Must Politics Be War?
In Defense of Public Reason Liberalism

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Introduction: Must Politics Be War?

“War is politics by other means.” – Carl von Clausewitz

“Politics is war by other means.” – Michel Foucault

Politics is war. Or so we have been told, in centuries past and today. Be it the orthodox vs. the heretical, the rational vs. the superstitious, the productive vs. the parasitic, the story is the same: politics is an arena of strategic confrontation where parties struggle to defeat their opponents. Even democracy is a gladiatorial encounter. Philosopher David Enoch’s recent remarks speak for many; with respect to politics, “there is no way out of the arena,” and we are all mere players. We must “enter it, to fight, shoulder to shoulder ... for what is just and good.”

This attitude – that politics is fundamentally about good defeating evil – plagues American politics. Increasing polarization has made it harder for people with reasonable disagreements to see one another as good-willed. In some cases, we cannot even understand each other’s point of view. To many Americans, then, politics looks like a brute contest for power, where the victors take the country in their direction without concern for the losers.

This book attempts to save politics (and political philosophy) from the war that their practitioners often wish for us. To do so, it develops an account of a liberal social order that both permits and draws on deep moral and political disagreement while simultaneously preserving the peace. The liberal theory developed in this book demonstrates that ordinary human beings can live on

peaceful terms despite their profound disagreements about the right, the good, the holy, and the just. It challenges those who believe that politics is a mere struggle for power.

I argue that liberal institutions preserve moral peace, where people trust one another to comply with a common, shared system of publicly recognized moral conventions that all persons can justifiably internalize as their own. Moral conventions, as social conventions, are publicly recognized rules of conduct that ground social practices and expectations about those practices. What distinguishes moral conventions from other conventions are the distinctive emotional responses and forms of social ostracism associated with the violations of these conventions. When we violate moral conventions, we make ourselves subject to the reactive attitudes of the relevant public, such as resentment and indignation. Often times we even convict ourselves through guilt. And feelings of resentment, indignation, and guilt motivate social control and punishment, which frequently have serious costs for violators. Thus, moral conventions are not mere matters of etiquette, but practices enforced by the community, often without hesitance or mercy. They thereby raise the core questions of political philosophy, namely whether they have genuine authority or legitimacy, and whether they are just or unjust, fair or unfair.

In the age of social media, when the costs of a night in jail pale in comparison to the utter social ruin of a minor slip-up on Twitter, political philosophers should be all the more sensitive to John Stuart Mill's concern of the tyranny of society, and
not just the tyranny of the state. Thus a society’s merely moral conventions should be of equal concern as the justification of a society’s political and legal conventions.

I contend that moral conventions are legitimate when they are publicly justified for suitably idealized members of the public; moral conventions are publicly justified when each person has sufficient reason to adopt and internalize the conventions as authoritative. Deviations from these conventions should prove irrational when complied with by all or nearly all members of the public. Thus, an order of publicly justified moral conventions should be stable and create a kind of peace between persons. This peace is moral because it is both grounded in justified moral conventions and enforced by moral opprobrium.

I argue that moral peace has considerable intrinsic and extrinsic value. Moral peace has intrinsic value because its establishment is a method of taking the perspective of others into account in our personal judgments and actions. And taking the perspective of others into account is the appropriate response to the inherent worth of persons. Moral peace has extrinsic value because it only obtains when a society exhibits a high degree of social trust, and social trust is essential for the proper function of nearly all social institutions—political, economic, and civic.

The value of moral peace, I argue, grounds a version of public reason liberalism, a liberal theory of social legitimacy and authority that emphasizes the importance of justifying coercive law to multiple reasonable points of view. As the

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inheritor of the social contract tradition, public reason liberalism attempts to create a social contract among citizens: a complex agreement on the terms of social life. But unlike the social contract tradition, which relies on the problematic notions of express and tacit consent, public reason relies on the notion of public justification.\(^3\)

Many in philosophy and political theory accuse public reason liberals of double-talk. On the one hand, public reason liberals insist that all reasonable points of view be taken seriously and that a political order cannot justifiably imposed on upon adherents to these views without their rational assent. On the other hand, public reason liberals insist that citizens must reason in terms of shared values or even use the same reasons in important forms of political discussion. Those who refuse to engage in this shared “consensus” reasoning are labeled unreasonable; their objections and political concerns do not count towards the justification of laws and policies. Critics of public reason claim that the public reason liberals cannot have it both ways.\(^4\)

I believe public reason liberals have fallen prey to hypocrisy. To remedy the problem, I criticize mainstream public reason views that understand public reason as a form of deliberative democracy, where public reason is limited to solving political disputes in democratic discourse by appealing to shared reasons and


\(^4\) In some ways, the point of my first book was to resolve the appearance of hypocrisy with respect to the treatment of specifically religious citizens by showing that public reason is friendly to citizens of faith and their political contributions. See Kevin Vallier, \textit{Liberal Politics and Public Faith: Beyond Separation} (New York: Routledge, 2014).
shared political values. I understand public reason much more broadly—as concerned with maintaining moral peace between persons despite their pursuing diverse, and sometimes incompatible goods. Accordingly, public justification applies not merely to laws, but to moralized social conventions that comprise what P.F. Strawson, Kurt Baier, Joseph Raz, and Gerald Gaus have called a social morality. The turn towards a social morality helps demonstrate that the public reason project is not an attempt to promote the interests of the modern liberal state. Instead, as I will argue, the liberal state is considerably limited by the fact that moral peace between persons is most often realized through non-coercive moral conventions alone.

The turn to social morality also helps to explain why coercion needs public justification. The common respect-based defense of public reason, advanced most prominently by Charles Larmore and many others, has been subjected to successful critique. New defenses, such as the anti-authoritarian defense of public reason championed by Gerald Gaus, also face difficulties. But if public justification is understood as a condition of moral peace, then coercion must be publicly justified.

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justified because publicly justified legal conventions are uniquely suited to help moral conventions preserve moral peace between persons.

The book is structured into three parts. In Part I, I defend an original conception of public reason based on the value of moral peace. I also develop a conception of publicly justified moral conventions and a theory of political obligation based on the need to complete the system of publicly justified moral conventions. We can therefore understand Part I as establishing a society’s moral constitution, the order of justified norms prior to government, politics and coercive law. While I draw on the idea of a moral constitution as found in Rawls and Gaus, I will understand the idea of a moral constitution as the descendent of the early modern idea of the constitution of a society prior to the state, such as those found in Althusius, Suarez, Locke, and others. In this way the public reason project proceeds in two stages: first we set out a morally peaceful society’s moral constitution, and then develop an account of its political constitution.

Part II focuses on the political constitution. Once a social-moral order is properly constituted, members of the public do not seek to institutionalize a common conception of the good or even a common conception of justice. On my view, if we impose our sectarian conception of justice on others, there is an

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important sense in which we are at war with them. The theory of justice, then, plays a much more restrained role in my theory than it does in other accounts of public reason. Contractors will instead choose a set of political, economic and civic institutions and procedures to govern persons who disagree about justice and the good. Among these institutions and procedures is the system of higher-order rules for the legitimate use of state power commonly called a constitution.

For this reason, the political dimension of public reason liberalism is defined by the theory of moralized constitutional choice. A constitution-focused conception of public reason signals two important departures from Rawlsian political liberalism. First, members of the public do not choose principles of justice to govern their society; instead, they settle on a more modest notion of primary rights. Rawls denied that political philosophy was in the business of determining the nature of the authentic human good, so he developed a notion of the good that was sufficiently shared that state promotion of those goods would not be authoritarian or sectarian—primary goods, resources that anyone might want given a rational conception of the good. Primary rights have a similar basis: we identify a system of rights that all can converge on as necessary for each person or group to advance her good and her sense of justice on reciprocal terms with others.

The second part of political public reason involves the choice of constitutional rules of two types. First, we must choose constitutional rules

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designed to protect, define, harmonize, and enforce primary rights. Second, we must choose constitutional rules to govern matters of political concern other than the protection of rights, such as the production of public goods and the regulation of negative externalities. Few public reason liberals have developed accounts of constitutional choice, so I argue that we must appeal to other fields to develop a substantive model of constitutional choice. In particular, we should appeal to constitutional political economy and the public choice contractarianism advanced by James Buchanan and Gordon Tullock.\textsuperscript{11} So Part II is focused on the derivation of primary rights and the synthesis of public reason and public choice to generate a theory of constitutional choice.

I end Part II by developing a new model of stability for the right reasons. Rawlsians all agree that a just and legitimate political order must be stable for the right reasons or in some sense self-stabilizing among reasonable persons. But the models of stability in the literature are, in my view, much too simple to be plausible. They do not recognize the complex dynamics of assuring cooperative behavior in a mass society. Further, equilibrium models that are used to describe a well-ordered society imagine such a society as coordinating around a single focal point understood as an abstract set of substantive principles of justice and their associated institutions. The idea that social stability should depend on a single equilibrium, and one that is both so abstract and so contentious, is implausible. After arguing for this point, I develop an alternative agent-based model,

understood as a class of computational model that simulates the actions and interactions of autonomous agents and aiming to assess their effects on an entire social system. Towards this end, I develop a complex computational model of the equilibrium conditions for constitutional rules, as providing assurance to cooperative members of the public and resisting those of the public prone to rent-seeking behavior.

Part III outlines the contours of publicly justified constitutions, following the case for establishing moral and political constitutions for a given society. I begin with an account of the nature and authority of social-moral institutions in the absence of the state, including both the family and civic associations. A society’s moral constitution not only protects non-state associations, but also draws on them as sources of legitimacy. Given that publicly justified moral conventions can establish moral peace between persons, non-state institutions that establish moral peace have original legitimate authority that can compete with the state. In this way, I attempt to integrate the tradition of liberal pluralism into public reason, despite the long-standing association between public reason and rationalistic social contract theories. The turn to social morality requires that we assign great authority to civic associations and intermediary institutions, social authority that can substantially limit state power.

I then explain the place of markets and private property in a social-moral order. Commercial institutions, I contend, need state power more than civic

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associations like the family and religious organizations to function well. And yet, the publicly justified moral conventions that underlie commercial institutions will constrain the reach of state power. A publicly justified constitution may allow for some redistribution of wealth, social insurance, state regulation and the provision of public goods, but it is prohibited from more radical interventions, such as those involved in establishing liberal socialism and property-owning democracy. As such, I will argue against the common view that property rights are creations of the state. Property rights are, indeed, partly social creations, but they are not mere political creations. Property relations are primarily the natural product of social-moral conventions and spontaneously evolved common law, not state design.

Finally, I develop a conception of democracy for a publicly justified constitution. It contrasts with the traditional deliberative democratic approach in three ways. First, it focuses on explaining the public justification of democracy given a justified moral constitution. In this way, my conception of political democracy more closely resembles Lockean theories than traditional public reason views. Second, my conception of democracy does not rely on deliberation as the sole or even the best method of public justification; other institutions can help reveal the will of the people, such as the market economy, political bargaining, and even unconventional information pooling tools like prediction markets. In this

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13 In particular, I will focus on the conventionalist line of argument found in Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (New York: Oxford University Press, 2002).
way, my conception of the general will is more closely aligned with idealist
theories found in T.H. Green and Bernard Bosanquet, rather than the Rousseauian
views popular among philosophers and political theorists.14 Third, my conception
of democracy does not depend on reaching or even approaching consensus on
political issues, but rather seeks decision-mechanisms that minimize legislative
errors. Given these three contrasts, my conception of democracy is not limited to
coercive political mechanisms and public deliberation. Instead, my view is process
democratic because it restricts the role of deliberation in social decision-making
vis-à-vis other choice procedures.

The aim of the book is to show that a moderate, developed, diverse liberal
society can achieve a lasting moral peace between persons. In contrast to those
who insist that politics is war, I contend that a liberal moral order can allow
persons with fundamental disagreements to live on moral terms with others.
Politics does not have to be war. Moral peace is possible.

14 That is, I follow T. H. Green, *Lectures on the Principles of Political Obligation* (New York:
Longman’s Green and Co., 1895), and Bernard Bosanquet, *The Philosophical Theory of the State and
Related Essays*, ed. Gerald Gaus and William Sweet, Key Texts: Classic Studies in the History of
Ideas (South Bend: St. Augustine’s Press, 2001). My view can be contrasted with Joshua Cohen,
"Deliberation and Democratic Legitimacy," in *Deliberative Democracy*, ed. James Bohman and
Chapter 1: Moral Peace and Social Trust

To show that politics is not war, this book identifies the political institutions that establish moral peace between persons. In chapter 2, I argue that moral peace provides a philosophical foundation for public reason liberalism. Insofar as we have reason to establish moral peace between persons, we must insist that the norms that comprise our shared moral life must be publicly justified. Public reason liberalism, then, offers an attractive answer to the titular question of the book. But we must first explain the idea of moral peace and its value—the task of this chapter.

I define moral peace as a state of society that exhibits a high degree of rationally scrutable social-moral trust. Social-moral trust is the convergence of public expectations (a) that the moral conventions of that society be followed and (b) that people exhibit reactive attitudes, such as resentment and indignation, when they detect convention violations. Social-moral trust is rationally scrutable when each person can subject their moral conventions to rational criticism and reconstruction based on the commitments derived from their own perspective. A society is at peace when its members socially trust one another not to use coercive force or threats to impose control and exploit others. And a society is at moral peace when its members socially trust one another to follow moral conventions that are rationally scrutable, and not to enforce moral conventions that cannot survive the rational scrutiny of members of the public.
After explaining the idea of moral peace, I offer two arguments for why persons have reason to establish this valuable form of social relationship. First, I argue that a morally peaceful social order has great intrinsic value—value for its own sake. This is because a morally peaceful order is comprised of actions that appropriately respond to the fundamental worth of persons. I claim that an especially important way to respond to the worth of persons is to take their perspective into account in deciding how to act. Based on an analysis of how responding to the worth of our loved ones requires taking their perspective into account, I argue that we have similar, if weaker, reason to take the perspective of strangers into account in our public conduct. Moral peace derives its value from the fact that it is established by actions that are instances of taking the perspective of strangers into account, which in turn are appropriate responses to strangers’ inherent worth. Since all persons have worth, then, we have strong reason to co-author a morally peaceful social order.

Second, I argue that a morally peaceful order enjoys the great extrinsic good of enduring social trust. Social trust is the glue that holds a great many valuable social institutions together, including civil society, the commercial order, and the political order. In this way, social trust is critical for a society to effectively achieve an enormous array of goods over time. If social trust in our moral conventions is rationally scrutable, we can ensure that persons with diverse perspectives have reason to maintain social trust in their institutions and in one another. Otherwise,
social trust is too fragile. Thus, if we are to enjoy the goods brought about by social trust, we should promote moral peace between persons.

Towards the end of the chapter, I argue that value of moral peace should appeal to both realist and constructive approaches to political philosophy and public reason liberalism in particular. Moral peace is something value by our own lights; this provides constructivist reason to care about public justification. Moral peace is also something we should value—objectively and mind-independently; this provides realist reason to care about public justification. In this way, the moral peace foundation for public reason should have broad appeal. I also argue that grounding public reason in moral peace allows us to capture the advantages of alternative defenses of public reason, such as the common respect-based defense and the Gausian concern to avoid authoritarianism, without their deficiencies.

I spend the first four sections of this chapter laying out the idea of moral peace between persons (I-IV). I then turn, in the next six sections (V-X), to explain the intrinsic and extrinsic value of moral peace. The final section (XI) explains the realist and constructivist aspects of the moral peace defense of public reason. The supplementary material to Chapter 1, found on the book website, argues that the moral peace view has important advantages over competitor approaches.
I. States of War and Peace

The version of public reason liberalism I defend descends from the social contract tradition. Social contract theories, including contemporary ones, begin their justification of political power by describing a state of *nature*, identifying its flaws, and suggesting government as a remedy for those flaws. The challenges of life in the state of nature engender considerable conflict, as we see in the states of nature described by Thomas Hobbes and John Locke.\(^{15}\) In contrast, I contend that we can identify an attractive foundation for public reason if we focus on the less familiar analysis of the state of *war*. The significance of the state of war for our purposes is that characterizing it appropriately will help us identify its opposite—a state of social peace.

Of course, analyses of the state of nature often appeal to the threat of the state of war, on the grounds that the former leads to the latter. Hobbes’s theory illustrates a particularly tight connection between the two. However, even for Hobbes, the state of nature and the state of war are conceptually distinct.\(^{16}\) For both Hobbes and Locke, states of nature are established merely by the absence of a public arbiter of disputes about the interpretation of natural law. In this way, states of nature can *lead to* states of war, but they are not the same.

Consider Locke’s account of the state of war:

The state of war is a state of enmity and destruction: and therefore declaring by word or action, not a passionate and hasty, but a sedate settled design upon another man’s life, puts him in a *state of war* with him against whom he has declared such an intention, and so has exposed his life to the other’s power to be taken away by him, or any one that joins with him in his defense, and espouses his quarrel.\textsuperscript{17}

A society whose members use violent force against one another are in a state of war with one another. However, persons can enter a state of war merely by one person developing a “declared design” upon another’s life.\textsuperscript{18} This means that the state of war can arise even if the attacks have yet to occur. In principle, a society could enter a state of war if *everyone* were biding her time, waiting for the right moment to strike.

We can extend Locke’s account of the state of war to a society in which a group *mistakenly* perceives a declared design upon their person and property. That misperception may be enough for the group to develop their own designs upon the person and property of others, if only to protect themselves. So we can establish a state of war simply by responding to the *public expectation* of aggression against person and property even if the purported aggressors *in fact* have no such plans. And this expectation can lead other groups to *properly* perceive a declared design upon themselves. States of war can arise, therefore, merely from a change in public

\textsuperscript{17} Locke \[1690\] 1988, p. 278. Emphasis mine.
\textsuperscript{18} Locke \[1690\] 1988, p. 280.
expectations about the dispositions of groups to use force. Accordingly, we can imagine an entire society of people who are willing to cooperate and submit to a common authority but who lack assurance that others are so willing. A society of peace lovers can enter a state of war through false expectations alone.\textsuperscript{19}

This disappointment of expectations can be characterized as a failure of social trust that others will comply with peaceful public rules of conduct, enforced by a common superior, and that are based in the natural law, or some broader conception of what is morally required. Social trust breaks down when persons no longer believe that others will follow publicly recognized rules of conduct in their interactions with one another.

The conditions for establishing Locke’s state of war are not obviated by leaving the state of nature, since Locke claims that society enters a state of war if its ruler abuses his power. A state of war is established by “he who attempts to get another man into his absolute power” since absolute power embodies a “declaration of design upon his life” or, less dangerously, an attempt to “take away the freedom that belongs to any one in the state [of nature]” or of the freedom “belonging to those of society or commonwealth.”\textsuperscript{20} So even the existence of a nation-state with a constitution is not sufficient to exit the state of war. Improper uses of political power can create a state of war just like improper uses of force in the state of nature. Therefore, a government creates a state of war between itself and its citizens just by claiming more power than the people delegated to it. The

\textsuperscript{19} There are elements of this point in Hobbes’s account, since most people want peace.

\textsuperscript{20} Locke [1690] 1988, p. 279.
government need not even exercise that power. Combining this point with that of the previous paragraph, a government can create a state of war even when people mistakenly perceive that it has claimed more power than it has been given. That is, we can enter a state of war due to failures of a kind of social trust, in or out of the state of nature.

We can now begin to see how one might use the idea of social trust to distinguish between a politics of war and a politics of peace.

II. Social Trust

Cristiano Castelfranchi and Rino Falcone have provided a helpful, if complex, definition of social trust that emphasizes beliefs among interacting agents who have their own goals and beliefs. Trust is a “complex attitude of an agent x towards another agent y about the behavior/action A relevant for the result (goal) g.”21 They stress the tight relationship between trust and acts of “delegation.” Delegation occurs when “delegating agent (x) needs or likes an action of the delegated agent (y) and includes it in her own plan: x relies on y or x plans to achieve g through y.”22 The trusting agent, then, has a “multi-agent plan” that

21 Castelfranchi and Falcone 2010, p. 39. [Referees: I’ve found this the best definition of trust for my purposes. If you think it necessary, I can discuss other views as well, or at least cite them.]
22 Castelfranchi and Falcone 2010, p. 79(?).
includes y, where y must realize some goal or action that is part of x’s plan. Social trust, then, typically involves delegation.  

Social trust requires at least two types of beliefs. For John to trust Reba, John must have a “competence” belief and a “disposition” or “willingness” belief. He must believe that Reba is necessary and capable of providing the expected result, and that Reba will actually do what he needs. This is a “belief relative to their willingness” which makes the trusted person predictable. From these beliefs, the trusting agent can form a “positive expectation” understood as the combination of a goal g and beliefs \([B_1, B_2 ... B_n]\) about the future.

The next belief required for trust is a “dependence” belief where John believes that he needs or depends upon Reba’s help and that it is better from John’s perspective to rely on Reba rather than not. John also has a “fulfillment” belief where he believes that the goal g will likely be achieved. Trust therefore involves some risk; John trusts Reba when he believes that it is possible that Reba will fail to do her part. Castelfranchi and Falcone claim that John takes two risks in trusting Reba: the “risk of failure” of achieving g and “wasting the efforts” of

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23 Importantly, there can be trust without delegation if “either the level of trust is not sufficient to delegate, or the level of trust would be sufficient but there are other reasons preventing delegations,” like social or legal prohibitions. See Ibid.

24 Castelfranchi and Falcone 2010, p. 16.

25 Note that neither of these beliefs requires actual delegation, but delegation will be required if trust is to be demonstrated.
others.\textsuperscript{26} Thus, by trusting Reba, John takes a risk and so makes himself \textit{vulnerable} to her.\textsuperscript{27}

Based on the foregoing, we can define trust as follows:

\textit{Trust:} A trusts B just when A has goal G, believes that B is necessary or helpful for achieving G and that B is willing and able to do B’s part\textsuperscript{28} in achieving G.\textsuperscript{29}

Trust requires a goal, a belief that another agent is necessary or helpful for achieving the goal, and that the other agent will (probably) do her part in achieving the goal.

This definition of trust can be expanded to define trust that is mass and mutual—social trust. In mass society, few goals are shared among all citizens. So social trust does not require some substantive shared goal G, such as realizing the common good. Instead, social trust requires the belief that others are necessary or helpful for achieving each person or small group’s ends and that people are generally willing and able to do so by \textit{following publicly recognized rules of conduct}, such as prohibitions against aggression, deception, and harm. A definition:

\textsuperscript{26} Castelfranchi and Falcone 2010, p. 76.
\textsuperscript{27} The authors enumerate other belief conditions not required to advance the argument of the chapter.
\textsuperscript{28} As A conceptualizes B’s part.
\textsuperscript{29} These beliefs are, most frequently, implicit.
Individual Social Trust: a member of the public P socially trusts other members Q when she believes that Qs are necessary or helpful for achieving her goals G and that Qs are generally willing and able to do their part, knowingly or unknowingly, to achieve G by following publicly recognized rules of conduct R₁ ... Rₙ.

John must expect others to act in concert with public expectations for him to formulate his projects and plans. Social trust obtains when all or nearly all members of the public have these beliefs and expectations. Define social trust as follows:

Social Trust: a public exhibits social trust to the extent that its members generally believe that others are necessary or helpful for achieving one another’s goals G and that (most or all) members of the public are generally willing and able to do their part to achieve G, knowingly or unknowingly, by following publicly recognized rules of conduct R₁ ... Rₙ.

Large societies lack shared goals and, due to their size, they are unable to explicitly communicate the beliefs upon which trust is based. So I claim that societies establish social trust through mass compliance with social rules. As long as each person believes that most or all others will comply with publicly recognized rules of conduct based on observing rule compliance, she can socially trust others.
Social rules can be understood as norms or conventions. Both involve regular patterns of social behavior that conform to a public standard over time. But those who follow conventions regard themselves as benefiting from doing so, whereas people follow norms less consciously and sometimes without seeing the benefits from social interactions based on the norms. I use the idea of a convention capaciously to include norms whose benefits are realized because deviation from the norm is punished. Punishment makes a norm a convention by changing the payoffs of agents such that compliance with the convention is beneficial. This means I depart from standard terminology in acknowledging that many conventions are seen as mutually beneficial only with punishment. I provide an account of conventions in Chapter 2, but for now we can proceed with this simple understanding of a social rule as a convention, which include practices of norm compliance; compliance is rational based on the expectation of punishment.

III. Social-Moral Trust and Moral Conventions

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30 See the overlap between the two ideas in Bicchieri and Muldoon 2011, and Rescorla 2015. Bicchieri and Muldoon raise some problems with understanding norms merely as regular patterns of behavior and suggest that norms can be understood as combinations of expectations and behaviors. For our purposes, we need not settle the question of how to define a norm. I thank Steven Stich for this point.

31 I will understand conventions as necessarily public in nature, such that the notion of publicity in public reason that I adopt will be analyzed within my analysis of conventions in Chapter 2. I thank Steven Stich for pressing me to make this point explicit early.
Moral peace is a form of social trust that members of the public will follow moral conventions, as opposed to non-moral conventions like etiquette norms or norms of dress. For a convention to be moral, it must meet several conditions:

1. Moral conventions are emotionally infused, especially with the moral emotions. Infractions of rules yield attitudes of resentment and indignation.
2. Moral conventions are seen as nonconventional. Authority figures cannot waive moral conventions at all.
3. Moral conventions are also seen as categorical; we are to follow moral conventions because doing so is the right thing to do, and not merely because we gain some benefit from doing so.
4. And yet, moral conventions are typically seen as promoting mutual benefit; genuinely moral conventions should promote the interests of all, at least over the long run.
5. Moral conventions typically concern how we treat others, and must be distinguished therefore from mere rules of prudence that concern self-preservation or avoiding harm.
6. Moral conventions are enforced with social ostracism, blame and even violence; infractions of moral rules are seen as warranting punishment and not mere disappointment or criticism.\(^{32}\)

I would add that moral conventions must be reciprocal or universalizable. Moral conventions must apply equally to those who demand compliance with them: when John demands that Reba not violate a moral convention, he must also regard himself as subject to the rule were he in Reba’s circumstances. P.F. Strawson argued that moral conventions cannot exist without “reciprocal acknowledgment of rights and duties.\(^{33}\) A universal feature of morality is “the necessary acceptance of reciprocity of claim.” Kurt Baier also claims that moral conventions are “universally teachable and therefore universalizable” in virtue of the fact that they license claims against all members in the moral community.\(^{34}\)

Moral conventions are also necessarily publicly recognized. They cannot be conventions unless they are so recognized and they cannot be enforced by public ostracism unless the public recognizes that others know the convention applies to them. I should also stress that moral conventions are “mid-level” rules, ones that concern types of concrete acts, rather than moral principles that serve as abstract generalized requirements on moral conduct, such as a principle of utility.

\(^{32}\) My account draws on Gaus 2011, pp. 172-3. It yields a conception of social trust similar to Annette Baier’s generic definition of trust which characterizes breaches of trust as “betrayals” in contrast to disappointments. See A. Baier 1986, p. 235.

\(^{33}\) Strawson 1974, p. 40.

