* (Boston: Beacon Press, 1959).

social transformation caused by the industrial revolution and under the pressure of democratic radicalism—thus, rather unwillingly—the politics of classical liberalism during the 19th century has gradually adapted itself to new realities.³

But it undoubtedly is part of the nature of liberal constitutionalism to have allowed such a development towards democratic reforms and political equality. By espousing the idea of democracy—rule by the people through universal suffrage—perhaps for the first time in history liberal constitutionalism, which from its beginning was linked to the medieval tradition of representative government, has also given to the idea of democracy a practicable form. It is based on the constitutional guarantees of fundamental rights and, therefore, on the idea and practice of government limited by the *rule of law* and through representative legislative bodies. Modern constitutional democracy is thus *limited* democracy, limited in favor of rights, liberties and a shared conception of the politically relevant good which consists primarily in the maintenance of these liberties and rights and the basic political and legal institutions and procedures which render possible peaceful cooperation according to generally acknowledged standards of justice.

Modern constitutionalism, however, is not just “liberal.” Liberal constitutionalism has reactivated and developed a tradition which is much older than liberalism.⁴ Not only the Anglo-Saxon “rule of law” has its root in late mediaeval times. Constitutionalism is also intimately linked to the mediaeval doctrine of the right to resistance⁵—not surprisingly denied by Kant—which in turn presupposes the idea that the exercise of political power is not in the service of this power and its interests, but of a good common to the totality of citizens. Such doctrines survived and were further developed by the Spanish early modern theorists of natural law like Suárez, Vázquez and mainly Vitoria. To a perhaps even more important extent, modern constitutionalism is also the offspring of medieval conciliarism.⁶ The idea that the authority of the Pope

3. Some of these aspects are treated in Richard Bellamy, *Liberalism and Modern Society: An Historical Argument* (Cambridge: Polity Press, 1992).

4. See for this the still unequalled, nearly encyclopedic presentation by Carl J. Friedrich, *Constitutional Government and Democracy* (New York: Blaisdell, 1950) which I know in its German version *Der Verfassungsstaat der Neuzeit* (Berlin, Göttingen, Heidelberg: Springer, 1953). Further: Nicola Matteucci, *Organizzazione del potere e libertà. Storia del costituzionalismo moderno* (Torino: UTET, 1988).

5. See the classical study by Fritz Kern, *Gottesgnadentum und Widerstandsrecht im früheren Mittelalter. Zur Entwicklungsgeschichte der Monarchie*, 7th edition, reprinted from the 2nd edition 1954, edited by Rudolf Buchner (Darmstadt: Wissenschaftliche Buchgesellschaft, 1980).

6. For a concise overview of this doctrine see George H. Sabine, *A History of Political Thought*, fourth edition revised by Thomas Landon Thorson (Hinsdale: Dryden Press, 1973), chapter 17, 294 ff.

depends on the consent of the totality of bishops united in a council, that he is elected by them and therefore responsible to them, was theologically unorthodox and finally rejected as heretical. Yet, through its transformation into a political doctrine of legitimate resistance by the French Huguenots, adopted later also by Lutherans, this originally theological and canonistic doctrine became an additional ferment in modern development of constitutionalism and representative government.⁷ Meanwhile, Catholic political thought was unfortunately more and more influenced by the absolutist idea of the state which conceived its authority and power as representing on earth the supreme authority of the Creator in a way of feeling responsible not to citizens, but only to God.

Undoubtedly, Locke's idea of government as a trust and his idea of its being dependent on the constituent power of civil society are unthinkable without the presence of this late medieval tradition. Yet, Locke was not what we would call a "liberal" or a constitutionalist as, for example, was Benjamin Constant later. As far as England is concerned, Locke—and after him Bolingbroke—in fact promoted parliamentary sovereignty, which turned out not to be very respectful of fundamental rights. The tyranny of the English parliament went even so far as to temporarily suspend in the early 19th century the right of *habeas corpus* which, as the most basic and cherished right of citizens, was supposed to have its roots in the Magna Charta of 1215. Edward Coke's idea that the Magna Charta and the rights rooted in it were a "sovereign"—that is, the idea of rule of law—was not easily compatible with Locke's idea of parliamentary sovereignty.⁸

English parliamentarianism has finally been preserved from degeneration into ever increasing parliamentary tyranny by the ongoing process of democratization. In the American colonies, however, with their puritan background and under the influence of Montesquieu, Locke was right from the beginning read in a different way. Montesquieu developed his idea of representative government as a system of separated powers from an interpretation of what he called in the corresponding chapter of his *De L'esprit des lois* the "The constitution of England."⁹ In the form Montesquieu described it, such a constitution in fact never existed except in Montesquieu's interpretation of it. It was this description of a system of checks and balances that, through William Blackstone's later commentaries on the English "constitution,"

7. Cf. Quentin Skinner, *The Foundations of Modern Political Thought*, Volume Two: *The Age of Reformation* (Cambridge: Cambridge University Press, 1978).

8. For Coke see the valuable study by Jean Beauté, *Un grand juriste Anglais: Sir Edward Coke 1552-1634. Ses idées politiques et constitutionnelles, ou aux origines de la démocratie occidentale moderne* (Paris: Presses Universitaires de France, 1975).

9. *De l'esprit des lois*, ed. R. Derathé (Paris: Garnier 1973).

formed the spirit of American constitutionalism. Interestingly, Montesquieu was not a “liberal” either, but rather an aristocratic anti-monarchist; his ideas had been very much influenced by the same older traditions that gave rise to the Anglo-Saxon idea of *rule of law*, which includes the essential idea of an independent judiciary. Things are, thus, rather complexly inter-related and linked by transformations and feed-backs. History is a multifaceted continuum; nobody should appropriate it for ideological reasons exclusively for his own side.

Therefore, to understand classical political liberalism properly and to protect it from self-destruction by a partial self-interpretation we have to acknowledge that not everything in liberalism is genetically “liberal.” Classical liberalism is embedded in cultural traditions and presupposes the recognition of some truths about human persons, society and the reality of sovereign state power. Classical political liberalism, the basic political ideas of which have fully triumphed in our times, though without causing thereby the “end of history,” was from the 18th century, if not before, the movement opposed to abuse of power by absolutist regimes and their oppression of freedom and human dignity. Classical political liberalism has reactivated and re-vindicated the older tradition of limited government, the right of resistance and popular sovereignty. Moreover and most importantly, it presupposes the tradition of representative government, unknown to Greek and Roman antiquity but stemming from medieval (feudal) traditions, medieval urban political culture and parliamentarianism, and the practice of religious orders to be ruled by representative bodies (the chapters). This rich inheritance would hardly have survived without the traditions of Roman law and medieval natural law in its different forms. Liberal constitutionalism, after all, has always been a specifically *political* form of expression of the natural law tradition.¹⁰ The historical enemy of liberalism was not the medieval political world, which had long vanished by the time liberalism emerged. Liberalism’s enemy was rather the modern absolutist territorial state, based on uncontrolled power and which arbitrarily privileged a socially and economically incompetent *noblesse de robe*, a state which, in consequence of the spiritual-religious rupture of occidental society, had extended its power, taking more and more a kind of paternalistic control over the life of its citizens.

10. See Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law 1150-1625* (Grand Rapids, Michigan: William B. Eerdmans, 1997). Tierney convincingly challenges the view of Michel Villey for whom the idea of “rights” (as subjective rights) is specifically modern. For the roots of modern political thinking in medieval sources of legal thinking see Quentin Skinner, *The Foundations of Modern Political Thought*, Volume Two: *The Age of Reformation*.

Thus, classical political liberalism has its roots in cultural premises which cannot be understood independently from the history of the Christian occident with its Hebraic biblical and Greek, Hellenistic and Roman background. I therefore agree with Charles Taylor that “[w]estern liberalism is not so much an expression of the secular, postreligious outlook that happens to be popular among liberal *intellectuals* as a more organic outgrowth of Christianity...” and therefore share his view that it is not “a possible meeting ground for all cultures” and “shouldn’t claim complete cultural neutrality.”¹¹ Of course, Taylor himself is a believing Christian. Yet, it might be revealing to recall in Taylor’s support the famous words of a secularist and agnostic liberal like Karl Popper, who famously wrote: “When I call our social world ‘the best’ ..., I have in mind the standards and values which have come down to us through Christianity from Greece and the Holy Land; from Socrates, and from the Old and New Testament.”¹²

It is important to keep these things in mind in order to correctly approach the issue of public reason, common good and natural law as it has continually evolved up to today. If we trace back the genesis of this modern political culture to its roots and original motivations we come to understand why certain contemporary interpretations of public reason—or some specific aspects of these interpretations—like, for example, the one expressed by John Rawls in my view tend to fall short of a sound understanding of the ethos of constitutional democracy.

Although Rawls’s “political liberalism” claims to be an adequate expression of the intrinsic ethos of modern liberal constitutional democracy, this is only partly true. If I say “partly,” I do so because I think that Rawls’s mature theory of political liberalism, which I read independently from some of his questionable egalitarian views on justice, is in fact *very close* to being an adequate, even very powerful, expression of the ethos of constitutional democracy. So, my goal in criticizing Rawls is not to refute political liberalism, but rather to put into evidence shortcomings of the Rawlsian version of it and make some proposals to amend it (which, understandably, some might consider to be something futile to attempt).

In important aspects, mostly because what Rawls himself calls its extreme “Kantian” constructivism, Rawls’s political liberalism actually departs from the liberal constitutionalist—and even contractarian—tradition by substituting for its foundation in natural law the simple idea of reciprocal acknowledgment

11. Charles Taylor [et al.], *Multiculturalism: Examining the Politics of Recognition*, Edited and introduced by Amy Gutman (Princeton: Princeton University Press, 1994), 62.

12. Karl R. Popper, *Conjectures and Refutations*, 3d ed. (London: Routledge and Kegan Paul, 1969), 369.

of “free and equal citizens.” This, I think, is a mistake which has roots in a confusion concerning the relation between public reason and natural law, a confusion by which Rawls is led to ignore natural law entirely, holding the idea of natural law to be incompatible with his ideal of public reason. So: though Rawls is close to being right, in the sense that his mistake is compact and definite, correcting it nevertheless implies a sizable adjustment to his account of how natural law and his restricted “public reason” are related.

In the following I shall first present a brief epistemological and then a more extensive historical argument in favor of the legitimacy of the political ethos of modern constitutional democracy (section B and C). Secondly, I will characterize the essential features of this ethos (section D and E). After that I will show why in my view Rawls’s theory of Political Liberalism only partly succeeds in being a true expression of the political ethos of constitutional democracy, why he delivers a biased account of it, and why he fails to render justice to important aspects of that ethos, aspects which refer to natural law and corresponding basic political values (Part Two). In Part Three, I will try to clarify the relationship between natural law and public reason (section A) and finally turn to the political problem of natural law in a pluralistic society (section B). I will conclude this essay by showing how what I call “Rawls’s immunization strategy” against the validity of natural law reasons in public reason necessarily breaks down in consequence of the inner logic of his own approach (C).¹³

B. Political Philosophy as Practical Philosophy and the Importance of History

It is a fundamental feature of political philosophy to be part of *practical* philosophy. Political philosophy belongs to ethics, which is practical, for it both reflects on practical knowledge and aims at action. Therefore, it is not only normative, but must consider the concrete conditions of realization. The rationale of political institutions and action must be understood as embedded in concrete cultural and, therefore, historical contexts and as meeting with problems that only in these contexts are understandable. A normative political philosophy which would abstract from the conditions of realizability would be trying to establish norms for realizing the “idea of the good” or of “the just” (as Plato, in fact, tried to do in his *Republic*). Such a purely metaphysical view, however, is doomed to failure. As a theory of political praxis, political philosophy must include in its reflection the concrete historical context,

13. Readers exclusively interested in my views on Rawls might wish to skip the epistemological and historical part and directly proceed to Part Two.

historical experiences and the corresponding knowledge of the proper logic of the political.¹⁴ Briefly: political philosophy is not metaphysics, which contemplates the necessary order of being, but practical philosophy, which deals with partly contingent matters and aims at action.

Moreover, unlike moral norms in general—natural law included—which rule the actions of a person—“my acting” and pursuing the good—the logic of the political is characterized by acts like framing institutions and establishing legal rules by which not only personal actions but the actions of a multitude of persons are regulated by the coercive force of state power, and by which a part of citizens exercises power over others. Political actions are, thus, both actions of the whole of the body politic and referring to the whole of the community of citizens.¹⁵

Unless we wish to espouse a platonic view according to which some persons are by nature rulers while others are by nature subjects, we will stick to the Aristotelian differentiation between the “domestic” and the “political” kind of rule¹⁶: unlike domestic rule, which is over people with a common interest and harmoniously striving after the same good and, therefore, according to Aristotle is essentially “despotic,” political rule is exercised over free persons who represent a plurality of interests and pursue, in the common context of the polis, different goods. The exercise of such political rule, therefore, needs justification and is continuously in search of consent among those who are ruled, but who potentially at the same time are also the rulers.

Thus, unlike individual ethics, which is concerned with the goodness, fulfillment and flourishing of human persons, political ethics and philosophy—as a conception of political action and the political, that is, the *common* good—must be right from the beginning, and even on the level of basic principles, prudential in a specific way: it is a *principled* kind of prudence, based on the specific subject matter of the political, that guides actions—e.g., law-making—chosen for, and in many cases in behalf of, a multitude of free persons the results of which are enforced by means of the coercive apparatus of what we nowadays call “the state.” This principled kind of political prudence and its inherent logic of specifically political justification constitute “public reason.” Therefore, *public reasons* cannot be simply identical with *natural law reasons* as such, because natural law, as such, does not distinguish moral actions generally from the specifically political. By its very nature,

14. See my article “Perché una filosofia politica? Elementi storici per una risposta,” *Acta philosophica* 1 (1992) 233-263.

15. See for a similar, though not in all regards identical, view the essay by Ángel Rodríguez Luño, “Ética personal e ética política,” in Rodríguez Luño, “*Cittadini degni del vangelo*” (*Fil* 1, 27). *Saggi di etica politica* (Roma: Edizioni Università della Santa Croce, 2005), 23-33.

16. Aristotle *Politics* 1.7.1255b16 ff.

natural law encompasses the whole of human life and, inasmuch as it is *natural* law, it therefore cannot be a criterion for what is to be counted as *politically* reasonable. Natural law reasons do not distinguish between the moral norms a person is obliged to impose on her own actions on one side, and what she legitimately may impose on the actions of others. Although natural law may always work as a criterion for recognizing specific laws as unjust, it is not a criterion sufficient for making out what belongs to the *political* common good and therefore is to be *imposed* by law and the coercive apparatus of the state on the totality of citizens.¹⁷ For natural law reasons to be valid reasons in the sphere of the political and public reason they must be a political *application, restriction or concretization* of natural law, according to the logic of the political. This logic is not contained in the concept of natural law as such, but is specifically political, that is, it is proper to reason as *public* reason.

Finally and most importantly, unlike natural law reasons, public reason is based on the logic of realizability, that is, on the conditions of possible consensus and cooperation under conditions of disagreement and conflict. Natural law reasons, which appeal to normative moral truth, precisely are not the kind of reasons that are able to settle social conflicts and ideological divergence. On the contrary, they are rather part of these conflicts and in some cases they are their cause. For those who believe in the existence of natural law—as I definitely do—natural law reasons are rather a measure of truth, but in many cases they are also controversial. And this is a major *political* problem which cannot be settled by invoking that natural law reasons are open to everyone's understanding. I will come back to this in more detail in Part Three, section A and B.

17. For example: a positive law which for demographic reasons imposes on women the obligation to abort or otherwise to eliminate after the third baby, or to do so generally with genetically handicapped offspring, would be clearly contrary to natural law. To show such contrariety, no additional argument is necessary. But why is it against natural law *not to legally forbid* abortion, leaving it simply to citizen's free choice to abort or not to abort whenever they wish? Of course, also in this case, the practice of abortion would still be contrary to natural law. Yet, the question is whether the legislator's not punishing these actions is contrary to natural law. If one wants to avoid the conclusion that everything natural law demands or forbids has to be enforced by positive law, an additional argument is required to show why the legislator should protect unborn life (e. g. that also unborn human persons have a right to life, which must be legally protected, and that it would be contrary to publicly recognized standards of justice not to do so). I have tried to develop such an argument in my "Fundamental Rights, Moral Law, and the Legal Defense of Life in a Constitutional Democracy. A Constitutionalist Approach to the Encyclical *Evangelium Vitae*," *American Journal of Jurisprudence* 43 (1998) 135-183.

C. From Aristotle to Marsilius of Padua and Early Modernity: the Experiences and Burdens of History Revisited

In one important sense, then, the spirit of my argument is clearly Aristotelian. Aristotle has taught us to reflect upon politics in this historically contextualized and essentially practical manner which always includes the reflection on the conditions of realization of an action. He also conceived of political society as a system of cooperation between essentially free citizens who are potentially in conflict and establish between them mutual relations on the grounds of rules of reciprocity and equity. With this Aristotle deeply contrasts with Plato for whom the just order of the polis aims at eliminating conflicts by establishing the polis as a harmoniously structured social organism, which is, as Aristotle criticized, domestic and despotic rather than political. A *political* community is an order of free citizens which, although pursuing different aims and having often conflicting interests, create an institutional and legal framework for cooperation.

In another regard, however, my position is rather un- or anti-Aristotelian. History has taught us that the way Aristotle typically conceived politics to be a part of ethics is mistaken or at least unrealistic. The way Aristotle thought of politics as belonging to ethics is precisely that he considered politics to be the consummation of the ethical, and this in two senses: that the political life, which consists of active participation in public affairs, is the most excellent life for ordinary people—that is, for all except the philosophers who achieve first-rate happiness in contemplating truth—and that for non-philosophers political or civic involvement is therefore necessary for human fulfillment and happiness; and, secondly, that the polis, especially its laws, have the task to make people live the virtues and educate them accordingly by the power of legal coercion.¹⁸

Unsurprisingly, then, right from its beginning Aristotle calls his lectures on ethics “political science.”¹⁹ The books of the *Politics* are nothing other than the completion of the previous *Nicomachean Ethics* which, thus, form the first part of Aristotelian *Politics*. So, in reality, Aristotle’s ethics is essentially a “polis-ethic,” it is political philosophy in the form of comprehensive moral philosophy the central aim of which is to build politics on human virtue and sees human virtue—moral excellence—as the principal aim of the polis and its laws. The virtues are to be lived in the context of the polis, and it is the laws of the polis which have the task of making citizens live the virtues or at least refrain from vices. In conceiving ethics and political philosophy in such

18. *Nicomachean Ethics* 10.9.

19. *Nic. Eth.* 1.2 and 3.

a way as a *polis*-ethic, Aristotle is still a faithful disciple of Plato. The Aristotelian polis remains an eminently pedagogical undertaking. A Macedonian immigrant and despiser of the Athenian political system, Aristotle repeatedly insists, talking to the, in his view, decadent Athenians, that for him the exemplary city is the capital of Laconia, Sparta. So-called “Neo-Aristotelians” hardly ever mention this rather problematic feature of Aristotelian political thinking.

Yet, what happened between Aristotle and the rise of early modern political thought? Let me outline some basic features of this history, focusing on what seems to me important for understanding the proper legitimacy of the political ethos of modernity.

In Hellenistic times with its numbers of territorially vast *basileia* and the exaltation of kingship, the traditional Greek city-state sunk into insignificance, and so the Aristotelian conception of a *polis*-ethic lost its practical appeal. Finally, ancient Roman political thinking, after its temporarily republican Ciceronian and Polybian phase, was more and more centered on the empire and replaced by Roman public law, eager to confer on the principate of the first emperors republican legitimacy. Thereby the different famous juridical-political formulas—belonging to the *lex regia*—were created, like *quod principi placuit legis habet vigorem*, “everything that pleases the Prince has force of law.”²⁰ This formula was transmitted though medieval canon law to those who in early modern times used it, as did the Roman emperors, to justify absolute power.²¹ It was based on the fiction that the people had transferred its ruling power entirely onto the Emperor. Hence, every law issued by him was to be considered as just and ratified, as if it had been made by the people itself.

The corresponding absence of public political philosophy in the Roman Empire was compensated for not only by public law but even more importantly by civil religion.²² The favor of the Gods obtained by worshipping them was held to be the condition for the flourishing of the empire. When the empire and its power through Constantine, and even more, with Theodosius the Great, became Christianized and the Catholic religion was established as state religion, the Roman mentality did not change: the upholding of the

20. About the presence of the *lex regia* in medieval thought see H. Kurz, *Volkssouveränität und Volksrepräsentation* (Köln: Carl Heymanns, 1965), 38–42.

21. See Sergio Mochi Onory, *Fonti cononistiche dell'idea moderna dello stato* (Milano: Vita e pensiero, 1951); Dieter Wyduckel, *Princeps legibus solutus: Eine Untersuchung zur frühmodernen Rechts- und Staatslehre* (Berlin: Duncker & Humblodt, 1979).

22. For this and the following see also chapters 2 and 3 of the second edition of Peter Brown's *The Rise of Western Christendom: Triumph and Diversity, A.D. 200-1000* (Oxford: Blackwell, 2003).

Christian religion—which unlike paganism was monotheistic and, thus, increasingly unwilling to tolerate alternative cults—was thought to be the guarantee for the well-being of the empire. Constantine’s vision of the Christian cross—*in hoc signo vinces*—before his decisive victory over his rival Licinius at the *Ponte Milvio*, a vision that assured him of his imminent victory, was a typically Roman way of adhering to the Christian God: to be protected by him in the struggle for supremacy and for the good of the empire. This was already the reason why Constantine’s immediate predecessor Galerius—a wholehearted pagan—issued the first edict of toleration of the Christian religion. Constantine’s famous “Edict of Milan” from 313 was only a confirmation, though a definitive one, of this previous edict.

A radical change in Christian political thinking, however, came about when Rome a century later fell under the force of Alaric’s invasion. The remaining pagans accused Christianity and its hostility to the traditional Roman gods of being the cause of this disaster. It was the moment in which Saint Augustine in his epochal work *The City of God* severed the bonds between Christian religion and the Roman Empire: the fall of Rome, Augustine famously argued, is not an argument against the truth of the Christian religion. The worshipping of the true God is not a means to maintain the glory of Rome, but to lead citizens of the earthly city to their heavenly fatherland. The City of God is not to be built on this earth, but it must take shape in the hearts of human beings.

From this moment Christian social and political thinking in the occident began to be dualistic. The Aristotelian idea of a *polis*-ethic with its monistic conception of moral perfection linked to life in the polis had become impossible. The “polis” was now existentially divided into two parts: the earthly part, orientated, as Augustine writes, towards the “conservation of mortal life” and with the task of subjecting citizens to an order which guarantees true peace. The order of earthly state power, according to Augustine, was legitimate as long as it did not impede worshipping the true God.²³ The second part is the City of God which is established in the hearts of men and which does not find its completion, not even its representation, in present history and the actual world, but is spiritual and eschatological. This typical Christian dualism was well expressed in the formula of Pope Gelasius I (492-496): “There are two things by which this world is chiefly ruled: the sacred authority of the priesthood and the power of kings.” While earthly rulers had *potestas*, coercive power, the spiritual power of the priesthood was *auctoritas*, which is charisma.²⁴ Dealing with matters of moral perfection and

23. *De civitate Dei* 19.17.

24. The doctrine—first formulated in his Ep. 12 to Emperor Anastasius I—is contained in its definitive form in Tractatus 4 (printed in *Sources chrétiennes*, edited by H. de Lubac and J.

integral salvation, the latter imposes itself by force of moral guidance, excellence of doctrine and superiority of dignity. Both *potestas* and *auctoritas* had been, in pagan times, jointly attributed to the *Augustus*, the Emperor. Christianity split them into two, attributing it to two separate forces. Thus the political autonomy of coercive temporal power (the *regnum*) was established, but simultaneously, it was subordinated to the moral authority of the spiritual power (the *sacerdotium*), which however was not conceived as being politically coercive.

In a way, the Augustinian dualism—based on the distinction between the “political” task of coercive state power of securing the peaceful coexistence of citizens and to promote the temporal well-being of citizens without pretending to achieve their moral perfection on one side, and the spiritual task of the Church of promoting in the hearts of human persons the City of God which consists in holiness and eternal salvation, on the other—already implied a concept of “public reason.” The distinction specifies the realm of the political by conferring on it a certain autonomy and indifference to the realization of higher values. It also legitimates the use of coercive political power by a specific logic of the temporal and political common good. This is the logic of peacekeeping, social order, temporal well-being and non-interference in religious matters. The public recognition of religious truth is no longer the condition for the flourishing of the political realm. The temporal power simply must abstain from hindering this truth to be announced by the Church and the true religion to be practiced by its citizens.

During Christian antiquity, this typically Augustinian “residual” or “minimalist” political thinking had not, however, persisted for long. What followed was rather a turn that centuries later would cause the reaction from which political modernity would take its origin. This first, and I would say, fatal turn was “political Augustinism.”²⁵ Political Augustinism stems from a misreading of Augustine’s idea of the duality of the two cities and the corresponding superiority of the spiritual over the temporal. The fundamental idea of political Augustinism was, expressed in the famous words of Pope Gregory the Great (590–604), that “who governs has received his power over all men from above, so that the earthly city be in service of the heavenly.”²⁶ In a cruder form the idea that state power had to serve the City of God and, therefore, the aims of the Church was expressed by Isidore of Sevilla who wrote that the “powers of the earthly princes would not have been necessary

Daniélou, vol. 65, Paris 1960). Cf. also W. Ensslin, “Auctoritas und Potestas: Zur Zweigewaltenlehre des Papstes Gelasius I,” *Historisches Jahrbuch* 75 (1955) 661–668.

25. See the landmark study by H.-X., Arquillière, *L’Augustinisme politique: Essai sur la formation des théories politiques du Moyen Age*, 2d ed. (Paris : J. Vrin, 1955).

26. Epist. 3.65.

if they could not impose with the terror of coercive power what the clergy has been unable to impose with his word alone."²⁷ This, and not Augustine's plea to the Emperor—totally untypical for the saint Bishop of Hippo who always believed in the force of dialogue—to use state force against the Donatists, was the origin of a long tradition which considered the coercive power of the state to be the secular arm of the spiritual power of the Church.

Now, Pope Gregory's intentions obviously were not political in the sense of aiming at an increase of Church power by putting the secular power at its service. On the contrary, originally and in his spirit always remaining a monk, Pope Gregory was a man of spirituality and prayer. Gregory rather wanted to exalt the power of secular rulers reminding them of their task of being servants of the City of God and, therefore, of the dignity of the power they held in their hands. It was an essential implication of this Gregorian doctrine to deny any right of resistance whatsoever against earthly rulers, seeing in them a representation of divine authority on earth. In consequence, earthly *potestas*, seen as serving the higher ends of eternal salvation, now more and more acquired a kind of religious consecration (no wonder that later his teaching was so eagerly referred to by Luther, and in England used by James I., who considered himself as God's "lieutenant," in his confrontation with Catholics and Presbyterian dissenters and generally, in the formulation of 16th and early 17th century doctrines of the "Divine Right of Kings"). This religiously exalted view of temporal power—very much in continuity with the self-understanding of late ancient Roman imperial thought—culminated in the Carolingian renewal of the Roman Empire. The Carolingian emperors called themselves *Vicarius Christi*—the traditional title generally used for bishops and even priests—and considered the Emperor's consecration as a proper sacrament.²⁸ This finally led under the Ottonian emperors to the system of the imperial Church which integrated bishops as territorial rulers into the political and administrative structure of the empire. A *respublica Christiana* was created, a new polis in which political ethics now coincided with the Christian ethics of salvation and the Christian Faith underlying it and in which, consequently, heresy was conceived of as opposed to what we would call today "constitutional essentials," and thus as undermining the political system and social order, and to be repelled by state power.²⁹ Though the distinction

27. *Sententiae* 3.51 (Migne P.L. 83, 723-724); the entire Latin text is to be found in Arquillère, *L'Augustinisme politique*, 142.

28. Cf. Ernst Kantorowicz, *The King's Two Bodies, A Study in Medieval Political Theology*, 3d ed. (Princeton: Princeton University Press, 1973).

29. Conversely it was seen as licit to force heretics by coercive public power to salvation (actually a rather strange idea) as it was contained in the *Decretum Gratianum* (38, 23, 4): "haeretici ad salutem etiam inviti sunt trahendi." According to the later reception of Roman law

of the two powers temporal and spiritual survived, in practice Augustinian dualism was replaced by a political-ecclesiastical monism in which secular power had the Church at its service.

From this integration into, and subordination under, the political system the Church, defending her freedom—the *libertas ecclesiae*—liberated herself though long struggles from which, in high medieval times, ironically, the papacy ended up as the only remaining sovereign power. Under the guidance of papal supremacy, now a *respublica Christiana*, understood in feudalist terms and containing its proper *polis*-ethic, was created. Thus, the existential unity of the *polis*, typical for Platonic and Aristotelian political thinking, was renewed, but now defined in clericalist terms. The project was never really realized and, from the outset, doomed to failure. It broke down for a whole series of reasons, internal and external.

The project indeed contradicted the very essence of what Christianity brought into occidental political thinking: the originally Augustinian dualism, not in its medieval form of superposing the secular and sacred orders hierarchically in the one or the other way, putting the one in the service of the other, but distinguishing them as belonging to different *institutional* orders: one political, characterized by the need of using earthly coercive power for the sake of the temporal well-being of society, and the other spiritual, characterized by authority and moral charisma, acting not by coercive power and in the name of temporal and earthly goods, but on the basis of influencing man's conscience and in the name of truth and eternal salvation.

In contrast to this, from the high middle ages, the pope now claimed to possess not only the supreme *auctoritas* proper to the priesthood, but the *plenitudo potestatis* with the right to consider worldly princes, including the emperor, as subjected to his jurisdiction which, *ratione peccati*—that is, by moral reasons—was considered to extend also to temporal affairs.³⁰ The title of *Vicarius Christi* passed from the emperor to the pope.³¹ Though this

in the occident, heresy was conceived of as the crime of *laesa maiestatis* which demanded capital punishment.

30. See the important decretal *Novit ille* (1204) by Innocent III. Text in E. Friedberg, *Corpus Iuris Canonici*, vol. 2, reprint of the *Editio Lipsiensis secunda* (Graz: Akademische Druck- u. Verlagsanstalt, 1955) col. 242-244. Some passages of the decretal can be found in my "Perché una filosofia politica?," 239. For the whole period still very valuable is R. W. and A.J. Carlyle, *A History of Mediaeval Political Theory in the West*, 6 vols. (Edinburgh/ London: William Blackwood, 1903-1936), especially vol. II. Cf. also *The Cambridge History of Medieval Political Thought c. 350 - c.1450*, edited by J. H. Burns (Cambridge: Cambridge University Press, 1988); Walter Ullmann, *Principles of Government and Politics in the Middle Ages*, 3rd edition (London: Methuen, 1973).

31. Harold J. Berman has called this a "Papal Revolution"; see his *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983).

plenitude of power and jurisdictional sovereignty was justified morally and pastorally rather than politically, it was impossible that a spiritual power claiming juridical—that is, institutional—superiority over political power would not become political itself (not to speak of medieval and, until the 19th century, also modern popes, who in their own pontifical states were also temporal princes and, therefore, players on the political scene). To oppose and weaken the emperor in his struggle for supremacy, the popes in the high middle ages promoted the independence of Italian city-states and territorial princes.³² Therewith they ironically promoted those who less than a century later would oppose in the name of territorial sovereignty the papal *plenitudo potestatis* which they perceived to be the main obstacle to their own power and to the peaceful coexistence of citizens in their territories.³³

This exactly was the opinion of the first “modern” political thinker, though he lived and wrote in the 14th century: Marsilius of Padua, a pure Aristotelian. Marsilius challenged the subordination of temporal power under papal spiritual supremacy—and the idea of clerical supremacy over worldly affairs altogether—and its concept of *plenitudo potestatis* by opposing to it an Aristotelian view of monistic *political* ethics of the polis. The Church and its ministers should not exercise any power, not even spiritual, but be confined to preach the Gospel and administer the sacraments. The crucial point is Marsilius’s unorthodox denial of the Church’s right to exercise any form of even merely ecclesiastical jurisdiction and his assertion that she not even had the right to determine whether a theological doctrine was heretical, and in case it was, to condemn it. For Marsilius this was the task of the secular power which, so he was convinced, was the only one that legitimately could possess *plenitudo potestatis*.

Now, the point of this kind of Erastianism—which reminds us of Hobbes’s later view—is not spiritual or religious, that is, the attempt to confer on the state a sort of higher religious consecration. The essential novelty of Marsilius’s view, and what makes it so modern, is that it follows a strictly *political* logic which is perfectly expressed in the title of his main work, *Defensor pacis* (“The Defender of Peace”). Marsilius argues, as Hobbes would two centuries later, in favor of civil peace. Thus, Marsilius’s anti-clericalism expresses a strictly political claim. Marsilius’s is a pragmatic-political approach, and a secular one, which already points forward to what two centuries later will be the proper starting point of modern political

32. Cf. Quentin Skinner, *The Foundations of Modern Political Thought*, Vol. 1, *The Renaissance* (Cambridge: Cambridge University Press, 1978), ch. 1.

33. About the ideological and theological implications see the classical study by Jean Rivière, *Le Problème de l'Église et de l'État au temps de Philippe le Bel* (Louvain / Paris : Champion, 1926).

thinking: the quest for peace in a society cruelly divided by religious and ideological controversies. Perhaps in Marsilius we find the first appearance of a modern idea of public reason. Most interestingly, but not surprisingly, it is much closer to Augustine's original Christian dualism, never entirely forgotten through the middle ages, than were the curialist and "papalist" ideas of Giacomo di Viterbo—a disciple of Aquinas—and Aegidius Romanus about papal supremacy and *potestas directa*, a doctrine based on a mixture of a certain brand of Aristotelianism and Roman public law which, however, was never put into practice.³⁴ Ironically, medieval curialist theories on papal *plenitudo potestatis* prepared the modern political formulas of state sovereignty and absolute political power which later were adapted to needs of the rising territorial state and its secular interests.³⁵

According to Marsilius it is only the civil laws which are to rule in a state, and the authority and force of the government is entirely derived from the will of the people.³⁶ Marsilius shows us that Aristotelian political thinking had vigorously survived during the middle ages, not only in the already mentioned theories of curialist theoreticians of a papal hierocracy, but in a much more fruitful and decisive way in what Georges De Lagarde has called medieval "political naturalism" which was most prominently represented by Thomas Aquinas.³⁷ "Political naturalism" was to assert—this time *against* Augustinian traditions—that human society and the polis, rather than being a consequence of original sin, was part of the order of creation, and that, therefore, it is natural for human beings to live in society and establish political forms of government.³⁸

34. This was classically explored by Martin Grabmann, *Studien über den Einfluss der aristotelischen Philosophie auf die mittelalterlichen Theorien über das Verhältnis von Kirche und Staat* (Sitzungsberichte der Bayerischen Akademie der Wissenschaften, Phil-hist. Klasse, 1934, Heft 2), (München: Verlag der Bayer. Akad. d. Wiss./C.H. Beck, München, 1934), 41-60. Cf. also Walter Ullmann, *Medieval Papalism: The Political Theories of the Medieval Canonists* (London: Methuen, 1949). The doctrine, which was followed in practice and which finally became the dominant one, was the doctrine of *potestas indirecta*. See the classical exposition of that doctrine by Charles Journet, *La Juridiction de l'Église sur la cite* (Paris: Desclée, 1931).

35. Cf. Helmut Quaritsch, *Souveränität: Entstehung und Entwicklung des Begriff in Frankreich und Deutschland vom 13. Jh. bis 1806* (Berlin: Athenäum, 1986).

36. *Defensor pacis* 3.3.

37. Georges De Lagarde, *La naissance de l'esprit laïque au déclin du moyen age*, vol. 2, *Secteur social de la scolastique* (Louvain/Paris : Nauvelaerts, 1958), 51 ff.

38. Medieval Aristotelianism has transmitted a series of essential features to subsequent ages which are crucial for modern political thinking: among these namely the idea of a common good to be realized by political and legal institutions; the idea of government by law; the conviction that any system of government is man-made and must therefore serve their interests and goods; and that, consequently, any system of government is liable to be put into question, reformed and changed; and finally the belief that the legitimacy of any government depends on

Marsilius's legacy is twofold. He is the testimony and a transmitter of what we can call Aristotelian "constitutionalism" and the first advocate of modern "public reason" in the sense of discovering the "political" as a specific kind of reasonableness. We certainly find a similar combination of both features in Machiavelli, though not so much in the Machiavelli of the *Principe*, but the one of the *Discorsi*.³⁹ Here he expresses the conviction that the ideal state is a republic in which through the rule of law citizens are free, while where legal institutions do not prevail, public power will fall into the hands of tyrannical princely power. In different ways, Marsilius of Padua and Machiavelli announce a new era of political thought. Yet, before it definitively broke through, Europe underwent a fundamental transformation by the breakdown of the religious unity of Christianity by the different protestant reformations and the subsequent confessional conflicts and wars.

D. The Ethos of Pacification at the Root of the Political Ethos of Constitutional Democracy

The political ethos of constitutional democracy is the product of a long history of conflicts and struggles, in which much blood was shed and which left tracks of misery and hatred. Post-medieval Europe, already characterized by the emergence of territorial states with sovereign rulers, had suffered a fundamental transformation by the breakdown of the religious unity of Christianity, by the different protestant reformations, and by the subsequent confessional conflicts and wars. It was this experience of social conflict, shared in a different context in the 14th century already by Marsilius of Padua and in the 16th by Machiavelli, which made people believe that the main task of public power was not to promote the achievement of a supreme good, but the avoidance of the supreme evil: civil war. This insight—typical not only for Marsilius and Machiavelli, but also for Thomas Hobbes and Jean Bodin—that for politics there was primarily not a *summum bonum* to achieve, but a *summum malum* to avoid is, as it were, the *cantus firmus* of early modern political thought.

It is Jean Bodin (1529-1596) whom we can call the first outstanding champion of modern political thinking and the progenitor of "public reason" in its modern form. Not surprisingly, Bodin was a jurist, forming part of an entire group of French legal thinkers who, in the middle of the wars between Catholics and Huguenots, became known as the "politiques" or "politicians"

its being capable of guaranteeing a minimum of justice and common utility. See for this Peter Graf Kielmansegg, *Volkssouveränität, Eine Untersuchung der Bedingungen demokratischer Legitimität* (Stuttgart: Ernst Klett Verlag, 1977), 38ff.

39. *Discorsi sopra la prima Deca di Tito Livio*, 1.2-10.

because they advocated a strictly political solution for the problem of religious diversity. Their ideas are famously summarized in the French king's chancellor Michel de l'Hôpital's assertion that the important thing is not which one is the true religion, but how people can live together in peace.⁴⁰

In his enormously learned and voluminous work *Six Livres sur la République* (1576) Bodin developed his doctrine of sovereignty, which for him was of the essence of the state. Far from advocating absolute power, however, this doctrine follows a specifically political logic. It is the logic of a *modus vivendi* grounded on assuring "public goods," as distinguished from private ones, which aims at creating the political conditions of civil coexistence and cooperation in a world characterized by conflict and disagreement on matters of fundamental existential relevance.

Bodin's idea of a *modus vivendi* rests upon the distinction between (1) values which are, in an existential and absolute sense, higher and (2) values which, though being of lesser moral and religious dignity, are more fundamental *politically*.⁴¹ This distinction marks, I think, the *début* of modern public reason. It is significant that the political philosopher who in our days has initiated the revival of the concept of "public reason," John Rawls, precisely draws, without explicitly referring to Bodin, upon this distinction.⁴²

This distinction actually includes a nuclear *political ethic* which is an ethic of responsibility: the readiness to renounce political implementation of what one considers the higher values in favor of what is *politically* more fundamental because it is supported by general interest and consensus. It establishes the priority of the politically indispensable over what, from a moral and religious point of view, is higher. This distinction was necessary to reestablish, in a way, the original Augustinian and Galesian dualism—and parallelism—between the temporal, coercive power of the state and the spiritual authority of the Church, which, mainly because of the canonical doctrine of papal *plenitudo potestatis*, had been abandoned during medieval times.