\(^{34}\) K. Baier 1954, p. 108. Also see pp. 111-2.
Given the foregoing, *social-moral* trust is trust that members of a public will comply with moral conventions:

*Social-Moral Trust*: a public exhibits social-moral trust to the extent that its members generally believe that others are necessary or helpful for achieving one another’s goals $G$ and that (most or all) members of the public are generally willing and able to do their part to achieve $G$, knowingly or unknowingly, by following publicly recognized *moral conventions* and *punishing violations* of those conventions.

Social-moral trust also requires members to enforce violations of moral conventions, say, by ostracism and blame, or perhaps by coercion. If members of the public merely expected others to follow moral conventions most of the time but did not believe that violators would be punished, then social-moral trust will be weak, at best. Punishment is required to stabilize moral conventions and prevent breakdown.\(^\text{35}\)

I believe that my notion of social-moral trust is well-grounded in the social trust literature. In a recent survey of conceptions of social trust, Marc Cohen develops an account of generalised trust where “social order depends on moral relationships between the persons involved.”\(^\text{36}\) He denies that we can understand

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\(^{35}\) Social-moral trust may require punishing those who fail to punish; see Boyd and Richerson 2005, pp. 193-203.

\(^{36}\) Cohen 2015, p. 465.
social trust purely in terms of expectations and that trust involves some sort of
dependence relation between the truster and the trustee. Instead, with respect to
generalized trust, “A trusts B to act in accordance with some (specified) general or
background moral obligation, where A can assume that B is committed to acting in
that way because of the character of the obligation....”

Social trust is also
understood in terms of the “fundamental constitutive practices that make a social
order possible.” On all these points, I am in agreement with Cohen, and, according
to Cohen’s survey, the notion of social-moral trust I’m working with is compatible
with many conceptions of social trust in the literature, though not all.

IV. Rationally Scrutable Social-Moral Trust

Moral peace is a foundation for public reason because norms that survive rational
scrutiny do so in virtue of being publicly justified. We must, therefore, explain the
idea of rational scrutiny.

*Mere* social-moral trust involves beliefs that may lack epistemic support.
That is, the trust-beliefs might be held irrationally. But if trust-beliefs are
irrational, then sustained rational examination of a society’s moral conventions
will undermine social-moral trust, leading rational and informed persons to violate

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37 Cohen 2015, p. 475.
38 Cohen 2015. Though while, in contrast to Cohen, I do not think that *mere* social trust necessarily
involves reference to moral obligations, my notion of social-moral trust is quite close to his
definition of social trust. [for v2: add Uslaner book]
these conventions. We want social-moral trust to be well grounded in that its constituent beliefs are epistemically justified.

To simplify, I restrict my discussion to disposition beliefs—beliefs that others are disposed to comply with moral conventions. The epistemic question is whether each trusting agent justifiably believes that she and others are actually and rationally disposed to comply with publicly recognized moral conventions, leaving us with four beliefs:

\[ B_1: \text{I am disposed to comply with moral conventions.} \]
\[ B_2: \text{I am rationally disposed to comply with moral conventions.} \]
\[ B_3: \text{others are disposed to comply with moral conventions.} \]
\[ B_4: \text{others are rationally disposed to comply with moral conventions.} \]

Beliefs \( B_1 \) and \( B_2 \) concern what the trusting agent will do, whereas beliefs \( B_3 \) and \( B_4 \) concern what the trusting agent believes others will do. \( B_1 \) and \( B_3 \) are justified when they are affirmed based on consistent, public observation of convention compliance or reliable testimony to this effect. They must be epistemically justified; unless public expectations are recognized, and recognized as rational, complying with the convention is irrational. In contrast, \( B_2 \) and \( B_4 \) concern rational dispositions to act. They are epistemically justified, then, when an agent has good ground for action; her dispositions are practically rational, as well as her judgment that others have similar dispositions. I take a disposition to be practically rational
when an agent, given a respectable amount of reasoning, can determine that the actions to which she is disposed advance her goals, values, and principles.⁳⁹ So a disposition can be rational when the motivated acts lead the agent to choose (what her evidence suggests will be) effective means towards her ends, or to choose between alternative ends.⁴⁰ I also assume that following moral conventions for their own sake can be practically rational.⁴¹

Taken together, then, social-moral trust is rationally scrutable when each person’s disposition beliefs (B₁-B₄) are epistemically justified. Consequently, we can define rationally scrutable social-moral trust as follows:

*Rationally Scrutable Social-Moral Trust:* social trust that persons will follow moral convention C is rationally scrutable only if each person justifiably believes (a) that she has sufficient practical reason to comply with C and (b) that others have sufficient practical reason of their own to comply with C, and (c) that all persons are in fact motivated to comply with C.

A complete definition would specify *all* the relevant beliefs, which is why the idea of rational scrutability is here defined merely as a necessary condition.

I explain the ideas of epistemic justification and sufficient practical reasons in Chapter 2. For now, I stipulate. Epistemic justification is to be understood as a

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³⁹ Gaus 2011, p. 253 discusses this standard in more detail.
⁴⁰ I omit discussion of the rationality of rule-following. For discussion, see Gaus 2011, pp. 122-163.
⁴¹ Where the reason for following a convention can be that compliance is the “right thing to do.”
form of access internalism: S is justified in believing P just when she can make herself aware of her justifiers for P. Social trust involves \textit{subjective} expectations, and so the notion of epistemic justification at work in social trust should also be subjective.\textsuperscript{42} The reason that epistemic justification for moral conventions is internalist is that persons need to be able to see the reasons for their beliefs if they are to trust on the basis of those reasons. The notion that a belief could be justified based, say, on whether it was formed by an objectively reliable process, renders obscure the idea of a rational expectation, which seems to be based on observation and evidence, not on reliability.

The idea of sufficient practical reasons will be understood as applying to a person such that she has sufficient reason to act, which is to say that the relevant favoring reasons override or undercut reasons to act contrariwise. What counts as good practical reasoning varies considerably between persons; so social trust can be rationally scrutinable by surviving each person’s diverse evaluative scrutiny.

V. Moral Peace and Its Value

I can now define moral peace as follows:

\textit{Moral Peace:} a society is in a state of moral peace when it exhibits a high degree of rationally scrutinable social-moral trust.

\textsuperscript{42} Pappas 2005 discusses access internalism in more detail.
The idea of moral peace helps distinguish the state of war from the state of nature. A state of nature has no recognized political order, but it does have, to some weak degree, a recognized order of moral conventions. Locke’s state of nature is an excellent illustration. All people recognize that some moral conventions, understood as natural laws, apply to them, but they face inconveniences all the same. Thus, we can understand a Lockean state of war as reached when moral convention violations reach a critical mass, leading to the destruction of trust that others will act cooperatively. This collapse in expectations does not necessarily lead to physical conflict, but it will often produce it, either by private parties or by government. I suggest that the collapse of the expectations that transition us from a peaceful state of nature to the state of war can be understood as the collapse of moral peace between persons.

I turn now to the intrinsic and extrinsic value of moral peace—the value moral peace has in itself and the value it has derived from some further or more fundamental value respectively. An intrinsic value is one whose value derives from no other source; it is not the same as a value that we value for its own sake—a final value. An extrinsic value is one whose real value derives from something or somewhere else, value distinct from instrumental value, something we value for the

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43 The state of nature might have some private political institutions, such as systems of private law not recognized as binding by all.
44 Importantly, not all natural laws are conventions, but given that the laws are “natural” those with the requisite rational nature tend to follow them; so for Locke, natural laws frequently meet the conditions for being moral conventions.
45 Here I follow Christine Korsgaard’s distinction between intrinsic-extrinsic value and instrumental-final value. See Korsgaard 1983, p. 170.
sake of something else. Therefore, intrinsic value and extrinsic value are not to be defined in terms of how persons value them.

Moral peace is intrinsically valuable because it arises from actions that appropriately respond to the inherent worth of persons. Responding to the worth of persons, I argue, involves taking their perspective into account in deciding how to act. My argument depends upon an analogy with how we respond to the worth of loved ones. I argue that the value of romantic love and the love of friends show that we have reason to care not merely for the good of the beloved, but for what the beloved believes her good to be.\footnote{In this way, my view bears some affinities to a civic friendship account of public reason, though I think my foundation is broader and less politically oriented. For civic friendship accounts, see Ebels-Duggan 2010 and Lister 2013, Ch 5. Rawls mentions civic friendship as part of the foundation of political liberalism; see Rawls 2005, p. 447. I will address civic friendship as a foundation for public reason below.} The explanation of the value of these intimate loves is that they are especially excellent instances of taking the perspective of others into account, and so are especially excellent instances of responding to the worth of persons. This explanation of the value of intimate love implies that taking the perspective of others, including strangers, into account has intrinsic value. And the way we take the perspective of strangers into account, I will argue in Chapter 2, is to comply with widely recognized rules of conduct that all normally functioning persons have sufficient reason to endorse and follow. In following these rules, even when doing so is not in our best interest, we modify our behavior in light of valuing the perspective of others, and so value \textit{them}.\footnote{Though rule compliance cannot significantly frustrate what we take to be our interests, it can require significant sacrifice, so long as general compliance with the rule advances our goals, aims or values.} Moral
peace is the societal result of complying with these rules; mass compliance creates a rational basis for enduring social-moral trust. A society that realizes moral peace between persons, then, has great intrinsic value because its members appropriately respond to each other’s inherent worth.

The extrinsic value of moral peace arises from other social goods brought about by social trust. As we will see, much social science suggests that we cannot explain the difference between well-functioning political and economic institutions and poorly functioning political and economic institutions without appealing to some conception of social trust. Societies with high levels of social trust will tend to have effective institutions, whereas societies with little social trust typically do not. Given how important social trust is to social life, a morally peaceful society is one whose institutions can function well on an ongoing basis.

VI. One Realist Foundation for Public Reason

But before I explicate the value of moral peace, I should clear up an important confusion. By grounding public reason in intrinsic value, I do not claim that public reason must embrace a realist metaethic.\(^{48}^{49}\) Instead, I am merely claiming that I

\(^{48}\) Rawls 2005, pp. xix-xx claims that public reason is compatible with realist metaethical views. Political liberalism “does not criticize, much less reject, any particular theory of the truth of moral judgments.”

\(^{49}\) Following philosophical parlance, I understand a realist metaethic as one that holds that moral facts are not true in virtue of response-dependent facts. A realist position holds that moral requirements can be adequately represented by concepts whose conditions of application do not essentially involve conditions of human response. A “response” in this sense is a form of mental
think that the value of persons is objective and response-independent. Persons have worth regardless of whether anyone believes or desires that they do. And taking their perspectives into account requires recognizing that others provide us with reasons to act, not because we value them, but because they are response-independently valuable. I also believe that there is a response-independent fact that taking the perspective of others is good for a person, and not good merely because it satisfies a deep-seated, rational, and stable desire. Instead, a person who engages in perspective respect lives objectively better than one who does not.

There is no tension between my account of the objective value of public justification and public reason approaches because I allow, and even hope, that there are other successful justifications for public reason views. My goal is only to show that there is one viable justificatory path, and that this path is realist in character. I do this not merely because I am a realist myself, but to counteract hostility to public reason based on a dim view of the tendency among public reason liberals to refuse to offer “comprehensive” ethical foundations. The reason for the tendency is to avoid leading the reader to believe that public reason liberalism holds that the author’s favored foundation is the only acceptable foundation for public reason. But in refusing to ever tell such a story, we risk


51 John Rawls’s “Political, not Metaphysical” strategy is the most familiar. See Rawls 2005, p. 10. Though as we saw above (ft. 31?), Rawls did not claim that his political constructivism was incompatible with moral realism. Also see Habermas 1998, p. 469. Habermas thinks moral realism should simply be rejected.
leading the reader to believe we think there is no such objective ground, or that such a ground is impossible or unnecessary.

A powerful illustration of this mistake can be found in G.A. Cohen’s critique of Rawlsian constructivism, especially Cohen’s distinction between fact-independent and fact-dependent principles. Cohen condemns the Rawlsian project on the grounds that principles of justice must ultimately be fact-independent principles, where their normative force in no way derives from non-normative facts. But Cohen’s critique misses the fact that Rawlsians need not and do not deny his claim. Instead, their view is that principles of justice and their justification can be at least prima facie formulated independently of our comprehensive doctrines, though the “full justification” of a conception of justice requires an overlapping consensus of reasonable comprehensive doctrines. To illustrate, recall that Rawls claims that “we must distinguish between how a political conception is presented and its being part of, or as derivable within, a comprehensive doctrine.” There is a sense in which a political conception of justice depends on comprehensive doctrines and several senses in which it does not. A political conception can be “presented” and “expounded” independently of a comprehensive doctrine. And we can present and expound upon it without knowing anything about or even guessing the comprehensive doctrines that may support it. On the other hand, we will want a political conception “to have a

51 Cohen 2008, pp. 229-273 reviews the facts and principles argument.
justification by reference to one or more comprehensive doctrines," many of which might include objectivist conceptions of well-being and value.\footnote{Rawls 2005, p. 12.}

To avoid Cohen’s error, I offer an objectivist, realist foundation for public reason. But let me again stress that my aim is to propose \textit{only one justificatory path} from a more comprehensive ethic rooted in objective moral value to a theory of the public justification of moral and legal conventions.

VII. The Worth of Persons and the Perspective of Others

I shall assume that one of the fundamental sources of moral normativity is the inherent worth of persons. Right action is a function of responding appropriately to the worth of persons, both our own worth and the worth of others. There are two different modes of responding to the worth of persons. One mode is teleological—we recognize the worth of persons by promoting their good. The other mode is deontological—we recognize the worth of persons by refraining from interfering with them or using them as mere tools for our own purposes. As a deontologist, I believe that the deontological mode of responding to the worth of persons generally overrides the teleological mode in cases of conflict—appropriately responding to the worth of persons typically requires, for instance, refraining from sacrificing the good of the few for the many. But both modes of response are of enormous importance.
The deontological mode of response can be understood as respecting side-constraints on how we promote the good or well-being of persons. A person who recognizes a side-constraint should let it place a constraint upon his action, “rather than (or in addition to) building it into the end state to be realized.”\(^5\) A side-constraint issues reasons that lack hypothetical qualifiers—the side-constraint commands us to engage in certain lines of action. Given that the teleological mode of response involves promoting the good of persons, the combined response to the worth of persons requires the side-constrained promotion of personal good or well-being.\(^5\)

Both modes of response can be understood in terms of the interests of each person or the will of each person. The interests of persons can be understood in terms of personal good understood as their well-being. There are different accounts of well-being, such as objective list and desire views.\(^5\) Perhaps the interests of persons are based in enjoying some combination of a list of objective goods for persons, or perhaps the interests of persons are rooted in the satisfaction of their rational desires. In contrast, we might understand the appropriate response to the worth of persons as responding to what they will, or in my terms, what they take themselves to have most reason to do. I understand “most reason” capiciously to include not merely what they desire, but what they might take

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\(^5\) The idea of side-constrained promotion is similar to the notion of constrained teleology in Gaus 1990, p. 333.

\(^5\) For a discussion of the distinction between desire and objective list theories of well-being, see Crisp 2013.
themselves to have reason to do despite desiring to do otherwise.59 In other words, when we ask what people will, I will understand us asking what reasons persons believe themselves to have. On the will-based understanding of responding to the worth of persons, responding to personal worth requires promoting and respecting what persons take themselves to have reason to do. This is not quite the same as promoting and respecting what persons take to constitute their well-being, as persons might regard themselves as having reason to sacrifice their well-being for the sake of some other goal or end.

I shall understand both the teleological and deontological modes of response to personal worth in terms of the will account, recognizing in many cases that a person might be mistaken about what she has most reason to do. Hard cases arise when we think we justifiably believe that someone is mistaken about what she has reason to do but that the person herself cannot be brought around to seeing the mistake. I shall defer discussion of this case to my discussion of love below, but for now I will say that the worth of persons often requires permitting others to act based on these mistaken apprehension of their reasons for action. My argument for understanding worth in terms of the will of persons will become clear below in my discussion of the good of intimate love.

I shall term responding to the will of persons as taking the perspective of others into account. A “perspective” is understood as a set of beliefs about what a

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59 I do not here settle or even really speak to the question of how to settle what persons take themselves to have reason to do. Humean accounts of reasons will reduce reasons to the satisfaction of desires, whereas Kantian theories may deny that desires are sufficient to give us reasons to act.
person has reason to do given her goals, values, and principles. A perspective can be represented by a scheme of beliefs about one’s reasons for action that are often organized into more or less coherent wholes by broader rational ethical principles and values, along with one’s memories, relationships, and ongoing personal life narrative. If responding to the worth of persons means requires responding to the will of persons, then taking the perspective of others into account is the normal way of responding to the inherent worth of persons. To put it another way, actions based on considering the perspective of others partly constitute responding to the worth of persons. Regard for perspectives is not a mere instrumental means of responding to worth, but a constitutive means—regard for perspectives is a proper part of responding to the worth of others. Combining the two modes of response to the worth of persons, then, implies that taking the perspective of others into account requires the constrained promotion of what others believe themselves to have reason to do.

I now turn to connect responding to the worth of persons with taking their perspective into account. I do so by arguing that love is a supreme response to the worth of persons that necessarily involves taking their perspective into account. Love is just a way of taking the perspective of others into account, so if love is an appropriate response to worth, then at least in the case of love, responding to the worth of persons involves taking their perspective into account. This suggests, though it does not prove, that responding to the worth of persons in general requires taking their perspective into account. The reason for this is that the best
explanation for why love is a supreme response to worth is because it is an especially excellent and demanding way of taking the perspective of others into account. Thus, my claim is not that we should establish relations of love between persons as a condition of responding to their worth; rather, love illustrates the connection between a person’s worth and taking her perspective seriously.

VIII. Eros and Philia

My discussion will focus on the love we have for friends and romantic partners, which, following C.S. Lewis, I will call Philia and Eros.60 These are the loves, and indeed, the goods, that persons value more than any other. As Peter Railton notes, “we must recognize that loving relationships, friendships, [etc.] ... are among the most important contributor to whatever it is that makes life worthwhile.”61

In developing a conception of love, I am primarily interested in what we might, following Kant, call “moral” love and friendship, love based not merely on emotional affect or passion, but that involves a sustained, rational commitment to maintaining a relationship with others.62 I shall therefore focus on moral Philia and Eros, and not mere affective loves, such as a “crush” or finding interaction with another person pleasurable.

60 See Lewis 1960.
61 Railton 1984, p. 139.
62 Gaus 1990, pp. 287. Also see Kant [1797] 2009, pp. 217-8?
These loves can be understood as rational commitments to satisfying two desires. To love is to desire (a) the good of the beloved and (b) union with the beloved, a willed connection that involves both the feeling of intimacy and the commitment to living life together, sharing burdens, celebrating each other’s accomplishments, serving as confidants, and so on.\footnote{Stump 2012, p. 91. See Aquinas, \textit{Summa Theologica}, I-II q.26, a.4.}

Eros and Philia are distinguished from one another by feature (b), the sort of union one desires with the other. Eros seeks romantic union that is often, but not always, sexual in nature. It essentially involves a kind of infatuation with the other that leads one to desire close emotional and even physical union. Philia seeks a union in shared values, shared projects, and/or shared history, and involves mutual admiration and respect. Erotic relations are inward looking: the lovers are drawn to the beloved. Philial relations are outward looking: the lovers are united in their pursuit of certain goods.

Lewis claims that Philia is the most unnatural love, but not unnatural in a derogatory sense. It is “the least instinctive, organic, biological, gregarious, and necessary.”\footnote{Lewis 1960, p. 88.} It affects our passions the least. Philia also holds “essentially between individuals” such that once two people become friends “they have in some degree drawn apart together from the herd.”\footnote{Lewis 1960, p. 89.} Friendship is also distinguished from Eros because lovers discuss and obsess over their Eros much more than friends discuss and obsess over their Philia. Here is Lewis’s familiar contrast: “Lovers are always
talking to one another about their love; Friends hardly ever about their Friendship. Lovers are normally face to face, absorbed in each other; Friends, side by side, absorbed in some common interests.  

Again, “we picture lovers face to face but Friends side by side; their eyes look ahead.” Philia ultimately rests on common interests, history, or goals. As Lewis says, “The typical expression of opening Friendship would be something like, ‘What? You too? I thought I was the only one.’” Friends also have an appreciation for one another, especially for their talents in pursuit of common interests and goals.  

Eros is the state of being in love and desiring union with another person for her sake. In an important sense, “the lover desires the Beloved herself, not the pleasure she can give.” While Eros is familiar, since Western culture celebrates it, we can still confuse it with other forms of attachment. For instance, Lewis terms sexual love “Venus” which is often the companion of Eros, but is not a proper part of it. Venus and Eros are not only different, but are sometimes in tension. As Lewis says, “A man in this state [of Erotic love] really hasn’t leisure to think of sex. He is too busy thinking of a person” and while he is “full of desire” this desire isn’t

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66 Lewis 1960, p. 91.
67 Lewis 1960, p. 98.
68 Lewis 1960, p. 96.
69 Lewis 1960, p. 105.
70 Lewis 1960, p. 131.
71 Lewis 1960, p. 135.
72 Lewis 1960, p. 132.
necessarily “sexually toned.” Without Eros “sexual desire, like every other desire, is a fact about ourselves.”

Lewis claims Eros will sometimes pit itself against the good of the beloved: “it is useless to try to separate lovers by proving to them that their marriage will be an unhappy one. This is not only because they will disbelieve you. ... even if they believed, they would not be dissuaded.” Here I disagree with Lewis. Eros is defective insofar as lovers prefer being together instead wanting the beloved to have a good and happy life. This is because they prefer union to the good of the beloved. Imagine, as an illustration, a man and a woman who are deeply “in love” but who mutually encourage their respective drug addictions. Both lovers may recognize that they are bad for each other, but they nonetheless prioritize their union. This pits the two elements of love against one another. If their Eros were more perfect, they would frustrate their desire for union by seeking rehabilitation, and only then resume their relationship. When our beloved fares better without us, we should not prioritize union with them over their well-being. The old cliché that “if you love her, let her go” contains a bit of truth.

Some philosophers, however, deny that love includes a desire for union with the beloved. David Velleman has famously argued that, “love is an arresting awareness of value in a person” where our motivation “is to suspend our emotional

73 Lewis 1960, p. 133.
74 Lewis 1960, p. 136.
75 Lewis 1960, p. 154.
self-protection from the person rather than our self-interested designs on him.” If love is partly a desire for union, then Velleman would argue that, like any other theory on which love is an aim, the desire makes the beloved “instrumental ... in which he is involved.” Instead, Velleman argues that the person who is loved is in an important sense revered: “he is a proper object for reverence, an attitude that stands back in appreciation of the rational creature he is, without inclining toward any particular results to be produced.” I agree with Velleman that the lover must regard the beloved as having value in herself as a person, but while love per se might be an appreciation of the beloved’s value, Eros and Philia essentially involve a desire for union. Lovers and friends want to be together; they may grow tired of one another, they may come to believe that their love is unhealthy and so avoid one another, but in the normal case, these loves mean a desire to be together. And I see nothing particularly “instrumental” about this desire, since it is a desire to be with the beloved because we value them. As Niko Kolodny argues, love involves valuing some kind of relationship with the beloved, however distant, such that love involves some kind of union, and that this relationship is not valued instrumentally, but as a final end.

Now that we have some familiarity with Eros and Philia, we can explain how they necessarily involve a disposition to take the perspective of others into account. I contend that, if John loves Reba, he not merely wills Reba’s good, but

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77 Velleman 1999, p. 354.
78 Velleman 1999, p. 358.
79 Kolodny 2003, p. 151.
wills Reba’s good as she understands it from her own perspective. John wants to help Reba realize not merely what he takes to be her good but what Reba takes to be her good. As Rawls claimed, “Love clearly has among its main elements the desire to advance the other person’s good as this person’s rational self-love would require.”80 Those who love not only want the good for the beloved, but want the good as the beloved understands her good. Kyla Ebels-Duggan argues that if we care merely for the interests of the beloved, and not her own understanding of her interests, we fail to “take the beloved’s agency seriously enough.”81 Instead, given that “achieving her aims is what she takes herself to have most reason to do” it will seem to the beloved that “she should be able to count on her intimates to help her enact these choices.” The problem with characterizing love in terms of desiring merely the objective best for a person is that “it refuses to acknowledge the beloved’s competence and right to make the decisions that significantly affect her life.”82 Similarly, Melissa Seymour Fahmy argues that Kant believes that, with respect to those we love, our duties of love mean that “we are not simply obliged to promote others’ happiness: we are obliged to promote their happiness unselfishly and in accordance with their conception of happiness.”83 Dean Cocking and Jeannette Kennett agree that “we shall miss much of the good of friends, and of what we think we have reason to do on account of friendship, if we focus

80 Rawls 1971, p. 190. Also see p. 487.
83 Fahmy 2010, p. 327.
exclusively on our pursuit of the well-being of the other.” Though David Velleman disagrees with this view of love, he describes the common view as holding that all loves “necessarily [entail] a desire to ‘care and share,’ or to ‘benefit and be with.’” In short, when John loves Reba, he wants her to have the desires of her heart.

This account of love raises a critical question: what if we come to believe that what our lover or friend desires is, in fact, bad for her? Ebels-Duggan argues that love essentially involves what she calls “authority in judgment” by treating “her choice of an end as if it were evidence that the end is worthwhile,” and while this does not require treating the lover’s judgment as infallible, the lover “must operate under the presumption that [the beloved’s] choices are good ones.” But then, what happens when you are justified in thinking the beloved’s choice is good? Do you still have reason to pursue your partner’s ends, or at least help her advance her own? What “if you think your beloved’s ends are not worthwhile—or worse, impermissible?” Importantly, Ebels-Duggan is not sure what to say, since we typically find it “uncomfortable to attribute confusion about what is worthwhile to our intimates.” And yet, suppose our lover, or adult child, falls into drug addiction and she comes to affirm her addiction as good for her. In that case, does love require valuing drug use? Most people will say no, but that is likely because we think our beloved knows full well that she is fooling herself and that,

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84 Cocking and Kennett 2000, p. 284.
85 Velleman 1999, p. 353. The account of love I offer here somewhat contrasts with Velleman’s view.
86 Ebels-Duggan 2008, p. 159.
even if she has formed this judgment, she has done so under the duress of physical or mental addiction to the drug.