40. About the role of French lawyers in 16th century civil war see Roman Schnur, *Die französischen Juristen im konfessionellen Bürgerkrieg des 16. Jahrhunderts. Ein Beitrag zur Entstehungsgeschichte des modernen Staates* (Berlin: Duncker & Humblot, 1962). See also Matteucci, *Organizzazione del potere e libertà*, 37 ff.; and Joseph Lecler, *Histoire de la tolérance au siècle de la Réforme* (1955, Paris: Albin Michel 1994), 479 ff.

41. For understanding the importance of Bodin in this respect I am much indebted to Martin Kriele, *Einführung in die Staatslehre. Die geschichtlichen Legitimitätsgrundlagen des demokratischen Verfassungsstaates*, 4th ed. (Opladen: Westdeutscher Verlag, 1990), 50-52.

42. See e. g., John Rawls, "The Idea of Public Reason Revisited," § 6.3, in *The Law of Peoples*, with "The Idea of Public Reason Revisited" (Cambridge, Mass.: Harvard University Press, 1999), 173.

Bodin's main idea was to create an ethos of pacification, an ethos of peace which is, or at least aims, to secure the stability of public goods and institutions. In Bodin's eyes, the indispensable guarantee for this was the sovereignty of state power. Similarly to Hobbes, for Bodin the essential task of the public reason of the sovereign is to maintain peaceful coexistence and cooperation between citizens. Of course, this ethos of social peace is essentially linked to the rise of the modern territorial state.

It is, to put it more precisely, a political ethos which is focused on the question of how to establish, in a society lacking consensus about highest values including about what is good and just, a basis for peaceful coexistence and cooperation, as well as institutions to which all citizens can adhere despite their disagreement on fundamental matters of human fulfillment, the sense of life, the good and even on matters of basic justice. This was the inner logic not only of Bodin's ethos of peace, but also of subsequent liberal constitutionalism.⁴³

E. The Ethos of Liberty, Contractarianism and Liberal Constitutionalism

Bodin's theory was one sided, seeing the solution in undivided state sovereignty—not to speak of Hobbes's contradictory intent to base absolute sovereignty on extreme individualism.⁴⁴ The main defect of Bodin's view—and generally all views stressing only the need of an unquestioned sovereign power to maintain peace and secure progress—was its lack of institutional guarantees to limit state power and to put it effectively into the service of the common good, understood as including the good of individuals, and not only of the good of the whole of society, understood as the “public sector,” which actually turned out to be the good of the maintenance of the sovereign's power. In front of the rise of state absolutism, justifying itself by using the traditional formula of Roman public law transmitted by medieval canon law, the ethos of pacification by sovereign power had to be complemented by an ethos of civil liberty, security and political autonomy of the individual.

43. England is a special case because here, as in some other cases, not only the formation of modern state power goes back to the 12th century (Henry II), but its successive constitutionalist challenge has accompanied it since then continuously, at least since the Magna Charta of 1215 and the 14th century principles of *rex in parlamento* and *rex infra regem* (Bracton), as well as through the development of common law and an independent judiciary. This is another reason why it is correct to say that modern constitutionalism has medieval roots (this, of course, also applies to medieval Aragon, the constitutionalism of which, however, did not survive and develop the wide and decisive influence of English constitutionalism).

44. See my *La filosofia politica di Thomas Hobbes. Coerenza e contraddizioni di un paradigma* (Roma: Armando, 1997).

Liberal constitutionalism, thus, essentially includes an ethos of liberty which comes to complement the ethos of peace. Together they form a specific kind of public reason. Liberal constitutionalism presupposes the modern sovereign state, the facts of society and government.⁴⁵ Constitutionalism in the liberal tradition and, thus, liberal democracy is not anarchic, but only wants to subordinate power to the rule of law and thereby secure the primacy of the citizen as an individual person that pursues her own interests. Liberalism is hostile to undeserved privileges and believes in the creative power of freedom of individual citizens pursuing their legitimate interests; it is skeptical towards bureaucracies, “big government” and centralized planning. Liberalism generally holds that citizens know their own interest better than state officials do, although these interests are not simply the interests of “individuality,” but also those of social units, first of all those which naturally define human being’s social dimension.

The great achievements of modern constitutionalism have been to subordinate absolute power to legal restrictions and controls; to institutionalize certain natural rights and personal liberty, securing them as positive law; and to develop an independent judiciary. Theorists of modern constitutionalism based it on the idea that society and government were to be thought of as the product of a social contract. Modern contractarianism was an ingenious idea, understandable against the background of absolutism. Contractarianism opposed this with the radical claim that government was to promote not the interests of the public sphere—the state and their rulers—but rather those of individual citizens.

Contractarianism is commonly held to be the opposite of the Aristotelian idea that life in society and political existence are natural to man. Yet, this seems to me to be exaggerated. All contractarian theories are in fact an explanation of man’s social nature because all these theories show the necessity for man of an ordered life in society and of government. Moreover, they all try to make out the precise reasons why it is intrinsically reasonable and thus natural for man to enter into a state of society and government. Modern social contract theories, thus, can be understood as a *determinate kind of argument* in favor of the naturally social character of man.⁴⁶ Yet, this argument possesses a problematic feature: it implies the idea that society is essentially a means to realizing man’s individuality. I do not want to reject this

45. This is one of the major points made by Stephen Holmes in his *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago and London: University of Chicago Press, 1995), especially chapter 4.

46. I have argued for this in my “Lo Stato costituzionale democratico e il bene comune,” in *Ripensare lo spazio politico: quale aristocrazia?*, edited by E. Morandi and R. Panattoni (*Con-tratto—Rivista di filosofia tomista e contemporanea* VI [1997]) (Padova: Il Poligrafo, 1998), 57-122.

idea from the outset. It seems to me to express licitly the anti-absolutist intention of this thought mentioned above. But this idea is one-sided and in an important way it is wrong because it erroneously seems to imply that “society” is a product of a contract between originally non-social individuals. This cannot be true because in order to stipulate a contract the essentials of society must already exist, although—as both Hobbes and Locke in different ways describe—it may exist in a depraved, conflictive and unsatisfactory way.

Provided we do not want to espouse the Hobbesian view of the creation of state authority by auto-submission under a sovereign absolute power, we must reject a basic assumption of social contract theories: we must reject the strange idea that there can be any “natural rights” independently from man’s existing as a social being.⁴⁷ This means to reject equally the assumption, implied in classical contractarianism, that before a contract is stipulated there only exist the individuals who stipulate it and that what a social contract refers to is exclusively the interests of these pre-social individuals. As I will try to show, nowhere has this basic assumption become clearer than in John Rawls’s neo-contractualist conception of an original position. By rejecting this, we need not abandon the truth of contractarian individualism which under the conditions of political modernity, its specific problems and needs, helpfully comes in to compensate the one-sidedness of Aristotelian—and Neo-Aristotelian—communitarianism.

The rejection of the idea that there are “natural rights” independent of, and previous to, man’s existence as a social being implies that we also reject the assumption, implicit in contemporary contractarianism, that before a contract is stipulated there are only individuals who stipulate it, and that the social contract properly refers exclusively to the interests and preferences of these pre-social individuals. This is exactly the basic assumption of Rawls’s theory

47. The idea that not only “natural rights” but “rights” altogether are previous to “society”—“society” understood in the basic sense of coexistence of individuals which relate to each other in different forms of cooperation, communication, exchange, affection etc.—is obviously absurd because the very notion of “having a right” implies to have a claim towards *someone else*. Natural rights are not simply natural tendencies as Hobbes claimed for the natural right to use all means for self-preservation (which he simply derived from the *natural compulsion* towards self-preservation and the corresponding dominant passion, the fear of violent death). This is why I think that any “right” (*ius, iustum*) is intrinsically also a subjective right, that is, a claim towards others. The concept of subjective rights is not a modern invention as famously argued by Michel Villey, for example, in his *La formation de la pensée juridique moderne* (Paris : Éditions Montchrétien, 1975), 215-262, and his disciple Michel Bastit, *Naissance de la loi moderne: La pensée de la loi de saint Thomas à Suarez* (Paris : Presses Universitaires de France, 1990). Against Villey’s view see Brian Tierney, *The Idea of Natural Rights*. I am much indebted to Tierney for a better understanding of the medieval roots of the notion of subjective rights.

of justice; see especially the design of his “original position.” Yet, a social contract cannot *create* society; it can only express a determinate and qualified way of existing *in* society. Most social contract theories in the past have acknowledged this. A social contract, mostly in the liberal understanding of its Lockean version, legitimates political power by establishing—and this is the truth of contractarianism—the legally secured priority of the individual over the collective, of the private (one might say) over the public.

Once we have abandoned the mistaken idea that society and the state are entirely to be understood as means of promoting individual interests and preferences, we can reconcile Aristotle with the central insight of modern contractarianism. Contractarianism basically expresses the idea that any form of government which does not promote the true interest of individual persons but, conversely, puts individual persons into the service of the political community, is illegitimate.⁴⁸ This, however, does not signify that society and its political organization is simply and exclusively a means to promote the interests and preferences of *individual citizens*. “Society” is a reality which naturally coexists with the individual human person, and a person’s interests are also defined respecting his or her existence as an individual embedded in society. In this respect we need to return to Aristotle, who teaches us what society is, and therefore also what it means for a person to be naturally a social being.

Yet, modern contractarianism and 19th century liberalism were not really as individualistic as they theoretically could have been. In reality it was very clear both in theory (excepting the special case of Rousseau) and in practice that society was not something created by man simply to promote the interests of the individual. It is easy to show this. On the level of theory, Hobbes’s description of the state of nature is in reality a description of a social state, although of society in conflict and war. Locke’s state of nature is social in the sense that man lives in natural communities and by no means in an isolated way; the state of war, then, is the degeneration of the natural social bonds, rooted in natural law, because of lack of independent judges able to settle conflicts.⁴⁹ Locke’s “life,” “liberty” and “property,” which government is entrusted to secure, are not simply values of individuals, but also of social

48. It is crucial to understand the correct historical antonym of contractarianism; see for this the valuable remarks on “antonym substitution” in Stephen Holmes, *The Anatomy of Antiliberalism* (Cambridge: Harvard University Press, 1993), 253 ff.

49. That Locke’s state of nature is not asocial is argued also by John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the “Two Treatises of Government”* (Cambridge: Cambridge University Press, 1969), 103 ff. It is most important not to forget that Locke’s argument is mainly directed against Sir Robert Filmer’s patriarchal conception of the state.

unities; they presuppose the family and a social order in which land owners and working people dependent on them share—until industrialization—common interests. Similar things can be said of Kant and, of course, of previous social contract theorists of the German enlightenment, and even more clearly of the early modern social theorist Johannes Althusius.⁵⁰

The same applies to political documents of early constitutionalism both in the American colonies and in France: for example, in the Virginia Bill of Rights or in the French Declaration of the Rights of Men and Citizens from 1789, constitutions and governments are not understood as creating society (or the “nation”), but as securing rights that are inherent to man as an already social being. The concept of a society as protecting individual rights but pursuing also a “common benefit” is presupposed, and in no way do these documents promote the kind of mistaken individualism which is inherent in the contractarian idea that society is created by a social contract just to promote the interests and preferences of individuals.⁵¹ Also for 19th century liberals generally there were some unquestioned social presuppositions for the legitimate exercise of individual freedom. A famous example is John Stuart Mill who, though advocating divorce, declares it much more difficult and problematic for spouses with children the existence of which, according to Mill, decisively restrict their parents’ autonomy.⁵²

Far from being anarchical, classical liberalism was embedded in the evidences of social reality, like the values of marriage and the family, the importance of education, cultural values, and the value of human life. It was exactly the enlightenment’s codification of civil and penal law which extended at the end of the 18th and at the beginning of the 19th century the protection of human life back to the moment of conception. So, classical liberalism conceived society as promoting the interests not only of individual persons but also of natural, pre-political, basic social unities. It is only a more recent phenomenon that—as a consequence of a pluralism and a new kind of solipsistic, sometimes even egomaniac preference-individualism which puts into question the very bases of society—principles of political liberalism are applied to the non-political presuppositions of society. This contributes to the

50. “Rediscovered” by Otto von Gierke at the end of the 19th century; see his *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorie: Zugleich ein Beitrag zur Geschichte der Rechtssystematik*, 2d ed. (Breslau, 1902).

51. See, for example, section 3 of the *Virginia Bill of Rights*: “That government is or ought to be instituted for the common benefit, protection and security of the people, nation or community.” “People,” “nation,” “community” are, thus, thought of as *preceding* the institution of government.

52. *On Liberty*, ch. 5 (London: J. M. Dent & Sons, 1972), 158 f.

corruption of the very social basis of liberal constitutionalism itself and its public philosophy.

Historically, thus, liberal constitutionalism and its ethos of freedom presupposed a certain consensus about the basics of a human society. Though liberal constitutionalism had yet to be complemented by the ethos of *equality* of basic liberties and opportunities through democratization, liberal constitutionalism was in practice never an ideology of simple individualistic self-realization. Individualism was, in its historical context, a valuable idea directed against the idea of a state whose power was not under control, and that not only considered citizens as its property but also purported to paternalistically know their interests and to provide—in most cases, ineffectively—for their felicity.

II. THE ETHOS OF CONSTITUTIONAL DEMOCRACY AND RAWLS'S THEORY OF PUBLIC REASON

A. Rawls's Idea of "Political Liberalism" and its Mistaken Premise: An Inadequate Concept of "Human Society"

As I have argued in the preceding section, the political ethos of modernity is an ethos of peaceful coexistence, of liberty, and of justice in the sense of equality of liberty. It is essential for this kind of political ethos and for a public reason shaped by it that, first, questions and doctrines about the realization of the highest moral values, such as the attainment of happiness, religious truth and eternal salvation, are excluded from the realm of the political, so that their conflictive potential is neutralized.

Secondly, it is part of this ethos that it contains (1) a moral obligation of citizens to accept the outcomes of the legitimate political process even where they contradict their wishes, personal interests or even their convictions, not about the good in the comprehensive and higher sense, but also about those matters which are included in the political agenda, and (2) the disposition to reverse such decisions only and exclusively by the peaceful and legal means provided by the constitution.

It is not, however, a part of this ethos—but rather contradicts it—to exclude, on principle, from public reason basic questions *about the nature of society* and, therefore, on what *naturally* makes human persons to be social beings; these are not genuinely "metaphysical" but empirical questions. At least *some* basic affirmations about human beings and the nature of human society necessarily do not interfere with the logic of public justification and public reason; they do not, as comprehensive doctrines may, compete with

political conceptions of justice. They express what *naturally* forms the basic structure of society and, therefore, is at the root of the phenomenon of the political. Consequently, a priori there can be no valid public reason why corresponding values should not be politically privileged or publicly endorsed. Such are the value of human life in every stage of its development, the dignity of the person, the reproductive marital union of male and female and the family rooted in it, and also basic local communities which spring from the natural need of division of labor and communication. They are natural in the sense that the very possibility of political society depends on them, and any sound political conception of justice must include and serve them.

To put what has been outlined so far in a schematic order, the political ethos of modernity is shaped by the following two basic features, the first of which, however, has (albeit limited) *political* priority over the second:

- (1) An ethos of peaceful coexistence, liberty and justice, which includes
 - (a) the acknowledgment of a distinction between what is politically fundamental and what is morally (and religiously) highest, and the acknowledgment of the priority of the former over the latter;
 - (b) the willingness of citizens to respect and accept, within certain limits, the outcome of the constitutional political and legal decision making procedures, even when these outcomes do not fully correspond to or, in certain limits, contradict their own convictions, not only on what is of highest value, but also on what is politically fundamental (this is a certain priority of positive law); and
 - (c) a fundamental engagement for equality, at least in the sense of the equality of basic liberties, which is the idea of reciprocity.
- (2) The conviction that politics and therefore any publicly endorsed conception of justice and public reason are in the service of *some* basic goods which are prior to politics and define its scope. These include
 - (a) basic liberties and rights of the individual;
 - (b) respect for the basic and naturally given characteristics of human society—and, therefore, the naturally social character of human existence—and a thereby defined political common good, in the service of which every political organization of society and public reason are to be put; which is, as we will see, tantamount to respect for natural law, *as far as it is politically relevant*.

Now, the problem of most forms of contemporary theories of liberalism⁵³ and especially of John Rawls's "Political liberalism" is to be found on level

53. There are important exceptions, like Joseph Raz's *The Morality of Freedom* (Oxford: Oxford University Press, 1986) and in a certain way also anti-neutralist positions like William A. Galston's *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge: Cambridge University Press, 1991).

(2b). Rawls's theory lacks an adequate concept of society and the human person *as a naturally social being*. His concept of "free and equal citizens" is already a result of political constructivism which makes abstraction from what persons naturally are as social beings and, therefore, also as citizens.

Already in his *A Theory of Justice*, Rawls defines society as a "more or less self-sufficient association of persons" and then as a "cooperative venture for mutual advantage," of course, "of persons."⁵⁴ That society is a cooperative venture for mutual advantage over time is certainly true and intuitively acceptable; but what is certainly not true is that "society" can be described as simply a cooperative venture of *individual citizens*. Politics does not refer only to "individual citizens" as "free and equal" but also to citizens as naturally social beings.⁵⁵ Politics refers moreover to what "citizens" also are: parents, family members, children (even unborn), property owners, neighbors, partners in business and other kinds of exchange and cooperation corresponding to the elementary fact of division of labor. Politics also refers, finally, to the social units in which this social dimension of human persons *naturally* unfolds (although they may be natural and elementary in different degrees). Thus, by defining "society" in his way, Rawls illegitimately makes abstraction from the reality of society as it is—to adopt a contractarian terminology—in "the state of nature." He only considers society as political and, thus, as a result of political constructivism. This is at odds with classical liberal methodology based on contract theory which always aimed at securing by political structures the *pre-political*, that is, natural social essentials. Although methodological individualism is typical for contractarianism, the interests of these individuals were always thought to be shaped by what in the "state of nature" was essential for persons as social beings.

It is true that sometimes Rawls calls a "well-ordered society" a "union of social unions"⁵⁶ and he acknowledges "the social nature" of man, because we "need one another as partners" in our life.⁵⁷ Rawls even accepts the family as a, if not the, basic unit of society, mentioning it together with "friendships, and other groups" as "social unions."⁵⁸ In his later essay, "The Idea of Public Reason Revisited," he finally equates the family to all other forms of voluntary associations, "churches or universities, professional or scientific

54. *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 4.

55. A similar defect seems to me to characterize Ronald Dworkin's fundamental emphasis on "equal respect and concern" which also only refers to individual citizens; see for example Dworkin's *Taking Rights Seriously* (London: Duckworth, 1978), 272 ff.

56. For example, *Theory*, 525.

57. *Theory*, 522f.

58. *Theory*, 525.

associations, business firms or labor unions.”⁵⁹ This, however, seems to be quite unreasonable. It contradicts basic empirical facts about the reproductive nature of the marital union and about the family. The family is not voluntary: nobody has chosen his parents or his family, nor has he chosen to be born. And, inversely, parents do not choose their offspring. The family clearly is not a voluntary association; and marriage, though voluntary, is not associative.

The marital union, though being voluntary, is the origin of society not only causally and temporarily, but in a natural way and it shapes what human society basically is: an ordered multitude rooted in the reproductive union of male and female.⁶⁰ Thus, marital union, its extension through procreation to becoming a family, its goals and goods, created and transmitted by it form the naturally basic structure of society. To refer, therefore, to “society” as simply a cooperative venture of “free and equal” individual citizens is, so it seems to me, incomplete and reductive in a way that makes it misleading and perverts the very concept of the “political” which, also in Rawls’s thought, is shaped by reference to the “social.”