The harder case is when two lovers reasonably disagree about what is good, say where one spouse converts to another religion while the other spouse remains within their original faith. Suppose their faiths are incompatible in important respects. Perhaps John is a Buddhist and Reba converts from Buddhism to Christianity. The two agree on the importance of moral behavior, compassion, and self-control, and both believe it important to discipline selfish attitudes and desires. But Reba now wants to have God remake her into a full human being, while John seeks to fully appreciate that the self is an illusion. Reba wants to sing praises to Jesus, whereas John wants to meditate. Should John support Reba’s pursuit of her end? Or not? The answer to this question is important, since I’m drawing a connection between the considerations that explain the value of love and the considerations that explain the value of public justification with respect to those who reasonably disagree with us. I think in these cases, mature adult lovers have a few different options. First, their love may simply dissipate somewhat with respect to their previously shared religious ends. Second, they may come to hope that each spouse become the best exemplars of their faith, and to adopt more ecumenical beliefs about their eternal destinies; perhaps Reba allows that John will go to heaven, and John allows that Reba, in virtue of disciplining most of her desires, will grow closer to Enlightenment in this life. Alternatively, they can simply encourage and drive one another to abandon their faith, and perhaps the
lover, in virtue of valuing the beloved, will convert. Interfaith couples, as well as couples with some other sort of deep division in their visions of a good life and a good relationship, routinely grapple with these problems. And all of these responses are consistent with the idea that when we love someone, we desire what they want for themselves. In cases where we think that is bad, either our love diminishes, or we allow their judgment authority to change our minds, maybe towards more ecumenical beliefs, or to new beliefs. I do think it possible for the couple to maintain their love by simply setting aside the ongoing dispute about who has the correct faith, but this invariably reduces their intimacy and so, I think, the extent of their love for one another. They may preserve romantic union by setting religious union aside.

Ebels-Duggan joins a number of other philosophers in arguing that loving others not only involves desiring what the beloved wants for herself, but in coming to share ends with the beloved. By choosing an end, Reba gives her beloved John evidence that the end is good, and so gives John a reason to act towards her ends, and that John believes that Rebahas chosen these ends well because she is his beloved. This means that two people who love each other will pursue these ends together, and so gradually grow more unified.88 In this way, the lover has two sorts of authority over the beloved—epistemic authority that her end is well-chosen and moral authority that the beloved should pursue the end as well. Thus, “when two people reciprocally attribute these sorts of authority to each other, the result is

88 Ebels-Duggan 2008, p. 162.
normally that they come to share ends. And this is what love, at least in its practical aspect, is all about.”

Cocking and Kennett largely agree, claiming that in companion friendships, “friends are characteristically receptive to being directed and interpreted and so in their ways drawn by each other.” And this process yields shared ends. As Michael Smith summarizes their view,

loving someone [is] a dynamic process in which the desires of lovers, and their self-conceptions, develop under each other’s influence: the lover comes to desire to do certain things because that fits with what the beloved desires to do, and vice-versa; the lover comes to think that certain things are important to focus on, among the many important things that could be focused on, because that’s what the lover thinks is important to focus on, and vice-versa.\[91\]

So in intimate loves, lovers not only take one another’s perspectives into account, but give enormous weight to the beloved’s perspective on what pursuits are worthwhile. When John loves Reba, he acknowledges Reba’s judgments about how he should conduct his own life. If Reba tells John that he has committed a moral infraction, and John loves Reba, he will listen to her and validate her concern out of respect for her, even if John denies that he has committed the infraction.


\[90\] Cocking and Kennett 2000, p. 284.

\[91\] Smith 2015, p. 11.
many cases, John will even take Reba’s judgment to override his own. Given his love for Reba, he will sometimes take her judgment to be definitive. This helps to explain why lovers often celebrate their beloved by remarking that the beloved knows the lover better than the lover knows himself. Lovers are thought to have special insight into one another’s character, dreams and habits, such that their judgments should be taken extremely seriously. We expect those we love to defer to our judgment, since our judgments are motivated by love and concern for the beloved.

Love, therefore, not only involves considering what the beloved has reason to do, but taking the beloved’s judgments and advice about the lover’s own choices extremely seriously. This means that love is an especially rich and demanding form of taking the perspective of others into account.

Our analysis of Eros and Philia illustrates how taking the perspective of others into account is a way of realizing the inherent worth of persons. I take it as obvious that Eros and Philia are among the finest and noblest responses to the worth of persons, if not the finest and noblest of all. But love essentially involves caring about the perspective of others, such that we fail to love others well when we care about their interests without caring about their perspectives. This means that in at least some cases, responding to the worth of persons requires taking their perspectives into account.

I would also argue that the best explanation of why loving others is a response to their worth is that loving others requires especially constant,
demanding, and skillful choices that necessarily involve taking the perspective of others into account. If I am correct that the teleological and deontological modes of responding to the worth of a person require taking the person's perspective into account, in considering not merely her interests but what she wills, then love has value because it is constituted by and strengthened by acting consistently with the teleological and deontological modes of responding to worth. Loving others requires desiring and promoting the good of the beloved as the beloved understands it, an expression of the teleological mode of responding to the worth of persons. Loving others also requires deference to and respect for the judgments and goals of the beloved, an expression of the deontological mode of responding to the worth of persons.

Erotic and Philial love have \textit{intrinsic} value because they are not instrumental means towards responding to the inherent worth of persons, but instead \textit{are responses} to the worth of persons. If responding to the worth of persons has intrinsic value, then taking the perspective of others into account also has intrinsic value, and if taking the perspective of others into account has intrinsic value, then we can explain the intrinsic value of love.

IX. Taking the Perspective of Strangers Into Account

I would now like to explain how persons take the perspective of others into account by establishing and maintaining a morally peaceful social order.
But first, I must assure the reader that I am not arguing that moral peace is a kind of love for strangers, since love requires a certain degree of intimacy that we cannot share with strangers, much less all the people we know. The argument, instead, is that taking the perspective of others into account has intrinsic value, as illustrated by the intrinsic value of love, and second, that taking the perspective of strangers into account is another way of taking the perspective of others into account besides love. The point of discussing love is to show that taking the perspective of others into account has intrinsic value, given that love has intrinsic value because it is a particularly excellent way of taking the perspective of others into account. Moral peace has intrinsic value because it is both constituted by and is the consequence of actions that take perspective of strangers into account.

Second, recall that a morally peaceful society is one where people rationally comply with and enforce moral conventions in ways that build and sustain a high degree of social trust. That is, most of a morally peaceful society’s moral conventions are rationally scrutable, and so form the rational basis for social trust that both encourages compliance with conventions and that is sustained by such compliance.

To begin the argument, let us now examine that persons establish moral peace by acting on moral reasons to comply with moral conventions; persons do not act for purely self-interested reasons, such as the fear of being punished or disliked, or simply because they benefit in some purely economic way from the convention. But the stability of moral conventions requires that persons act on
other types of reasons, moral reasons. As a member of a morally peaceful social order, Sarah will generally (a) not pursue her self-interest come what may\(^\text{92}\) and will (b) resist and punish other members who pursue their self-interest in violation of moral conventions. Sarah will do so not merely because she believes that the convention is required by her personal ideal, but out of a sense of reciprocity. Sarah does not experience compliance with a moral convention as a merely private obligation, as she would about keeping a promise to her husband. Instead, she recognizes that others expect her to follow the convention and will frequently insist and even demand that Sarah and others do likewise. So her compliance is rooted only partly in her fear of punishment. Instead, Sarah desires to do the right thing as understood by the public, as a response to the value of others. If Sarah simply acted for what she took to be her moral reasons, without acknowledging the normative force of conventions, she would fail to respect practices that she can observe have some value for others.\(^\text{93}\) Sarah also expects others to follow the convention, and is thereby motivated to follow the convention herself. Were Sarah to violate moral conventions to pursue her self-interest (or for some other reason), she recognizes that she will become the subject of resentment and indignation and general disapprobation by other members of her society, and that she may be punished for her violation. Further, she will sometimes even blame herself for violations and experience guilt.

\(^{92}\) That is, unless we construe self-interest as covering our interest in rule-following.

\(^{93}\) I thank Steve Stich for pushing me to make this point explicit.
I argue that these moral reasons for complying with and enforcing moral conventions are rooted in our implicit recognition of the value of taking the perspective of others into account, which in this case involves taking the perspective of strangers into account. We sacrifice greatly for our intimate partners, and allow their judgments to shape and motivate our own judgments and actions. In doing so, we take the perspective of others into account. In parallel, we sacrifice, though much less, for members of our society by complying with moral conventions that form from society’s collective judgments and actions even when it is inconvenient. In doing so, we respect others and acting consistently with the value we place on reciprocal relations with them.

This is to say that specific acts of compliance with moral conventions can be motivated by our taking others to be sources of reasons for action. On my view, taking strangers to be sources of reasons manifests itself in complying with widely recognized rules of conduct. With intimates, our expressions of care and concern are much more direct. Nonetheless, it is not hard to see the similarities between concern for intimates and concern for strangers, such that both could be different species of the broader moral phenomenon of taking the perspective of others into account. My proposal, then, is that in complying with rationally scrutable moral conventions, we thereby take the perspective of strangers into account. The objective reason that justifies and requires me to play my part in a “social-moral order” understood as a system of largely coherent moral conventions, is that in forming, reforming and maintaining such an order, I take the perspective of
strangers to matter in shaping my actions. My acts are tokens of a generic type of perspective-respecting action, a type of action that is itself an instance of taking the perspective of others (in this case, strangers in may society) into account. Philial and Erotic love are additional tokens of that generic type.

To illustrate, consider the case of Driver John, who frequently violates traffic laws on his daily drive to work. Let us suppose that the traffic laws in John’s community are rationally scrutable: each person believes she has sufficient reason to comply with the traffic laws, such that each person’s belief matches the belief that would be held by her suitably rational and informed counterpart. We have simple cases of such laws: stopping at stop lights and abiding by speed limits are rationally scrutable moral conventions given their obvious benefit to just about everyone. When John violates these laws, say by speeding past other cars and running stoplights, he violates rationally scrutable moral conventions and fails to take the perspective of strangers into account in the ways I’ve outlined. His actions imply a low level of regard or concern for others. John doesn’t care if he sets others’ interests back by causing traffic jams; he also knows that he will make others angry and resentful when he breaks the law. Were John to obey the law even when he finds it difficult, his actions will often be motivated by concern and respect for others, not merely for their interests, but for their perspectives. Just as the lover bends his reasoning and judgment around the reasoning and judgment of

94 Traffic laws are not, strictly speaking, moral conventions since people believe authorities can wave them, but my point should still stand regardless because traffic laws do capture more basic moral intuitions about the rightness of sharing the road. I thank Steve Stich for this point.
95 I discuss my understanding of idealization in much more detail in Chapter 2.
the beloved, so a person bends his reasoning and judgment around the reasoning and judgment of strangers when he complies with rationally scrutable moral conventions when it conflicts with his other aims.

Someone is bound to object that there are different ways of taking the perspective of strangers into account, and that the most valuable ways of doing so—the ones analogous with Eros and Philia—do not necessarily, or typically, involve compliance with rules that are rationally scrutable for each person. This would be to say that Erotic and Philia love are not tokens of the same type of perspective taking as moral peace between persons. Assuming my account of love is correct, I suspect the objection must come from a disanalogy between the perspective taking involved in intimate love and the perspective taking involved in dealing with strangers. The best argument for a damaging disanalogy is that compliance with publicly recognized rules is not a way of taking the perspective of others into account because strangers’ perspectives remain disparate and unknown to us. Compliance with moral conventions is mostly tacit and automatic, whereas loving others involves actions that are, to a much greater extent, explicit and deliberative. Further, perspective-taking for strangers are mediated by impersonal rules, whereas intimate love is not.

I think the appearance of disanalogy is based on an inaccurate picture of intimate love, one that invites us to imagine romantic love as consisting in the most meaningful moments in our intimate relationships that we can pleasantly recall. However, anyone who has had a long-term romantic relationship or
friendship understands that living love involves far more day-to-day, automatic behaviors than those moments where we stare into each other’s eyes and feel overcome by emotion. In fact, most of our interactions with those we love involve compliance with moral conventions, as signs of respect and love for the beloved. We hurt our partners when we fail to automatically do what is expected, such as routinely failing to do our part in cleaning the house or sharing in the burdens of child-rearing. So while Eros and Philia involve more explicit, deliberative action than taking the perspective of strangers into account, they still have important affinities.

To be clear, Eros and Philia require more of us than taking the perspective of strangers into account, since Eros and Philia require sharing ends and a striking amount of deference in judgment, but they share with compliance with rationally scrutable social-moral rules the fundamental feature of respect for the perspective of others.

Thus far, I have only argued that compliance with rationally scrutable moral conventions has intrinsic value because compliant acts are ways of taking the perspective of others into account. I have not explained how compliant acts are related to trust. To remedy this, I offer two clear connections, which I will later explore in more detail. First, compliant acts are acts of trust that others will generally comply with the moral conventions the agent in question complies with. If the agent did not believe that others were necessary and disposed to comply with the relevant moral conventions, then she would lack reason to comply with
the convention herself, at least over the long term. In fact, if she believed as much, there is a sense in which the convention would not be a convention for the agent, since she would disbelieve that the rule is generally complied with, and so beneficial for her to follow. So since acts of compliance are trustful acts, and acts of compliance have intrinsic moral value, then these trustful acts have intrinsic moral value.

It does not follow that all trustful acts have intrinsic moral value, but we can see, based on the value of taking the perspective of others into account, how acts of trust respond to the inherent worth of persons. This is because we make choices based on placing a kind of value in other persons such that we regard them highly enough to build our plans around our belief that they will comply as we expect; in cases of social-moral trust, the perspective-taking is even more significant because we trust that others will do the right thing for the right reason.

Compliant acts are also connected to social trust because they create social trust. Observed compliance with moral conventions helps to establish trust between persons because each person observed large-scale compliance with the convention. She can come to believe that others are actually and rationally disposed to comply with the convention. Further, when moral conventions are rationally scrutinable, each person can see that she has sufficient reason to comply with the convention, such that agents can expect that insofar as others are rational, that they will comply with the conventions. This lays the groundwork of
stable, rational trust because we can expect that, over time, rational people are disposed to comply with the relevant moral conventions.

We can now explain why moral peace has intrinsic value. I call this the *Moral Peace Argument*:

1. Taking the perspective of others into account has intrinsic moral value as a proper response to the inherent worth of others.
2. Taking the perspective of strangers into account is a way of taking the perspective of others into account.
3. Therefore, taking the perspective of strangers into account has intrinsic moral value. (1, 2)
4. By complying with rationally scrutable moral conventions and punishing violators (including in cases where compliance sets back our interests or the interests of third-parties and when punishment can be avoided), we take the perspective of strangers into account.
5. Therefore, complying with rationally scrutable moral conventions (and punishing violators) has intrinsic moral value. (3, 4)
6. Complying with rationally scrutable moral conventions builds rationally scrutable social-moral trust.
7. Rationally scrutable social-moral trust builds and sustains compliance with rationally scrutable moral conventions.
8. Therefore, a society with large amounts of rationally social-moral trust contains a great deal of compliance with rationally scrutable moral conventions. (6, 7)

9. A society is at moral peace when it maintains a high degree of social-moral trust. (definition)

10. Therefore, a morally peaceful society, in virtue of containing a high degree of rationally scrutable social-moral trust, contains a great deal of compliance with rationally scrutable moral conventions. (8, 9)

11. Therefore, a morally peaceful society, in virtue of containing a great deal of compliance with rationally scrutable moral conventions, has a great deal of intrinsic moral value. (5, 10)

I have defended premises 1, 2 and 9 above. By drawing on an analogy with Eros and Philia, I have given reasons to think that taking the perspective of others, including strangers, into account has intrinsic value. And I have defined moral peace as obtaining when a society contains a high degree of rationally scrutable social-moral trust. I will defend premise 4 in Chapter 2, where I argue that complying with rationally scrutable moral conventions and punishing violators is a way of taking the perspective of others (specifically strangers) into account.

In the next section, I will argue that moral peace has extrinsic value in realizing the great economic, social and political goods promoted by societies with high degrees of social trust. This argument will also help to fully substantiate premises 6 and 7. All the other premises of the argument are established by
implication. Thus, by the end of the chapter, we will be able to turn our attention to premise 4.

X. The Extrinsic Value of Moral Peace

Economists, sociologists, psychologists, and many others have argued that social trust is critical for maintaining well-functioning political and economic institutions. If members of a society do not trust one another, then they have little reason to take the risks required to create, build, and sustain good institutional structures. I will argue that rationally scrubtable social trust, understood in terms of compliance with moral and legal conventions, is an especially stable and attractive form of social trust. As such, moral peace will generate a great amount of the goods realized by social trust found in the social scientific literature. This is the extrinsic value of moral peace—its contribution to the formation and maintenance of effective economic and political institutions.

Many researchers believe that social trust is critical for the creation of social capital, which Glaeser, Laibson and Sacerdote define as “a person’s social characteristics—including his social skills, charisma, and the size of his Rolodex—which enable him to reap market and non-market returns from interactions with others.”96 Social capital is built in part by being trustworthy in the eyes of others,

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96 Glaeser, et al. 2002, p. 48. For further discussion and several related definitions, see Dasgupta and Serageldin 2000.
and being trustworthy requires acting in concert with public expectations of norm compliance.\textsuperscript{97}

The World Bank has made a significant effort to measure social capital in various populations, making comparisons not merely between nations but between intra-national organizations, regions, communities and households.\textsuperscript{98} The Social Capital Assessment Tool (SCAT) and the Social Capital Integrated Questionnaire (SC-IQ) are now used to measure social capital around the world.\textsuperscript{99} The SCAT collects data on social capital at the household, community and civic organizational level, providing information about how social capital is linked to the welfare and outcomes of families. The SC-IQ focuses on the degree of social capital found in developing nations. The World Bank keeps hundreds of studies using SCAT and SC-IQ measures in a database.\textsuperscript{100}

These studies largely conclude that social capital and economic performance measures are positively correlated. For instance, Paul Whiteley has argued, “social capital, or the interpersonal trust of citizens, plays an important role in explaining the efficiency of political institutions, and in the economic performance of contemporary societies.”\textsuperscript{101} He focuses on a study of the relationship between social capital and economic growth in thirty-four countries between 1970 and 1992 suggests that the impact of social capital on growth “is at

\textsuperscript{97} Ulsaner argues that social trust is not built up through an accumulation of trusting actions. ... address in v2.
\textsuperscript{98} Grootaert, et al. 2004.
\textsuperscript{99} Grootaert and van Bastelaer 2001.
\textsuperscript{100} At present, the database is inaccessible through the World Bank’s website. I hope to add an expanded discussion once it is back up.
\textsuperscript{101} Whiteley 2002, p. 443.
least as strong as that of human capital or education.” It also has a similar impact on the ability of poorer nations to adopt technological innovations introduced by richer countries and to “catch up” with rich countries in terms of their level of development. Social capital is thought to reduce transaction costs in markets and reduce the burdens of enforcing agreements. It also limits fraud and theft. Recent work by Fabio Sabatini has helped to quantitatively substantiate Robert Putnam’s famous comparison of northern Italian and southern Italian institutions, with the former exhibiting higher functioning and higher levels of social capital than the latter.\textsuperscript{102} Sabatini finds that “strong ties” such as familial ties, do not promote economic development, but “weak ties” do, as weak ties act to diffuse knowledge and trust among strangers.\textsuperscript{103} Jankaukas and Seputiene have found that social capital in the form of social trust and the maintenance of wide social networks are positively correlated with economic performance in twenty-three European countries.\textsuperscript{104} Reino Hjerppe, in a survey of the relationship between social capital and economic growth, argues that “generalized trust” or trust between strangers positively correlates with many measures of economic performance.\textsuperscript{105} Robert Hall and Charles Jones find that in 130 countries, differences in “social infrastructure” lead to considerable social differences in the accumulation of capital, economic

\textsuperscript{102} Putnam 1994.
\textsuperscript{103} Sabatini 2007, pp. 19-20.
\textsuperscript{104} They find no correlation, however, between the degree of civic involvement in these societies and economic performance. See Jankaukas and Seputiene 2007.
\textsuperscript{105} Hjerppe 1998. The term “generalized trust” derives from Fukuyama 1995, p. 29.
productivity and even educational attainment, which impacts income across countries.\textsuperscript{106}

Given the foregoing, we can conclude that social trust has great extrinsic value because it is part of forming social capital, which is in turn required for effective economic transactions and economic growth.

Some readers are bound to object that economic performance, while important, is not directly related to intrinsic values we care about, like personal welfare or societal well-being. But the main arguments that economic performance is not related to welfare or well-being are based on controversial studies about the relationship between happiness measures and income levels. For instance, the famous Easterlin paradox—that people with high incomes are happier than poorer persons, but that in the long-run, increased income does not correlate with increased happiness—has been repeatedly critiqued.\textsuperscript{107} Both Veenhoven and Hagerty and Stevenson and Wolfers found no Easterlin paradox in their own research.\textsuperscript{108} The philosophical reader is bound to object that happiness studies do not use plausible measures of well-being, and so argue that the debate, on either side, is moot.\textsuperscript{109} But whatever one thinks of happiness research, economic performance is surely critical for realizing further goods of many kinds, such that its connection with trust gives us strong reason to value trust extrinsically.

\textsuperscript{106} Hall and Jones 1999, p. 84.
\textsuperscript{107} Easterlin 1974.
\textsuperscript{109} For some philosophically informed concerns about the happiness literature, and important developments of different views, see http://plato.stanford.edu/entries/happiness/#EmpFin
One might further object that rationally scrutable social-moral trust is not captured by measures of social trust for two reasons. First, my discussion has only shown that a valuable form of trustworthiness forms around social conventions, and not moral conventions. But moral conventions are obviously a critical subset of rule compliance that leads to social trust. Even perfect public compliance with all non-moral rules, such as rules of etiquette, style and culture, but that ignores moral rules, will not establish social trust, given the importance of moral norms in sustaining social cooperation. So it should be clear that social-moral trust will capture a great deal, if not the lion’s share, of the extrinsic value of social trust.

Second, my discussion has only shown that mere social-moral trust has extrinsic value, and not rationally scrutable social-moral trust. To solve this problem, I need to show that rationally scrutable social-moral trust has greater benefits than inscrutable social-moral trust. My argument is that rationally scrutable social-moral trust will prove more stable and enduring than inscrutable social-moral trust. If people ask whether the moral conventions that apply to them are compatible with their values, commitments and reasons, and can answer affirmatively, then they will have more and longer-lasting motivation to comply with those conventions.

A critic could counter that rationally inscrutable social-moral trust will crowd out rationally scrutable social-moral trust because our evaluation of the practical rationality of following various public moral rules will be colored by real-
For instance, imagine that John decides to inquire as to whether current immigration law is compatible with his values. Assume that John is an Irish Catholic and generally trusts the social teaching of the Catholic Church, but that he is hostile to immigration because he fears whites becoming an ethnic minority in the United States. Assume that his commitment to the social teaching of the church is a rational commitment and that his commitment to preserving a white majority is not. John is riddled with what economist Bryan Caplan calls “anti-foreign bias.” His rational inquiry will lead him to validate his hostility to immigration and so his friendly attitude towards present immigration restrictions. If people are systematically biased (and they are), then that bias may lead people to distrust immigration reformers and trust talk radio hosts who fight against any relaxation of immigration law. As a result, John’s hostility to immigrants will increase and settle over time, as he ignores his parish priest in favor of his talk radio political commentator.

And yet, while most people exhibit systematic rational bias, this bias is insufficiently coordinated to give a society with rationally inscrutable social-moral trust more extrinsic value than one with rationally scrutable social-moral trust. Some people will support norms based on bias, but others will scrutinize the norm under diverse conditions and based on assorted considerations, and so will find that they have reason to violate the convention because it does not make sense

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\(^{100}\) A summation of decades of research on systematic psychological bias can be found in Kahneman 2011.

\(^{111}\) Caplan 2007, p. 35.
from their own perspective. To make the case that rationally inscrutable social-moral trust will produce more social value, it has to be the case that the stability of most of the norms that produce the relevant valuable depends on systematic bias from most people most of the time, but that is a hard claim to substantiate based solely on the cognitive bias literature.

Furthermore, if trust is rationally scrutable, then it should be self-sustaining in virtue of justifying further acts of compliance. Social trust and social capital are built over time through the public observation of specific acts of compliance. But if the social trust that is built is not rationally scrutable, then people will have reason to not only stop complying for their own reasons, but to believe that others are likely to do the same. If the trust is rationally scrutable, however, each person will recognize that she has reason to engage in compliant acts, which will lead to more social trust over time. And since this social trust is itself rationally scrutable, it serves as a justification for further trustful acts, further motivating social trust. A rational, trusting order, therefore, generates a kind of positive feedback loop. The dynamic of high trust is self-reinforcing. In this way, we can substantiate premises 6 and 7 of the Moral Peace argument.

I conclude, then, that moral peace has great extrinsic value because a high degree of social-moral trust is crucial for persons to enjoy a wide range of social goods, and rationally scrutable trust will realize these social goods more richly and reliably through a dynamic feedback process over time.
XI. Beyond the Constructivism-Realism Debate in Public Reason

Moral peace has high intrinsic value because it is a way of taking the perspective of others into account, and it has high extrinsic value because, as a form of social trust, it helps political and economic institutions to function well.

Now that we have identified the value of moral peace, we can use the idea to resolve a disagreement among public reason liberals concerning whether the foundations of public reason are realist or constructivist. Constructivists tend to ground public reason in shared ideas, shared values, or shared practices. The norms of public justification are justified based on a construction drawn from these shared ideas and practices. Readers will recognize that this is the dominant approach in the literature, characterizing all three of the great “tomes” of public reason: Rawls’s Political Liberalism, Habermas’s Between Facts and Norms and Gaus’s The Order of Public Reason. Rawls’s theory rests on the shared notions of citizenship and a well-ordered society; Habermas’s theory rests on the logic of discursive justification; and Gaus’s theory rests on our shared system of social-moral practices and our normal moral agency.\(^{112}\)

The motivation for constructivism is that public reason is designed to transcend debates about which political principles are true. As Amy Gutmann and Dennis Thompson note, public reason views (which they mistakenly run together with deliberative democratic views) are second-order political theories, theories

that concern how to deal with disagreement about the moral and political truth. They write:

... deliberative democracy is best understood as a second-order theory. Second-order theories are *about* other theories in the sense that they provide ways of dealing with the claims of conflicting first-order theories. They make room for continuing moral conflict that first-order theories purported to eliminate. They can be held consistently without rejecting a wide range of moral principles expressed by first-order theories.\(^\text{113}\)

So public reason views do not deny that truth in a theory is important, or that first-order theories of moral and political truth are invalid. Instead, constructivism is used to get traction on disagreements about first-order moral principles and theories. Consequently, attractive accounts of public reason should not be committed to mind-independently true moral principles.\(^\text{114}\)

Second, insisting that one has the political truth does not help a society to solve its moral conflicts in ways all can accept. If one person simply insists on getting her own way for reasons unintelligible to others, then even if she is right, others will take her actions to be controlling and, in some cases, a declaration of war against them. As we have seen above, complying with mutually acceptable

\(^{113}\) Gutmann and Thompson 2004, p. 13.

\(^{114}\) Gutmann and Thompson mistakenly characterize this as a procedure-substance dispute in Gutmann and Thompson 2004, pp. 95-124. However, one might advocate for a theory of procedural truth, where political institutions are justified based on mind-independent true moral principles that are procedural in nature, and they would raise the same issue as non-procedural moral truths do for public reason.
moral conventions is a way we value and convey that we value the perspective of others in a way that justifies and sustains social trust and its associated social goods. Insisting on political truth, in contrast, can undermine the acceptance of moral conventions by those imposed upon, undermining these goods.

The realist approach, prominently pursued by Charles Larmore and David Estlund, claims that public reason must rest on some mind-independently true moral principles.\(^{115}\) Larmore insists that we admit that a principle of public justification is a mind-independently true principle: “I am certain … that our commitment to democracy of political self-determination cannot be understood except by appeal to a higher moral authority, which is the obligation to respect one another as persons.”\(^{116}\) We are otherwise unable to explain why we should accept a public reason position. Estlund roots public reason partly in the requirement that political institutions avoid producing a set of serious, objective bads: “… democratic authority rests on democracy’s tending to make better decisions than random, and better than alternative arrangements, so far as can be determined within public reason” where “better … than random” is understood in part as avoiding certain “primary bads” or clearly important bad outcomes or events.\(^{117}\)

The motivation for realism is driven by the sense that public reason liberals cannot coherently give up on insisting that their foundational principles are, in some non-constructivist sense, true. As both Larmore and Estlund argue, there

\(^{117}\) Estlund 2008, p. 160.
must be some answer as to why we should accept the restraints of public reason and the answer must, of course, be true. We can’t have constructivist explanations of normative principles all the way down; at some point, our moral claims on one another must ground out in real moral truths. Larmore claims that we must simply admit that a principle of public justification is mind-independently true.\textsuperscript{118} Estlund has argued that political liberalism cannot avoid the truth: “the justification of political institutions must rest, at least partly, on the substantive quality of its decisions” rather than mere procedural appropriateness.\textsuperscript{119}

The ideal of moral peace can accommodate both constructivist and realist commitments. It captures the core concerns of constructivism because it insists that the value of moral peace can only be realized by compliance with shared rules and practices rooted in shared values, ideals and goals. Further, as we shall see in Chapter 2, I draw the standard of public justification out of moral peace between persons, which persons normally regard as an intrinsic and extrinsic good. So the standard of public justification is not an attempt to impose the moral truth on those who disagree.

Moral peace can capture the concerns of the realist, as moral peace is a social state that in fact realizes the value of taking the perspective of others into account. Moral peace has objective intrinsic value because it characterizes a social order where persons take the perspective of others into account, and so respond

\textsuperscript{118} Larmore 2008, p. 167. But also see his broader understanding of moral reasons on pp. 87-136. As he notes in the title page (p. i), “reason consists in being responsive to reasons for thought and action that arise from the world itself ... the moral good has an authority that speaks for itself. Only in this light does the true basis of a liberal political order come into view....”

\textsuperscript{119} Estlund 2008, p. 39.
appropriately to the inherent worth of persons. Moral peace has objective extrinsic value because it *in fact* produces great social goods. So when we ask why morality contains public justification requirements, we point to the objective value of moral peace, both extrinsic and intrinsic. Moral peace is not valuable merely because we *value* it, but rather we *should* pursue it because it has intrinsic and extrinsic value.

Rawls and Gaus never deny that we can appeal to objective values to explain why public reason liberalism is true *so long as* we do not insist that our moral demands have authority over others simply in virtue of being derived from true moral principles.\(^{120}\) Rawls claims that holding “a political conception as true, and for that reason alone the one suitable basis of public reason, is exclusive, even sectarian, and so likely to foster political division,” which is not merely to worry about the bad of instability but about the lack of respect conveyed by such behavior.\(^{121}\) Gaus notes that when “one demands that others must do as he instructs because he has access to the moral truth” that he is a “small-scale authoritarian.”\(^{122}\) So I do not depart from the constructivist position as much as it may appear. But unlike public reason constructivists, I have offered *candidate* objective values that those who affirm objective theories of moral value can assess. The moral peace defense of public reason, then, gives realists something to evaluate as an appropriate candidate value.

\(^{120}\) With Habermas, it is less clear, as he adopts a kind of comprehensive constructivism. Habermas 1999, pp. 52-68.

\(^{121}\) Rawls 2005, p. 129. Note that, for Rawls, his public justification principle is the liberal principle of legitimacy, which is adopted as part of a political conception of justice, so Rawls offers a constructivist ground for public justification, and not just a conception of justice. For discussion of this point, see the next section.

\(^{122}\) Gaus 2011, pp. xv-xvi.
I depart from standard realist views about the foundations of public reason with respect to the *kind* of objective value I appeal to as a candidate foundation for public reason. We should publicly justify moral demands and coercive laws because we *should* value morally peaceful relations with others, given that morally peaceful relations are objectively valuable. With the account of moral peace developed here, we can also give a much more detailed objective foundation for public reason, in contrast to respect-based defenses Larmore began offering nearly thirty years ago.\(^\text{123}\) Larmore’s defense has been subjected to excellent criticism and, while I believe there is much to the position, we need to say more about why respect requires public justification.\(^\text{124}\) Moral peace provides some of the connecting tissue between respect and public justification, if we understand persons who live in moral peace with one another as exhibiting a kind of respect for others.

I also depart from realist approaches in that I identify a deliberative route from taking *objective* reasons seriously to taking *subjective* reasons seriously. On the moral peace view, we have objective reason to value moral peace, and to realize or institutionalize moral peace we must only insist upon moral rules and laws that take the subjective reasons of persons seriously. We have a realist foundation for a constructivist approach, an inferential path from objective moral value to valuing the subjective reasoning of others.

\(^\text{123}\) Larmore 2008, pp. 139-167.
\(^\text{124}\) Eberle 2005, pp. 173-194. For a more recent piece, see Van Schoelandt 2015.
For discussion and criticisms of alternative foundations for public reason, see the Supplement to Chapter 1.

XII. Conclusion

Moral peace resists a politics of war wherever it is found. In complying with rationally scrutable moral conventions, persons signal a high degree of social trust that reinforces itself over time. Moral peace, I have claimed, has enormous moral value, both intrinsic and extrinsic. The intrinsic value of moral peace derives from the fact that it is constituted by many trusting actions that are instances of taking the perspective of others into account, which is in turn the appropriate way to respond to the inherent worth of strangers, much like Eros and Philia are appropriate responses to the worth of intimates. The extrinsic value of moral peace derives from the fact that it is a stable and enduring form of social trust, where social trust is essential for political and economic institutions to function well. So if we wish to establish moral peace between persons, and we have strong objective reason to do so, then we must ensure that the moral conventions in our social order are rationally scrutable to multiple points of view.

I also argued that moral peace is the best foundation for public reason, since it avoids difficulties in arguments that ground public reason in respect for persons, the value of anti-authoritarianism, and civic friendship, while simultaneously explaining why these three approaches seem attractive.
In the next chapter, I will argue that rationally scrutable moral conventions are essentially *publicly justified* moral conventions, such that moral peace will ground a public justification requirement. Publicly justified moral conventions are parts of a morally peaceful social order. Thus, if we have reason to seek moral peace, we have reason to insist on public justification. Chapter 3 will then explain how the public justification of law is grounded in the need to publicly justify moral conventions.
Chapter 2: Public Justification

Moral peace forms the foundation of the ideal of public justification in two ways. First, it explains the structure of public justification: what is to be publicly justified and how it is to be publicly justified. To establish moral peace, we must show that moral conventions are rationally scrutable—that is, as we shall see, publicly justified—for all subject to them. In other words, we must show that each person has sufficient practical reason of her own to endorse the moral conventions that apply to her. Second, moral peace explains why public justification matters morally. The reason to care about public justification is that a system of publicly justified norms constitutes moral peace between persons. Given the great intrinsic and extrinsic value of moral peace, then, we have strong reason to establish and maintain an order of publicly justified moral and legal conventions.

The chapter, therefore, divides into three parts. I must first identify what is to be publicly justified. I must then explain what sorts of reasons are required in order to complete a public justification. Finally, I must show that public justification matters morally; that it prescribes reasons for action and that these reasons are capable of generating an obligation to comply with publicly justified moral conventions.¹²⁵

Before I begin, I would like to stress two points. First, my account of social-moral order supposes a deeply social account of the human person, one whose nature involves the disposition to comply with certain kinds of rules, the vast

¹²⁵ Throughout the book, I understand obligations as a type of duty with an inherently social component; see section 3 for discussion.
majority of which are neither chosen nor consented to in any traditional sense. In fact, even the institutions that confer psychological identity on persons are comprised of social rules (consider, for instance, rules governing the family). I do not mean to offer a metaphysic of human nature; there is no reason to take a stand on such a controversial matter here. But I do think that persons are morally emotional rule-followers; as such, it is a verifiable claim about human nature.\textsuperscript{126}

Second, I do not deny that we have moral duties other than duties derived from publicly justified moral conventions. My aim in this work is to analyze a subset of the normative order, namely binding public moral conventions that we hold others (and ourselves) to on pain of the reactive attitudes, blame, and punishment. Following Chapter 1, it should be clear that I affirm that some moral reasons are response-independent and objective. I nonetheless think that public justification trades in \textit{subjective} or internal reasons that persons have to comply with or reject moral conventions in a real world order. Objective reasons can ground duties that cannot be publicly justified, but those duties are not my concern.

The first part of this chapter contains five sections that explain what is to be justified and the presumptions that have to be met. I claim that the most fundamental unit of public justification is an authoritative, public moral convention. In section I, I offer an account of moral conventions. In section II, I explain my focus on conventional rules rather than, say, larger, unified principles.

\textsuperscript{126} For a review and defense of this point, though without appeal to the idea of a human “nature” see Gaus 2011, ch. 3.
Section III explains the sense in which moral conventions can be morally authoritative. I then argue in section IV that our moral practices suppose a presumption in favor of liberty from moral conventions; that the structure of practical reason contains a presumption against the authority and appropriateness of moral demands. Section V covers the ideas of freedom and equality in public justification.

The second part of the chapter offers an analysis of the currency of public justification, what an authoritative moral convention must be justified by. In section VI, I develop an account of sufficient intelligible reasons, the whole set of which are relevant to public justification. Public justification requires an account of idealization as well, so I outline the notion of idealization required and answer some objections to idealization in section VII I then explain, in section VIII, that public justification aims at internalization, and the idea of internalizing a rule is critical for distinguishing between a morally peaceful order and a moral modus vivendi—a kind of truce. I explain the idea of evaluative pluralism in section IX, which implies that persons have diverse, unshared intelligible reasons and then, in section X, I address some of the concerns posed by evaluative pluralism.

The third part of the chapter explains how public justification is grounded in the ideal of moral peace. I will argue in section XI that the idea of public justification is a plausible specification of the notion of rational scrutability. In the supplementary sections I-III, I explain how my account public justification avoids a
wide range of common objections to public reason views, for example, that public reason is self-defeating and exclusionary.

I. Moral Conventions and Publicity

A society is at moral peace when it exhibits a high degree of rationally scrutable social-moral trust. Social-moral trust is understood as trust that persons will follow publicly recognized moral conventions. Thus, moral conventions are the first norm or practice that we must publicly justify; the justification of coercion comes later.

The idea of a convention has been subject to various analyses.\textsuperscript{127} Rather than review the literature, I will appeal to Peter Vanderschraaf’s definition, which incorporates a wide range of the insights of other convention theorists. Before offering his conditions, I should define my key terms. We can understand an agent’s strategy profile as a specification of which acts the agent should engage in given her circumstances and expectations about how other agents will behave. A strategy profile is an agent’s individual strategy defined over her expectations, which is formulated on the basis of the history of agents in game and possible future outcomes, where the value of outcomes is what defines the utility derived from each outcome.\textsuperscript{128} Vanderschraaf defines a strategy profile as act consistent if an agent’s end requires her to engage in the same set of behaviors under the same

\textsuperscript{127} For a helpful overview, see Vanderschraaf 2016, ch 2., section 2.

\textsuperscript{128} In this way, Vanderschraaf (and I) understand utility not as a psychological state but as a formal representation of whatever an agent regards as choice-worthy. For a defense of this formal notion of utility, see Gaus 2007, pp. 30-56.
circumstances across possible worlds. A strategy profile has act equivalence when it requires the same moves in the same games.

We can understand a super game as a game played between two players whose terms are chosen by a third player, who often serves to correlate action between the in-game agents. A strategy profile is an equilibrium of the supergame if each agent maximizes her expected utility by pursuing her ends given that others will pursue their ends as well and that no agent has an incentive to deviate from her choices. The equilibrium is strict with respect to path deviations if any strategy profile other than the one the agent has adopted (a) requires the agent to deviate from unilaterally from her strategy profile and (b) generates a strictly lower payoff.

Vanderschraaf’s conception of convention involves an assumption of common knowledge, where each agent knows some fact that bears on the conditions of cooperation, and each agent knows that each agent knows this, and each agent knows that each agent knows that each agent knows this, etc. Some analyses of convention do not include common knowledge.\textsuperscript{129} Gintis has argued against this condition on the grounds that common knowledge is impossibly demanding. But Vanderschraaf counters that common knowledge can remain part of the definition of convention if we can devise social mechanisms by which common knowledge is generated.\textsuperscript{130} I think that, regardless of whether common knowledge is required, some sort of shared information is required, if only knowledge that the relevant set of behaviors is salient in a population.

\textsuperscript{129} Gintis 2009, pp. 100-101, p. 117.
\textsuperscript{130} Vanderschraaf 2016, ch. 3., sec. 3.4.
For Vanderschraaf, we can understand a convention formally as a kind of strict equilibrium of social practices stabilized by the fact that deviations from the practice are self-correcting.\textsuperscript{131} He understands a convention as follows. For a community of agents who can be matched in each period in a game drawn from a supergame of act equivalent games, an act consistent strategy over the supergame counts as a convention if and only if:

\begin{enumerate}
\item[(C₁)] A set of strategy profiles for all agents defines a strict equilibrium with respect to path deviations from the supergame. Each agent believes that if she unilaterally departs from her strategy profile that her overall expected utility in the supergame is strictly lower than if she follows her strategy profile.
\item[(C₂)] There is some strategy profile distinct from the agent’s strategy profile that also defines a strict equilibrium with respect to path deviations of the supergame.
\item[(C₃)] (C₁) and (C₂) are common knowledge among the community of agents.\textsuperscript{132}
\end{enumerate}

If the following two conditions are met, we have an extant convention, an \textit{incumbent} one:

\textsuperscript{131} Vanderschraaf 2016
\textsuperscript{132} Vanderschraaf 2016, ch. 2, 2.4.
(C4) Each agent expects other agents in the community to follow their strategy profiles, and,

(C5) (C4) is common knowledge among the members of the community, then the set of strategy profiles of the agents is the incumbent convention for the members of the community, where a convention is incumbent if it is the one presently coordinating behavior.\textsuperscript{133}

This is a complicated definition (simplified from a more complicated one), so let us unpack the conditions carefully. First, a convention is a set of strategy profiles for all members who comply or are expected to comply with the convention. Typically conventions require the same behavior from all agents, but they need not. The convention needs to be a strict equilibrium with respect to path deviations in that no agent believes she can do better over the course of iterations of the game by unilaterally changing her behavior. The supergame notion stipulates that there are other potential games that the players could play if the correlator agent (the third party) were to change her play. This feature allows that coordination around some convention is a game of games that yield coordination on some particular convention. Briefly, then, (C1) says that a convention is a practice—a set of agent choices—that each agent regards as superior to available, unilaterally playable alternatives.

\textsuperscript{133} Vanderschraaf 2016 Note that this condition does not require perfect compliance from all agents.
Condition (C2) captures the fact that conventions are always in some sense *arbitrary* in that other conventions may have solved the relevant coordination problem just as well. Vanderschraaf defines the arbitrariness of a convention that matters as arbitrariness in the *indifference sense*, where the convention appears frivolous to an outsider, and potentially to players themselves, given indifference between following this convention rather than some alternative.\textsuperscript{134} We are familiar with conventions that seem arbitrary in the indifference sense, such as the traffic convention that a red sign means stop, rather than a purple sign.

Condition (C3) says that the fact that each agent believes she cannot improve her utility by unilateral deviation from the convention and the arbitrariness of the convention must both be common knowledge. Each agent must know that she and every other agent believes that their present behavior is their best response to others, including the denoted agent, and that we might have selected other conventions. We can now see why the definition of convention may require that agents realize that a third-party, correlated agent (perhaps a policeman punishing stop sign violations) has determined the set of games to be played among the players and that she might have done otherwise.\textsuperscript{135}

Without common knowledge, Vanderschraaf argues, it will not be rational for each agent to comply with her strategy profile, given that she can no longer know whether unilateral deviation will make her worse off, since she lacks common knowledge of what others may do. The same will hold for other agents.

\textsuperscript{134} Vanderschraaf 2016, ch. 2., introduction.

\textsuperscript{135} Is this right? Do we include the correlator as an agent?
This lack of common knowledge can make equilibria unstable; Vanderschraaf illustrates this instability with his case of a thousand-person orchestra without a conductor.\textsuperscript{136}

Public reason liberals can understand common knowledge as a relatively weak \textit{publicity} condition of justified proposals or rules. It must be public knowledge that the relevant convention is an arbitrary equilibrium. I do not think public reason needs more than this weak publicity condition, despite the fact the mainstream position is that the reasons that justify the relevant conventions (typically coercive legal conventions) are shared and recognized as shared among members of the public.\textsuperscript{137} Since, as I will argue, moral peace only requires that each person have sufficient reason to internalize moral conventions, we do not need a further level of publicity beyond that required in order to have a moral convention.\textsuperscript{138}

So we can define a convention informally as a practice of cooperation that each agent believes is beneficial for her with respect to alternative unilateral behaviors, that she recognizes as arbitrary, where each agent recognizes that others believe likewise.

Conditions (C\textsubscript{4}) and (C\textsubscript{5}) distinguish conventions from really existing conventions, or incumbent conventions. Condition (C\textsubscript{4}) requires that agents actually expect other agents to comply with their strategy profile consistent with

\begin{itemize}
\item \textsuperscript{136} Vanderschraaf 2016, ch. 6, sec. 6.
\item \textsuperscript{137} Rawls 2005, pp. 66–72.
\item \textsuperscript{138} In fact, insisting on more demanding forms of publicity will yield patterns of behavior that cannot establish peace between persons, since the demands for publicity will themselves prove disruptive.
\end{itemize}
the practice, whereas condition (C5) requires that all agents know that they each expect one another to comply with their strategy profile. So a convention is incumbent when it goes into effect. In brief, an incumbent convention is a beneficial, seemingly arbitrary, yet stable and real social norm.

We have already followed Gaus in defining a moral convention as a convention that is emotionally infused with the moral emotions, seen as promoting mutual benefit, and that concerns how we treat others (Ch.1, III). Moral conventions are enforced and deviations punished with social ostracism, blame and even violence. They are also categorical in that we are to follow them because they specify the right thing to do, and not merely for instrumental reasons.

However, following both Gaus’s idea of a moral convention and Vanderschraaf’s definition of a convention yields a tension, since Gaus specifies that a moral convention is seen as nonconventional, such that authority figures cannot waive them. But Vanderschraaf, in contrast, requires that conventions be seen as arbitrary, in that other conventions might have served just as well. The tension arises because, if agents really believe that another convention might have taken the incumbent convention’s place, they may have a harder time viewing the moral convention as nonconventional. To resolve the tension, I suggest that we modify Vanderschraaf’s condition (C3) such that only (C1) need be common knowledge, and not (C2). This difference will help distinguish moral from non-moral conventions, as the indifference condition of a moral convention need not be common knowledge.
In claiming that we should publicly justify moral conventions, I leave open the possibility that *incumbent* moral conventions may sometimes be unjustified, which suggests that it would not be advantageous for the agent with a defeater for the relevant convention to continue complying with it. In that case, it may appear that the incumbent moral convention is no longer a convention for the person for whom it is not justified. However, it may be the case that a defeated convention is one the agent still has reason to comply with, perhaps to avoid punishment, rather than acknowledging a sufficient *moral* reason to comply. In that case, the unjustified convention is still a convention for the noncompliant.

II. Individuation

With an account of moral conventions on the table, we can turn to the question of individuation: why should we publicly justify at the level of social rules and conventions, rather than more general types of conventions, such as constitutions?\(^3\) This is not an easy question to address, since nearly all of the accounts of individuation in public reason have concerned the justification of *legal coercion*, rather than moral conventions.\(^4\) Nonetheless, we can still identify several attractive features of justifying at the level of local moral conventions. The simplest reason is cognitive in nature. People are built to evaluate rules with quick

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\(^{3}\) I take a moral convention to concern relatively specific sorts of behavior, such that they are “mid-level” rules, following Chapter 1, III.

\(^{4}\) Rawls 2005, p. 140. For a discussion of this controversy, see Quong 2011, ch. 9, pp. 273-287.
applications of implicit cognitive judgments and emotional reactions. We are best at evaluating rules in contrast to lofty political principles, and our judgments about acts are governed by rule-based cognition, where rules classify all kinds of percepts and evaluations and dictate many of our actions.\textsuperscript{141} It is harder to evaluate principles given all the factors that go into justifying one, rather than evaluating a more local social regularity like a convention. In the same vein, it is difficult to detect and punish violations of principles and constitutions than it is to detect and punish violators of rules. Principles and constitutions are extremely general; determining violations often requires a theorist or a judge. But nearly everyone can determine, and frequently do determine, whether someone has violated a moral convention.

A second reason to justify rules is that their effects are easier to evaluate. It is much easier to assess the effects of a single moral or legal convention than of constitutions and conceptions of justice. With respect to the former, we can develop relatively simple models of the effects of this or that law or convention. Obviously such judgments are fraught with difficulty, but evaluating rules against a backdrop of other conventions is much easier than evaluating principles and constitutions.

A third reason to justify at the level of conventions is that any more general level of individuation will require assuming or imposing some sort of harmonization upon its constituent rules that may not exist; this means that

\textsuperscript{141} Gaus 2011, Chapter 3 reviews arguments to this effect.
justification at the level of principles could foreclose paths to moral peace between persons. Moral peace might be reached through a patchwork of distinct and often unrelated conventions, rather than a unified system of rules that can be described by generic principles.

A standard objection to my approach is that rule-following is irrational when doing so sets back one’s interests. I do not have the space to develop an account of the rationality of following conventions when doing so seems to set back the aims and achievements of the convention followers. Instead, I simply assume that such an account can be given, that our best account of practical rationality permits complying with conventions not to achieve something further, but because the convention is a bona fide moral requirement. My aim in assuming this is merely to develop a coherent theory of the foundations of moral and political authority in terms of moral peace between persons, not to provide a theory of practical reason; perhaps the work can be appreciated as an attempt to do just this.

III. The Authority of Moral Conventions

A critical part of creating, maintaining, and reforming a system of rationally scrutable moral conventions is the issuing of moral demands or demands that

\[\text{For discussion of the rationality of rule-following, see Gaus 2011, pp. 131-63.}\]

\[\text{I also cannot address how we came to be rational rule-followers. Both Gaus and Vanderscrhaaf have useful discussions in the books already cited. Also see Bicchieri 2006}\]
persons comply with the moral conventions of her society. Moral demands are required to sustain moral conventions because demands punish convention violators and create expectations of compliance.

I contend that there is a paradigmatic form of moral demand that takes the perspective of others into account. To distinguish it from other demands, consider a simple order. John orders Reba to comply with a convention when he insists that Reba comply regardless of her attitude about the convention. That the convention frustrates Reba’s evaluative standards, perhaps her religious conscience or her secular ethos, matters little to John. He merely wishes to alter her behavior, and is indifferent to whether the demand has any rational uptake for her. This sort of moral demand is not merely disrespectful and authoritarian browbeating, but implies that John lacks an interest in moral relations with Reba. His demands are a small-scale form of attack. When John issues this sort of moral demand, he is asserting his authority based merely on his power, popularity, piety, etc.

An even more problematic kind of moral demand involves John issuing orders while fully realizing that the order is incompatible with Reba’s evaluative standards. In this case, John flagrantly disregards Reba’s perspective in issuing moral demands. Perhaps John is attempting to prod or tempt Reba into violating her conscientious convictions. This is an active refusal to take the perspective of others into account.

\[144\] For an analysis of the way in which moral demands can take the form of browbeating, see Gaus 1996, p. 176.
A third form of moral demand is issued *with regard* to Reba’s perspective. John issues a moral demand sincerely believing that the demand is rooted in a convention that Reba accepts, or should accept given her, not John’s, commitments. Only this third sort of demand is capable of sustaining a system of moral conventions that takes the perspectives of strangers into account. And so only this sort of moral demand can be part of a social system that establishes moral peace between persons, or so I will argue.

I term this third form of moral demand an *authoritative* moral demand. An authoritative moral demand is one that has authority for the demandee. A moral demand has authority for Reba when Reba’s evaluative standards commit her to compliance. A moral demand derived from a convention has authority over Reba when she is committed to it by means of the convention it derives from and that Reba is committed to permitting others to insist that she comply with the convention. That is, others are permitted to demand that Reba comply with the convention in question because their demands are simply demands to comply with Reba’s own standards. Consequently, authoritative moral demands will not typically lead Reba to experience the demand as alien or authoritarian. Instead, it will likely evoke feelings of guilt, and accordingly, motivation to behave differently or to defend one’s actions as justified.

In my previous book, I understood moral authority as a claim-right that the demander has for the demandee to comply with the demand.¹⁴⁵ If John makes an

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authoritative moral demand of Reba, then Reba owes it to John (and others) to comply with the demand. That is just part of what it means for a person to have authority over another—that the person under authority owes compliance to the person in authority. Of course, in a system of moral conventions, authority does not run in one direction from authorities to subordinates. Instead, moral authority is equal and reciprocal: we may all insist that others comply with our social order’s moral conventions.

I understand authoritative moral demands as issuing from obligations, distinguished from mere duties. A duty to engage in some action is a moral requirement, but it is not necessarily a requirement that others are permitted to enforce through criticism; nor is a duty necessarily the appropriate subject of the reactive attitudes when violated. I may have a duty to worship God, but my failure to comply with the duty does not license the reactive attitudes in others. On my view, obligations are a type of duty with an inherently social component. Obligations are duties to others that others may hold us to and that generate the rational reactive attitudes when violated.

Moral demands that lack authority undermine moral peace because they are orders that show little regard for the perspective of others. The two types of non-authoritative moral demand are different ways for John to fail to account for Reba’s point of view. An authoritative moral demand, in contrast, is based on a moral convention that Reba has reason of her own to accept. Reba therefore sees the point of the demand because it merely requires that she live up to her own
commitments. Consequently, moral demands that have authority are instances of taking the perspective of others into account, grounding relations of trust and the social trust that evolves out of it.

I recognize that my position is unusual, since most public reason liberals understand public justification as demonstrating the state’s liberty-right to coerce. My account of legitimacy differs because the master value at the root of public reason is moral peace. If our aim is to use public justification to establish moral peace, then our conception of political legitimacy must be more ambitious. If we only publicly justify liberty-rights to enforce moral and legal conventions, we will only justify the state’s permission to create conflict and violence that disrupts moral peace. Creating moral peace requires authority to render acts of enforcement acts of preserving rather than breaking the peace.