In a significant section⁶¹ in which Rawls argues that society is “neither a community nor an association,” it becomes clear that his concept of society is clearly reductive. This is so, not because Rawls denies that societies have “final ends and aims,” as associations typically have, or that societies have a shared comprehensive conception of the good, which is typical for communities.⁶² Rawls is right in emphasizing that we do not join society “at the age of reason, as we might join an association,” but are “born into society where we will lead a complete life.”⁶³ Nothing is truer than that. The problem is that when talking in this context about “society,” Rawls means the “well-ordered democratic society,”⁶⁴ that is to say, he is speaking of society *already shaped by a political conception of justice*: the society of citizens or political society.

Now, when we are born we are certainly born into political society, becoming thus citizens of a determinate state. However, this is neither our first nor our entire social identity; first we are born as children of determinate parents and as members of a specific family, a social reality which logically precedes one’s becoming a citizen. We also belong to determinate local

59. “The Idea of Public Reason Revisited,” 5.2, in Rawls, *The Law of Peoples*, 158.

60. This cannot be said of same-sex unions: they have no relation to the natural constitution of society, because they are not reproductive. If they naturally were reproductive, things would be different. Yet, this would also be a different world and not the one we are living in.

61. *Political Liberalism*, Lecture 1, § 7, 40-43.

62. *Ibid.*, 41f.

63. *Ibid.*, 41.

64. *Ibid.*, 40.

communities which are all prior to political society and *naturally* exist with a proper aim and a specific nature before civil or political society is well-ordered by a political conception of justice. The latter must take into account *these* pre-political social realities. It cannot reconstruct them as parts of the basic structure of society by a political conception of justice elaborated on the idea that the only pre-existing reality to such a conception is “free and equal” individual citizens. Any well-ordered political society is essentially subsidiary to, and must be respectful towards, *what naturally constitutes its citizens as social beings*.

Therefore, in my view the basic flaw of Rawls’s original position is not the “veil of ignorance.” The problem is not the basic assumption that in order to shape or adopt a principle of justice the participants must abstract from their own identity. The problem is rather that they are made out to represent exclusively individual citizens as “free and equal” and their interests. In effect, they are allowed to represent themselves only as individuals, and not as representatives of what, in such an original position, should be represented *as well*: the basic natural social unions to which belong above and before all the marital union, and the family. The reason for this is that the principles of justice to be decided on in the original position refer to a real social world—although nobody knows his own place in it—and not to a fictitious universe, or a social universe yet to be created by individual persons and shaped by the logic of something like the original position.

This criticism is not implicitly to deny that in an ontological way we exist only as individual persons, and that *as citizens*—on the level of politically organized society—we have to be thought of and recognized as free and equal (this is the aim of classical contractarianism); nor do I mean to reject, on principle, Rawls’s political concept of the person.⁶⁵ Yet, a publicly endorsed political conception of justice must refer to, and politics generally is called to deal with, human beings as they are in reality; that is, as fundamentally social beings which naturally are related to each other in very determined forms which are part of the nature of human society. And this means that any reasonable political conception of justice and of public reason must consider that the identity of citizens is not only shaped by their political condition as “free and equal,” but also by those facts through which they naturally become social beings—and such, before all, is the reproductive marital union of male and female, and with it the family springing from and founded on this union.

65. *Political Liberalism*, 29 ff. See also “Justice as Fairness: Political not Metaphysical” (1985), in Rawls, *Collected Papers*, ed. Samuel Freeman, (Cambridge, Mass.: Harvard University Press 1999), 388-414.

They, therefore, are presuppositions and integral parts of any reasonable political conception of justice.⁶⁶

What I have said has nothing to do with advocating a “comprehensive” doctrine of the good or of moral values. What I am talking about is simply a fundamental part of any form of reasonableness which starts with the basic facts of our existence as real human beings in the real world we are living in. To adduce against this the fact of reasonable pluralism based on the “burdens of judgment” would not make sense because it is simply unreasonable—a lack of sound judgment—to ignore that human society is originated in the reproductive union of two persons of different sex and that as citizens we all naturally have our origin in such a union. Ignorance of this kind cannot be explained by the “burdens of judgment” nor can it be explained as belonging to *reasonable* pluralism. So, some basic truths—very few, though each important—concerning the nature of society and human persons as naturally social beings cannot be excluded from a publicly endorsed political conception of justice. They certainly must be endorsed and defended by public reason. The fact that at a given moment some of these truths may be controversial does not mean that they cannot be publicly justified or should be excluded from public reason.

To illustrate my point against Rawls let me briefly go back to Bodin. In some central aspects Bodin’s political thinking explicitly claims to be anti-Aristotelian. Unlike Aristotle, Bodin held that the most fundamental political good is not the perfection of moral virtue or happiness. Yet, in another most important sense, Bodin does not deviate from central suppositions of the Aristotelian conception of the polis: like Aristotle Bodin holds that the state and generally the domain of the public presuppose, and are in service of, social unions and realities as they exist prior to the political.

Therefore, it is significant that Bodin does not define political society as a multitude of *citizens*. The public power of the “republic,” he writes, is “power of government, based on law, and sovereign, *over a multitude of families and over what is common to them.*”⁶⁷ Bodin’s sovereign power is not absolute; it is limited, though not by political institutions restricting the sovereign’s power, but by natural law, by the fundamental law of (in France) the *Lex*

66. Surprisingly, in *Theory*, 137, Rawls says about the parties in the original position: “It is taken for granted, however, that they know the general facts about human society.” This is an important affirmation which does not, however, seem to prevent Rawls from exclusively considering as “facts about human society” what concerns citizens as free and equal *individuals*. In Rawls’s theory, the pre-political values to be recognized by the parties in the original position are the “primary goods” which exclusively are goods of persons thought of as individual citizens.

67. Jean Bodin, *Six livres de la République*, 1.1.

salica and, most importantly, by the social unit of the family and property, realities which are prior to, as we would say today, the “basic structure” of political society, and which shape the very nature and scope of a political conception of justice publicly endorsed.⁶⁸

Rawls clearly departs not only from Bodin and the anti-absolutist features of his thought, but also from the liberal tradition as represented, for example, by Locke. For Locke, any social contract and the creation of community which entrusts its interests to a parliamentary government are related to a previous state of nature where the “Law of Nature” obtains and regulates human conduct. As was already mentioned before, Locke’s state of nature is a state of perfect freedom, not simply of individuals, but of the reproductive unity of the family, of land owners and workers (take only chapter V about “Property” and chapter VI on “Paternal Power” of the *Second Treatise*). Because—and, as it seems to me, perhaps *only* because—Rawls works with a deficient concept of society exclusively focused on the democratic and well-ordered, that is *political* society, his entire theory not only of justice but also of political liberalism stands on one leg only and sees reality with only one eye.

Once we have acknowledged that human society is not just an association of individual persons, representing themselves, and only themselves, but that prior to the phenomenon of the political and the public there are certain natural social facts to which any reasonable conception of justice must refer and from which it also naturally receives its basic content, we will automatically find that some basic assumptions of Rawls’s political liberalism—in my view correct and valuable in themselves—will yield rather different results. This applies to Rawls’s “liberal principle of legitimacy”, his “criterion of reciprocity” and his concept of “public reason,” as well as to their mutual relation. It also is relevant for the very nature of Rawls’s concept of an “overlapping consensus” and, most importantly, for the analysis of the relations between a political conception of justice and comprehensive doctrines.

68. It is typical that the same analytical method—to dissolve, in thought, society in its most basic components—leads Aristotle and Hobbes to a different result: Aristotle arrives at the basic unit of society as the conjugal union of male and female; for Hobbes it is the individual. Both views have their merits. The Aristotelian view is certainly closer to truth, but it is not complete either: it is excessively communitarian. Hobbes’s individualism is not to be rejected as such, but because it is a one-sided individualism. Although it rightly declares the moral and political priority of the individual person, it wrongly excludes from its horizon that these persons are also naturally constituted as social beings (which is empirically erroneous).

B. Rawls's *Principle of Liberal Legitimacy and the Criterion of Reciprocity*

Let me, then, turn to Rawls's liberal principle of legitimacy. This principle says that "our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason."⁶⁹ This formulation has caused discussions and provoked criticism, mainly from defenders of natural law.

John Finnis has called this principle "bafflingly ambiguous": when one says of an assertion that all citizens may be "reasonably expected to endorse it," is one "predicting the behavior of people or assessing the rational strength of the thesis?"⁷⁰ Thus, if I have correctly understood Finnis, he thinks that the ambiguity is whether constitutional essentials and corresponding contents of public reason are legitimate (1) insofar as they in effect *will* or are at least very likely to be accepted by all reasonable citizens, or (2) insofar they *should* be accepted by all reasonable citizens, that is, they are legitimate because those citizens who refuse to endorse them give proof of being unreasonable.

I have some difficulties in understanding these doubts because I do not see the alleged ambiguity. If the liberal principle of legitimacy is read in its wider and specific *Rawlsian* context, its meaning seems to me rather clear. In my opinion, the problem of this principle lies elsewhere. In the following I will first explain why I think that the ambiguity Finnis reproaches in Rawls does not, and cannot, exist. I then will try to make out what in Rawls's liberal principle of legitimacy such "reasonable expectation" precisely means. By this procedure we will detect where, in my view, the real crux of Rawls's liberal principle of legitimacy lies: in his (politically underdetermined) concept of "reciprocity" and its unclear relation to the concept of public reason. Notice that in some respects my criticism of Rawls comes to similar results as Finnis's, yet with significant differences regarding the evaluation of the idea of political liberalism and some practical implications of political ethics.

Let me start with the second case of what—according to Finnis—is a possible reading of the phrase "may reasonably be expected" (the meaning of "assessing the rational strength of the thesis"). Provided we assume it is this that Rawls had in mind, then the question obviously would only be postponed. To make the principle of legitimacy workable we would need additional standards of reasonableness, and so the principle of legitimacy would not

69. *Political Liberalism*, 137; see also 217.

70. J. Finnis, "Abortion, Natural Law, and Public Reason," in *Natural Law and Public Reason*, ed. Robert P. George and Christopher Wolfe (Washington, D.C.: Georgetown University Press, 2000), 75-105, 79.

settle any question. We would have to be able to distinguish reasonable from unreasonable substantive claims. Now, Finnis and others argue that it is most proper to natural law to provide exactly such standards of reasonableness for public reason. Therefore, so Finnis's argument runs, provided this is the meaning of Rawls's formulation, then natural law reasons *are* public reasons.

It seems to me obvious that Rawls could never accept such a characterization of natural law reasons as public reasons—and that the possibility of such an interpretation of the meaning of Rawls's principle must therefore be dismissed—because, according to him, it would deprive the principle of legitimacy of one of its central features which is that the principle reflects, and works under, the condition of reasonable pluralism. “Natural law,” however, with its substantial claims about the good is, so Rawls would certainly argue, itself exposed to the “burdens of judgment”; it is not, in Rawls's logic, capable of creating consensus and thus being part of public reason, but rather itself controversial and a cause of civil disagreement. Therefore, to correctly understand Rawls's liberal principle of legitimacy in the context of his “political liberalism,” the second interpretation must be discarded as a possible reading of Rawls. Rawls's liberal principle of legitimacy includes a *specific* kind of reasonableness which is not dependent on any other kind of reasons except the one specifically proper to the political domain and to public reason. The point of this principle is that it purports to be part of a freestanding *moral* view of the political, as it is developed in *Political Liberalism*. This view, Rawls says, is the focus of an overlapping consensus of those endorsing it as a publicly valid political conception of justice embodied in the basic structure of society.

The first interpretation, however, that the “reasonable expectation” predicts the behavior of (reasonable) citizens and, therefore, legitimates all those political positions which in effect *will* or are at least very likely to be accepted by all reasonable citizens, seems at first sight to be a better candidate for a right understanding of Rawls's principle. Yet, if this meant to equate liberal legitimacy to the simple acceptability or foreseen acceptance of a position by a vast majority of citizens, then the liberal principle of legitimacy would simply coincide with the majority principle. But this is certainly not the way Rawls understands it. As I mentioned, Rawls's “political liberalism” is not a strategic or pragmatic conception, but purports to be a—“freestanding”—*moral* view. Although the majority principle has certainly a moral content, for Rawls foreseeing a law or a policy to be endorsed by majority is not yet sufficient to be a moral principle of public legitimation of the endorsed law or policy.

Therefore, for a moral conception of political justice to be morally legitimate, being accepted by a majority is not sufficient; according to Rawls,

such a conception must be accepted additionally *for the right reasons*. These reasons must express the respect for other citizens as free and equal persons. So, the likelihood of being accepted could mean that legitimate political positions are those which in effect *will* or are very likely to be accepted by *reasonable* people because they meet with an essential requirement of the kind of agreement and consensus which characterizes what Rawls calls the “right reasons” for endorsing a political conception of justice and statutes and laws enacted on its grounds: they are *fair*, that is, *they satisfy the criterion of reciprocity* and this is why they may be *reasonably* expected to be accepted by virtually all *reasonable* citizens. This again means (for Rawls): by always leaving people to make their own choices, where there is a major disagreement such political positions do not enforce substantial values at the cost of other people’s autonomy. Now, exactly this is what Rawls’s concept of public reasons implies. It has been rightly criticized by natural law theorists (including Finnis), in the sense that “it almost always has the effect of making the liberal position the winner in morally charged political controversies.”⁷¹

I would argue, however, that if this critique is true—as I think it is—it is not because of Rawls’s liberal principle of legitimacy *as such*, nor because of the criterion of reciprocity *as such*. In my view, rather the first and main problem is Rawls’s already mentioned counterfactual and thus unreasonable disregard of the nature of pre-political human society and thus, of human persons not only as “free and equal” citizens but also in the dimension of what makes them naturally social beings. This is not without consequences for the specifically *political* sense of reciprocity. The second problem is how Rawls connects reciprocity with the idea of public reason (see next section).

Thus, provided we read Rawls’s liberal principle of legitimacy in its proper context and as a part of his conception of political liberalism, it seems to me to have a clear and rather unambiguous meaning. The meaning of the principle of legitimacy, in fact, depends upon what Rawls understands by “reasonable.” To grasp the exact Rawlsian meaning of this term is important for correctly—and effectively—focusing any criticism of Rawls’s liberal principle of legitimacy.

With the terms “reasonable” and “reasonableness,” Rawls refers to a characteristic of citizens which is specifically political and which he distinguishes from citizens’ “rationality.” Persons are to be called *rational* insofar as they pursue a conception of the good, seeking to employ the proper means to attain their personal goals. According to Rawls, however, one is *reasonable* when one owns a “particular form of moral sensibility that underlies the desire

71. Robert P. George and Christopher Wolfe (eds.), *Natural Law and Public Reason*, Introduction, 1 f.

to engage in fair cooperation as such, and to do so on terms that others as equals might reasonably be expected to endorse.”⁷² This kind of reasonableness, Rawls says, is adequately expressed in the idea of reciprocity.

The idea of reciprocity for Rawls is linked to his conception of a society as a “fair system of cooperation over time, from one generation to the next.”⁷³ People are reasonable in the sense of meeting the criterion of reciprocity “when, among equals say, they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do.”⁷⁴ So, “[t]he reasonable is an element of the idea of society as a system of fair cooperation and that its fair terms be reasonable for all to accept is part of its idea of reciprocity.”⁷⁵ The conceptions of the good, personal life-plans etc., which persons pursue as *rational* agents, however, are comprehensive views referring to personal goals and life plans which are often mutually in conflict. It is not rationality, but reasonableness which, as a political form of morality, seeks to find an overlapping consensus between them *so as to make possible society as a system of cooperation for mutual advantage over time. A reasonable comprehensive view, may it be true or not, is a view the adherents of which are disposed to peaceful political cooperation with adherents of other—with respect to their truth claims conflicting—comprehensive views.*⁷⁶

72. *Political Liberalism*, 51.

73. *Ibid.*, 15.

74. *Ibid.*, 49.

75. *Ibid.*, 49f.

76. In contrast to this, Rawls talks in *Political Liberalism*, 152f. of the “rationalist believer” (which, as Rawls remarks, corresponds to Joshua Cohen’s “rationalist fundamentalist” as described in his “Moral pluralism and political consensus,” in *The Idea of Democracy*, ed. David Copp, Jean Hampton and John E. Roemer [New York: Cambridge University Press, 1993], 270-91, 286). Such a “rationalist believer” (or “fundamentalist”) is a person who wants a determined doctrine of salvation to be politically endorsed, thinks that the need of it can be rationally proven and, thus, is not disposed to find a politically common ground of cooperation with those who do not share his religious doctrines or are nonbelievers altogether. As it seems to me, in his critique of Rawls, Robert George grossly misreads *Political Liberalism*, 152 f., thus misunderstanding the concept of “rationalist believer.” Rawls applies it to the very “uncommon view” of those religious fundamentalists (or fanatics) who think that certain questions are so fundamental that “the salvation of a whole people” depends on their being rightly settled; according to Rawls, the rationalist believer thinks that his comprehensive religious views about salvation “are open to and can be fully established by reason.” By claiming the latter, Rawls affirms, the “rationalist believer” is mistaken because he disregards the fact of reasonable pluralism. George takes the term “rationalist believer” out of this very specific and limited context, asserting that Rawls’s verdict generally applies to claims based on natural law and defended as both fundamental and open to rational and public justification. Unfortunately, large parts of George’s critique of Rawls are based on this over-interpretation of the concept of a “rationalist believer.” See especially Robert P. George, *In Defense of Natural Law* (Oxford:

Rawls emphasizes that “being reasonable is not an epistemological idea (though it has epistemological elements). Rather it is part of a political ideal of democratic citizenship that includes the idea of public reason,” because “the reasonable, in contrast with the rational, addresses the public world of others.”⁷⁷ In contrast to “truth,” reasonableness is essentially a political category referring to the virtue of civility, the capacity of cooperating on the basis of a shared political conception of justice despite the “practical impossibility of reaching reasonable and workable political agreement in judgment on the truth of comprehensive doctrines.”⁷⁸ Constitutional essentials and the public conception of justice must be shaped in a way which allows all peacefully to cooperate for mutual advantage in society as free and equal citizens. This is also the idea of the *political* priority of the right over the good which corresponds to the idea of the *political* priority of the reasonable over the rational—without opposing them to each other—and the *political* priority of the public over the private.

It seems to me that, with this, Rawls not only expresses the modern political ethos of constitutional democracy in its quintessential form, but also formulates a principle of reasonableness which seems to be nothing other than what we all understand to be the basis of any workable and just political order. Specifically, the criterion of reciprocity must be inherent in any conception of political justice capable of creating conditions of peaceful cooperation and equal liberty. Without accepting the criterion of reciprocity and its proper reasonableness neither a peaceful public order, nor constitutional democracy (*rule of law* with its procedural logic of neutrality and justice, equal basic liberties and democratic participation in government) would be possible. So, the idea underlying Rawls’s liberal principle of legitimacy is nothing else than the expression not simply of “liberalism,” but of the soul of constitutional democracy as it has developed through the last centuries of European and American history, and since then has been spreading all over the civilized world.

Yet, Rawls gives this idea a turn which is clearly hostile to “natural law” in the sense that it does not allow natural law reasons as such—that is, on the

Oxford University Press, 1999), Chapter 11: “Public Reason and Political Conflict: Abortion and Homosexuality,” especially 202 ff. (At page 202 George says: “If I understand accurately what Rawls means by “rationalist believers,” then I am something of one myself.” I think George both did not accurately understand what Rawls meant and—clearly and fortunately—is far from being a “rationalist believer” himself, because as a Catholic he certainly holds that essential features of his religious convictions cannot be “fully established by reason” but only be known by divine revelation and with the help of supernatural grace.)

77. *Political Liberalism*, 62.

78. *Ibid.*, 63.

basis of their claim of containing truth, open to everyone's understanding—to be public reasons. Before we are able to defend natural law as belonging to public reason, we therefore first have to detect those elements which in Rawls's theory create this hostility towards the public function of natural law, show them to be at odds with the liberal tradition of constitutional democracy, and so deconstruct them without, however, jeopardizing what is the truth in Rawls's position, that is, the ethos of liberal constitutional democracy.

The real problem, therefore, is how the principles of liberal constitutional democracy, namely the idea of reciprocity, in Rawls's theory of political liberalism work. This depends on how his conception of society bears upon them. Yet, this is exactly what Rawls does not really analyze. As we have seen, he simply presupposes, in the tradition of Hobbes, a concept of society composed by free and equal individuals and by nothing but individuals. The question, then, is how in Rawlsian political liberalism the criterion of reciprocity relates to public reason. Let me now turn to this important question.

C. *The Criterion of Reciprocity and Public Reason*

The Introduction to the 1996 paperback edition of *Political Liberalism* is revealing, in that it shows Rawls's argument to be circular and, in an important aspect, self-defeating. In this new Introduction, the "criterion of reciprocity" is defined as follows: "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." Rawls emphasizes that the liberal principle of legitimacy is *derived* from this understanding of reciprocity. This means that only what—on the level of the constitutional structure itself and of particular laws and statutes enacted in accordance with that structure—satisfies the criterion of reciprocity is in a liberal sense legitimately enforceable upon the whole of citizens.⁷⁹

Now the following question arises: does to "sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions" mean that—in order to meet with the criterion of reciprocity—we must expect others to be able to *accept* our reasons in the sense of *agreeing* with them?⁸⁰ In my view this is impossible;

79. Ibid., xlv. Later in his above quoted paper (on page 85)—in my view too late—and in a different context Finnis mentions Rawls's criterion of reciprocity and rightly calls it "the source of the liberal principle of legitimacy."

80. Notice that this question is different from the questions Finnis had asked. It does not refer to the meaning of the phrase "may reasonably be *expected*" (to being accepted or endorsed by other citizens). The problem I am dealing with here is not a possible ambiguity of the term

in Rawls's own logic such an expectation would be utterly unreasonable and contradict the very fact of reasonable pluralism and the existence of burdens of judgment. Reciprocity cannot and must not demand so much. Moreover, it would simply not work because then *any* disagreement would be a cause for abstaining from *any* legal enforcement in the sphere of that controversial issue. Yet, such a minimalist practice of legal enforcement has nothing to do with liberalism but rather resembles anarchism, or at least an extreme form of libertarianism.

Consequently, the criterion of reciprocity can only mean that the reasons by which we justify the exercise of political power and coercion on others must be reasons *of the kind* which is proper to public reason and must therefore, as such reasons, be acceptable for reasonable citizens, even if they do not agree with them. (In case someone does not accept this kind of reason, this, then, would mean that not the *reasons*, but this person, who does not accept them, is unreasonable.) This is exactly what Rawls says in his later "Idea of Public Reason Revisited," and it is a crucial point: Rawls tells us that public reason is "a view about *the kind of reasons* on which citizens are to rest their political cases in making their political justifications to one another when they support laws and policies that invoke the coercive powers of government concerning fundamental political questions."⁸¹

Now, this implies an important point about the logical status of the criterion of reciprocity: if we do not want simply to reduce "public reason" to the "criterion of reciprocity," the latter cannot be what defines the very content of public reason. Rather, the converse: what "reciprocity" means must be derived from the logic and content of public reason; that is, in Rawls's words, it must be derived from the "view about the kind of reasons on which citizens are to rest their political cases in making their political justifications to one another when they support laws and policies that invoke the coercive powers of government." To assert that this view and this "kind of reasons" are simply and only the criterion of reciprocity would be ridiculous. To assert it would render public reason a politically empty formula.

Hence, what *in a political context* "reciprocity" means, and how it works, cannot be understood independently from, and prior to, what "public reason"

"reasonable expectation," but the problem of the (political) meaning in Rawls's theory of political liberalism of the concept of *reciprocity* (and thus the conditions of reasonable acceptability of our reasons given for determinate policies or laws). Moreover, my question is not situated at the level of the liberal principle of legitimacy (which, as such, does not seem to me to be the problem) but on the level of the "criterion of reciprocity" which is the rationale of the liberal principle of legitimacy. In my view, the real problem is the way Rawls uses—and in my opinion politically misuses—the concept of "reciprocity."

81. "The Idea of Public Reason Revisited," 165f. (the emphasis is added).

is fundamentally about. The concept of public reason—or of public reasons generally—has a foundational function and gives to the criterion of reciprocity its specifically political meaning. Consequently, the idea of public reason and of what public reasons properly are must be defined independently from, and prior to, the criterion of reciprocity. Otherwise the content of public reason would simply be reduced to a vague and general idea of reciprocity without further qualification by a view about the *kind of reasons* which are proper to the public and political domain. Such a reduction of public reason to the simple idea of unqualified reciprocity would be politically unreasonable. It would mean to reduce public reason to something like the golden rule, and nothing more. Such a form of public reason wouldn't work because it would not allow enforcing anything if it happens to be in contrast to the preferences of some citizens.

“Reciprocity,” therefore, must be politically qualified. Of course, the idea of “reciprocity” *as such* is perfectly understandable independently of the idea of public reason. But this is not yet a *political* concept of reciprocity; it would be much too broad and underdetermined. Obviously, the same obtains for the liberal principle of legitimacy and the concept of “reasonableness”: as Rawls says, it is derived from the concept of reciprocity, and this is why the principle must be primarily defined in terms not of reciprocity as such, but of the idea of public reason.

So, in order to know what kind of reasons satisfy the criterion of reciprocity—and what, in a political sense, therefore is fully reasonable—we must previously determine what public reason and its basic contents are. Yet, Rawls does not do that. In some passages of his “The Idea of Public Reason Revisited” he instead does exactly the opposite: he affirms that the content of public reason simply is defined by the criterion of reciprocity.⁸² In the 1996 Introduction to *Political Liberalism* he affirms that his political liberalism is “a freestanding political conception having its own intrinsic (moral) political ideal expressed by the criterion of reciprocity.”⁸³ So, in effect this criterion has in Rawls's theory the function of a kind of joker or of a *Deus ex machina*. It is used in a politically unqualified and uncontrollable way, independent from a previously determined concept of public reason. The concept of public reason does not in Rawls's theory perform its properly foundational role; it becomes instead dependent on the simple idea of reciprocity which *as such* has no specific *political* content. Without being embedded in a concept of public reason and thus in a specifically *political* conceptual framework, it arbitrarily works as a leverage for the preferences of individuals conceived as

82. *Ibid.*, 136f., 141, 175.

83. *Political Liberalism*, xlvii.

“free and equal citizens.” It tends to reduce society to an aggregate of individuals who pursue their personal preferences, and public reason to a means of furthering such preferences, often at the expense of the political common good of society.⁸⁴ (A recent and actual case for this is the claim to equate in the name of liberal non-discrimination “same-sex marriages” to the naturally reproductive marital union of male and female, which, however, as a fundamental part of the political common good of society cannot be reasonably equated in public reason to the naturally non-reproductive private sexual preference of individual citizens).⁸⁵

Since “public reason” necessarily includes reference to certain elementary and politically relevant tasks which spring from the nature of human society and of persons as naturally social beings, the meaning of reciprocity must include not only considerations on the interest of individuals persons as free and equal, but also of the natural reproductive union of male and female, of the family and its educational task, as well as the interests of local communities—basic and quasi-natural structures of the division of labor (with which we perhaps can also count in, in some way, enterprises, but I do not want to go further into this). All this is basically relevant for shaping the meaning and content of public reason and, therefore, essentially belongs to political reasonableness.

Rawls explicitly rules out such a conception of public reason. For Rawls, public reason serves the individual citizen as “free and equal,” and this is the way his original position too is designed. Political reasonableness seems to be confined to its function of securing cooperation between “free and equal” human beings under the condition of not only religious, but also deep-rooted, radical moral pluralism, that is, *overall* disagreement about what is “good” for

84. This is why (as already mentioned before) it has mostly the effect of “making the liberal position the winner in morally charged political controversies” (Robert P. George and Christopher Wolfe (eds.), *Natural Law and Public Reason*, Introduction, 1 f.). Most interestingly and somewhat paradoxically, in his *Justice as Fairness: A Restatement*, ed. by Erin Kelly (Cambridge, Mass.: Harvard University Press, 2001), 90 f., Rawls defines public reason and the liberal principle of legitimacy without any reference to reciprocity! He instead says: “Citizens must be able, then, to present to one another *publicly acceptable reasons* for their political views in cases raising fundamental political questions” (emphasis added). This means, as Rawls asserts in the preceding paragraph, that political power should be exercised “in ways that all citizens can publicly endorse *in the light of their own reason*” (emphasis added). Rawls seems to have recognized that the criterion of reciprocity alone is too shallow a principle to define public reason and liberal legitimacy. He seems to have, at least intuitively, acknowledged that the definition of “public reason” is prior to the definition of (political) “reciprocity.”

85. With “naturally” I mean “by its own nature,” “essentially”; though heterosexual unions in some cases may not be reproductive, unlike homosexual relations they are still sexual relations of a reproductive *kind*.

human beings and for society. (Of course, such a description of pluralism is exaggerated; it could never realistically be defended as “reasonable” pluralism and work as a basis for juridical restrictions on public reason, although Rawls exactly underpins his theory with such an exaggerated and, at the end, morally self-defeating concept of pluralism.)

This, again, is why I think that the problem of the original position is not the “veil of ignorance.” The problem of Rawls’s original position is rather that the participants represent only individual “free and equal” citizens as well as the interests and preferences of those *as individual citizens*. In my view and to say it again, this is unreasonable. Even though a participant in the original position may not know, for example, his own sexual orientation, it would be unreasonable for him not to privilege in the framing of the principles of justice the heterosexual union. It would be unreasonable, because it is generally reasonable also for homosexual citizens to affirm that the marital union of male and female is the reproductive foundation of society and that they themselves owe their existences to such a union, and that, therefore, unlike homosexual partnerships, the marital union has a political relevance which same sex unions are entirely lacking. Failing to acknowledge this is failing to acknowledge the social function and, thus, the political relevance of sexuality.

To assert, therefore, any violation of “reciprocity” in this context would mean to contradict basic social, and socially relevant biological facts, which obtain in a Rawlsian original position. As with many other basic truths about the real world we are living in they cannot be reasonably hidden by the veil of ignorance.⁸⁶ After all, participants in the original position should not be ignorant to an extent which renders them *unreasonable*. The veil of ignorance should only serve to exclude personal partiality. It is of course true that nobody should be treated differently as a citizen or, say, as a member of a university simply because of his sexual orientation; but this does not mean that from a political and legal point of view heterosexual and homosexual life-unions should be treated equally, nor can it mean that a publicly endorsed political conception of justice should not express a clear and privileged interest in promoting and protecting the reproductive marital union of male and female and the family springing from it.⁸⁷

86. Let me quote again what Rawls says in *Theory*, 137, about the parties in the original position: “It is taken for granted, however, that they know the general facts about human society.”

87. In *Justice as Fairness*, 87, Rawls says that to represent citizens as “free and equal” in the original position they have to be situated “symmetrically,” respecting the “basic precept of formal equality” which, as he adds, corresponds to “Sidgwick’s principle of equity: *those similar in all relevant respects are to be treated similarly*” (emphasis added). Nothing truer than that! This is why it is difficult to understand why in a political conception of justice

To put it briefly: the political and legal conception of citizens as “free” and “equal” must be orientated and adjusted—and in some cases restricted—by substantial pre-political values which precede and necessarily shape any reasonable political conception of justice. Though these politically relevant pre-political values may under given circumstances be controversial, they cannot be excluded on principle from the domain of public reason, because this contradicts the very idea of public reason (provided we acknowledge the genuinely political meaning of this idea and do not make it unilaterally and exclusively dependent on an idea of reciprocity which remains politically unqualified).

Something analogous applies to the question of unborn life: all the participants in the original position know that at one time they were not-yet-born human beings. At that time they could not participate in the decision about the basic structure of society. Therefore, it would be, from the outset, fundamentally unjust, unfair and unreasonable not to represent in the original position also the interests of the unborn (as it would be unjust not to represent the interests of children). That is to say that the status of embryos and fetuses—like the status of living human beings of the species *homo sapiens* generally—has to be cleared *before* entering into the original position and presupposed; it cannot be a matter of deliberation in the very process of establishing principles of justice, or even afterwards; this would be unfair.⁸⁸

Although in his later writing on public reason Rawls conceded that even religious beliefs, as long as they are promoted on the grounds of public reasons, may be promoted in the public sphere, there is nevertheless a tendency in Rawls’s conception of public reason towards such concessions only insofar as they satisfy the criterion of reciprocity as *he* understands it, that is, referred exclusively to individual citizens conceived as “free and equal.” But this is wrong and, as we have seen, by no means genuinely *liberal*. Even if we concede that comprehensive doctrines and their components may not be legally enforced except where there are specifically public reasons for such an enforcement, these positions are not to be excluded from public reasons. They not only contain the essence of what politics is called to deal

heterosexual and homosexual unions should be treated equally.

88. This is not to disregard the right of women’s self-determination. It only means that this right cannot be respected by simultaneously disregarding the life of the unborn, which, however, is the case in the pro-choice position. In order to value the right of self-determination of women other ways must be found. Thereby we should not forget that also getting pregnant unwillingly already is a lack of a woman’s self-determination. Pregnancy is not a natural event but ordinarily the outcome of a freely chosen human act, performed by self-determined and morally autonomous citizens.

with, but the nature of the reality of human society to which political justice refers.

The criterion of reciprocity, thus, cannot possibly have the task of singling out which basic doctrines about society, the union of male and female and the family can legitimately be a content of public reason. On the contrary, these basic empirical truths about society as a cooperative venture over time rather restrict the very criterion of reciprocity. They bestow on this criterion its properly political meaning and allow applying it properly in the political domain as a *political* criterion of legitimacy and justice for coercively imposed legal norms and public policies.⁸⁹

D. The Relation Between Political Conceptions and Comprehensive Doctrines: the Case of the Family

The way in which Rawls conceives the relationship between public reason and the criterion of reciprocity seems to me to be the reason why Rawls misconstrues the relation between what he calls a “political conception” and “comprehensive doctrines.” At the very beginning of *Political Liberalism* Rawls asserts that a conception is not “political” but “comprehensive” “when it includes conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship *and of familial and associational relationships*, and much else that is to inform our conduct, and in the limit to our life as a whole.” He adds that a conception is “fully comprehensive when it comprises all recognized values and virtues within one rather articulated system” and it is only “partially comprehensive when it comprises a number of, but by no means all, *nonpolitical values and virtues* and is rather loosely articulated.”⁹⁰

This is revealing because Rawls says that a political conception must not refer to *nonpolitical values*⁹¹ and also because he again equates the family to

89. Calling these basic truths “empirical” does not mean that they do not already include a value which is also *morally* relevant. This is so, because they are not only empirical—that is, facts about the world—but in their specific context they are also *basic*. The same is true of other basic empirical claims, like the natural tendency to self-preservation or the need of nourishment. In their context, they formulate fundamental human goods which include, or are the basis for, moral value. Empirical claims, thus, may include moral value; it depends on their “location” and relevance. We should generally abstain from opposing “facts” to “values.”

90. *Political Liberalism*, 13 (emphasis added).

91. See also “The Idea of Public Reason Revisited,” 144: “... a value is properly political only when the social form is itself political: when it is realized, say, in part of the basic structure and its political and social institutions.” In one sense this is obviously true, and even a truism; but it does not imply that to be politically relevant a value must not be pre-political: there are some pre-political values which exactly become political because they essentially bear upon

other associational relationships, declaring the family to be an ideal which cannot be part of a political conception. Both statements are to be rejected because political values necessarily refer to the non- or pre-political domain and corresponding values and because the reproduction of society is clearly one of the most prominent *political* values. The “political” cannot come out of nothing and political justice, though being specifically political, does not *create* what it refers to, but is political in the *way* it refers to what is pre-political. Precisely a liberal conception of politics must refer to genuinely non-political or pre-political values like privacy, property, individual liberty, etc. Politics must refer to the reality of human society as it is: not only as composed of individual persons, but also of natural societal unions. The reproductive union of male and female and the family simply are the origin of society and their future; they belong to the very structure of it. This, obviously, does not apply to churches, universities, syndicates, etc. These may all contribute to the perfection of society; but they are neither a part of its very nature nor are they what society is naturally rooted in.

Rawls seems to be fully aware that a theory of justice and of political liberalism must be grounded on some basic assumptions about the nature of society. Yet, Rawls gives no reason why he defines society simply as a system of cooperation of *individual citizens*; and he is not able to explain, and does not try to explain, how citizens can deliberate about a political conception of justice to be publicly endorsed in a world in which there exists no other socially and politically relevant reality except “free and equal” individuals with their personal preferences. Of course, this reveals the already mentioned problem of social contract theories. Yet as long as contractarianism—as in the case of Locke—is not taken too seriously and is not developed in too rigorous a way, it does little harm and considerable good, making it clear that political society has to serve citizens, and not the reverse, and that in the common good there is a priority of the individual person over community. In the case of Rawls, however, contract theory is not so harmless. Here contractarianism turns out to be a device for properly constructing a conception of political justice *ex nihilo*—I mean, from a *social* nothing, basing the construction exclusively on the concept of “free and equal” citizens. In such an attempt of radical “Kantian constructivism,” as Rawls calls it, the shortcomings of contractarianism do cause serious problems, rendering contract theory (for the reasons already given) counterintuitive and self-defeating.

I am aware that Rawls (mainly in his later writings) emphasized that the family belongs to the basic structure of society and, therefore, that it must be

politics. Such is, of course, the reproductive role of the family (based on the marital union between male and female).

regulated by the publicly endorsed political conception of justice. In “The Idea of Public Reason Revisited” a whole section (§ 5) is dedicated to the family. There Rawls effectively acknowledges that the family is “the basis of the orderly production and reproduction of society and its culture from one generation to the next,” and that “reproductive labor is socially necessary labor” and that “[t]he family must ensure the nurturing and development of such citizens in appropriate numbers to maintain an enduring society.”⁹² Most curiously, however, in a rather strange footnote (no. 60), Rawls adds that “no particular form of family (monogamous, heterosexual, or otherwise) is required by a political conception of justice so long as the family is arranged to fulfill these tasks effectively and doesn’t run afoul of other political values.” Particularly “gay and lesbian rights and duties,” says Rawls, may be dealt with on this principle: as long as these “are consistent with orderly family life and the education of children, they are, *ceteris paribus*, fully admissible.”

The absurdity of this latter claim is so evident that one wonders whether its author is informed about the basic facts of the origin of human life (which, of course, he is). How can sexual copulation in same-sex unions take part in “reproductive labor”? Of course, Rawls is perfectly acquainted with the basic facts about the origin of human life, and this is why in his footnote he simply speaks of “orderly family life and the education of children,” omitting precisely what is most typical and naturally characteristic of heterosexual unions: “reproductive labor” (thinking, perhaps, that same-sex unions can get children through adoption or reproductive technology). Rawls seems to intentionally overlook the obvious: that, generally speaking, without heterosexual reproductive acts there is nothing like “family life” and “education of children”—because there are no children and, without them, no mutual cooperation of citizens *over time*. Civil law cannot possibly disregard this fact and equate unions which are by nature of a non-reproductive kind to the naturally reproductive kind of union which we call “marriage.”⁹³

92. “The Idea of Public Reason Revisited,” 157.

93. A possible objection to this might be that “nature” is a sufficient guarantee that most people are heterosexual and will, or can, reproduce sexually; hence, so the objection says, there is no need to deprive homosexuals from the benefits of marriage. I think this objection simply misses the point: the point is that there is simply no *political* (or public) reason to bestow on homosexuals the benefits of marriage. Marriage possesses a legally privileged status because there is a specific public reason for it that does not apply to homosexual unions: its naturally reproductive character. On the other hand, law should not prevent homosexuals from living together according to their private preferences, as ever they happen to wish (what citizens do in their bedrooms must not be a concern of the law). Likewise it should not impede other persons to live together or form naturally non-reproductive communities of any kind (like female or male religious communities), provided they do not interfere with public order.

To deny that reproduction is a political value and, therefore, a necessary part of a political conception of justice, would simply be to deny that the existence of society as cooperation of citizens *over time* is politically relevant and a political value. This, however, would contradict the very basis of Rawls's political theory and the fundamental role his theory gives to the idea of society as a fair system of cooperation over time.