I should also stress, as I did in the introduction to the chapter, that I distinguish between the authority of moral conventions and the authority of bona fide moral requirements. Gaus contrasts moral authority with the authority of morality to bring out the distinction. Moral authority is essentially interpersonal and interpersonally justified, whereas a bona fide moral requirement might have its own authority in virtue of being a mind-independent moral fact. In Chapter 1, I

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146 So long as the demander has the relevant standing. See Ch. 7 for more on this.
147 For example, it appears that Rawls’s liberal principle of legitimacy only focuses on specifying when the state has permission to coerce and not when a citizen is obligated to comply. Rawls 2005, p. xliiv.
employed both forms of authority.\textsuperscript{149} I suggested that we not only care about taking the perspective of others into account, but that we have objective reason to do so, such that we should take the perspective of others into account. In doing so, we respond to the inherent worth of persons. But taking the perspective of strangers into account requires appealing to the subjective reasons of persons. So the authority of morality gives us objective reasons to care about the subjective reasons of others that we must be able to see as their grounds for being under the relevant moral demands. Public reason issues a standard of justification that appeals to subjective, internally accessible reasons, but it can be grounded in the bona fide moral requirement that we have objective, response-independent reason to endorse. In this way, the authority of moral requirements feeds in to the social authority of moral conventions.

A problem for combining interpersonal moral authority and the authority of morality in an account of public reason is that the two can conflict. What are we to do when the authority of morality requires that we φ but our publicly justified moral obligations prohibit us from φ-ing? That is, what are we to do when our objective reasons point towards one course of action but our subjective reasons point towards an incompatible course of action? John may have objective reason to worship God, since God exists and has given him every good he has, but he lacks subjective reason to worship God, since he denies God’s existence based on what he takes to be good arguments. In this case, John \textit{rationally misses} the authority of

\textsuperscript{149} Though, as I stressed there, I do not claim that all adequate public reason views must commit themselves to the authority of morality.
a real moral requirement, something easy to do in a pluralistic world where people have dramatically different moral positions. What should John do in this case? Objectively speaking, he should worship God, but those who recognize that he has this duty should conclude that John is *morally excused* from failing to comply with his objective duties.\(^{150}\) He is not culpable given that his atheist beliefs are epistemically justified. With an excusal strategy, we can build a system of moral authority between persons who advocate incompatible moral requirements—a necessity for any public reason view—while remaining open to the possibility that morality itself has a kind of authority that might contradict the authority of moral conventions.

IV. The Presumption in Favor of Moral Liberty

Liberals of many stripes endorse a presumption in favor of liberty with respect to *political coercion*. Without a good justification, political coercion should be regarded as unjustified. I contend, following Stanley Benn and Gaus, that social morality contains a parallel presumption in favor of *moral* liberty.\(^ {151}\) If we wish to coerce or ostracize others, our actions are only appropriate if others have some sufficient reason to endorse the convention upon which the coercion or ostracism

\(^{150}\) In this way, I must take the stance that moral ignorance of certain kinds can excuse, though I need not commit myself to the claim that moral ignorance excuses *in general*. For discussion of whether moral ignorance excuses, see Harman 2011, as well as Peels 2014.

\(^{151}\) See Benn 1988, p. 112. For further discussion, see Gaus 2011, pp. 341-6.
is based. Without sufficient reason, persons are at moral liberty to act as they see fit.

To be more specific, persons are at moral liberty *vis-à-vis one another* to act as they see fit, as bona fide moral requirements may apply to them even in conditions of moral liberty. So “moral liberty” is a liberty with respect to the *demands of other members of the public*. Consequently, a state of moral liberty is *not* a morality free zone, but a *social* morality free zone.\(^{152}\) This distinction is critical. If the presumption in favor of moral liberty is applied to moral requirements *as such*, it would be extremely implausible. The presumption I defend is far more limited; it is just a presumption in favor of moral liberty with respect to what others may require of us.

Importantly, all societies have moral conventions that include many moral conventions operating in the background of social life, and so may never be brought under explicit scrutiny. These social moralities pre-date modern civilization and appear in every human community ever observed, not unlike linguistic conventions. Even societies in a state of civil war have rules of engagement that are considered morally binding. Disorder arises when social morality breaks down, but social morality seldom breaks down entirely.

The presumption in favor moral liberty *does not* imply that these vast arrays of conventions must be explicitly justified to those who are bound by them. This too would be implausible; having to expressly justify all moral conventions would

\(^{152}\) For a contractualist theory that understands a social morality free zone as a *morality* free zone, see Gauthier 1986, pp. 83-112.
be extremely cognitively demanding. Instead, the presumption is met when a moral convention is justified for the person under the convention associated with the relevant demand. Given the utility of most moral conventions, I contend that many moral conventions meet the presumption rather easily. This explains why the presumption in favor of moral liberty can be hard to see, since it is frequently and easily met in most cases.153

The presumption becomes most visible when members of a society reasonably disagree about what morality requires. For instance, when an oppressive norm begins to break down through challenge, such as social prohibitions on homosexual sex, it is clear that if we are to properly hold persons accountable for having homosexual sex, homosexuals engaged in these acts must see themselves as having sufficient reason to refrain from those sex acts. Otherwise, we must regard them as confused or excused. The point is clear with respect to rules that held great weight in the past but now no longer ground a practice of moral responsibility, such as norms requiring that parents raise their children to be good Christians. Christian parents are entitled to think that it is their duty to raise their children in line with the faith, but most implicitly recognize that atheist parents are permitted by social morality to raise their children in line with their own values. We do not resent or become indignant with parents who raise their children to believe a false philosophical or religious position when the parents sincerely believe that position is correct. People

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153 For an (in my view mistaken) attack on the presumption in favor of liberty, see Lister 2010, pp. 163-170.
acknowledge that most parents try their best to take care of their children, even if the parents have false beliefs about how to do so. If we were to blame or ostracize them, we would need an appropriate reason to do so, such as the knowledge that those parents knew better than to raise their children in line with a false philosophical or religious view.

Gaus characterizes the presumption in favor of liberty as follows:

(1) agents are under no standing moral obligation (in social morality) to justify their choices to others; (2) it is wrong to exercise one’s liberty so as to interference with, block, or thwart the agency of another without justification.\textsuperscript{154}

The presumption assumes that there is no social-moral obligation to justify all of one’s actions to others, just actions that involve interfering with the agency of another, either through coercion or other forms of social punishment.

Given this, why would the public evaluation of moral conventions contain an asymmetry between the justification of action and interference with action? One argument, first explored in detail by Stanley Benn, asks us to imagine situations where one agent interferes with another and then to locate where appropriate resentment relies. Appealing to our shared understanding of the appropriateness of resentment turns out to be evidence that some agent or

\textsuperscript{154} Gaus 2011, p. 341. Also see Benn 1988, pp. 87-90.
another has committed what we take to be a moral violation. Benn’s case asks us to imagine Alan splitting pebbles while Betty casually observes him; Betty then asks Alan to justify his behavior to Betty, but it seems clear in this case, that Betty is the one who owes Alan a justification because she is interfering with Alan’s agency when Alan is not bothering anyone else. The point is that the “burden of justification falls on the interferer, not on the person interfered with. So while Alan might properly resent Betty’s interference, Betty has no ground for complaint against Alan.”

Benn’s case illustrates that it would be inappropriate for Betty to resent Alan for failing to justify his pebble-splitting activities, but that it would be appropriate for Alan to resent Betty for interfering with his pebble-splitting. Gaus notes that if you want to reject a presumption in favor of moral liberty, then you should also reject the idea that Alan’s resentment of Betty is appropriate, since he is under a standing social-moral obligation to justify his actions to Betty. But it seems rather plain that he is not.

Turning to the second argument, conforming our behavior to a presumption in favor of moral liberty helps to realize moral peace between persons. The reason is that by rendering our actions consistent with the presumption, we express our recognition that moral demands are meant to disrupt and direct the behaviors of others to comply with rules. Moral demands, therefore, can serve both good and bad purposes. Good purposes include insisting that

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155 Benn 1988, p. 344-5.
others comply with moral conventions that are rationally scrutable and authoritative for them. Bad purposes include insisting that others comply with moral conventions just because they are *correct*, or because we have some form of natural or supernatural right to be obeyed. If we wish to take the perspective of strangers into account, then in cases of controversy, we should be circumspect in our demands by acknowledging that others could have good reasons for acting as they do. When Betty interrupts Alan and insists that he justify his behavior, she knowingly issues a kind of threat, since if Alan fails to give what Betty takes to be an adequate justification, the prospect of the reactive attitudes and blame is present. Betty disrupts harmonious relations with Alan, approaching him as though his actions are automatically under suspicion. But if Alan is committed to responding to the demand, then the demand does not undermine moral peace, but will preserve it against Alan’s real or potential infraction.

There are objections to the idea of a moral presumption in favor of liberty that I cannot review here. Gaus and Benn’s discussions are more comprehensive. My aim in this section has rather been to motivate the idea of a presumption based both on their more familiar grounds and based on the value of moral peace between persons.

V. Liberty and Equality
I must say something about how I understand the ideas of liberty and equality within the construction of an order of moral conventions. One way in which the value of liberty is expressed is in the endorsement of a presumption in favor of liberty. Liberty has sufficient value to place a justificatory burden on those who would restrict it. This is a form of negative liberty. In what follows, I develop an account of what reasons justify moral demands and coercion and claim that our freedom is maintained when others insist or force us to comply with those justificatory reasons. This is a notion of positive liberty, liberty with respect to rationality. On the classical positive liberty view, one is free when she can act on her best reasons, when she can do what it is rational for her to do. The theory of public reason I develop, therefore, deploys two conceptions of liberty: a negative presumption in favor of liberty that can be overcome via the establishment of conventions that enable our positive liberty. In this way, I contend that one's total liberty is preserved by a publicly justified moral order; what we have lost in negative liberty, we gain in positive liberty. This, I think, is what Rousseau was after: a way to preserve something of the liberty of the state of nature in civil legal society, despite the fact that the latter requires restricting the liberty of persons.

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156 I discuss the notion of negative liberty at work in presumptions in favor of liberty in Vallier 2014, pp. 30-31. Though there I am focused on a presumption against coercion and not against moral ostracism and punishment.

157 Plato argued that a person’s freedom is diminished when, for instance, his actions “enslave the best part of himself to the worst.” Cooper 1997, Book IX, p. 8.

158 Rousseau argues that once we establish the social contract and government, persons trade their “unlimited right to everything that tempts him and he can reach; what he gains is civil freedom and property in everything he possesses.” See Rousseau 1997, pp. 9, 54.
Rousseau revives the idea of positive liberty from the ancients in order to pull off this trick.

We can also see a thin idea of equality at work. Following many others, I contend that moral authority is essentially reciprocal. Given that moral conventions have a generic form by not referring to particular persons and being essentially reversible, moral conventions will only have authority if they have authority for all members of the relevant moral community.\textsuperscript{159} Moral conventions should also ground relations of mutual accountability, where each person must make publicly justified demands on others. So no person has more \textit{justificatory} power than anyone else. At this stage, the notion of equality is compatible with strong forms of social hierarchy, so long as the moral conventions that exist in that order are rationally scrutable from multiple points of view.\textsuperscript{160} Liberal theory requires thicker, more substantive egalitarian commitments, such as the possession of equal rights, and I defend that position in Chapter 4.

VI. Intelligibility and Convergence

\textsuperscript{159} For the most familiar articulation of this idea, see Darwall 2006, p. 21. Following Darwall, though with some revisions, Gaus argues that public justification solves the puzzles of moral authority and mutual, equal authority. Gaus 2011, pp. 22-23. In chapter 6, I will qualify this claim, since some moral rules confer special standing on persons to hold others responsible, such as voluntary members of groups.

\textsuperscript{160} Subordinates are unlikely to see hierarchy-preserving rules as rationally scrutable, so that fact alone will prevent many hierarchical moral conventions from being publicly justified. I discuss hierarchy and public justification in more detail in my discussion of associations in the supplement to Chapter 6.
We have established that moral conventions must have moral authority to establish moral peace and that there is a standing presumption against making moral demands of others. So we now turn to describe the conditions under which authoritative moral demands meet the presumption in favor of moral liberty. The standard of public justification is a principled, coherent description of the conditions under which moral demands are authoritative for the demandee. The standard renders moral demands compatible with moral peace because the demands are grounded in moral conventions that are *rationally scrutable* for each person, and so practically rational for each person to follow. Each person must be able to see the point of complying with the moral conventions to which she is subject. So we can derive a conception of public justification from the more general idea of rational scrutability, which is required to establish moral peace.

The idea of rational scrutability is subjectivist, as the notion of moral peace is a way of taking the perspectives of others into account. If moral conventions are not rationally scrutable for those subject to them, then agents will regard the demands associated with the conventions as arbitrary browbeating and control, instead of a call to live up to publicly recognized rules of conduct. Rational scrutability, then, requires that a justificatory path be traversed from a person’s own commitments to the rational endorsement of the convention if the convention is to be justified.

The rational scrutability constraint applies not merely to our own interrogation of moral conventions, but also to our assessment of the prospects for
interrogation by other persons, who frequently have quite different views about how to conduct their lives from our own. Social-moral trust requires not merely that we think norms will survive our rational scrutiny but that they will also survive the rational scrutiny of others. Otherwise, social trust lacks adequate rational ground. So if we are to take the perspective of strangers into account, we must allow our assessments of the general rational scrutability of a moral convention to guide our actions. We must do more than take the interests of others into account. Instead, we must take other perspectives to be sources of reasons, allowing, at least within some significant confines, these perspectives to shape what we are prepared to do.

To further flesh out the idea of rational scrutability, let us begin with the observation that taking the perspective of others into account is not to cordon off some part of their values and concerns and then only take these privileged reasons or considerations seriously. If we wish to establish moral peace, we must establish a scheme of conventions that take each person’s full deliberative perspective into account. Now, taking the perspective of others seriously does not require that we take another’s reasons and values seriously as options for us. But we must take their reasons and values seriously as options for them. Establishing moral peace means establishing a system of moral conventions compatible with the diverse reason (and diverse reasons) of all.
Many public reason liberals insist that justificatory reasons be shared, shareable, or accessible.\(^{161}\) I have spent a great deal of time arguing against shared reasons and accessible reasons requirements on justificatory reasons in my previous book, *Liberal Politics and Public Faith*. There I also defend a convergence conception of reasons that allows inaccessible and unshared reasons into public justification. I will not repeat my arguments here, as I still agree with them. But in that book, my aim was partly negative—refuting arguments in the literature for shared reasons and accessible reasons requirements—and using the values of standard versions of public reason to vindicate my alternative convergence conception of public justification.\(^{162}\)

This book is more ambitious, since I am developing a defense of public reason as based on the value of moral peace between persons. This means I need moral peace-based arguments for the convergence view that reject restricting justificatory reasons to the set of shared or accessible reasons. I offer two such arguments. First, as we have seen, moral peace between persons is established when we take others’ perspectives into account in constructing and reforming our joint social-moral order. But taking someone’s perspective into account involves taking her *full* perspective into account, diversity and all. Were we to appeal merely to the reasons other agents share with us (a restriction widely endorsed in the public reason literature, though applied solely to laws), we would not take the

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\(^{161}\) For my earlier discussion of shared reasons requirements, see Vallier 2014, Ch.4, especially pp. 104-111, and for criticisms, see pp. 121-3.

\(^{162}\) Vallier 2014, pp. 124-130.
perspective of others into account. In fact, there’s a sense in which we don’t take her perspective into account at all since we are only focused on reasons she shares with others.

Second, if we restrain the reasons people may appeal to in order to justify endorsing moral conventions, restraint will prove *incredibly* burdensome. Restraint would bar persons from using their diverse reasons to shape their shared moral order, in discourse and in action, inside and outside the traditional strictures of the public square. These means that persons would be prevented from building their moral emotional lives around diverse conventions that other persons have no shared reason to accept.\(^{163}\)

VII. The Intelligibility Requirement

I turn now to a positive account of the reasons that can justify moral conventions, which I term an intelligible reasons requirement (IRR). The intelligible reasons requirement expands the set of justificatory reasons to its outer limit. That is, it counts as justificatory any reason that can be recognized as such by members of the public. If \(R_A\) can be seen as a reason for agent A to act, then it can potentially play a justificatory role, so long as \(R_A\) is relevant and not overridden or undercut by another justificatory reason. That is, \(R_A\) can figure into a public justification if it is relevant and sufficient.

\(^{163}\) Importantly, one could agree that restraint with respect to the reasons justifying moral conventions should be rejected but still maintain shared reasons requirements on public discourse.
I take a reason $R_A$ to be relevant just in case it counts in favor or against some proposed social-moral rule that members of the public are presently evaluating. For example, John’s reason to refine his ability to pitch a fastball does not speak to whether his country should adopt a lax or strict norm on the moral obligation to vaccinate children. Similarly, Sarah’s reason to go on a bike ride neither supports nor undermines the case for a rule concerning morally offensive clothing. Further, reasons must be sufficient in the sense that they are not rebutted or undercut by other reasons. They must be sufficient reasons to justify action and belief. Sufficient reasons are those that remain undefeated, in that they are neither rebutted nor undercut.

Qualifications made, we can now define the intelligible reasons requirement. I define the IRR in terms of the idea of the property of intelligibility:

**Intelligibility**: A’s reason $R_A$ is intelligible for member of the public P if and only if P regards A as entitled to affirm $R_A$ according to A’s evaluative standards.\(^{164}\)

The IRR counts all and only intelligible reasons as justificatory.

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\(^{164}\) I here modify the definition of intelligibility found in Vallier and D’Agostino 2012. I also appeal to the definition of intelligibility in Vallier 2014, pp. 104-108.
Intelligible Reasons Requirement: A’s reason $R_A$ can figure in a justification for (or rejection of) a moral convention $M$ only if it is intelligible to all members of the public.

Intelligibility has four elements that require explication: (i) the idea of members of the public, (ii) the idea of regarding an individual as entitled to affirm a reason, and (iii) the idea of an individual’s evaluative standards, and finally (iv) the moral restrictions on what count as a justificatory reason. In the remainder of this sub-section, I will expand on (i), and cover the next three elements in the next three sections.

Regarding (i), members of the public are rational representations of those citizens on whom social-moral rules are imposed and the reasons moral persons affirm. Thus, John is represented among members of the public as an idealized version of himself, one that only affirms reasons based on sound information and valid inference. John is said to have a reason on this view if he would affirm it in light of adequate information and reasoning. In this way, John is characterized as a reason-possessor at the appropriate level of idealization. It is John who has the reasons. As a group, then, members of the public denote the set of all reason possessors on whom moral conventions are imposed, and so whose endorsements bear on the justification of a moral convention.\footnote{Gaus 2011, pp. 232-258 provides a detailed explanation of what it means for a member of the public to “have” a reason.}
The definition of intelligibility refers to a single member of the public, whereas the IRR refers to all members of the public. What accounts for the difference? In the former, we’re merely trying to define the property that makes a reason intelligible. This means that the intelligibility of a reason is agent-relative in two senses. First, the agent who advances the reason must endorse it based on her own evaluative standards; second, the person assessing the reason must judge herself entitled to affirm the reason. The result is that the extent to which a reason is intelligible to the public is a matter of degree, which is understood in terms of how many members of the public regard the agent in question as entitled to affirm a reason. In contrast, the intelligible reasons requirement holds that reasons may only enter public justification when all members of the public judge the reason to be intelligible.

While it may seem extreme to require that all members of the public must regard a reason as intelligible for the reason to enter public justification, appearances are deceptive. Recall that members of the public are idealized, so no one can prevent a reason from entering public justification based solely on the fact that she dislikes the reason or the person who offers it, or because she makes a blatant inferential error, or can only access poor information. Of course, the stringency of intelligibility will vary considerably based on the conception of idealization with which it is combined. Moderate conceptions of idealization will allow some reasons to be vetoed based on some informational or rational errors,
whereas radical conceptions will not. Yet radical conceptions may veto reasons based on extremely lofty and complex forms of reasoning, unmoored from real-world individuals’ concerns, and so may prove restrictive in their own way. But either way, idealization prevents a unanimity requirement from appearing excessively restrictive.

The IRR requires unanimity because if members of the public cannot see the reason as intelligible, it is hard to understand how they can see it as a reason at all. If members of the public cannot even regard the reason as having epistemic credibility based on the evaluative standards of the person who offers it, then they cannot regard it as even minimally epistemically credible, and so cannot ascribe it normative force. Further, without epistemic credentials, it is hard to determine whether the reason is held sincerely or, perhaps, even genuinely affirmed at all. A final consideration is that if we were to weaken the IRR to allow, say, a majority to regard the reasons as justified, then reasons can enter into public justification even if some members of the public cannot ascribe them epistemic credibility. This implies that members of the public would allow themselves to be coerced or morally ostracized, or at least the social-moral order to be shaped by considerations that they cannot in any sense regard as normatively effective. This permission does not comport with a commitment to take seriously the diverse perspectives of members of the public rather than their utterances or non-rational sentiments.

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VIII. Entitlement, Reasons and Justification

Regarding element (ii), we now turn to explain what it means for a member of the public P to regard an agent A as entitled to affirm the reason based on A’s evaluative standards. Remember first that P is idealized in accord with a here-unspecified notion of idealization, so the notion of regard is epistemic, not factual.  A member of the public regards the agent as entitled when a suitably rational and informed individual would regard the agent as entitled, so an agent understood as rational and informed makes the determination. What, then, does entitlement come to? The notion of epistemic entitlement in epistemology is historically tied to the notion of one having a right or permission to believe a claim versus the idea that one has an epistemic duty to believe a claim. Many entitlement theorists also hold that one can have an epistemic right to believe something for which one has no articulable or specifiable or recognizable evidence.  Infants are presumably epistemically entitled to trust their perceptions, even if they are not cognitively sophisticated enough to make themselves aware of any justification or evidence for their views. Epistemic entitlement does not require that, in being entitled to hold a belief, that one be able to engage in “some sophisticated mental exercise.”

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167 For this reason, I use the terms “entitlement” and “epistemic entitlement” and their respective grammatical variations interchangeably throughout.
168 Wolterstorff 2010, ch. 4.
169 For a general overview, see Altschul 2014.
Some notions of entitlement then are connected to reliabilist accounts of knowledge where one is entitled to a belief just when one’s faculties reliably track the truth of some set of propositions. In my view, public reason accounts of epistemic credence should not endorse a theory of knowledge, as knowledge is a truth-concept that public reason genetically tries to eschew. Further, I believe public reason’s account of epistemic credence should avoid externalist notions of epistemic justification simply because this makes the process of public justification too sensitive to what it metaphysically, really, true, which seems to undercut the ability of a notion of epistemic justification to remain neutral among various worldviews.\textsuperscript{170}

My aim is to appropriate the idea of epistemic entitlement as a way of relaxing the requirement of epistemic justification such that one can have a reason to X simply in virtue of being permitted or entitled to affirm X rather than being required or having a duty to affirm X. If we employ the notion of epistemic justification, we may be tempted to hold that a justificatory reason is one that an agent is rationally or epistemically required to affirm. If so, we run into two unnecessary problems. First, we will rule out of public justification reasons that one lacks decisive considerations to accept or endorse, and this seems too strong. Our epistemic situation often permits a variety of attitudes toward what we have reason to do. Many considerations present themselves to us, along with many courses of action. The notion of epistemic entitlement or permission better

comports with this recognition than the notion of an epistemic requirement. Second, if we do not rely on epistemic entitlement, then members of the public will be able to veto reasons from entering into public justification solely based on the fact that the person who offers the reason is not rationally required to endorse the reason, and this seems too strong a veto power in the hands of members of the public. We can imagine a case where an atheist thinks that someone is not epistemically required to believe in God, but that same individual may be epistemically entitled to do so. As a result, the theistic agent’s God-based reasons can enter into public justification if the atheist employs entitlement but not if she employs a strong notion of justification. By employing entitlement, we better embody a commitment to recognizing reasonable pluralism.

Importantly, entitlement suggests that someone can be coerced or ostracized based on a reason that she is merely entitled to affirm rather than one is rationally required to affirm. This may seem to set the bar for chastising individuals too low, as we are entitled to affirm all sorts of considerations as reasons for us and it seems inappropriate to be indignant with someone for violating a rule that she could have internalized based on reasons she was merely entitled to affirm. But we are still restricting ostracism to conventions persons take themselves to have reason to comply with and internalize; we are merely allowing that the epistemic pro-status of that reason is entitlement, not requirement.
IX. Evaluative Standards, Prescriptive and Descriptive

On to (iii): an evaluative standard is a set of prescriptive and descriptive norms a member of the public takes to justify her reason affirmations by providing standards that enable her to order her moral and political proposals. Consider Roman Catholicism as providing a set of evaluative standards. Roman Catholic social thought is rooted in complex notions of natural law and the common good, which has led to a variety of social and political positions, many of which are hard to classify along traditional left-right spectra. Pope Francis has argued both against abortion and for the restrictions on carbon emissions based on doctrines that he believes lie at the core of the Catholic social thought.\textsuperscript{171} He sees no tension between the two views but rather a substantial unity. Catholic evaluative standards, then, are partly modes of prescription, moral and political considerations that lead Catholics to make certain proposals, reject others and generally order their social and political priorities.

But notice that Catholic doctrine also has a descriptive component. Catholics believe that God imubes fetuses with souls at conception, or more accurately, that in the act of the creation of a human person, God creates a being with both substantial form (the soul) and matter. Catholics, thus, rely heavily both on theism and Aristotelian metaphysics, most often in the combination developed by Thomas Aquinas. So Catholics develop and order their moral and political

\textsuperscript{171} Francis 2015.
proposals not merely in accord with their values but by their beliefs about the nature of the social world, which for Catholics includes God and the unborn. In fact, arguably much of Catholic opposition to abortion is not based on their unique moral evaluative standards, but rather their descriptive ones. It is because human fetuses are persons that it is wrong to kill them. Everyone agrees that innocent persons should not be killed without a good reason, but in the Catholic social world, fetuses are persons, hence the moral and political prohibition on abortion.

The IRR, by allowing evaluative standards to vary, allows both normative and descriptive evaluative standards to vary and so generate variable reasons. Descriptive evaluative standards can yield different verdicts on pressing social issues without much aid from prescriptive evaluative standards. As a result, there are two sources of variation – prescriptive and descriptive – that can lead a member of the public to affirm different reasons as applying to her, but that other members of the public can see as justified according to that member of the public’s evaluative standards. This provides reason to think that Gaus is mistaken to conjecture that shared standard views will be extensionally similar to diverse evaluative standards views like the intelligibility requirement. Gaus remarks that, “I would conjecture that there is not a great practical difference between a deliberative model based on the Shared Standards view and that of mutual intelligibility.” But a shared standards view will have difficulty in allowing social worlds, that is, social ontologies, to vary. Consequently, a major source of diversity

\[^{172}\text{Gaus 2011, p. 286.}\]
among members of the public will be defined out of bounds as a foundation for justificatory reasons, which Gaus’s recent work on social worlds pluralism commits him to resisting.\footnote{See Gaus and Hankins 2016 and Gaus 2016.}

**X. Moral Limits on Reasons and the Idea of the “Reasonable”**

Finally, we should focus on (iv), the intuitive moral limits on what reasons count as relevant to some justificatory question. Gaus puts the general idea like so: “Certainly we must exclude ... evaluative standards that disvalue the very idea of morality, value immoral acts qua immoral acts, disvalue conformity to justified moral rules, or value forcing people to conform to unjustified moral rules.”\footnote{Gaus 2011, p. 282.} The question is on what basis we may do so and still realize moral peace between members of the public. The traditional weapon in the public reason armory is the idea of “reasonableness,” where parties are interested in the moral enterprise of building a cooperative order with others who have a functioning sense of justice, who affirm the value of reciprocity, and who recognize the depth of pluralism.\footnote{See Rawls 2005, pp. 54-66 for the dominant exposition of the idea of the reasonable in political liberalism.} But appeals to reasonableness run afoul of a dilemma. First, the only way that “reasonableness” can give us a basis for excluding some evaluative standards from public justification is if it has some intuitive content, such that it is more than a mere term of art. Otherwise “reasonableness” only has normative force by
stipulation. But public reason liberals build a great deal of content into the idea of the reasonable, which potentially renders it a normatively inert term of art. Accordingly, uses of reasonableness are torn between the intuitive notion, which lacks specific and substantive content, and the technical notion, which leaves the reasonableness’s normative force unexplored. Rawlsians maintain that the notion of the reasonable is both an intuitive notion and that it can be fleshed out in specific ways. But I submit that this is a challenge has yet to be met.