Thus, to achieve his goal of grounding his concept of public reason on reciprocity between single citizens and their "rights and duties," Rawls must manipulate or disregard the basic natural facts of society. It is true, he does not disregard the family as belonging to the basic structure of society; but he disregards it as a pre-political reality which is not created in the process of establishing the basic political structure of society and which enters in it as something which is not only regulated by the publicly endorsed political conception of justice, but firstly *regulates*, that is, shapes this conception and thus the content of public reason and, in consequence, the specifically political application of the criterion of reciprocity in the sense that regarding *reproduction*, partners in hetero- or homosexual unions are not to be considered to be equal, and thus, in order to uphold justice, they have also to be treated unequally by civil law.⁹⁴

III. CONSTITUTIONAL DEMOCRACY, PUBLIC REASON AND THE POLITICAL RECOGNITION OF NATURAL LAW

A. *Natural Law, Public Reason, the Domain of the Political and the Concept of "Common Good"*

What I have outlined so far was obviously a natural law argument. Although natural law is not public reason, it shapes in a fundamental way its content. Natural law is *prior* to public reason in such a way that public reasons, though being different from natural law reasons, include natural law. But it includes it in a restricted and limited way, that is, it includes natural law insofar it is politically relevant. Yet, what exactly is the criterion for "political relevance"?

94. A similar point is made by Michael Pakaluk, "The Liberalism of John Rawls: A Brief Exposition," in *Liberalism at the Crossroads: An Introduction to Contemporary Liberal Political Theory and its Critics*, 2d ed. ed. Christopher Wolfe (Lanham, Md.: Rowman & Littlefield, 2003), 1-19, 14. *Pace* Pakaluk, however, I think that to settle what counts as the basic structure of society no *comprehensive* doctrine on the family is needed, but only some basic empirical truths which, for a person normally informed about the basic facts of the origin of human life and "reproductive labor," rather seem to me to belong to common sense.

Natural law is politically relevant insofar as it refers to the common good of political society. Take such a simple case as murder. Natural law commands us not to commit murder because this is intrinsically unjust and contrary to human good. But this alone is not the reason why we think it reasonably repressed by criminal law. Positive law does not repress certain acts simply because they are immoral or opposed to natural law. The reason why murder—deliberate homicide—is declared to be a crime and punished by public authority is a specifically *political* one: it is necessary in order to allow citizens to live together in peace and security and, thus, to prevent society from disintegrating. Thus, already for Aquinas the reason why murder must be prohibited by positive law is its relevance for the “common good of justice and peace.”⁹⁵ Aquinas, therefore, says human criminal law is restricted to those vices “without the prohibition of which the preservation of society would not be possible—just as human law forbids murder, theft, and similar things.”⁹⁶ The rest of the enforcement of natural law is left to God’s judgment. According to Aquinas, therefore, “human laws leave many things unpunished, which according to the Divine judgment are sins, as, for example, simple fornication; because human law does not exact perfect virtue from man, for such virtue belongs to few and cannot be found in so great a number of people as human law has to direct.”⁹⁷ But general human imperfection is not the only reason. Aquinas also asserts that human laws are *on principle* limited to matters of justice, with which, in fact, he states a kind of concept of “public reason” (which is surprisingly close to Mill’s harm principle):

Now human law is ordained for one kind of community, and the Divine law for another kind. Because human law is ordained for the civil community, implying mutual duties of man and his fellows: and men are ordained to one another by outward acts, whereby men live in communion with one another. This life in common of man with man pertains to justice, whose proper function consists in directing the human community. Wherefore human law makes precepts only

95. *Summa Theologiae* I-II, q. 96, a. 3: “Nevertheless human law does not prescribe concerning all the acts of every virtue: but only in regard to those that are ordainable to the common good—either immediately, as when certain things are done directly for the common good, or mediately, as when a lawgiver prescribes certain things pertaining to good order, whereby the citizens are directed in the upholding of the common good of justice and peace.” See also I-II, q. 98, a. 1: “For the end of human law is the temporal tranquility of the state, which end law effects by directing external actions, as regards those evils which might disturb the peaceful condition of the state.”

96. *S.T.* I-II, q. 96, a. 2.

97. *S.T.* II-II, q. 69, a. 2 ad 1. See also q. 77, a. 1 ad 1: “human law is given to the people among whom there are many lacking virtue, and it is not given to the virtuous alone. Hence human law was unable to forbid all that is contrary to virtue; and it suffices for it to prohibit whatever is destructive of human intercourse, while it treats other matters as though they were lawful, not by approving of them, but by not punishing them.”

about acts of justice; and if it commands acts of other virtues, this is only in so far as they assume the nature of justice, as the Philosopher explains (Ethic. v, 1).⁹⁸

Natural law forbids adultery, sodomy or lying: these are as natural practical reason prescribes, intrinsically immoral acts. But this does not mean that the natural law reasons forbidding these acts are also public reasons and that corresponding moral norms should be legally enforced or corresponding vices repressed by the criminal law. To be apt for public justification, natural law reasons must first be converted into public reasons. They are becoming public reasons only insofar as they can be justified in terms of referring to the common good of political society. So, for example, it is forbidden both by natural law and by public reason to lie in court or in making contracts, as generally fraud is forbidden by law. So, the whole set of public reasons contains a part of the whole set of natural law reasons, or saying it in another way, some (but not all) natural law reasons are, because of their referring to the political common good, also valid as public reasons.

From this it follows that public reason is at least partly based on natural law reasons. Natural law reasons, thus, are to public reasons what conscience is to prudence: the voice of objectivity which commands, warns, admonishes or prohibits in the name of moral truth and the truth about the human person. But this does not imply that the whole of natural law belongs to public reason or that what is a valid natural law reason is also valid as a public reason. Even though we agree that such or such norm pertains to natural law, we can still disagree, not only for prudential reasons, but also on principle, on whether it should be implemented politically. Natural law theory, therefore, is not a sufficient theory of public reason if it is not simultaneously part of a specific political theory of public reason.

What has been said cannot only be justified in Thomistic terms, but also seems to me to belong to the central tradition of natural law (though I am aware that there also exist other interpretations of this tradition).⁹⁹ There is, however, a second aspect regarding the relation between natural law and public reason to be mentioned. It specifically concerns the ethos of modern

98. S.T. I-II, q. 100, a. 2. Very helpful for this entire subject is John Finnis, *Aquinas, Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), chapter VII, especially pp. 222 ff.

99. See for example Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Oxford University Press, 1993), Ch. 1. To this I have partly responded in my "L'immagine dell'uomo nel liberalismo e il concetto di autonomia: al di là del dibattito fra liberali e comunitaristi," in *Immagini dell'uomo: Percorsi antropologici nella filosofia moderna*, ed. Ignacio Yarza (Rome: Armando, 1997), 95-133.

constitutional democracy. An essential feature of natural law is that its claim of validity is identical with its claim of being both *right* reason and open to *anyone's* understanding. Natural law, in fact, makes its claim in the name of moral truth and of right reason so that, according to this logic, a person who does not accept a natural law reason turns out to be considered as morally corrupted or at least unreasonable.

From the view that natural law reasons rightly claim to be public reasons just *because* they are natural law reasons—that is, because they are *right* reason¹⁰⁰—it immediately follows that a public reason generally can claim to be such only once it is shown to be true and “right reason.” Now, this is precisely the logic which constitutional democracy intends to overcome. Not in the sense of precluding the question of right reason or of truth from the political agenda, but in the sense of creating a public platform on which conflicting views about truth and right reason can be settled in what modernity has learned to be the only politically reasonable way, that is, without jeopardizing social peace, cooperation and basic liberties. To identify “public reason” with “right reason,” however, is politically conflictive and unwise, because it is to make the recognition of other citizen’s reasonableness—and thus the *political legitimacy* of their views—dependent on their agreement with what others (be they a majority or not) consider “right reason.” As it was clearest in the case of religious freedom, such identification of public reason with right reason subordinates reciprocity to truth claims. As we have seen, wherever in a historical context of deep ideological conflict this attitude became the *last and decisive* criterion of political legitimacy, it turned out to make civil cooperation impossible and finally cause civil war.¹⁰¹

The question is not resolved by—rightly—referring to the fact that differing in opinion in some fundamental matters “can only be rooted in ignorance or some subrational influence” and to the fact that by appealing to “natural right” we appeal to “principles and norms that are reasonable, using criteria of evidence and judgment that are accessible to all.”¹⁰² I fully agree with Finnis on that. In my view, however, this only shows that natural law reasons are, in fact, valid candidates for public reasons and that full reasonableness of public reason is attained only when it does not contradict natural law. It does not

100. This, so it seems to me, is the view Robert P. George and Christopher Wolfe defend in their “Introduction” to *Natural Law and Public Reason*, 2.

101. In my view, it is also the reason that explains how religious truth claims could be easily mixed with a political (social, nationalist etc.) agenda, misusing in this way religion for political purposes, causing in consequence what is falsely called “religious wars”; in reality these wars were very political, but additionally fuelled and enraging people by abusively linking a concrete political cause to religious truth claims and thus converting religion into a political ideology.

102. Finnis, “Abortion, Natural Law, and Public Reason,” 83.

show, however, that the claim of being a valid public reason can be *politically* legitimated by their being based on criteria of evidence and general accessibility. As a *political* and, thus, public criterion, this simply would not work.

Hence, my point is that for a reason to be legitimated as public reason it is *politically* not sufficient to be “right,” “true” and based on “criteria of evidence and judgment that are accessible to all” (though, these are all real criteria of full reasonableness of public reasons). The reason for this is that “ignorance,” “subrational influence,” and, additionally, bias caused by personal (perhaps illegitimate) interests, cultural or religious prejudices, and many other factors—true “burdens of judgment,” although perhaps not exactly in the Rawlsian sense—seriously interfere with and diminish the evidence of natural law and its rational accessibility. The only possible solution to convert “truth” and “right reason” into public standards of political and, hence, juridical legitimacy and validity would be to advocate a kind of political guardianship of the “truly virtuous” or “saint,” or a kind of submission of the political to a higher authorized spiritual power, a new form of polis-ethic founded on a comprehensive conception of moral perfection.¹⁰³ This is what political modernity has abandoned, due to long and painful historical experience.¹⁰⁴

Modern democratic societies, thus, need a concept of public reason which does not legitimate itself by being *true* or *right* reason; here I partially agree with Rawls. What is needed is in a certain sense a “freestanding”—or perhaps better, “specific”—public reasonableness in the sense that it refers to fundamental and specifically *political* values. This, to repeat, is far from meaning that the question of truth or “right reason” is removed from public reasonableness or that political values have no relation to moral truth. It only

103. See for this Robert A. Dahl’s valuable “critique of guardianship” in his *Democracy and its Critics* (New Haven and London: Yale University Press, 1989), 65 ff.

104. Notice that the fact that natural law reasons are mostly invoked by what Rawls calls “citizens of faith,” that is by religious believers, does not convert such reasons into religious truths (and parts of some comprehensive religious doctrine). This would only be the case if such natural law reasons would be invoked, instead of referring to public reasons, on specific religious grounds (referring as *argument*, e. g. to the simple authority of the Magisterium of the Church, of the Bible, the Koran, or of something similar). Even if a citizen holds a natural law reason to be true because of his religious faith, he must defend it in the public sphere with public reasons. Otherwise he could rightly be accused by his fellow citizens who do not share his faith of trying to impose on them his religious faith. What I have just said is—I think, adequately—expressed in Rawls’s *proviso*; see “The Idea of Public Reason Revisited,” § 4, 152 ff. This does not exclude on principle that some reasons as contained in religious comprehensive doctrines are able to work as public reasons; this, however, not because of their religious authority, but rather because of their public reasonableness (see also note 109 below).

means that truth-claims are politically legitimate only insofar as they can be shown to participate in specifically *public* reasonableness (what in turn does not contradict what I have said before, namely that public reason is fully reasonable only to the extent in which it corresponds to, or does not contradict, the truth of natural law). Now, public reasons justify themselves on the grounds of being the *kind* of reasons which can be considered politically legitimate also by those citizens who do not—perhaps unreasonably and due to prejudice, passion or even moral corruption—agree with them regarding concrete issues, and for whom they are, as such a citizen would contend, not based on criteria of evidence. Nonetheless, these citizens will be compelled to recognize them as legitimate public reasons exactly because they are not presented in the public sphere in the name of “right reason,” but of generally recognized political values (as I do in this essay in the case of marriage, the family, abortion and euthanasia). Thus, even if they disagree and balance these values in a different way, they must acknowledge that they are the *kind* of reasons which belong to public reasonableness. I think any serious defender of natural law must be convinced that natural law, as far as it refers to the political common good, can be, and even must be, defended in terms of political reasonableness and political values.

In virtue of such recognition as valid public reasons independent from the recognition of their truth, legislation and policy based on such reasons can be legitimately (and without jeopardizing civil peace, cooperation and fundamental liberties) enforced also on those who do not agree with them. Again: this does not hinder citizens who advocate natural law to invoke natural law reasons because they think them to be “right reason” and to correspond to moral truth. On the contrary, it rather entitles them to do so. Since these reasons are properly and in an argumentatively transparent way invoked as *public* reasons, it additionally provides evidence that by this they neither intolerantly impose their own views on others nor endanger civil peace, cooperation and fundamental liberties.¹⁰⁵

I do not intend to propose here a full account of the relation between natural law and public reason. In this section I only wanted to underline three things:

(1) Although natural law may always work as a criterion for recognizing specific laws as unjust, it is not a criterion sufficient for making out what is to be *imposed* by law and the coercive apparatus of the state on the totality of citizens. For this, natural law must be specified or applied to the political

105. Generally, fundamental liberties can be legitimately restricted by public reasons. There may be, and certainly will be, disagreement also about what *kind* of reasons are public reasons. As we will see in Section C, Rawls gives us—without intending it—good help to settle this question in favor of the public relevance and legitimacy of natural law. I will come back to the political problem of disagreement about fundamentals of public reasonableness in section B.

sphere, according to criteria which are specifically political, that is, which belong to public reason.

(2) By the same token, for being recognized as public reason, natural law reasons must be more than simply *natural law* reasons; they must show themselves to be capable of being justified in terms of public validity, which means they must refer to the political common good of society and in this way be acceptable (not as such and such reason, but as *the kind of reasons* which on principle is considered politically legitimate) also to those citizens who do not agree with them in a determinate case. I in fact think that generally natural law reasons, precisely for the reasons given by Finnis and other natural law theorists, exactly meet with this last requirement, provided they contain an argument for their *public* (or political) relevance.¹⁰⁶

(3) On the other hand, public reason cannot be properly defined without *some* reference to natural law and, consequently, any use of the criterion of reciprocity and consequently of the liberal principle of legitimacy are to be embedded into, and in this sense limited by, the specific context of the “political” and of what “public reason” according to its very nature is.

My argument is founded on the conviction that the domain of “the political” cannot be defined except by a conception of what we traditionally call the (political) “common good.” As has been argued by Gerald F. Gaus,¹⁰⁷ it is characteristic of Rawls that he does not succeed in defining properly what characterizes the political or a political value. Of course, there is an intuitive idea of it, but Rawls’s specifications are all circular: as we have most clearly seen in the case of the family, they define the political in terms of the public conception of justice and, in turn, define *this* conception in terms of political

106. In some respects, I consider interesting also the approach by Amy Gutman and Dennis Thompson in their publications on “Deliberative Democracy,” namely in their essay “Moral Conflict and Political Consensus,” in *Liberalism and the Good*, ed. R. Bruce Douglass, Gerald M. Mara, and Henry S. Richardson (New York and London: Routledge, 1990), 125-147. There they develop (moral) criteria for the aptitude of concrete positions for being legitimately included in the public political agenda. The authors argue e. g. that in the abortion debate a pro-life position which is based on the claim of the personhood and a corresponding right to life of the unborn is to be acknowledged as a position which can legitimately claim to be part of the political agenda, *what should be recognized also by those who disagree with that position*. So, also on these grounds the argument that the pro-life position is grounded in religious or otherwise “comprehensive” private beliefs and therefore should not be endorsed by public reason, turns out to be invalid. The problems of the concept of “Deliberative Democracy” as developed in Gutman and Thompson’s book *Democracy and Disagreement* (Cambridge: Harvard University Press, 1996) are critically discussed in *Deliberative Politics. Essays on “Democracy and Disagreement”*, ed. Stephen Macedo (New York and Oxford: Oxford University Press, 1999). The book includes a response by Gutman and Thompson who also reply in their subsequent *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004).

107. *Contemporary Theories of Liberalism* (London: Sage Publications, 2003), 182f.

values (that is, as “political” as opposed to comprehensive views). In fact, Rawls’s problem is that to define what a political value is he would have to refer to something which could be called a “partially comprehensive” doctrine. So, he has to abstain from defining it. As I have argued, he instead simply relies on the idea of reciprocity, which refers to his concept of society as composed of free and equal citizens willing to cooperate over time, without any further specification of what a “society,” its nature, goals and specific goods are. This is why I think that Rawls’s concept of the political is much under-determined, and finally even turns out to be unreasonable.

It turns out to be unreasonable because, as I have previously argued, it tacitly implies that “society” as a system of cooperation is *created* by the basic structure and the political conception of justice which regulates it and which is worked out in the original position. So, in Rawls’s view the fundamental problem of social contract theories comes to bear, namely that political society is the product of the contract to serve the interests of individuals who are thought of as pure “individuals,” not yet living in a reality which is naturally shaped by the “social.” Rawls’s original position, his principle of reciprocity and the concepts of public reason, and the liberal principle of legitimacy derived from it, make the natural facts of society disappear or become politically “neutral” and, therefore, subordinated to the claims of citizens’ individual autonomy. So, Rawls’s key principles systematically disregard the politically relevant natural properties of society, which proves that in Rawls’s political liberalism these principles work in an unreasonable, that is, politically arbitrary manner.

The only social contract theorist of modernity who has maintained that man before entering into the state of society by a contract is to be thought of as nothing but an isolated individual was Rousseau. Neither Hobbes nor Locke nor Kant conceived of a “state of nature” as being a condition of man in which the basic facts of society do not already naturally exist. Unlike Kelsen, Hobbes wisely and explicitly bases his legal positivism on the “natural right” to self-preservation and on nineteen “natural laws,” knowing that otherwise his legal positivism could not be justified.¹⁰⁸ Hobbes’s, Locke’s and Kant’s conception of a “state of nature” is one in which these natural facts of society, rather than being non-existent, lead to conflict and war and, therefore, must be ordered politically—by law—to be conducive to the human being’s

108. For understanding that—paradoxically—Hobbes’s political theory in fact is legal positivism founded in natural rights and natural law, I am indebted to Norberto Bobbio’s fine article “Hobbes e il giusnaturalismo,” *Rivista Critica di Storia della Filosofia*, 17 (1962) 470–485. See for this my *La filosofia politica di Thomas Hobbes*, 229 ff. For a juridical reading of Hobbes see the important book by Simone Goyard-Fabre, *Le droit et la loi dans la philosophie de Thomas Hobbes* (Paris: C. Klincksieck, 1975).

flourishing and progress. As I have already mentioned, Locke's basic values of life, liberty and property, which refer not only to individuals but also to the marital union and the family, and are regulated by what Locke calls the law of nature even in the pre-political state of nature, shape the meaning and content of the political. Any political conception of justice publicly endorsed must respect these realities and values as the basic content of public reason.

Ironically, it is precisely about these basic facts of society and the values connected with them that there exists most consensus in our society. On these basic questions most people actually think in quite traditional ways but, being taught in most countries by the media not to impose their views on other people, they often vote "liberal." These basic social values actually are the best candidates to form the focus of an "overlapping consensus." The fact that they are typically promoted by "citizens of faith," as Rawls calls them, does not convert them into "comprehensive doctrines" to be excluded from public reason, nor does the fact that historically they have been decisively furthered by a culture permeated by Judeo-Christian and—in other parts of the world—Islamic or other religious values, remove their characteristic of belonging to public reason and of even being the basis of any public reason claiming to be not only *public* reasons, but also *public reason*. It rather could be symptomatic of the fact that concerning some basic issues, "citizens of faith" are more reasonable because they are intellectually closer to the cultural roots of constitutional democracy. I do not think that Popper was less a liberal because he remembered, as I have quoted him at the beginning of this lecture, that the values of a liberal world had these precise cultural roots, which historically cannot be separated from our religious heritage.