The best alternative, in my opinion, is to work with a more deflationary or thin moral notion than reasonableness that, while less able to rule out certain evaluative standards as immoral, will in combination with other features of a theory of public justification prevent some of the coercion we regard as unjustified. One key feature of reasonableness is that reasonable agents are normally prepared to play assurance games rather than prisoners’ dilemmas. An agent will cooperate when she believes others are prepared to do likewise even if she could do better by defecting. In Rawlsian terms, contractors are prepared to go beyond appealing to their threat advantage—the minimal share required to make cooperation in their instrumental interest. Contractors are reasonable in a

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176 For this formulation, see Gerald Gaus, "Reasonable Utility Functions and Playing the Cooperative Way," Critical Review of International Social and Political Philosophy 11(2008). By “playing assurance games” I mean that she conceives of the payoffs of cooperation vs the payoffs of defection in terms of assurance game payoffs, not because she is maximizing self-interest. I understand the game theoretic modeling of choice much as Gaus does: as making use of purely formal utility theory that is compatible with almost any psychological assumptions.

second sense as well, for they must recognize the burdens of judgment, though my theory does not require that they hold this belief, as we will see below.\footnote{178}{Political Liberalism., pp. 54-58.}

My deflationary notion of reasonableness is broad. To illustrate, consider the ethical egoism advanced by followers of Ayn Rand’s Objectivism. Rawlsians could maintain that Objectivism is not a genuinely moral view, as it has no built-in notion of other-concern. But the Objectivist position resembles familiar forms of eudemonism; it is distinct in emphasizing that one can flourish in commercial activity and that the expression of ingenuity in the form of profit-seeking is a great life good.\footnote{179}{For a review of Rand’s position, see Badhwar and Long 2014.} Rawlsians may worry that Objectivists are not interested in developing a common, cooperative, public framework for social life. But Objectivists champion the voluntary formation of complex social orders based on positive sum games and innovation. They are reciprocal cooperators. Objectivists just have a different conception (even if false and ultimately unjustified) of what it means to form a cooperative order, rather than no conception. I think it is rather difficult, then, to show that Objectivists are unreasonable in any but the technical Rawlsian sense, which, again, doesn’t get us very far.

The deeper Rawlsian concern is that allowing Objectivist reasons into public justification would generate injustice or illegitimate social and political arrangements. But remember that permitting reasons into public justification does not imply or even render probable that members of the public will be justifiably coerced or ostracized solely on the basis of those reasons. If Objectivists insist on
implementing strong rights of private property, then whatever their reasons, Rawlsians will have their own reasons to object, in which case the Objectivist proposal is defeated. As a result, even if we allow Objectivist evaluative standards to count as reasonable, we are a far cry from being stuck with a publicly justified Objectivist legal order. Though, if Objectivism is a reasonable comprehensive doctrine, then Objectivists can reasonably reject the extensive states Rawlsians typically endorse. What economic structures can survive this contest is the subject of Chapter 7.

While a deflationary notion of reasonableness rules out few evaluative standards, our intuitive notion of reasonableness prevents obviously defective evaluative standards from generating justificatory reasons. As we have seen, being reasonable requires being prepared to propose reciprocal terms of cooperation. If you insist on getting your own way and are unwilling to compromise in the formation of social-moral institutions, then it is natural to say that demands made in accord with those terms are morally inappropriate. As a result, evaluative standards that directly imply the permissibility of such demands are morally inappropriate and can be ruled out of bounds as sources of justificatory reasons.

Similarly, and more generally, normal moral persons are interested in having moral relations with others. They see others as ends and not as mere means. So, reasonable evaluative standards recognize that people are interested in moral relationships with one another, especially those grounded in the value of moral peace between persons. In this way, we can rule out deeply egoistic
evaluative standards as unable to generate justificatory reasons. We can rule out sadistic and masochistic evaluative standards on the same basis, as both insist on valuing the destruction of value for its own sake, either for others or for the agent in question.

Beyond this we cannot say much. But I do not think this is problematic, as there are many ways to block coercion and moral authority other than condemning a host of evaluative standards as unreasonable. Given that the standard for allowing reasons into the justificatory process is not the only factor determining when rules and laws are justified, intelligibility theorists are not committed to regarding immoral or wicked proposals as just or legitimate or authoritative.\(^{180}\)

XI. Idealization

The IRR appeals to idealization to explicate its conception of a reason that can justify endorsing a moral convention or holding someone else to one. I have developed a detailed conception of moderate idealization in *Liberal Politics and Public Faith*, and I will not review that account in detail here.\(^{181}\) Instead, since I have previously only applied idealization to the public justification of legal coercion, I need to extend the account to the public justification of moral conventions generally.

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\(^{180}\) I have more to say about reasonableness in Vallier 2014, pp. 146-151.

\(^{181}\) Vallier 2014, Chapter 5.
Idealization is used to characterize the relevant justificatory public and the idea of a sufficient reason to endorse or reject a moral convention. Idealization is not meant to provide an account of all our normative reasons, or even all deontological reasons relevant to justice and right action. Instead, idealization focuses entirely on identify the reasons that can justify public moral and political power, and their associated forms of punishment, ostracism, and coercion. Further, it is critical to recognize that idealization is not an attempt to defend a hypothetical consent theory. Instead, hypothetical models in public reason, going back to Rawls, are heuristics for determining the reasons real persons – “you and me” – possess. So, idealization works as follows: a justificatory reason is one that an individual would endorse if she were suitably idealized, say as fully rational, informed, and reasonable. The endorsements of the idealized person are models that output the reasons that apply to us in the context of justifying moral and legal conventions.

Public reason liberals also idealize to avoid attributing reasons to persons based on what real-world persons presently endorse (or, at least, the reasons real-world persons claim they endorse, since what current individuals claim to endorse is surely corrupted by inferential errors and ignorance). We should not tie the justification of moral conventions to these factors, not only because we would end up with worse social-moral orders, but also that it is hard to see how such reasons could form a bona fide justification for ostracism or punishment in the first place.

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182 Rawls 2005, p. 28.
So the pressure to idealize is the pressure to not base a social-moral order on ignorance and irrationality.

As I read the literature, standard conceptions of idealization contain two epistemic dimensions, a rationality dimension and an information dimension. These dimensions regulate what citizens believe about what they have reason to do. The rationality dimension regulates how citizens reason with respect to their beliefs, i.e., how they draw inferences from more fundamental beliefs to more complex beliefs and how they revise their beliefs in response to new data. The information dimension determines the non-normative facts that persons can access – facts about the world and their present circumstances. The standard, radical approach to idealization pushes both dimensions to their limit, assuming the public’s reasons are modeled by what their perfectly rational and informed representatives would affirm. The reasons identified by this process should comprise the most coherent and plausible harmonization of real-world persons’ considered judgments. Consequently, the original position idealization ascribes reasons to real persons, in particular reasons to comply with the two principles of justice.

But there are more moderate conceptions of idealization, such as the models advanced by Gaus and myself, that rely on more modest notions of rationality and information, such as the rationality and information necessary for

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183 I do not have the space to review standard conceptions of idealization, but for two familiar models, see Rawls 1971, pp. 16-17, 119-121 and Gauthier 1986, pp. 233-58.
184 Rawls 1971, pp. 118-123.
real moral agents to navigate the world given normal environmental constraints.\textsuperscript{185} Individuals are boundedly rational and informed. I cannot here review all the reasons that one might radically or moderately idealize along both epistemic dimensions. But the trade-offs are relatively simple to state. If we radically idealize, public justification will not be subject to any irrationalities or ignorance, but we face the cost that the models of idealization we use generate reason-ascriptions that are too far removed from ordinary agents’ concerns. However, if we moderately idealize, we allow reason-ascriptions to be based on some non-trivial amount of irrationality and ignorance.

In this book, the core case for idealization in justifying moral conventions is that idealization is required to explicate the idea of rational scrutability. Rational scrutability is understood as a condition through which an agent can begin with her own evaluative commitments and trace an inferential path towards endorsing (or at least not rejecting) a moral convention her society applies to her. We cannot appeal to radical idealization to develop the idea of rational scrutability because it involves changing far more beliefs than the idea of rational scrutability warrants. The entire point of rational scrutability is to show how people, as they are, can assess moral conventions from their own perspectives. Radical idealization permits dramatic revisions to our beliefs and values, such that a radically idealized individual may lack the core commitments of her real-world counterpart.

\textsuperscript{185} Gaus 2011, pp. 244-258. Also see my Vallier 2014, Chapter 5.
In the same way, we must idealize some if we are to establish that social-trust is *rationally* scrutatable. Persons can only have sufficient reason to comply with a convention if the reasons they have possess at least some epistemic pro-status. Present acceptances frequently lack any epistemic pro-status because they are defeated, so by being based in bad inference or in culpably failures to gather relevant information. So if we are to insist on rational scrutability, we must insist on using idealized accounts of the reasons we have.

Another argument for moderate idealization is that it plausibly specifies what it means to take the perspective of others into account. A person’s perspective is not merely her present set of acceptances, but rather consists in the reasons a person has given her core values and commitments. If we do not idealize, then the justificatory reasons we ascribe to persons may bear no necessary inferential connection to that person’s core values and beliefs. By responding to those reasons, we would therefore not take her perspective into account, just her present acceptances, however biased or irrational. Similarly, we cannot appeal to radical idealization because radical idealization threatens to erase a person’s values and commitments. Consequently, by responding to the radically idealized reasons of persons we would not be responding to *them* at all. Similarly, if trusting others is a way of taking their perspectives into account, then if we appeal to radical idealization, we will not trust the person in question, but a rationally exemplary phantom.
Given the importance of moral peace, I do not think that the fact that moderate idealization allows justification based on reasons that lack the best epistemic credentials is problematic. If our aim in a diverse society with people that deeply disagree about justice and the good is to establish mutually beneficial relations of social trust, then responding to moderately idealized reasons seems more appropriate than responding to present acceptances of rationally exemplary reasons that cannot be plausibly ascribed to those with whom we wish (and with whom we ought to wish) to establish moral relationships with. Yes, moral and legal conventions will be based in some rational errors, but that is the consequence of being concerned with the great intrinsic and extrinsic value of moral peace.

XII. Wolterstorff and Enoch Contra Idealization

Christopher Eberle, David Enoch, and Nicholas Wolterstorff have all complained that idealization risks authoritarianism and paternalism by forcing people to comply with laws or social-moral rules that they would accept if properly idealized despite the fact that they in fact reject.\textsuperscript{186} I have elsewhere offered a generic reply to these criticisms, but here I want to defend my account of idealization against these new criticisms.

Wolterstorff has worried that idealization severs the connection between respecting persons as free and equal and respecting their rational autonomy on the

one hand and only taking the concerns of their idealized counterpart into account. Wolterstorff:

Why does respect for a person’s rational autonomy, thus understood, justify us in ignoring his views, if he in fact disagrees with the legislation, and in coercing him? For that is what the proposal amounts to: ignoring the actual views of all those who are not fully rational. Why do only the rational people, along with everybody’s fictional rational counterpart, count in the political calculus? Do we not deserve respect in our actuality as persons with political beliefs?\(^{187}\)

For Wolterstorff, there is no clear argumentative connection between respecting persons and basing law on reason those persons would affirm if idealized. In fact, there is serious risk of disrespect.

Similarly, Enoch complains that moderate (in this case Gausian) idealization permits us to treat persons in a condescending or patronizing fashion. If we treat people in accord with what their idealized counterparts would endorse, rather than what they actually endorse, we are condescending and patronizing. We certainly do not treat them as free and equal. This is why Enoch claims “the thought that by offering such a response [as Gaus’s] any progress at all has been

\(^{187}\) Wolterstorff 2012, p. 33.
achieved in dealing with authoritarianism sounds ridiculous." In fact, by treating people in accord with moderate idealization, we do something morally worse than treating them in accord with a mind-independent, transcendentally true moral principle. For the treatment literally “adds insult to inquiry.” Gaus is both “willing to coerce his interlocutor based on a rule she doesn’t endorse” and tells her “she misunderstands her own deep normative commitments.”

What unites the two criticisms is the idea that the grounding value of public reason (be it respect or anti-authoritarianism) prevents treating people according to what their idealized counterparts endorse. Wolterstorff cannot see how the value of autonomy permits us to disregard what persons actually, freely claim to endorse, whereas Enoch cannot see how the value of avoiding authoritarianism permits us to disregard what persons, actually, freedom claim to endorse. If we care about autonomy and would like to prevent authoritarianism, appealing to idealization frustrates our goals.

XIII. Moral Peace and Idealization

The form of idealization I favor serves the realization of moral peace between persons; idealization is not a proxy for consent or autonomy. To establish moral peace, a social order’s moral conventions must be rationally scrutable for diverse persons; conventions must be those each person has sufficient reason to accept,

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88 Enoch 2013, p. 166.
such that the rules bear the critical scrutiny of each person’s moral point of view. This means there is little motivation to appeal to what persons actually endorse, save for the fact that what others say they endorse may be our best indicator of what reasons they have. Since we should be humble in idealizing, appealing to real-world others for information is critical. But our account of their reasons is not settled by what they presently endorse. Again, the source of normativity is not consent, but peace based in moral reasoning.

To put it another way, even if John manages to get Reba to agree with his proposal, the terms of the peace will be dishonest or insincere. John secures the agreement while simultaneously believing that his best model of her reasons would lead her to reject the terms. Perhaps John knows that Reba only agrees to comply with a moral convention because she has not thought things through; like a disreputable car salesman, he must close the deal before Reba thinks too much about it. In an important sense, then, John pulls the wool over Reba’s eyes and the eyes of all other people who cannot or have not rationally interrogated their social morality. In this way, basing moral conventions on what we presently claim to accept cannot establish a long-term, stable moral peace.

In contrast, John treats Reba in a morally peaceful fashion when he insists that Reba comply with moral conventions that John believes could survive Reba’s rational interrogation. He does not treat Reba in a morally peaceful fashion by modeling her reasoning based on the cognitive capacities of a god with full information and perfect rationality, but he must idealize all the same.
Moral-peace based idealization, then, need not fall victim to Wolterstorff’s criticisms because idealization is not an attempt to secure the consent of persons or to protect their autonomy, at least not in the first instance. Instead, idealization demonstrates that some moral conventions realize moral peace because the conventions are rationally scrutable. And widespread compliance with moral conventions generates social trust. Failing to idealize would lead us to base social trust on weak or no rational scrutability; doing so would both reduce the extrinsic value of social-moral trust and failing to realize the intrinsic value of social-moral trust.

Part of the force of Wolterstorff and Enoch’s critique arises from imagining someone browbeating another person based on what the browbeater believes the browbeaten has most reason to do, even when the browbeaten person is telling him otherwise. But this is not an objection to idealization; instead, it is a complaint that the browbeater is misunderstanding the reasons of the browbeaten. That is why it is vital to listen to real world others. John may be prone to error regarding Reba’s evaluative standards. Wolterstorff and Enoch worry that John discounts the complaints of real-world Reba when he appeals to idealization to discount Reba’s real-world objections to his demands, or, at least public reason permits John to discount Reba’s objections. But John only discounts Reba if he makes moral demands of her despite realizing that she lacks sufficient reason to endorse the convention that John demands Reba follow. If John sincerely and carefully considers her objection, and his best model of her commitments
indicates that Reba is mistaken about her commitments, then he can make a
demand of her anyway. This is because his actions are shaped by his decision to
take Reba’s perspective into account, even if she herself explicitly disagrees with
his demand. I recognize that my suggestion may sound counterintuitive, but just
consider any case where we make moral demands of persons that they know better
than to resist. We think they’re just making excuses, merely trying to justify
themselves with bad reasons. A common example would be an addict who refuses
to check into a rehabilitation facility so that she won’t lose her children to local
child services. If John demands that Reba go to rehab, and Reba refuses, John may
nonetheless demand that she go anyway, since he knows that she does not really
want to keep hurting her children. In Chapter 3, I will argue that in some cases, we
may coerce persons to comply with laws on a similar basis.

XIV. Internalization and *Modus Vivendis*

I understand public justification as a means of preserving moral peace between
persons. When moral conventions have authority based on the intelligible reasons
of moderately idealized members of the public, social-moral trust is rationally
scrutable, and a society can achieve a great measure of moral peace. With this
understanding, I turn to explain what endorsement involves. I argue that publicly
justified moral conventions should be *candidates for internalization*, conventions
that people accept as their own and hold themselves to given their own moral
emotions. The idea of internalization is critical for distinguishing a morally peaceful society from one whose stability and persistence is based on mere power relations. In the latter *modus vivendi* society, people have some reason to comply with the conventions to which they are subject, but these are not reasons to internalize those conventions. As such, any peace imposed is not moral because it is based merely on coercion, fear, and intimidation. The idea of internalization should help us distinguish between a morally peaceful order based on a social peace treaty from the peace that comes with one group surrendering to another.

Sometimes *modus vivendi* regimes are understood as those whose stability is based primarily on a contingent balance of power rather than the fact that people can see themselves as its authors.\(^{189}\) This is why *modus vivendi* regimes are said to rest on mere force rather than reason. In contrast, a publicly justified polity should be stable based on the moral reasons of persons. David McCabe, who defends a version of *modus vivendi* liberalism, argues that public reason liberals draw too hard and fast a distinction between our pragmatic reasons to follow laws under a *modus vivendi* regime and our principled reasons to follow laws in a publicly justified polity. The only way to defend such a distinction is to accept the “power-independence” assumption, which holds that “one’s endorsement of some policy or principle is morally grounded only if one would not support a different policy or principle under a different balance of power.”\(^{190}\) On the power-independence assumption, a regime can only be publicly justified if citizens would support their

\(^{189}\) Rawls 2005, p. 147.

\(^{190}\) McCabe 2010, p. 126.
favored laws if power relations differed. McCabe rightly points out, however, that every regime’s stability depends on a balance of power because our moral judgments are often contingent on arrangements of power, and that it is hard to imagine laws that are *not* contingent in this way. For instance, we might support a law based on the fact that our favored party is out of power, but my reasons for such support are surely consonant with living in a publicly justified polity. I agree with McCabe that it is hard to distinguish our pragmatic reasons for supporting laws under a *modus vivendi* regime from our principled moral reasons for supporting laws in a publicly justified polity. A *modus vivendi* regime provides us with powerful reasons to comply with its laws. Similarly, a *modus vivendi* social-moral order also gives us powerful reasons to act. We act to avoid ostracism and resentment, if not because we think the moral convention at issue is authoritative for us. Thus, if we are to characterize a morally peaceful society correctly, we need an account of the specific sorts of reasons generated by publicly justified polities that *modus vivendi* regimes, by and large, do not.

In my view, the reasons prescribed by publicly justified social orders have three features. They are reasons to follow moral and legal conventions because (a) the conventions advance one’s conception of the good and (b) the conventions are publicly recognized as just or fair. Further, (c) the reasons must be considerations that count in favor of internalizing the conventions rather than merely complying with them.\(^{191}\)

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\(^{191}\) I have refined and distinguished these conditions elsewhere. See Vallier 2015.
In publicly justified polities, members of the public see moral and legal conventions as authorized by their fundamental evaluative commitments. Only when conventions are publicly believed to advance the common good and publicly believed to treat all fairly and equally do they make a full contribution to a morally peaceful order. Thus, conventions characteristic of *modus vivendi* orders can be distinguished from conventions characteristic of publicly justified polities in two ways: (i) *modus vivendi* conventions may be seen as advancing one’s personal good, but doing so unfairly, (ii) *modus vivendi* conventions may be seen as fair but not as advancing each citizen’s good.

The third feature—the internalization condition—is also critical, for the best public justifications require more than mere compliance with a convention. An agent conforms to a convention just when she regards herself as having reason to follow it, but the agent *internalizes* the convention when she takes it to be personally binding, which will often generate guilt and other moral emotions when she fails to meet the requirement, “even if by doing so she gets what she wants.” The person who complies with the rule based on a simple balance of reasons may well refuse to accord the convention authority over her. Again, a person can have a balance of reasons to comply with moral conventions in a *modus vivendi* regime: she sees herself as having good reason to avoid legal and social penalties. But *that* is not the ideal of public justification. Instead, a society at

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moral peace is one where people endorse the conventions that apply to them as their own; they internalize the conventions and regard them as personally binding.

I follow Cristina Bicchieri, Gaus, and a number of others in understanding internalization as involving the reactive attitudes and responsibility claims.\textsuperscript{194} A failure to comply with an internalized moral convention licenses both John and others to resent John and hold him responsible for violating the rule. If John has internalized the rule, then, in an important sense, he \textit{knows better} than to violate it. He accepts the convention as morally binding on his actions, not merely as posing an external threat if he fails to comply. If we justify a convention based solely on reasons to comply and do not appeal to reasons to internalize the convention, then we may as well count reasons to fear reprisal as justificatory. By appealing to internalization via the reactive attitudes and our practices of trusting and holding responsible, we can distinguish reasons based on a \textit{modus vivendi} from reasons derived from a publicly justified polity.

We now have a normative basis for distinguishing between modus vivendi regimes and publicly justified polities, between societies at \textit{moral peace} and societies \textit{at war}. We can say that a moral convention \( M \) is publicly justified for John when John has sufficient, intelligible reasons of goodness and justice to comply with and internalize \( M \). Let us, therefore, understand publicly justified moral conventions as the building blocks of a morally peaceful society. A \textit{modus vivendi} regime can be defined as one where some sizeable portion of moral and

legal conventions fail to be publicly justified, but whose institutions are nonetheless stable and effective.

I have elsewhere characterized an ideal public justification as a congruent justification, one that realizes the ideal of congruence found in Rawls and other public reason liberals.\textsuperscript{195} A congruent public justification is one where a citizen has both reasons of goodness and justice to internalize the convention in question. But I also admit less than ideal public justifications into my theory, where one can have sufficient reasons of goodness to internalize a law, or sufficient reasons to justice to internalize the law, or both. The convergence view I’ve defended elsewhere does not distinguish between ideal public justifications and less than ideal public justification. But it is useful for us to so distinguish if we are to distinguish a society that is at moral peace from those that are less than peaceful. Consequently, a publicly justified social-moral order is fully realized or complete when all moral conventions are congruently justified. A fully congruent order possesses the maximal degree of moral peace between persons because all of its moral conventions are rationally scrutable bases of social-moral trust.

XV. Evaluative Pluralism

We must now determine, insofar as we can, how much intelligible reasons can vary between persons. In a homogenous society, where people have the same religion,

\textsuperscript{195} See Vallier 2015. For an analysis of congruence as Rawls understood it, see Rawls 1971, pp. 496-503.
philosophy, geography, education level, family structure, race, and sexual orientation, we might be entitled to assume that people have more or less similar intelligible reasons. Perhaps they have the same general goals, the same available means, and the same ideas about how to pursue the former with the latter. But in any large-scale social order, intelligible reasons are bound to differ dramatically. Let us call the fact that persons’ intelligible reasons will differ dramatically in a free, mass moral order the fact of evaluative pluralism. I do not use the term “reasonable” to describe pluralism because it so often abused by public reason liberals and despised by their critics that the term is not worth the trouble. The term “evaluative” leads us to think of the resulting pluralism as concerning not just our evaluation of goals, means, ends, principles, and so on, but also that the disagreement can be rooted in cognitively sophisticated, yet still quite diverse, reasoning.

Explaining the fact of evaluative pluralism is beyond the scope of this book, but it surely includes Rawls’s “burdens of judgment” or the factors that lead those who freely employ their practical reason to adopt different and incompatible views about matters of ultimate import. Rawls lists six such factors:

(1) The evidence bearing on the disagreement is conflicting and complex.

(2) Even when we agree on the relevant considerations, we may disagree about their weight.
(3) Our concepts, not merely moral and political concepts, are often vague and subject to hard cases.

(4) The way we assess evidence and weigh values is shaped by our unique, total experience.

(5) We often find different kinds of normative considerations on both sides of an issue, making an overall assessment difficult. And,

(6) Any system of social institutions is limited in the values that it can admit. So many hard decisions may have no easy answer.\textsuperscript{196}

The economist F.A. Hayek has a similar account of the sources of disagreement, but that is in some ways much richer. Hayek argued as early as 1944 that at least one of Rawls’s burdens of judgment, disagreement about the weight of moral values, will lead to evaluative pluralism. As Hayek notes in \textit{The Road to Serfdom}, even the “scales of value” of rational and moral persons “are inevitably different and often inconsistent with each other.”\textsuperscript{197} But Hayek develops an even more radical account of the burdens of judgment in his other work. Hayek understands the mind as a system of rules that organize subjective percepts in cognitively unique ways. The mind itself is “a particular order of a set of events taking place in some organism and in some manner related to but not identical with, the physical order of events in the environment.”\textsuperscript{198} The result of this structure is that different

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\textsuperscript{196} Rawls 2005, pp. 56-7.
\textsuperscript{197} Hayek 2007, p. 102.
\textsuperscript{198} Hayek 1952, p. 16.
\end{flushleft}
minds will map the world differently, such that their knowledge of the world is inevitably subjective, limited, and dispersed. Hayek’s famous “abuse of reason” project rests on these ideas, since social scientific inquiry must recognize “that the concrete knowledge which different individuals possess will differ in important respects.” Consequently, solving social problems is limited by insuperable complexity, given that “the number of separate variables which in any particular social phenomenon will determine the result of a given change will as a rule be far too large for any human mind to master and manipulate them effectively.” Each person only possesses a tiny, distinct piece of knowledge about how to create a functioning social order. Our reasons to accept the conventions that comprise that order will, consequently, be radically situated and subjective.

Evaluative pluralism also assumes that disagreements about matters of ultimate importance are largely non-culpable. If someone fails to believe the true religion, the fact that she has missed the truth is not cause to hold her responsible for her beliefs. Further, under conditions of evaluative pluralism, persons who reason well with respect to their evidence will come to dramatically different conclusions about what forms of life have ultimate value. In some weak sense, then, persons can be epistemically entitled to affirm these ends and their associated reasons. I do not mean to wed public reason to the claim that all worldviews, or some restricted subset, will survive all rational, good-willed scrutiny. Instead, I mean that, given their reasoning up to the time of their present believing, persons

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199 Hayek 1979, p. 57.
200 Hayek 1979, p. 73.
are epistemically entitled to affirm quite different views. Further reasoning and learning may lead persons to give up their fundamental doctrines, philosophies, etc. But this does not mean that persons have easily accessible defeaters for their divergent beliefs. Again, given our radical epistemic situatedness, reasoning well based on our evidence can easily lead to divergent views.