It is important, however, to see that, unlike the reproductive basis of society and the moral facts springing from it, the determination of religious truth or the need of the endorsement of any particular religion *is not* part of the nature of society nor does it characterize the content of a political conception of justice. This is not to say that religion, as such, is not a basic human value which may or even should be acknowledged and the exercise of which should not be facilitated. What is outside of public reason and does not belong to the political common good of society is the question of *truth* of this or that religion; this is intrinsically not a political question. Europeans, and Christian churches, had to learn this through a long process of accommodation and to a considerable extent, though not exclusively, this learning process is what has generated the modern political ethos of constitutional democracy.

It is therefore politically reasonable to preclude questions of religious truth from the political agenda and consider arguments based on religious authority

qua religious authority as alien to public reason.¹⁰⁹ The same, however, does not apply to questions which concern the nature of human society, even though they have certain moral implications and are essential parts of some comprehensive moral and religious doctrine. Treating them analogously to religious freedom would be politically unreasonable because, unlike establishing a particular religion, it would pervert the very meaning of politics: politics essentially refers to the reality of society and the good common to all living in it, though it does not refer to the truth of religions which transcend the meaning and reality of human society. That an assertion so empirically obvious and socially so basic as that not all forms of sexual orientations are equal is an essential part of one or many comprehensive moral or religious doctrines does not render this teaching inappropriate for being included in a reasonable and publicly endorsed political conception of justice, but rather evidences the reasonableness of the comprehensive doctrines which include such a teaching, and the unreasonableness of those which reject it.

B. Pluralism, the Public Endorsement of Injustice and Political Legitimacy: Constitutional Democracy as a Modus Vivendi

Although the nature and content of public reason refers to realities regulated by natural law, and although, therefore, with regard to public reason natural law reasons are like the voice of truth, it may and actually does happen that certain public reasons or determined constitutional provisions, and/or statutes and laws enacted on their basis, do not correspond to this truth and, thus, are in a fundamental way in contradiction with the common good. It is possible that basic values of society are not sufficiently protected by public authority against threats internal or external. Sometimes public authority undermines or even attacks the common good. In given circumstances, as the case of abortion shows, consensus may vanish and in its place there arises a moral pluralism and corresponding claims about rights. Such pluralism is far from being *reasonable* pluralism (though, as I will argue, it can be politically legitimate pluralism). It is a pluralism outside the limits of what is reasonable *even in a strictly political sense*, because it denies systematically something

109. I do not want to discuss here the question whether or to what extent citizens may offer in public political debate reasons drawn from their comprehensive moral or religious views; I am talking only about the reasons by which state organs with coercive power may licitly justify legal enactments, judicial decisions and state policies. For the former question and for a partly alternative view to Rawls see Paul J. Weithman, *Religion and the Obligation of Citizenship* (Cambridge: Cambridge University Press, 2002). Weithman also rejects Robert Audi's view on "secular reasons" as developed e. g. in his *Religious Commitment and Secular Reason* (Cambridge: Cambridge University Press, 2000).

that is fundamental and basically constitutive for society and its legal order: that the right to life of a human being cannot be overruled by conflicting interests of third parties, such as self-determination, career projects, privacy, etc. Nothing of the sort has *ever* been considered by the liberal-constitutionalist tradition as a reasonable claim of political justice.

Other examples of fundamental and, in my view, unreasonable disagreement are the legalization of medically assisted suicide as practiced even in public health institutions, and the already mentioned equating of same-sex unions to the conjugal union of man and woman. By denying a right to abortion, to assisted suicide or the public recognition of same-sex unions, nobody's right as a "free and equal citizen" is violated, because these things simply cannot reasonably be a politically recognized right of any citizen, nor can they be constitutive of the basic structure of society.¹¹⁰

This may be less obvious in the case of euthanasia (medically assisted suicide). Yet, for the state to establish a legal right to euthanasia does not mean taking a neutral stance on this issue and respecting citizens' autonomy "in making those grave judgments for themselves, free from the imposition of any religious or philosophical orthodoxy by court or legislature," as the *crème de la crème* of liberal Anglo-Saxon legal philosophers have rather unconvincingly argued in their famous "Philosophers' Brief."¹¹¹ Quite

110. To give a summary of what has been already said on that topic, the argument against "same-sex marriages" would run somewhat like this: Considered with regard to their being a homo- or a heterosexual life-partner to another person, citizens are not equals; as partners in same-sex relationships they are reproductively and therefore politically irrelevant. Consequently, if both kinds of unions are not only differently treated by the law, but homosexual unions are not even considered by it at all, no reason exists why reciprocity should be violated. By taking into account citizens' sexual orientation their rights as "free and equal" would be violated only in those regards to which sexual orientation as such makes no immediate and obvious socially or politically relevant difference, that is, for example, insofar as citizens are students, workers, employees, artists, judges, voters, etc., and even as teachers (provided they do not, mainly if they teach kids, undermine by their public behavior and their teaching the political value of marriage and the family based on it). Notice that this does not necessarily presuppose a comprehensive moral evaluation of homosexuality and sexual acts between persons of the same sex. Rather conversely, the moral evaluation of marriage is also, though not exclusively, dependent on its *singular social and political value: sexuality not only refers to the good of individuals, but also and essentially to the good of the species.* This aspect is completely lacking in sexual activity between persons of the same sex. On the other side, the recognition of "same sex marriages" would imply a redefinition of the institution of marriage. "Marriage" would not be any more considered in law as an essentially reproductive institution, but would be defined independently from this role. This, in my view, is a grave structural injustice and juridical incoherence with unpredictable consequences for jurisprudence and the whole legal system.

111. John Rawls, Judith Jarvis Thomson, Robert Nozick, Ronald Dworkin, T. M. Scanlon, Thomas Nagel, "Assisted Suicide: The Philosophers' Brief," *The New York Review of Books*, Vol. 44, No. 5, March 27, 1997 (<http://www.nybooks.com/articles/1237>).

conversely: the legal enactment of such a right turns out to be a threat to autonomy, mainly of the elderly, the lethally sick and dying, for the mentally ill and generally for the weakest among us. Legal enactment of such a right would seriously and dramatically harm their prospects of being appropriately cared for by palliative means, their dignity precisely as persons who are suffering, because they would be publicly considered as a burden for society and would have to feel pressured into alleviating society from this burden by consenting to the acceleration of their own death (such an acceleration being their *right*, it seems to be unreasonable not to make use of it).¹¹² Legally granting a right to euthanasia, therefore, is a serious attack on the political common good of society, although in one or another extremely hard case euthanasia may have *some* plausibility as a good for a single person and as an at least understandable act of mercy. Yet, from such single cases one cannot infer the desirability of a generalized right to medically assisted suicide and the creation of corresponding structures and institutionalized practices, because such a right wrongly presents the possibility of assisted suicide as part of the common good, and assisted suicide itself as a good. At the most, in very rare and extreme cases, one could consider the concession of immunity from prosecution.

Those who disagree with such an argument must nevertheless concede that it is based on public reasons. For some reason they may not consider the concrete argument as concluding; but they must recognize it as the *kind* of argument which is proper to public reason and cannot reject it as “imposition of a religious or philosophical orthodoxy” (though those who offer this argument do so because they are supported by the comprehensive moral or religious doctrine they adhere to). Yet, in this case it seems that *public* reasons are rather on the side of *not* granting a right to medically assisted suicide because, looking closely to the matter, such a right would confer on personal preferences of *some* citizens, and at the expense of a significant public interest, the weight of public reasons.¹¹³ The aggressive polemic against the alleged “imposition of religious or philosophical orthodoxy” reveals itself to be, in fact, the political enthroning of personal preferences, bestowing on them

112. For this, and the real existence of a slippery slope, there is in the meantime abundant empirical evidence. See the excellent argument and well documented survey by Iñigo Ortega, “La ‘pendiente resbaladiza’ en la eutanasia: ¿ilusión o realidad?” *Annales theologici* 17 (2003) 77-124 (focusing on the practice of medically assisted euthanasia in Australia, Oregon, and the Netherlands).

113. Quite another question is the right to suicide as such and even leaving unpunished assistance to suicide generally, provided there is no self-interested motive recognizable. We are talking here exclusively of *medically assisted* suicide, which implies the support of society’s healthcare system.

absolute priority over public reasons. Yet, personal autonomy as such does not automatically generate a public reason. On the contrary, personal autonomy can, and sometimes must, be restricted by public reasons (which refer to the common good).¹¹⁴

Let me consider now the problem mentioned before that (1) there may not be, and in modern societies there is not, a consensus on these topics in themselves and on how to deal with them politically, and that (2) in many existing constitutional democracies these matters are in fact regulated by law in a way which in the eyes of many citizens—including me—is at odds with the nature and basic structure of human society and, hence, with natural law and the common good. These citizens will conclude that public reason is seriously flawed, if not perverted. Does the public endorsement of laws fundamentally unjust strip—in the eyes of those citizens who judge them so fundamentally unjust—a constitutional democracy, its political institutions and decision procedures which have enacted them, as well as the decisions themselves, of their legitimacy, so that a moral duty to give support to the political system which originated them evaporates?

I don't want to tackle here the general problem of unjust laws and whether and to which extent they oblige in conscience.¹¹⁵ My question is a different

114. Of course, also the personal autonomy of citizens is an essential part of the common good. Therefore, a concept of the common good which overrules the concept of personal autonomy would be a perversion of the idea of the common good. The idea of a common good always includes the good of the individuals who belong to the multitude the common good of which is at stake. Yet, this does not imply that personal autonomy is *a priori* trump, because it can be restricted in favor of protecting the autonomy of citizens in general. So, in a sound understanding, autonomy is restricted ... in favor of autonomy. This is at least one decisive reason of denying citizens a right to medically assisted active euthanasia.

115. In the tradition, this question has been treated as the question to what extent laws that command certain acts or impose burdens and duties bind in conscience. The general answer was that if laws command one to do something which is contrary to the natural or the divine law, they must be opposed; if they are otherwise unjust (too burdensome, for example), they do not oblige in conscience *as such*, but accidentally, that is for sake of the common good, however, there may be sufficient reason to comply with them. All of this is not very helpful in the present case of granting abortion or euthanasia rights because such laws (or judicial decisions), as such, do not *oblige* doing anything, but they simply *permit* citizens to do certain things. Hence, the traditional argument about unjust laws, which is an argument about obligation, does not apply in this context (it applies only indirectly to the subsequent question of the refusal for conscientious reasons of health service servants to cooperate in legally permitted abortion or euthanasia; but this question can be regulated independently from the former). Technically, by granting a right to abortion or euthanasia the state abstains from regulating by law a certain domain, leaving it to the discretion of citizens. So, what we need is not so much a doctrine about how and to what extent unjust laws oblige in conscience, but to what extent and in which areas citizens as acting for the common good and, thus, political society are obliged to regulate, promote or restrict citizens' behavior by (civil and penal) law. For this and the question of

one: can a political system and a seriously flawed or even partly perverted public reason which allows not only such divergence on basic matters, but also laws and policies which are in contradiction with basic requirements of natural law, still be *morally* justified, and legitimate, that is to say, justified as a political order which claims to embody a definite political ethic? And do citizens—supported perhaps by their religious faith and authoritative teaching of, say, the Catholic Church to which they wholeheartedly belong—who are convinced of the profound injustice and contradiction to natural law of such a legislation, still have overriding *moral* reasons which not only do cause them in fact to support the political system, but also cause them to feel morally *obliged* to do so, and therefore to support it loyally and even as wholeheartedly as they defend natural law? In other words: Do requirements of specifically political morality to a certain extent override requirements rooted in natural law? This is, put in another way, one of the central questions Rawls's *Political Liberalism* deals with, and it is a question the answer to which is intrinsic to the essence of the ethos of constitutional democracy.

To spell this answer out I first of all want to repeat what I have said before: natural law *as such*—that is, insofar as it is the standard for good and evil in human actions, naturally accessible to every human being's understanding—is not public reason. Even when, in a determinate political society, public reason allows certain decisions contrary to natural law, it maintains its own specifically political reasonability as *public* reason. As a socially and widely recognized form of public justification it still realizes the fundamental political values of peaceful coexistence of citizens and the equal and impartial security for their basic liberties.¹¹⁶ Such contradictions to natural law, however, do not eliminate the basic political reasonableness of the system; public reason continues to be a working political principle and fulfills most of its fundamental political functions. Nobody can say, for example, that the American constitution and its public reason did not successfully fulfill its political role while slavery was still not abolished, even though it was thereby permitting a grave injustice.

When talking in such a way, we have reached the core of the political ethos of modernity in which its institutional ethos of peace, freedom and basic

abortion I again refer to my "Fundamental Rights, Moral Law, and the Legal Defense of Life in a Constitutional Democracy. A Constitutionalist Approach to the Encyclical *Evangelium Vitae*."

116. Of course, this implies a politically relevant distinction between "citizens" and "human persons" to which the unborn also belong. The distinction does not diminish the right of the unborn to live, but it makes sense in the horizon of considering the prospect of civil war as the *summum malum* to be avoided by political cooperation. The unborn (and small children) are not a possible threat for the peaceful coexistence in society.

justice is situated: The acceptance of its public reason does not depend on the recognition of the *truth* of its reasonability, but of the recognition of its political legitimacy (without by this excluding the question of truth from the political or public domain, but only by allowing this question in a way which does not undermine the fundamental political values of peaceful coexistence, social cooperation and equal civil liberty).

To illustrate my point consider possible reactions to such a situation by two different defenders of natural law: the first considers that under circumstances as those just outlined the basic political structure of society is perverted to an extent that it has lost its legitimacy or, at least, that these laws are not to be regarded as legitimate products of the political and legal system. This first defender considers the situation a grave offense to civility and thus that it may be opposed by illegal and uncivil means (and that only for prudential reasons, that is, because of the expectation that illegal opposition to them would be most likely to be unsuccessful and even cause a civil war which cannot be possibly won, is one obliged to abstain from this form of opposition).¹¹⁷

Consider now the second defender of natural law: he judges these laws to be similarly unacceptable. He is convinced, however, that though they are unjust, contradict natural law, and gravely violate the common good, these laws are *politically legitimate* law: being enacted correctly they do not violate the standards of civility and, therefore, on principle *must not* be opposed by illegal and uncivil means. The *political* value of peaceful civil coexistence and basic liberties for all citizens, such a defender of natural law argues, has a freestanding and primary moral weight which is not overridden by the injustice of concrete laws and policies, even when they concern fundamental issues as the right to life of human persons and the reproduction of society and, thus, are gravely in contradiction with the common good.¹¹⁸

Such a defender of natural law would—as I do—hold that there are forms of pluralism which, though being unreasonable, are nevertheless politically legitimate. Their legitimacy lies in their participation in the public reason of constitutional democracy. It is this aspect of public reason which for strictly *political* reasons (which are *moral* reasons because they belong to political morality) has its own logic. At this point, the priority of peaceful coexistence and individual freedom is to be recognized and affirmed. Reciprocity among

117. If I have rightly understood, this is the position of John Finnis in his “Abortion, Natural Law, and Public Reason,” 89 f.

118. Of course, generally speaking such a position can be held only within certain limits. It cannot apply to cases in which the basic structure itself and the legal system as such are used in a way contrary to fundamental justice and thus intrinsically perverted. Such an *Unrechtsstaat* as was, for example, Nazi-Germany cannot demand any civil loyalty from its citizens because it is essentially uncivil.

citizens as free and equal must be considered, too, as a basic part of that civility which is part of political justice.¹¹⁹

Of course, this seems to be less the logic of overlapping consensus than of *modus vivendi*. The latter, in fact, always was and continues to be inherent in the political ethos of the democratic constitutional state. “*Modus vivendi*” has more moral substance than Rawls, who is eager to distinguish his “free-standing view” of political morality from a “mere” *modus vivendi*, wants to concede. A *modus vivendi* is also more capable of securing political stability over time than Rawls is ready to admit.¹²⁰

There are several reasons for arguing also that Rawls’s conception cannot be more than a *modus vivendi* or, at least, must contain elements typical for a *modus vivendi*. Nothing prohibits an overlapping consensus of a Rawlsian type to be called a *modus vivendi* or to contain some elements of it, precisely

119. This seems to me to be the position Rawls thinks a Catholic opposed to abortion might have (cf. “The Idea of Public Reason Revisited,” 169 f.). I substantially agree with Rawls’s remarks about the possibility for, say Roman Catholics (which Rawls mentions here as though they were the only Christians opposed to abortion) to accept a decision to grant a right to abortion as “legitimate law, binding on citizens by the majority principle.” Rawls does not want to say that citizens who see such a right as intrinsically illegitimate must now, as democrats, change their view (being in minority does not imply that one is wrong, as a Rousseauian *volonté générale* would suggest). But they should, and can, accept such a decision as legitimate law in the sense that it has the legitimacy of being enacted in accordance with the institutional rules all have accepted for the sake of peaceful coexistence, liberty and justice. Though they think that *this* law contradicts the conception of justice underlying the political system, they still may recognize that the way this law has been enacted is in accordance with the system they sustain. As long as the law does not *impose* a determinate behavior on citizens, that is, as long as it does not force citizens to abort or to cooperate in abortion, this argumentation holds. Rawls certainly does not say that in such a case Catholics may not try to oppose this law with all legal means, trying to reverse the decision, because now they have to consider the law as a just law. He only maintains that they should consider it (formally) “legitimate law,” because it has been enacted in a procedurally legitimate way. The point Rawls seems to me to want to make is that in consequence of such a decision, Roman Catholics need not refrain from supporting the political system, which has made possible such a decision (in their view gravely unjust), and that they can—and should—continue to wholeheartedly support it, trying to use it in the future to promote better their own agenda.

120. Cf. Bernard P. Dauenhauer, “A Good Word for a *Modus Vivendi*,” in *The Idea of a Political Liberalism: Essays on Rawls*, Ed. Victoria Davion and Clark Wolf (Lanham, Md.: Rowman & Littlefield, 2000), 204–220. See also John Gray, *Two Faces of Liberalism* (New York: New Press, 2000). In my view, however, in his defense of liberalism as a pure *modus vivendi* Gray goes too far: his idea of liberalism as a *modus vivendi* implies a series of presuppositions about the conflicting nature of value—in the sense of Isaiah Berlin—which is partly trivial and partly exaggerated. At least liberal *constitutionalism* does not need such a relativistic concept of value. For a liberal critique of Gray’s (and Berlin’s) position see Gerald F. Gaus, *Contemporary Theories of Liberalism* (London: Sage Publications, 2003), chapters 2 and 3.

because it can only work and fulfill its political task if it draws support from those who disagree with fundamental aspects of its endorsed conception of justice, support given for the sake of securing peaceful coexistence, social cooperation and basic liberties.¹²¹ Historically, it seems rather obvious that constitutionalism is a specific and highly sophisticated kind of *modus vivendi*. Rawls seems not to acknowledge this fact, thus undermining his own project of “political liberalism” in favor of some comprehensive and “closed” and sometimes seemingly rather intolerant form of liberalism. He seems to hold that wherever a “liberal” position is in the minority it undercuts public reason by appealing to the rights of “free and equal” citizens and the criterion of reciprocity understood as a leverage of these rights. Here the idea of individual rights and liberties—which are meant in principle to protect individuals from the tyranny of the majority—is abused to render irrelevant the majority principle precisely in those areas in which it is most legitimately applied, the area of our understanding of fundamental features of the political common good.¹²²

It is the specifically political logic of public reason which is the focus of an overlapping consensus that originates the freestanding political conception of constitutional democracy or, if you prefer, of political liberalism, which at the same time is also a *moral* conception. On this level of argument, Rawls provides some essential and, in my view, fruitful conceptual keys enabling us to better tackle this problem, although I think he exaggerates the needed amount of *overlapping* consensus. But there is still a decisive difference: while for Rawls everything which is not part of the political conception has to be counted as being a part of an excluded (or at least excludable) comprehensive doctrine, in my view natural law, *as far as it is politically relevant*, is not part of a comprehensive doctrine, but rather the basis of any sound and reasonable political conception. It is precisely the basic standard of (practical) truth of such a conception.¹²³

121. Though I am very skeptical towards Larmore’s discourse-ethical conception of politics and his understanding of practical reason (as intrinsically self-contradictory), I agree with his conception of the liberal state as a kind of *modus vivendi*; see Charles E. Larmore, *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987), 70 ff.