When I have presented the case for evaluative pluralism to others, especially on the Internet, I am immediately criticized on the grounds that persons who reason well with respect to their evidence can never or almost never hold religious beliefs. It is not always clear why people adamantly assume this, but my suspicion is that resistance is based in part on gross caricatures of what it means to believe something on faith, as though faith requires believing p and not-p or requires believing in the face of epistemic defeaters. I also suspect that my interlocutors do not distinguish what can be justified given a person’s present evidence and reasoning and whether the religious person’s views will survive ultimate rational scrutiny. That is, they do not distinguish between provisional epistemic justification and non-provisional justification; reasoning up to the present time is provisional, since new evidence or reasoning with respect to that evidence can lead someone to alter her views. I understand why secular persons deny that religious belief can have non-provisional justification. But to deny that any modern person can have any provisionally justified religious beliefs requires ignoring the burdens of judgment—Rawlsian and Hayekian.

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201 Pollock 2006, p. 6.
Another challenge to evaluative pluralism can be drawn from the peer disagreement literature.\textsuperscript{202} It may appear that political liberals are committed to the controversial position that epistemic peers, persons who share evidential bases and reason with similar degrees of competency, should, when confronted with one another, suspend or reduce their confidence in their disputed beliefs; “conciliationism” may be the rational response to evaluative pluralism. Conciliationism holds that when “two peers who disagree about \( p \) should subsequently become substantially less confident in their opinions regarding \( p \).”\textsuperscript{203} Fortunately, we can set aside this challenge, for evaluative pluralism is silent about how epistemic peers should cognitively respond to one another. Instead, the burdens of judgment and our radical cognitive situatedness suggest that interacting with an epistemic peer on an issue is highly unlikely and would be nearly impossible to discern were we to ever meet her. Even if people know all the same arguments, they could have easily encountered the arguments in a different order, or they could have non-culpably forgotten an argument they once knew, or perhaps they lack some hard to communicate insight due to life experience. Evaluative pluralism simply states that real-world persons, when moderately idealized, are epistemically entitled to affirm different practical reasons for action and theoretical reasons for belief on matters of ultimate import. That is a

\textsuperscript{202} For a review of the literature, see Goldman and Blanchard 2015.
\textsuperscript{203} Goldman and Blanchard 2015.
considerably weaker claim than conciliationism.\textsuperscript{204}

With a generic account of evaluative pluralism in hand, we can now ask which types of beliefs it applies to. Clearly evaluative pluralism applies to beliefs about the ultimate \textit{good}. But it also plainly applies to disagreement about what is right and wrong and about what is just and unjust. Thus, pluralism about the good and \textit{justice pluralism} both run deep and lead to sharp divergences between intelligent persons of good will. Some political liberals try to restrict the reach of justice pluralism, such as Rawls and Jonathan Quong.\textsuperscript{205} I have argued elsewhere that the limitations they place on justice pluralism are either ad hoc, too vague, or based on contentious and unattractive conceptions of the public reason project.\textsuperscript{206} I lack the space to review these arguments here. Nonetheless, we can say that, without some good reason to treat pluralism about the good and justice pluralism asymmetrically, the natural assumption is that evaluative pluralism applies to both domains.

I also believe that evaluative pluralism applies to beliefs about \textit{non-normative facts}. This is obviously true if we allow that persons of informed good will can have considerably different religious beliefs, since religious beliefs include beliefs about what exists. A theist believes God exists; an atheist denies this. People of good will disagree about when fetuses become persons. Given the fair assumption that informed, intelligent persons of good will could be theists or

\begin{footnotesize}
\textsuperscript{204} I take this paragraph to explain the irrelevance of the peer disagreement literature to the public reason project, contra Enoch in “Political Philosophy and Epistemology: The Case of Public Reason,” unpublished.

\textsuperscript{205} Rawls 2005, pp. xlvii-xliviii. Quong 2011, pp. 192-220.

\textsuperscript{206} See Vallier, “Political Liberalism and the Radical Consequences of Justice Pluralism.”
\end{footnotesize}
atheists, we here have an instance where evaluative pluralism applies to non-normative facts, specifically the fact of God’s existence (or non-existence). We can also have pluralism about social worlds, where people have different social ontologies.\(^{207}\)

A critic might worry that allowing persons to sensibly disagree about non-normative facts allows them to disagree about facts that are subject to direct scientific examination. This means that informed persons of good will can justifiably reject a number of scientific conclusions; while idealization may rule out the grossest anti-scientific beliefs, such as hostility to childhood vaccination, reasonable people could disagree about the extent to which climate change is a threat to humanity or about which macroeconomy policy is best during a recession. Most public reason liberals will want to avoid a standard of disagreement that is this permissive, as it generates too many defeaters for science-based policy.

I think it is obvious that evaluative pluralism extends to these plainly factive disputes. So the question, then, is how to avoid entitling moderately idealized agents to affirm propositions with low epistemic credence, regardless of whether those propositions are normative or non-normative. To answer the question, we must appeal to the epistemology of testimony. The justification of most beliefs depends at least in part upon justifiably believing the testimony of experts. Those who reject all expertise will then be, in an important sense, irrational, since they

\(^{207}\) Muldoon 2017 explores what I call social worlds pluralism and the prospects for the contractarian project in light of such radical pluralism.
do not bother to grapple with easily accessible defeaters for their beliefs. Anti-vaxxers and those who reject anthropogenic climate change have accessible defeaters that derive from the easily accessible expert judgments of the relevant scientific communities. Some may be entitled to oppose mandatory vaccination or to question the economic efficacy of certain climate change policies, but to deny the science that backs up the belief in anthropogenic climate change and the efficacy of vaccines is culpably irrational. Anti-vaxxers and climate change skeptics could otherwise develop defeaters for policies necessary to directly benefit and protect human well-being, such as public health and protection from climate change.

Going forward, then, I assume that evaluative pluralism applies to the good, the right, justice, social ontology, and scientific disagreement.

XVI. Social Choice

My conception of public justification, in combination with evaluative pluralism, will take the diverse reasons of persons as inputs and generate an eligible set of proposals as its output. An eligible set of proposals is a set of laws, policies, moral conventions, etc. that no suitably idealized member of the public has sufficient intelligible reason to reject. No member of the set is defeated, however; all members of the public regard the proposals in the eligible set as superior to no proposal at all.
An eligible set can be narrowed with a Pareto criterion, which holds that if each member of the public believes that a is superior to b, then the eligible set ranks a over b (aPb). If a proposal is Pareto superior to another, then the latter proposal is dominated and, by dominance reasoning, we can remove the dominated option from the eligible set of proposals in order to generate an optimal eligible set. Importantly, dominated proposals are still socially eligible in the sense that members of the public regard the rule as better than nothing. But they can nonetheless be excluded from the optimal set.

Now, given evaluative pluralism, how many elements should we expect the optimal eligible set to contain: zero, one, or more than one? An optimal eligible set (OES) cannot be empty if the socially eligible set has at least one member, since the OES is formed by all proposals superior to otherwise socially eligible proposals. Thus, when the OES is empty, we can infer that all (in this case) moral conventions are defeated, such that no moral conventions have authority, and so cannot be the object of rationally scrutable social-moral trust. Given enough diversity, there will be many null optimal eligible sets.

Some optimal eligible sets will contain one and only one member, but this state of affairs should prove exceptional. Diverse intelligible reasons will arguably place more than one eligible proposal in many optimal eligible sets. Evaluative pluralism will also ensure that members of the public rank members of the OES differently (after all, if they ranked them identically, Pareto shrinks the set).

\[^{208}\text{Gaus 2011, p. 323.}\]
Consequently, we can expect more than one eligible moral convention for regulating harmful, non-cooperative behavior in many cases.

Optimal eligible sets with more than one member raise the question of how we are to select a proposal from the set, given that members of the public will want to institutionalize at least one member of the set as a real-world convention. Given the diverse reasoning of members of the public, further reasoning is unlikely to generate consensus. This means that we need some publicly justified decision procedure for social choice.

Loren Lomasky first suggested the possibility of an optimal eligible set of proposals with more than one member. In Lomasky’s view, there are many combinations of rights that adequately split the difference between our desire to protect our holdings and to aggress against the holdings of others. A social contract cannot tell us which option is best, so we must appeal to social evolution to converge on a scheme of basic rights. Gaus follows Lomasky by extending this insight into public reason liberalism. Rawls would eventually admit that multiple conceptions of justice are eligible and that reasonable persons will rank them differently, though he resisted this conclusion for some time.

However, Gaus has arguably expended the greatest effort to explain how decision procedures are justified. In Justificatory Liberalism, Gaus argues that we should use publicly justified decision procedures to select a proposal from the optimal eligible set, which he then understood as a set of inconclusively justified

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209 Lomasky 1987, p. 79.
proposals. So long as we can publicly justify a decision procedure, appealing to that procedure to select a member of the optimal eligible set is permitted and can lead to the conclusive justification of at least one proposal because the proposal is both a member of the optimal eligible set and is selected by a publicly justified decision procedure.

In *The Order of Public Reason*, Gaus identifies a problem with using decision procedures in this way: if one procedure is publicly justified, others might be as well. This raises the question of how members of the public are to choose decision procedures. We might attempt to solve this problem by employing a second-order decision procedure to select a first-order decision procedure from an optimal eligible set of procedures. But this will quickly generate a regress by requiring a third-order decision procedure to resolve dissensus about second-order decisions procedures, a fourth-order decision procedure, and so on. Gaus attempts to avoid the regress by denying that we must publicly justify the processes by which we settle on a moral convention and that we can converge on inconclusively moral conventions via *cultural evolution*. So Gaus now denies that we must conclusively justify decision procedures. Specifically, Gaus rejects what he calls the Comparative Procedural Justification requirement, which holds that in choosing a member of the optimal eligible set, a publicly justified procedure is preferred to an unjustified (but undefeated) procedure. Gaus rejects this principle on the grounds

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212 Gaus 2011, pp. 391-393, 407 discusses related concerns.
213 It is also possible that the eligible set of decision procedures is empty ...
that it is irrelevant in most cases of the public justification of laws, as the constraints of social morality will limit the set of eligible decision procedures considerably.\textsuperscript{215}

But our problem is whether we must publicly justify a procedure in order to select a mere moral convention from an optimal eligible set of potential conventions. Gaus’s argument against the Procedural Justification Requirement does not apply here. I am prepared to admit that while legal procedures must be publicly justified, procedures governing the formation of moral conventions need not. Members of the public will want coercive restrictions on their behavior to be governed by a fair, and so publicly justifiable, procedure. But they are prepared to allow the formation of a moral convention through a non-justified process.

XVII. Public Justification and Moral Peace

So far I have outlined the object of public justification (authoritative, internalized moral conventions), the currency of public justification (a positive balance of intelligible reasons to internalize moral conventions as authoritative) and the subject of public justification (a member of the public idealized through a moderate, practiced-derived model). I can now provide a formal definition of when a moral convention is publicly justified. Let’s begin with the idea of public justification for a single agent:

\textsuperscript{215} Gaus 2011, pp. 454-5.
*Public Justification Principle for an Agent:* a moral convention M is publicly justified for a member of the public P only if P has sufficient intelligible reason I to internalize M.

We can also define a generic principle of public justification for moral conventions:

*Public Justification Principle:* a moral convention M is publicly justified only if each member of the public P has sufficient intelligible reason I to internalize M.

The case for this public justification principle is it specifies that conditions for realizing moral peace between persons. Recall that a society is at moral peace when it exhibits a high degree of *rationally scrutable* social-moral trust. *The PJP is a specification of rational scrutability in a society replete with evaluative pluralism.* If a moral convention M is publicly justified for John, then it is practically rational for him to internalize and comply with it, so long as others do likewise, even when compliance comes at some cost to him. In this way, the convention is rationally scrutable for John because a balance of his subjectively accessible reasons favors following the convention because John thinks he has sufficient moral reason to comply with it. M survives John’s rational interrogation. And unless M is publicly justified, it cannot be rationally scrutable, since an unjustified M is one that John
lacks sufficient reason to comply with, and so is not rationally scrutable for him. Thus, M is rationally scrutable for John if and only if M is publicly justified for John.

If M is publicly justified for all community members, John can be epistemically justified in believing that M is rationally scrutable for members of the public as a whole, and so can every other member of the public. The possibility of jointly realizing that M is justified for each person becomes critical for establishing social trust that members of the public will generally comply with M. Recall my definition of social trust:

*Social Trust:* a public exhibits social trust to the extent that its members generally believe that others are necessary or helpful for achieving one another’s goals G and that (most or all) members of the public are generally willing and able to do their part to achieve G, knowingly or unknowingly, by following publicly recognized rules of conduct R₁ ... Rₙ.

When M is publicly justified for all members of the public, it forms the basis for social trust because it meets these conditions. Publicly justified moral conventions are ones that persons take themselves to have reason to internalize, such that the formation of one’s goals should generally be congruent with the moral conventions one affirms as binding. And if M is publicly justified in general, then that suggests that others are generally willing to do their part to facilitate each person’s goals –
admittedly unknowingly – by complying with M. They are willing because M is publicly justified for them; M passes the test of rational scrutiny. And since M is a convention, then each member of the public already knows that others are able to do their part by complying with M. Consequently, when M is publicly justified, John can have social trust that others will comply with M for moral reasons. Public justification establishes “relations of trust.”

For example, if John believes that a speed limit law is publicly justified for other people on the road, then he believes that compliance with the speed limit law in some way facilitates his aims, even if it sometimes holds them back. He also believes that others regard the moral convention as binding, and so believes that they are generally and genuinely willing to comply with the moral convention. And since the traffic law is the incumbent convention, he knows that others are able to comply with the traffic law. In this way, the traffic law is the object of social trust. Persons socially trust one another to comply with the convention.

Further, if M is publicly justified, deviations from M will be culpable, and so will warrant punishment under normal conditions, and they will be understood as such.217 Punishment should therefore help to stabilize M, and so maintain M as a convention. This will help to ensure compliance, and so increase trust. Speed limits are not always observed, but when people go much faster than the driving public regards as acceptable, they will ostracize him by honking their horns.

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216 Gaus 2011, p. 315.
217 Sometimes deviation might indicate a failure of rational scrutiny, as someone might deviate from the norm because she comes to believe that others are deviating from the norm. Deviation might also indicate that the norm is not publicly justified for the deviator.
yelling, and the like, and so punish the speeder for speeding. This will help to enforce the traffic law on top of the threat of police penalty. And so the speed limit law will be more stable than otherwise, and further form the basis of trust between persons.

Assuming that the speed limit law is a moral convention, as speed limit laws often are, then we have social-moral trust. And since the moral convention is publicly justified, we have rationally scrutable social-moral trust. This rationally scrutable social-moral trust contributes to a society’s overall degree of moral peace. With enough publicly justified moral conventions like the speed limit law, a society will have a high degree of rationally scrutable social-moral trust, and so establishes moral peace between persons.

After some work, we can see the ground for public reason—the value of moral peace between persons. Moral peace has great intrinsic value because it is an instance of taking the perspective of others into account. Specifically, it is the social state realized when we regularly take the perspective of strangers into account by complying with publicly justified moral conventions. Moral peace has great extrinsic value because it is an especially robust form of social trust and, as such, generates social resources to create, maintain, and repair important social, political and economic institutions.

Focusing on the intrinsic value of moral peace, then, we can extend our argument that moral peace has intrinsic value in order to show that moral peace requires the public justification of moral conventions. All we need is a premise that
substitutes rational scrutability for public justification. Recall premise 11:

11. A morally peaceful society, in virtue of containing a great deal of compliance with rationally scrutable moral conventions, has a great deal of intrinsic moral value.

Based on the arguments of this chapter, we may now introduce premise 12:

12. A moral convention is rationally scrutable if and only if it is publicly justified.

And derive our critical conclusion:

13. Therefore, a morally peaceful society, in virtue of containing a great deal of compliance with publicly justified moral conventions, has a great deal of intrinsic moral value (11, 12).

Given that moral peace has intrinsic and extrinsic value, conforming our moral conventions to the public justification principle has intrinsic and extrinsic value. The question, “Why Public Reason?” is answered with, “To realize moral peace between persons.”

We now move towards an account of political public reason, the public
justification of coercive law. The motivation for publicly justifying coercive law, I will argue, is that an order of moral conventions that forgoes the public use of coercion will suffer from a number of critical defects. Legal conventions and constitutional rules that select legal conventions can help to remedy those defects. A society at moral peace, then, must be one with publicly justified political institutions. We shall see that, in a morally peaceful society, coercion is used only to enable moral conventions to conform to the PJP. In this way, we can determine which political institutions preserve moral peace and show that politics is not war.

For answers to a large number of objections to public reason liberalism, and how my account of public reason avoids those objections, see the supplementary material to Chapter 2.
Chapter 3: Legal Systems

To establish moral peace in our societies, the conventions that comprise our social-moral order must be publicly justified. In this chapter, I argue that we can only ensure that our social-moral order is publicly justified by introducing a publicly justified system of coercive law to organize and complete that order.\textsuperscript{218} I begin the chapter by explaining the notions of law and legal systems that I will use throughout the remainder of the book.

I. Law and Legal Systems

My definition of law follows a form of weak legal positivism, where laws need only have what Joseph Raz calls a “source” such that the “contents and existence of law can be determined without using moral arguments (but allowing for arguments about people’s moral views and institutions, which are necessary for interpretation).”\textsuperscript{219} That is the conception of law that I think is shared by all public reason liberals. Since laws must be justified, we must be able to identify laws and their contents to determine whether they are morally justified or not. We do not need to appeal to antecedent moral facts to say what the law of a community is. This is all to the good given that public reason liberalism is supposed to account

\textsuperscript{218} As I will explain below, the system of law itself must be publicly justified for the same reasons social-moral rules must be publicly justified: that only publicly justified laws preserve moral peace. So a legal system is not a mere instrument or tool for the social-moral order. It must be publicly justified as well.

\textsuperscript{219} Raz 2009, p. 47.
for disagreement about what morality requires. But notice that I do not endorse this weak form of legal positivism about law in general, just about laws with their justificatory status unspecified. A publicly justified law is one which members of the public regard as moral, such that we cannot identify publicly justified laws without appealing to what is justified or not, as specified by the public justification principle. Legal positivism is true about law as such but may be false about publicly justified law.

I understand laws as supremely authoritative social conventions typically coercively enforced through legal sanction by publicly recognized law-applying institutions. Laws are social conventions because they are recognized as a matter of social fact. Social facts can be understood as “subjective facts that concern interaction between subjects – facts about subjects, their beliefs, desires, objectives, aims, choices, points of view....” Ultimately, then, laws are social conventions in the same way that moral conventions are social conventions. The public recognizes them as in force and they are typically complied with. Raz remarks that, “all agree that a legal system is not the law in force in a certain community unless it is generally adhered to and is accepted or internalized by at least certain sections of the population.” So law is not only a social fact, as a convention that exists because it is recognized as existing, but it must be generally complied with and in some cases internalized by some sectors of the population. We can therefore

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220 Murphy 2006, p. 4.
221 Murphy 2006, p. 5.
222 Raz 2009, p. 43.
understand laws as a kind of incumbent social convention, following Vanderschraaf’s conception of a convention that we modified and adopted in Chapter 2.

Law is authoritative in that it “does not request: it commands.” Like moral conventions, legal conventions are also de facto regarded as obligatory; those who violate them are guilty. So laws are not mere advice or counsel, or good rules of thumb. They purport to have de facto (but not necessarily justified) authority over those to whom they apply. But legal conventions go beyond moral conventions because legal conventions are often regarded as the “supreme authority within a certain society” such that they have authority over the obligatory power of competitor conventions. This supreme authority implies that, if laws are efficacious, those who apply and enforce the law will typically have the de facto power to impose the law in opposition to any challenge. A further claim is that, in virtue of having supreme authority, laws attempt to provide practical reasons for action, reasons to comply with the law. For Raz, the authority of law implies an exclusionary reason for action; it excludes as practical reasons any reasons to disregard or not conform to the law. For other legal theorists, the authority of law provides weighty reasons for action that outweigh competitor reasons.

We can further specify the authority of law by observing that the law provides the “machinery for the authoritative settlement of disputes” that cannot

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\cite{Murphy2006} p. 9.
\cite{Raz2009} p. 43.
\cite{Raz2009} p. 30.
\cite{Gur2007} For a detailed argument against Raz’s position and in favor of the weightiness approach, see Gur 2007
be resolved by other conventions or practices.\textsuperscript{227} Law \textit{necessarily} implies the existence of “adjudicative institutions charged with regulating disputes arising out of the application of the norms of the system.”\textsuperscript{228} Thus, critically, law is \textit{not} legislation (not necessarily, anyway).\textsuperscript{229} But it is still distinct from custom in that it is formalized by an adjudicative system. Laws require courts. This does not mean adjudicative systems need to be complex. A primitive tribe can have laws if it has authoritative social conventions that are enforced by its authorities.

Laws are also typically backed by \textit{coercive} force. In some cases, laws do not claim coercive authority, such as laws passed by legislators to celebrate a national holiday or mint coins in certain way. But the vast majority of laws with which we are concerned are authoritative social conventions backed by violence. Laws are typically physically enforced against violators, either by the community, or by agents of the community or the nation-state. These enforcers act in concert with adjudicative institutions, such that enforcers typically obey the dictates of the adjudicator.

Raz distinguishes laws from ordinary social rules (akin to my definition of moral conventions) in part by distinguishing the idea of the \textit{sanctions} of law from the penalties imposed by ordinary moral conventions. Sanctions must be serious matters, such that they should lead to the deprivation of life, liberty, health, or

\begin{thebibliography}{9}
\bibitem{Raz2009}
Raz 2009, p. 110.
\bibitem{Raz2009}
Raz 2009.
\bibitem{I self-consciously draw on Hayek here, whose work in Rules and Order has the same theme. See Hayek 1973, especially pp. 72-4. Raz also notes that “not every law is created by law-creating organs, and though the importance of legislation as a law-creating method is characteristic of modern legal systems, it is not characteristic of every legal system, nor is any other law-creating method.” Raz 1970, p. 191. Also see Hasnas 2013, p. 450.}
\end{thebibliography}
possessions. And the performance of the sanctions should be “guaranteed by the use of force to prevent possible obstructions” in contrast to moral conventions, where ostracism might be prevented by other moral conventions. Further, the sanction is “determined with relative precision in the law, and only a small and predetermined number of sanctions are applied for each violation” of the duty associated with the law. Ostracism in response to the violation of moral conventions is less limited and formalized. Finally, only certain persons, expressly determined by the law, may apply legal sanctions. Ostracism in response to the violation of moral conventions is more open-ended; violations are in some sense everyone’s business.

The final feature of my definition of law is that laws require formal institutions that apply the law, namely courts. Raz defines a “primary law-applying organ” as “an organ which is authorized to decide whether the use of force in certain circumstances is forbidden or permitted by law.” This determination includes the capacity to determine what the law is in certain cases, including cases of conflict between laws, and to resolve conflicting claims about whether a law has or has not been violated. Primary organs include all norm-applying institutions, not merely courts, such as the police.

Legal systems are complexes of laws and adjudicative institutions. So legal systems themselves must be social facts in the same sense as laws and moral

\[\text{\textsuperscript{230}}\text{ Raz 1970, p. 150.} \]
\[\text{\textsuperscript{231}}\text{ Raz 1970, p. 151.} \]
\[\text{\textsuperscript{232}}\text{ Though see my complication of this point in Chapter 6.} \]
\[\text{\textsuperscript{233}}\text{ Raz 1970, p. 192.} \]
conventions are; a legal system only exists when it is in force in a certain community. Legal systems must have adjudicative institutions, which regulate “disputes arising out of the application of the norms of the system.” A legal system must also claim supreme authority in a society, as having the in principle right of guidance and adjudication, and when the legal system is efficacious, it has the de facto authority and power to impose and enforce laws. A legal system also “mark[s] the point at which a private view of members of the society ... ceases to be their private view and becomes (i.e. lays a claim to be) a view binding on all members notwithstanding their disagreement with it” so legal systems are taken to resolve social disputes about how to behavior. The legal system’s public character provides “publicly ascertainable ways of guiding behavior and regulating aspects of social law” such that “law is a public measure by which one can measure one’s own as well as other people’s behavior.”

Legal systems are also essentially “institutional, normative systems” such that the law is comprised of “norms, rules, and principles, that are presented to individuals and institutions as guides to their behavior by the body of legal institution as a whole.” Legal systems can therefore be understood as consisting of laws “which the courts are bound to apply and are not at liberty to disregard whenever they find their application undesirable, all things considered.” As such, legal systems have primary organs that have the de facto power to make

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234 Raz 2009, p. 43.
235 Raz 2009, p. 51.
236 Raz 2009.
238 Raz 2009, p. 113.
“binding applicative determinations.” Legal systems typically, but not always, include norm-creating institutions like parliaments. But, you can have a legal system without norm-creating institutions I set the public justification of norm-creating systems aside for later chapters.

Raz identifies three necessary conditions for a legal system beyond what we've discussed. Legal systems must (i) “contain norms establishing primary institutions” like courts, and (ii) regard as a law as belonging to the legal system “only if the primary institutions are under a duty to apply it.” Raz also stresses that legal systems are (iii) “open systems” where a system is open “to the extent that it contains norms the purpose of which is to give binding force within the system to norms which do not belong to it” such that it can appropriate other systems of norms, like the canon law of churches, or local customs.

Raz then distinguishes between the direct and indirect functions of law. Direct functions “are those the fulfillment of which is secured by the law being obeyed and applied,” whereas indirect functions consist in “attitudes, feelings, opinions, and modes of behavior which are not obedience to laws or the application of laws, but which result from the knowledge of the existence of laws or from compliance with and application of laws.” I set aside the indirect functions of law in this book, save to say that they play an important role in creating and maintaining moral peace, as social trust is arguably produced in part

239 Raz 2009, p. 110.
240 Raz 2009, p. 115.
241 Raz 2009, p. 119.
by widespread attitudes and feelings about the law beyond mere compliance, i.e., public opinion.

Direct functions can be divided into primary and secondary functions. Raz describes primary functions as “outward-looking” such that they apply to the general population; the primary functions are justified in terms of the effects that laws have on the population.\(^{243}\) The secondary functions concern the maintenance of the legal system, making its existence and operation possible. The secondary functions are justified in virtue of how effectively they facilitate “the fulfillment of the primary functions by the law.”\(^{244}\) I will set aside the justification of laws that perform the secondary function to future chapters, as they include procedures for changing the law and regulating the operation of law-applying organs.\(^{245}\) I focus on the primary functions of law here.

The primary functions of law are (a) preventing undesirable behavior and securing desirable behavior, (b) providing facilities for private arrangements between individuals, such as criminal law and the law of torts, (c) the provision of services and the redistribution of goods, such as defense services, road construction, and (d) settling unregulated disputes.\(^{246}\) A social-moral order without laws, then, typically cannot perform these functions to an adequate extent, or so I will argue below. But before examining this point, I should translate

\(^{243}\) Raz 2009, p. 168.
\(^{244}\) Raz 2009.
\(^{245}\) Raz 2009, p. 175.
\(^{246}\) Raz 2009, pp. 169-172.
these functions into the idiom of public reason as elaborated in the previous two chapters.