122. This point is constantly made with great force and certainly not without reason by Michael J. Sandel, for example in his *Democracy’s Discontent: America in Search of a Public Philosophy* (Cambridge, Mass.: Harvard University Press, 1996).

123. Natural law obviously gives rise to a comprehensive doctrine of the good; but this does not mean that everything that is rooted in natural law, as a political conception of justice may be, is therefore part of comprehensive doctrine and cannot be a political conception in Rawls’s sense.

Yet, it is equally important to emphasize that the correspondence of public reasons to natural law must itself be understood as the result of an open political process. It cannot be achieved by simply invoking natural law reasons insofar they are such, that is, by appealing to what those who invoke them consider to be their obvious truth, because this (as is explained by Hobbes, who on this had some essential insights) would amount to invoking private reasons against public reason and would therefore fail to settle the question. Invoking natural law as “true reason” would only increase disagreement and conflict. Hobbes’s famous dictum *Autoritas non veritas facit legem*¹²⁴ expresses, apart from its problematic features, also the basic truth that in politics disputes are finally settled by legitimate authoritative decision, not by truth.¹²⁵ There is no superior sovereign, no higher moral guardianship with coercive power, able to generate the correspondence of public reason with natural law. It is the democratic political process itself—on the level of both the constituent and the constituted power—which has the task of creating this correspondence between public reason and natural law. As we have seen, to be invoked as public reasons natural law reasons must be justified as political reasons; that is to say, they must undergo a process of political justification in the course of the democratic process itself.

In a pluralistic society there will necessarily always be a tension between the widely recognized content of public reason and the requirements of natural law. It is part of the political process of liberal constitutional democracies to tolerate this tension, and to maintain an institutional framework capable of living with such tensions, or of overcoming them, or both. This is why it seems to me to be crucial to recognize that certain forms of pluralism are both unreasonable and politically legitimate: they are *unreasonable* from the point of view of natural law, but still *legitimate* from the point of view of public reason. It is this very tension that permits and urges natural law, and citizens who defend it, to accomplish their function of being in public reason the voice

124. In this form this famous sentence only appears once in the works of Hobbes: in the Latin version of the *Leviathan*, which was drafted after the English version. See *Thomas Hobbes Malmesburiensis Opera Philosophica quae Latine scripsit Omnia*, 5 vols. ed. W. Molesworth, (London: 1839-1845; Aalen: Scientia, 1962-1966), vol. 3, 202. In the English version the sentence does not appear. In the famous *Dialogue between a Philosopher and a Student of the Common Laws of England* instead we find the sentence in a different form: “It is not wisdom, but authority that makes a law.” See *The English Works of Thomas Hobbes of Malmesbury*, ed. W. Molesworth, 11 vols. (London 1839-1845; Aalen: Scientia, 1962), vol. 6, 5.

125. I have discussed the sense of this dictum not only in my book about Hobbes, already mentioned, but also in my “*Autoritas non veritas facit legem*: Thomas Hobbes, Carl Schmitt und die Idee des Verfassungsstaates,” *Archiv für Rechts- und Sozialphilosophie*, 86 (2000): 484-498; see also my *La filosofia politica di Thomas Hobbes*, 214 ff.

of conscience and truth without, however, making the legitimacy of the political system depend on the full endorsement of this truth.

Here, of course, the influence of what Rawls calls the “background culture” is decisive: the outcome of this democratic process depends upon citizens who are rooted in solid moral, cultural and religious traditions. Here civil society and also religious authorities, addressing the consciences of their faithful, have a constitutive role to play. They are all, in this sense, actors in this process of shaping the background culture which is mediated, in the politically decisive way, by the political institutions of the democratic constitutional state and their fundamental respect for liberty as a political value.

I disagree, therefore, with Alasdair MacIntyre’s hostile assertion that “modern politics is civil war carried on by other means.”¹²⁶ Modern politics in constitutional democracies is not civil war at all, but a means of overcoming and preventing civil war by political culture, a conflictive political culture, of course, but a culture which precisely endures such conflict by avoiding the *summum malum* which is civil war, and maintaining peaceful coexistence and mutually advantageous cooperation of citizens over time. This is the basis of a culture of liberty and personal freedom. Political conflict in constitutional democracy is part of a highly differentiated political ethos which does not simply appeal to the virtues of citizens—sometimes, unfortunately, it does not do so enough—but first of all is an institutional ethos, which is not only procedural but also includes substantive, although specifically political, values. As a set, these values—peaceful coexistence, individual liberty, justice as equality of liberty—formulate a common good and work as a shared moral principle of politics and public reason.¹²⁷ The settling of the 2000 U.S.

126. *After Virtue*, 2d ed. (Notre Dame, Ind.: University of Notre Dame Press, 1984), 253.

127. This is why I think that MacIntyre’s verdict, “[t]he notion of the political community as a common project is alien to the modern liberal individualist world” (*After Virtue*, 156), is at least exceedingly exaggerated: it perhaps applies to certain brands of liberalism, or rather libertarianism, but cannot be called typical for the liberal tradition at all, nor for the reality of liberal constitutional democracies. This does not exclude that the behavior of citizens in modern democracies is often to an extent individualistic, which justifies MacIntyre’s assertion. But this, I should say, is not a characteristic of the idea of political liberalism, but pertains to the reality of the modern world (but perhaps not only of the *modern* world), which not only, but also, by forms of perverted liberalism has become exceedingly individualistic. At any rate it is wrong, as Robert A. Dahl in his book *Democracy and its Critics* (New Haven: Yale University Press, 1989), 299f., has criticized MacIntyre, to compare modern social and political *reality* with an ancient *ideal* as it appears in the views and writings of some philosophers. Aristotelian “communitarianism” must not be compared with the reality of modern society and the behavior of its citizens, but with political liberalism as it appears equally in *writings* of political philosophers and, perhaps, with the *ideas* underlying modern constitutions inspired by liberalism. The *reality* of modern society can, then, be compared with the social reality of Aristotle’s time. It would be easy, I think, to make a choice which we might prefer to live in!

presidential election dispute by the logic of institutional procedure was an example for the entire world of the peacemaking force of the political ethos of modernity.

In a free and “open” society many aspects of natural law and *some* natural law reasons will always be a part of political conflict, that is, they will always be focal points or the subjects of controversy.¹²⁸ To simply rely on them as being open to everyone’s natural understanding and invoke them as *public* reasons is politically illusory. The point I wish to make is that their quality of being *natural law* reasons does not yet qualify them as public reasons because modern public reason is partly defined by the task of creating consensus in a society which is divided about what is naturally good for human persons. No natural law theory can be, as such, sufficient to provide public reasons, even though it rightly presents itself as a doctrine of limited government.¹²⁹

Moreover, as I have argued before, many precepts of natural law are not politically relevant. Others substantially bear upon the political domain, but their doing so must be justified; this cannot be the task of a theory of natural law but only of a wider political philosophy which includes natural law as one of its essential elements. In practice, it is up to citizens to convince their fellow citizens by proposing natural law reasons and justifying them as valid public reasons, convincing the public that because of their truth they are to be publicly endorsed. But this includes arguments able to show that they are also *politically valid*; that is, that what they claim can be reasonably enforced by

128. This seems to me certain also for theological reasons, because outside the order of revelation and grace there is no full intelligibility of the natural law. What I mean by this is explained in my “Is Christian Morality Reasonable? On the Difference Between Secular and Christian Humanism,” *Annales Theologici*, 15 (2001) 529-549.

129. See John Finnis, “Is Natural Law Theory Compatible with Limited Government?” in *Natural Law, Liberalism, and Morality: Contemporary Essays*, ed. Robert P. George (Oxford: Oxford University Press, 1996), 1-26. The response to this paper by Stephen Macedo (“Against the Old Sexual Morality of the New Natural Law,” in *ibid.*, 27-48) polemically focuses on questions (of sexual morality) raised in Finnis’s paper, which, as I think, in this way are not an issue of public reason. But I cannot go into this in detail here. While I agree with Finnis on substantive positions, I would also recognize as partly true what Macedo in Chapter two of his *Liberal Virtues, Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford: Oxford University Press, 1990), says on “Liberalism and public justification,” namely that public justification follows a logic which does not simply coincide with identifying “what are simply the best reasons” (50), being “best” what mostly coincides with “right reason.” Unfortunately, also Macedo’s public reason, though different from Rawls’s version, remains confined to the same liberal logic of an (exclusive) “broader commitment to respecting the freedom and equality of persons” (*ibid.*). Provided this is really an absolute priority and a “trump,” then natural law reasons will have no chance as public reasons because they often do not respect the “equality of persons”: according to natural law not all persons are equal in every politically relevant respect. Yet, justice means equality for equals.

the coercive apparatus of the state. Conversely, the liberal principle of legitimacy must not put them aside because they are commonly held by “citizens of faith,” be they Roman Catholics or other believers. In his last writings, introducing the idea of the “proviso,” Rawls seems to eventually acknowledge this.

It is interesting and even fascinating to see how the Magisterium of the Catholic Church increasingly offers central teachings on natural law in the form of public reasoning. This is clearly the case for abortion, euthanasia¹³⁰ and “same-sex marriages.”¹³¹ The fact that these reasons are embedded in a wider “comprehensive” religious doctrine about the value of human life does not affect the specifically political character of other parts of this teaching. The reasons given for this teaching fully meet with the requirements of the proviso, mentioned by Rawls in his “The Idea of Public Reason Revisited.”¹³² Perhaps it is this that renders many liberals and European “laicists” increasingly nervous: that there are good public, that is, political reasons for defending the political requirements of natural law and that especially the Catholic Church seems to defend natural law positions in a way which has the appeal of public reasonableness. Of course, there is much in natural law and Church doctrine that is not really part of the political common good and, therefore, cannot be legitimately imposed by the coercion of civil or penal law on the whole of the citizens. The political relevance of natural law and, therefore, the legitimate legal enforcement of morality are limited—limited by *political* reasons. The political common good does not include the perfection of moral virtue, and even less religious perfection and holiness.¹³³

130. For these see the encyclical *Evangelium Vitae* (1985) by John Paul II. As far as abortion is concerned, I have tried to emphasize this in my “Fundamental Rights, Moral Law, and the Legal Defense of Life in a Constitutional Democracy: A Constitutionalist Approach to the Encyclical *Evangelium Vitae*.”

131. See for this the “Instruction by the Congregation of the Doctrine of the Faith” (June 3, 2003): *Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons* (especially part III).

132. 152ff.

133. This might be misunderstood. Of course in my opinion citizens’ being virtuous is of the utmost importance for society and the common good. *Making* men virtuous (or even promoting their holiness), however, is not the task of political institutions nor is it a part of the specifically political common good (insofar it is the aim of political praxis). Creating social *conditions* which are favorable for living the virtues may very well be the task of laws and policies (there exists nothing as absolute “neutrality”). But also in this respect, what will be decisive are political aspects and considerations, that is, public reasons. (Much should be said on this topic which for reasons of space cannot be said here.) It is symptomatic that following the communitarian critique to liberalism and also in response to it the civil importance of “virtue” has been rediscovered. It is not surprising that Will Kymlicka has added in the second edition of his *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press,

C. Postscript: Public Reason, Natural Law and the Final Breakdown of Rawls's Immunization Strategy

Rawls's political liberalism characteristically tries to immunize public reason from any influence by natural law reasons. The strategy tries to sharply and neatly distinguish the domain of the political from the domain of (moral or religious) comprehensive doctrines and, correspondingly, public reason from the background culture. I think the distinction as such is valid and useful. But Rawls misuses it. While affirming that the political conception of justice as fairness and political liberalism is the focus of an overlapping consensus, he nonetheless draws a sharp line between such a political conception and the content of comprehensive views as if they were mutually exclusive. In reality, there necessarily exists a certain tension between a political conception's freestanding character and its simultaneously being the focus of an overlapping consensus. Being a result of such an *overlapping* consensus—which implies that there are precisely some contents of *comprehensive views* which overlap—it does not anymore look so freestanding.

However, I don't think that this *necessarily* is an intrinsic contradiction of Rawls's position. In order to actually avoid open contradiction, however, a defender of Rawls will be constrained to concede that there are many things belonging to comprehensive doctrines—and to the background culture—which essentially also must belong to the overlapping consensus, the corresponding political conception of justice and, therefore, must be part of public reason. The basic political requirements of natural law, as I have emphasized them, are precisely such. And most interestingly, they are where the most overlapping consensus is to be found between Catholics, Protestants, Muslims, say, but also between other religions and secular comprehensive doctrines. This also applies to most of the liberal tradition itself which cannot be referred to for justifying abortion or "same sex marriages," and not even divorce as nowadays it is commonly understood and justified (in the name of personal autonomy).

It was Jürgen Habermas who attacked Rawls on these grounds and reproached him for being incoherent. Rawls's freestanding view, so Habermas objects, is not freestanding at all, because it still depends on comprehensive doctrines from which it draws its moral resources. It therefore fallaciously founds public discourse on non-public reasons instead of acknowledging a "third perspective for the reasonable" which, according to Habermas, should be totally independent from the moral substance of any comprehensive

view.¹³⁴ Yet, as Rawls had previously written in his “Reply to Habermas,” Habermas’s alternative discourse-ethical concept falls short, in some essential ways, of the liberal-constitutionalist understanding of modern democracy. Though Habermas’s observation on Rawls is correct—though not really a critique—I would defend Rawls against Habermas’s attempt to institutionalize a kind of democratic-republican permanent discourse at the expense of the “dualist” constitutionalist wisdom. It is typical of the liberal constitutionalist tradition to distinguish constituent from constituted powers, and to treat the latter—the constitution and the political and legal institutions based on it—as immune from alteration or manipulation by the former in the course of the ordinary process of lawmaking, adjudication, and daily politics. The effect, the “taming of democracy,”¹³⁵ is thus to set clear juridical limits and constraints on legislation and policy (provided they are not undermined by certain kinds of judicial activism which are more political than jurisprudential).¹³⁶

Yet, this is the reason why Rawls’s immunization-strategy has not succeeded. Precisely insofar as his political conception of justice necessarily depends on some truths contained in those comprehensive doctrines which by their overlapping form this very political conception there is much truth in Rawls’s conception of political liberalism; it tends (once properly used) to give room for public reasons expressing fundamental exigencies of natural law. Moreover, although Rawls has not given up his conception of public reason, he has improved on its fine-tuning, arriving at positions which clearly undermine his own immunization-strategy, thus improving his own theory of political liberalism.

134. Jürgen Habermas, “‘Vernünftig’ versus ‘wahr’ – oder die Moral der Weltbilder,” in Habermas, *Die Einbeziehung des Anderen: Studien zur politischen Theorie* (Frankfurt a. M.: Suhrkamp, 1996), 95-127. (This is Habermas’s answer to Rawls’s “Reply to Habermas”; to my knowledge it has not been published in English).

135. András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest and New York: Central European University Press, 1999), Chapter 2.

136. Of course, this is a terribly complex issue and I do not feel sufficiently competent to deal with it. Yet, I think everything is a question of measure. Also moderated judicial review should have its place, even if it comes to developing constitutional law further. Constitutions are not Sacred Scripture. In all countries, constitutional law and its understanding is a historical process and must be adapted to always changing challenges and requirements. Yet, a better and from a democratic point of view more logical way of doing this seems to me to be, rather than judicial review, revisions or amendments of the constitution itself by parliamentary or even plebiscitary processes. Therefore, I would agree with Russel Hittinger that natural law reasons have their place rather in the legislative than in the adjudicative context. See his “Natural Law in the Positive Laws: A Legislative or Adjudicative Issue?” *The Review of Politics* 55 (1993) 5-34; now republished as chapter three of Hittinger’s, *The First Grace: Rediscovering the Natural Law in a Post-Christian World* (Wilmington, Delaware: ISI Books, 2003).

Take, for example, the famous footnote on abortion from *Political Liberalism*.¹³⁷ In this note, Rawls tries to establish that the “equality of women as equal citizens” requires that a woman’s right to end a pregnancy during the first trimester may not be overridden by the “due respect for human life.” To deny this, Rawls argues, would be to deny that there must be a balance of political values; any comprehensive doctrine tending to exclude such a balance is to this extent unreasonable. There are several strange assertions in this note, but at the end Rawls admits that the only thing which would be opposed to the ideal of public reason is “if we voted from a comprehensive doctrine that denied this right,” that is to say, only referring, say, to the Bible or the authority of some Church teaching, but without having specifically political, that is, public reasons for such a denial.

Now, in another famous footnote contained in both “The Idea of Public Reason Revisited”¹³⁸ and the “Introduction to the 1996 Paperback Edition” of *Political Liberalism*,¹³⁹ Rawls complains that his first footnote on abortion has been misunderstood as claiming a right of women to abortion in the first trimester (which certainly, so I still think, was the meaning of the footnote). In his second footnote, however, Rawls adds what he seems to have forgotten to say three years earlier and what in my view is much more consistent with his own approach, namely that it is possible that there be public, that is, specifically political, reasons able to show that to establish a woman’s right to abort as overriding the value and rights of human life is to establish an *unreasonable* balance of values. What Rawls says, then, is that it is, on principle, thinkable that there actually be valid public reasons for denying that the value of human life can ever be overridden by a woman’s right to end her pregnancy (that is, to kill her baby). This exactly is what a defender of natural law would claim; according to the second footnote it now seems to be consistent with Rawls’s idea of public reason. On the grounds of Rawls’s reformulation, on the other hand, the pro-choice position, which considers exclusively a woman’s rights *but not at all the value and possible rights of unborn life*, now runs into serious trouble: the reason is that by systematically excluding from consideration the value of the unborn’s right to life, the pro-choice position possesses, in strictly Rawlsian terms, *no balance of values at all*. There is scarcely an effort to establish one; there is only an argument drawn from a non-political comprehensive doctrine—ideology—of “privacy” and “women’s self-determination” (which politically and legally, however, is

137. *Political Liberalism*, 243, note 32.

138. 169, note 80.

139. *lv f.*, note 31.

of quite doubtful relevance). The pro-choice argument, then, turns out to be politically not only unreasonable but also illegitimate.

If what Rawls says in this last footnote on abortion is true, then in Rawlsian public reason natural law reasons are not in principle excluded. The only condition is that we do not recognize only the values which refer to individual citizens as free and equal, that we do not exclude altogether, from the outset, those values which express the essential preconditions of political society and politics and which, therefore, are the “natural”—pre-political—premises of a political conception of justice. In doing this, we do not have to jeopardize the liberal concern for freedom and equality of individual citizens and corresponding reciprocity, nor do we have to give up the institutional ethos of constitutional democracy. We only have to recognize that before human beings are citizens they already are human and social beings, governed by natural law, and that as citizens they are not deprived of this identity of being naturally social beings and that their right to life does not depend on their political status as citizens, but on their being human beings (which is the necessary precondition for being able to become a citizen).¹⁴⁰

Any conception of political liberalism accepting this—while indeed maintaining most of its Rawlsian insights—will yield much more reasonable results than it does in Rawls’s own version of it. Enriched by a sound and politically reflected theory of natural law, Rawls’s theory of political liberalism would certainly not be any more *Rawls’s* theory of political liberalism, but Rawls’s original theory would still serve—as it does in this essay—as a conceptual framework and reflective background for better understanding and talking about how in liberal constitutional democracy natural law must be thought of as part of public reason, without thereby having to give up the specifically modern political ethos of peace, liberty and political equality, and the peculiarly modern conception of public reason dependent on that ethos, which we wish to defend not in the least place because of historical experience.

140. This means that even though the unborn is not a “constitutional person” in the sense of the 5th and the 14th amendments to the constitution of the United States of America—simply because it is not yet “born” or “naturalized,” that is, a citizen—it is unreasonable and contrary to political justice not to recognize its right to life because not all rights political justice has to take into account are rights of “citizens” (including aliens); some are simply natural rights of human beings. About this see also my “Fundamental Rights, Moral Law, and the Legal Defense of Life in a Constitutional Democracy,” quoted above. This is exactly the crucial point Rawls—as Dworkin and many other liberal theorists—fails to acknowledge.