Since I analyze the justification of law as a method of establishing moral peace between persons, I modify Raz’s understanding of the four primary functions of the law into four primary functions of the conventional order. These involve securing moral peace by: (1) discouraging the violation of moral conventions, (2) facilitating private arrangements, (3) settling unregulated disputes and (4) delivering goods and services.

Regarding (1), we should avoid using the law to promote desirable behavior and discouraging undesirable behavior because the notion of “desirable” behavior is too broad and vague. So I argue that the conventional order should generally discourage the violation of publicly justified moral conventions. In many cases, moral conventions and social ostracism will be enough to prevent the relevant violations. But sometimes legal systems will be required to enforce publicly justified moral conventions.

Regarding (2), the conventional order must facilitate private arrangements, such as the protection of interpersonal contracts regarding property transfers, marital contracts, and the like. In many cases, moral conventions like promise-keeping rules are sufficient to facilitate private arrangements. But in many cases the relevant parties, and society as a whole, will benefit from formalize legal arrangements for establishing and enforcing these contracts.
Regarding (3), the conventional order should be capable of providing important goods and services to its members, such as the provision of food, healthcare, and shelter. But I understand provision more broadly than Raz’s phrasing implies, even if he intends something relatively capacious. For instance, the conventional order should be involved not only in the redistribution of goods and services, but in their production. A primary function of the conventional order, then, is to allow for the formation of economic systems whose general operation results in the provision of the relevant goods and services. Often the moral order is sufficient for these purposes, but the economy generally requires legal coercion to sustain mutually beneficial commercial activity. Raz’s stress on the redistribution of goods suggests that the conventional order should be used to forcibly remove goods from one party and given to another. Sometimes this is appropriate, but it is better if the conventional order can ensure good distributions in the first place.

Regarding (4), the conventional order should provide a means for settling unregulated disputes, since societies are in flux with respect to their moral orders. Since moral conventions change and conflict, many disputes cannot be settled in advance. Given that the moral order cannot always resolve these disputes, laws and legal systems will sometimes be required to give parties the opportunity to settle these disputes in a calm, orderly fashion. In contrast to Raz, however, I restrict the legal resolution of disputes to legal solutions that are socially eligible,
such that no party to the dispute, or affected third parties, has a defeated for the solution.\textsuperscript{247}

In this chapter, I will appeal to the four primary functions of the conventional order to explain how to publicly justify a legal system. First, I will argue that a social-moral order without law has various severe defects that require law as a remedy. Second, I will argue that a legal system can perform these functions. Third, I will argue that a legal system is not justified merely in terms of extrinsic value, as facilitating the order of moral conventions, but rather must itself be publicly justified. Finally, I will develop an account of when laws that perform these functions have authority; that is, I develop a theory of legal (falling short of political) obligation understood as the duty to comply with laws that are \textit{necessary components} of a legal system.

I do not provide an account of the justification or obligatory force of legislation, just the obligatory force of the necessary features of a legal system. As John Hasnas notes, “the duty to obey the law is not the same thing as political obligation,” since legal systems can and do exist “that are not associated with any particular government or centralized political structure.”\textsuperscript{248} I develop an account of legislative authority in Chapters 4, 5, 6, and 9.

My theory of legal obligation builds legal obligation out of social-moral obligations—our obligations to follow moral conventions. Like social-moral obligations—

\textsuperscript{247} The solutions might need to be in an \textit{optimal} eligible set, but I will not impose that requirement here, since I think undefeated, yet dominated legal solutions to unregulated conflicts can be normatively binding, especially if we are unaware of the fact that the eligible convention is dominated.

\textsuperscript{248} Hasnas 2013, p. 451.
obligations, legal obligations are justified in terms of intelligible reasons. But legal obligations can only generated by publicly justified legal conventions, and legal conventions can only be publicly justified when moral conventions cannot themselves perform the four primary functions of the law.

To flesh out the conditions of legal authority, I draw on Raz’s theory of political authority. Raz argues that one person has authority over another if the authority’s commands, when followed, better enable persons to act on their external reasons for action. I revise Raz’s account to replace external reasons with intelligible reasons. So I contend that laws and law-applying bodies have authority if they better enable persons to fulfill their publicly justified social-moral obligations. Raz’s view might be described as a “reasons-in, obligation-out” account of authority, whereas my account of legal obligation is “obligation-in, obligation-out” given that I justify legal obligation in terms of social-moral obligation, which I think enables us to avoid some concerns about Raz’s position. So, my account of legal obligation should not only help us explain why moral peace requires legal institutions, but solve problems with related accounts of authority. For instance, in the supplement to Chapter 3, I will argue that my account of legal authority and legal obligation avoids common concerns about related natural duty accounts of political obligation.

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249 For the classic presentation of Raz’s theory of authority, see Raz 1986, ch. 3.

250 For instance, it enables us to avoid the concern about Raz’s view that it does not take disagreement seriously enough. See Christiano 2010, pp. 234-7. By understanding authority-justifying reasons as public reason liberals often have, no one must be subject to an authority if she disagrees with its dictates, since she is only bound to the authority by her own intelligible reasons.

251 Importantly, Raz rejects that the law itself has de jure authority over persons, but that the law is owed respect.
This chapter is divided into nine further parts. Section II describes a *social-moral state of nature*, an order with justified moral conventions but that lacks a publicly recognized system of law; in section III, I identify some difficulties it faces. I also insist upon its priority in resolving social problems, such that establishing laws are only justified or appropriate when social-moral conventions have failed or are widely expected to fail. I also make the case that a legal system has a limited capacity to remedy these difficulties. Section IV then argues that the public system of law must be publicly justified if it is to both fulfill its main functions and contribute to the realization of moral peace. In this way, I offer a novel *moral peace* foundation for the public justification of coercion, which contrasts with other foundations for public reason, more fully explained in Section V. I then review how legal obligation stands between moral and political obligation in Section VI. Section VII develops my modified Razian account of legal obligation. I term this a *social obligation* account of legal obligation in Section VIII, as it holds that one is obligated to comply with a law whenever compliance with a law enables persons to better fulfill their social-moral obligations. In the supplementary material, I contrast my view favorably with Razian and natural duty accounts of political obligation. I conclude in Section IX.

II. The Social-Moral State of Nature
Imagine that an advanced alien species descends upon the Earth and abolishes all legal systems. All courts are destroyed, as are all legislative bodies and executive offices. No coercive laws may be imposed on anyone by anyone. The aliens leave humanity with the capacity to create, alter, remove, enforce, or resist moral conventions, but not by means of law as I have defined it above. So the aliens permit social-moral orders to continue, such that systems of moral conventions can generate some social order via ostracism, shunning, and blame. Assume, as is likely, that many of these moral conventions are publicly justified.

Private parties may use coercion, but only as a liberty-right—a moral permission—not as a claim right—where others have the duty to permit one to act permissibly. And private parties may only use coercion to defend themselves or others from attack or to punish transgressors. No one has public authorization to engage in either action via a recognized system of moral conventions. Private parties can maintain legal codes to resolve their disputes in a private manner, say through systems of religious law like the Sharia. But they cannot enforce those laws coercively; they may only enforce private law through ostracism, such as shunning or excommunication.

Call this social order a social-moral state of nature. In Lockean terms, we have established a social contract that creates Society by establishing a publicly justified set of moral conventions. But it lacks a social contract between society

\[252\] Specifically, the status of the Sharia in non-Muslim countries, where Sharia is not a part of that country’s legal system.

and public agents with the authoritative power to coerce. There is no system of public judgment that can back society’s decrees with publicly authorized legal force. Thus, the social contract is incomplete because there is no political society.

The social-moral state of nature is a useful construct for identifying the purpose of legal systems. I grant that the social-moral state of nature has never existed, but it need not have existed to be useful. It is instead a thought experiment that enables us to distinguish between the social and political orders, specifically with respect to legal vs. merely moral conventions. Note that my state of nature construction avoids common complaints about state of nature constructs in general. I have made no especially “individualist” assumptions about human nature in constructing a social-moral state of nature. I have said nothing about people’s individual natural rights. I have said nothing about personal identity and the extent to which it is socially constructed. I have even allowed that normal moral agents have many social obligations that they did not acquire by choice, since they may have social-moral obligations in virtue of the practical reasons they have, despite their lack of consent. Furthermore, I have not assumed that political order is “natural” or “artificial” since the alien force expressly prohibits either a natural or artificial formation of the state. I know many people get off the boat (or perhaps never get in the boat) with social contract theories due to state of nature
thought experiments, but by separating the social and political orders, I believe I have avoided the vices of such views.\footnote{The criticisms arguably began with Hume 2008, but even Hume may have acknowledged the usefulness of the thought experiment in making sense of political authority. For a contractarian interpretation, see Gauthier 1979.}

We should now envision how such a social order will function. Some may contend, as Hobbes did, that the moral order must collapse once a publicly recognized unitary state is abolished. Others may have more Lockean intuitions, where the social-moral state of nature has a high degree of social order but still fails to realize critical social goods. I imagine a social-moral order more in line with Locke than Hobbes, though I think it is hard to determine who is correct, given that context will heavily influence social stability. But we can agree that such a social order will face huge social costs, especially in supporting large-scale institutions that local moral conventions cannot sustain. Moral conventions will be able to sustain local orders where ostracism and blame are effective due to limited interactions with total strangers. So a social-moral state of nature will still have families, civic associations (churches, clubs, etc.,) and small commercial institutions.\footnote{I discuss all three generic institutional forms in Chapter 6.} People will still want goods and services and some people will still try to sell them those goods and services. They will still be religious and want to go to church. And, most obviously, the vast majority of people will do what was necessary to protect their families. Many of these social associations may band together to provide their own private security and internal court systems that lack public recognition (canon law courts, for instance). It is even plausible to expect
the formation of unenforceable tort law given the need for a reliable, predictable method of resolving property disputes and damages.

The work of a variety of social scientific researchers can substantiate these assumptions. I have in mind anthropological studies of social cooperation in societies without states and the formation of legal conventions in the absence of state power.\textsuperscript{256} I also draw on economic approaches to private law.\textsuperscript{257} I further draw on the general observation that moral conventions play the most important role in promoting social cooperation, given the limitations of political coercion.\textsuperscript{258}

However, all but the most primitive societies have a legal system that nearly all regard as authoritative in its general aspects; and basically everyone sees the need for a legal system and that most people believe their legal system has some authority. So the social-moral state of nature should contain obvious defects that can be remedied by legal conventions. In my view, the defect in the social-moral state of nature is that societies within it cannot successfully establish moral peace and associated social goods.

\textsuperscript{256} Scott 1999, Scott 2009.
\textsuperscript{257} Benson 2011, Leeson 2014, Stringham 2015.
\textsuperscript{258} Ostrom 1990. For a review of Ostrom’s methodology, see Aligica 2014. See the discussion of the law merchant in North 1990, pp. 125-129. Large-scale social order may collapse without publicly recognize law, rather than limping along inefficiently, but private coercion is still available. This may lead to war, however, a distinct possibility.
III. What is Missing?

The social-moral state of nature has three general problems: the order of moral conventions will probably be uncertain, static, and inefficient.\(^{259}\)

(1) A mere social-moral order leaves its members in crippling uncertainty. If people disagree about what moral conventions require in certain cases, there are no formal, decisive means for resolving the disagreement. In a legal order, institutions and officials are expressly devoted to formalizing and harmonizing legal rules and generate authoritative, final judgments. These institutions can act relatively rationally and quickly. Further, the punishments imposed in the social-moral state of nature are haphazard and potentially numerous. Courts can impose regular punishments in an ascertainable fashion with a limited group responsible for imposing one or a few legal sanctions.

(2) A social-moral state of nature is also exceedingly static in that bad moral conventions can be very hard to change. As Murphy notes, social rules “possess tremendous inertia.”\(^{260}\) In many cases, oppressive moral conventions can last for centuries, such as conventions that permit slavery and serfdom. It is true that influential social groups, large or small, can change moral conventions. But the changes imposed are unreliable, since these groups can lose public favor in a

\(^{259}\) Murphy 2006, p. 29.
\(^{260}\) Murphy 2006, p. 28.
variety of ways that courts ordinarily do not. When a popular group loses public favor, the conventions they suppressed can return.

Stasis is explained by the fact that moral conventions are conventions—they are sets of actions in some kind of equilibrium. If a defeated or dominated convention is in equilibrium, then it will resist change; for no one has an incentive to unilaterally deviate from it. For example, imagine a stateless society that imposes strict conventions of racial superiority on the populace. Let us say that the Reds are the dominant race and the Blues are the subordinate race. The Reds are not able to legally repress the Blues but, due to the Reds’ greater social power, they can ostracize, shun, and boycott Blues whenever they would like; further, suppose the Reds have done this for decades. The advantage of law is that it can use legal coercion to quickly move the Red-Blue society from their inegalitarian moral conventions to publicly justified conventions. As Gaus notes, it may be the case that “only the political order is apt to be an adequate engine of moral reform as it can move us to a new equilibrium much more quickly than informal social processes.” Coercion can stabilize norms that our non-coercive moral practices cannot, so a legal system should have the special power to create new conventions and enforce them with coercion. This can help to move a society’s moral conventions into the optimal eligible set.

An excellent real-world illustration of the need for law in the case of an unjustified moral convention in equilibrium is the Jim Crow legal regime, prior to

\[261\] Gaus 2011, p. 437.
the Civil Rights Act.\textsuperscript{262} In the American South (though not limited to that area), the groups that supported racial equality fought an overwhelmingly hostile culture whose members exercised their moral, social and physical power to ostracize and assault “uppity” blacks, effectively insisting that blacks acquiesce in their inferior social position. Moral conventions requiring segregation were plainly unjustified, but these conventions were deeply entrenched. Importantly, reform groups, such as those led by Martin Luther King, Jr., were changing social attitudes before the Civil Rights Act was passed. In fact, the Civil Rights Act could not have been passed unless a certain segment of the population had already changed their social attitudes (though perhaps not their social practices). But once the Civil Rights Act was passed, law enforced many of the social changes wrought by the civil rights movement. Most people no longer needed to take the same physical risks in changing their minds and flouting old, racist conventions. The law brought about more equal political relations by extricating much of the South from a defeated moral convention with speed, uniformity, and finality that mere social change alone is typically unable to provide.

Consequently, while the Civil Rights Act was backed by coercion, it helped to extricate society from unjustified social equilibriums that were, in effect, demands to subordinate black Americans. So the Civil Rights Act helped to realize moral peace between whites and blacks. Whites, despite their resentment, were less “at war” with blacks than before, since the law enabled social relations that can

\textsuperscript{262} My example concerns legislation, which is not the subject of the chapter, but it can still serve as a useful illustration of the importance of a legal system.
be publicly justified for all, or nearly all, moderately idealized members of the public. Whites, on even modest reflection, could see that they would reject being treated as subordinated were they in the position of blacks. Public protest made this increasingly obvious.

I should say, however, that while the coercive power of law can move a society into the optimal eligible set, it can also stabilize conventions outside of it. Governments can enforce Jim Crow just as easily as they can pass the Civil Rights Act. So while it is important to empower public legal systems to move a society from unjustified equilibriums to justified equilibriums, that power must be restrained. I defer discussion of the limitations to Chapters 5 and 8, where I develop an account of protecting recognized rights from violation, by private parties or governments.

(3) Finally, a social-moral state of nature can be inefficient because its mode of enforcement is unreliable, clunky, and unclear. A legal system can respond faster and with greater accuracy to violations of moral conventions than the moral order can. When violations are detected, institutions are in place to quickly identify and enforce the law, given the existence of an expressly formalized system of legal sanctions. A benefit of this ability to act quickly and reliably is to stabilize public expectations about which conventions apply to them and which do not. Another attraction of general legal rules is that people can form short-term and long-term plans to realize their diverse ends because they can form reliable

\[263\] Peter Vanderschraaf’s example of breakdowns in a thousand-piece orchestra is illuminating. See Vanderschraaf 2016, p. xx.
expectations about how social life will proceed in the future.\textsuperscript{264} Consequently, uniform public legal systems can realize substantial social and economic benefits by propagating laws and enforcing them uniformly more effectively than mere moral conventions.

I grant that there are forces that guide moral conventions towards uniform application, even in a social-moral state of nature. This is due to the dynamic of increasing returns to moral requirements.\textsuperscript{265} As persons converge on an eligible moral convention, the remaining persons have stronger and stronger reason to comply with it, as it is a real-world convention with the benefit of allowing the formation and continued existence of moral peace between persons. The extant eligible convention has the additional normative property of it being effective and in force. But even with increasing returns, moral conventions alone still have the defects discussed.

We reach a doctrine of the \textit{rule of law}. Legal conventions, following Lon Fuller, have defining characteristics, such as generality, publicity, exclusion of retroactive legislation, clarity, stability, exclusion of legislation requiring the impossible, and the congruence of official action and declared rule.\textsuperscript{266} Legal conventions must apply to the public generally. They must be publicly accessible; members of the public should be able to determine what the law is. \textit{Ex post facto} laws cannot contribute to the rule of law. Laws must be clearly worded and be

\begin{footnotesize}
\textsuperscript{264} Hayek stresses the importance of stable rules that allow for the formation of plans in both Hayek 2011, pp. 82-83, and in Hayek 1973, pp. 41-51, 55-58.
\textsuperscript{265} Gaus 2011, pp. 398-400.
\end{footnotesize}
stable, enduring over time. They cannot demand the impossible and should be understood as applying to both citizens and political officials. Laws of this sort are capable of stabilizing public expectations in a way that can be publicly justified. We can see that the social-moral state of nature lacks key mechanisms for generating the rule of law, given that it cannot insist upon a uniform public, and publicly justified, legal system.\(^{267}\)

So a social-moral state of nature is comprised of rules that, without a legal order to support them, exhibit undesirable degrees of uncertainty, stasis, and inefficiency. A legal system is required to remedy these defects. We can see that a legal system is required to perform four social functions:

(1) Discourage the violation of moral conventions;

(2) Facilitate private arrangements;

(3) Settle unregulated disputes, and;

(4) Deliver goods and services.

Each of the primary functions of the law can be realized insofar as a legal system can be more certain, adaptive, and efficient than social institutions in the social-moral state of nature. A legal system can improve a society’s ability to secure moral

\(^{267}\) To give equal weight to the badness of a publicly authorized system of law, we must remember that the rule of law also rules out certain governmental actions that undermine it. The only justification for coercing persons to comply with the rule of law is that the social-moral order cannot establish the rule of law on its own; so once the rule of law is established, we need moral and legal conventions to prevent the government from violating the rule of law and disrupting public expectations.
peace between persons by providing certain, adaptive, and efficient tools discouraging the violation of moral conventions. It can better facilitate private arrangements by avoiding vagueness and creating a system that can recognize certain complex legal arrangements, such as commercial contracts. Similarly, it can settle unregulated disputes by means of its formal court system, which can lay down rules for dispute resolution that are clear and simple. Finally, a legal system can deliver goods and services more effectively than a mere moral order because it will be more efficient, adaptive, and clear.

Having a legal system is especially important when it comes to the recognition, codification, and enforcement of rights claims, given that the social-moral state of nature contains many rights claims. I will justify a scheme of rights in chapter 4, but I want to be clear here that protecting rights requires a legal system, as evidenced in part by the fact that every society that recognizes rights has a legal system to protect them, even if the protection is not enumerated in a constitution or written statutes.

One reason to have a legal system protect rights is that rights-claims are especially strong moral demands that can lead to severe social conflict if they go unrecognized by those who press the claims. Since social-moral conventions by themselves can be vague and ineffective, a legal system can help answer rights claims through the relatively quick and efficient application or extension of law to address the rights claim in a decisive fashion.
Importantly, a publicly justified legal system will not recognize all demands for recognition. For instance, in Western societies, socialist parties have pressed the claim that workers have the right to own and operate capital for over a century, but the claim never achieved public recognition because socialists were unable to convince enough people that the right is justified for the public. This does not mean that moral reality contains no such right; the true moral theory may specify that the rights of workers to own the capital they use are natural or objective rights. Nonetheless, sectarian rights claims are not part of a publicly justified system of moral conventions.

Moreover, sectarian rights claims may *undermine* the social-moral order when people begin to ostracize and interfere with others who have sufficient reason to reject the rights claim in question. Consider a small band of Marxists who ostracize local business owners for not handing their capital over to their employees. The Marxists might be correct that there *exists* an objective right for workers to own and operate capital, but their right has no public status. As T.H. Green noted, such claims are equivalent to invoking the “name of a fallen dynasty exercising no control over men in their dealings with one another.”\(^{268}\) If I tell most American business owners to fork over their capital based on my Marxist reasoning, my position is normatively identical to insisting that American business owners fork over their capital because the Soviet Union has passed a law requiring capital redistribution. The rights claim has no rational uptake; the demands

\(^{268}\) Green 1895, p. 105.
misfire. Since sectarian rights claims are not rationally scrutable, they will therefore tend to undermine, rather than support, moral peace.

In chapter 4, I will argue that evaluative pluralism leads sincere, informed people of good will to disagree about what rights we have and the extent to which these rights should have public status. Nonetheless, publicly justified polities will still raise some rights to public status if all have sufficient reason to endorse those rights. An example is a right against harm. Though societies understand harm differently, they agree on some core cases. A right not to have one’s hand amputated by one’s neighbors is almost always the subject of public recognition and should be rationally scrutable for all moderately idealized members of the public.²⁶⁹ No one wants to be vulnerable to losing her hand for no reason. Protecting a right to not have one’s hand amputated thereby realizes moral peace between persons. A social-moral order is limited in its ability to recognize and codify these rights, so another reason that a social-moral order needs a legal system is to determine with some efficiency, clarity, and short-term finality which rights are to be recognized. Codifying rights claims in public statements and defending them with violent, yet authoritative, means can stabilize the protection of rights and so answer those claims.

Public legal systems are subject to error. They frequently fail to extend publicly justified rights to those entitled to them and in still more cases violate the recognized rights of rights holders. So while we need a public legal system to

protect, recognize and institutionalize rights, the power of the legal system must be limited, or it will recognize and enforce defeated claims. I will address the limits of the law in chapters 4-8.

IV. Why Publicly Justify Coercion?

A morally peaceful social order must have a legal system if it is to solve the problems faced in the social-moral state of nature. The legal system must be authoritative.\(^\text{270}\) Its practices and the laws it interprets and enforce impose *de facto* claim-rights on persons to comply with the law. However, unless those *de facto* claim-rights are publicly justified, forcing persons to comply with the law is morally equivalent to private coercion or coercive threats. The enforcement of a law that lacks justified authority, then, is a small-scale act of war and breaks the moral peace. Given the intrinsic and extrinsic value of moral peace, then, law should only be imposed if publicly justified. This is, in brief, why law objectively must be publicly justified.

But this brief explanation requires further analysis. I have only shown thus far that a social-moral order needs a legal system. But that the social-moral order *needs* a legal system is not enough to show that the legal system has authority. Instead, we must explain how the need for a legal system helps us to publicly justify laws or legal conventions, given that law, like moral conventions, must meet

\(^{270}\) For a similar claim that law must be authoritative, see Christiano 2010, pp. 231-259.
a presumption against interference. One reason that law can meet the presumption is that all moderately idealized members of the public can see that law aids the social-moral order of which they are members. The public justification for the law, then, is the fact that the law is necessary to solve the problems faced in the social-moral state of nature. An implication of this justification is that, if moral conventions alone can establish moral peace by performing the four functions discussed above, the law cannot be publicly justified, since it is unnecessary for the sort of social life that members of the public want to possess.

We can now see a critical difference between how we justify moral conventions and how we justify law. If members of the public decide that a moral convention is superior to all alternatives and to no rule, then it is publicly justified. However, to have no law on some issue is not to say that there will be no moral convention governing the issue. To have no law regulating an issue is to leave the matter to social morality (save if the law is justified to prevent the formation of moral conventions on the relevant matter). So, in many cases, whether a law is publicly justified depends on whether members of the public think it better to use law rather than moral conventions alone. If a law is publicly justified, then, it must be justifiably regarded as an improvement on the social-moral state of nature, and not on a state of nature with no moral conventions at all (a truly fantastic scenario).

The pre-political social-moral order, then, has a kind of priority over the law. If the social-moral order is “good enough” then no law is needed and so no
law is justified, given the presumption against coercion in social morality. If we do not need legal coercion to supplement or alter the social-moral order, then the presumption against coercion is not met. What can be done well in the social-moral state of nature should not be done by the political order. The priority of the social-moral order is not absolute, since sometimes the order of moral conventions cannot perform the four functions described above. Instead, law can be justified when the social-moral order falls below a threshold of effective functioning.

A critic will wonder why we need to show that a legal system needs authority, as we might be able to justify a legal system by showing that the legal system is morally permitted to impose the law, even if the law lacks authority for its members. Traffic laws can stop wrecks even if people lack sufficient reason to internalize the traffic laws, since members of the public want to avoid police punishment. Or perhaps a government can impose a costly regulation on a sector of the economy to reduce carbon emissions, even if the owners of the firms in that sector have sufficient intelligible reason to reject the coercion, because climate change, as generated by carbon emissions, is an existential threat to a nation. But I think this line of argument is mistaken in two respects. First, when laws are publicly justified, they can better accomplish their purposes, since people see no reason, on reflection, to disobey or break the law. Without public justification, there is no continuing, rational basis for social trust, which is critical for avoiding opportunism and shirking that can easily corrupt legal systems. Second, since

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271 See Ch. 2, section 4 for a defense of the presumption in favor of moral liberty, and see Gaus 2011, pp. 456-460 for his version of the priority of social morality.
nearly all law is coercive, then law breaks the moral peace if it is not publicly justified. Public justification baptizes legal coercion, allowing its enforcement to count as establishing rather than breaking the moral peace. So, while a legal system can be beneficial without authority, it will both better perform its function if it has authority and will realize rather than frustrate the great intrinsic and extrinsic value of moral peace.

A critic could also argue that sometimes laws are sufficiently necessary that they should be imposed even without a public justification, given the other benefits that the law could generate. Sometimes enough might be at stake that coercion is objectively morally permissible even if the coercion violates moral peace between persons. Given that moral peace is a way of realizing something of fundamental normative value, I think these cases will be rare with respect to ordinary citizens. Important public purposes are frequently recognized as such by the population, and will almost certainly be acceptable to moderately idealized members of the public. This recognition will typically demonstrate that using coercion to achieve that purpose is publicly justified.

A natural response is to point to persons, like psychopaths, who lack an interest in moral relations with others and who cannot see a motivating reason to care about or not hurt others.  

For a discussion of the moral psychology of psychopaths and its relation to understanding moral rules, see Shoemaker 2011.
justification, but we may only coerce them when they break moral or legal conventions. Since they are engaged in acts of war and break the moral peace, we realize the value of moral peace between persons by stopping them from violating the relevant conventions. They have, as Locke thought, declared themselves the equivalent of wild beasts in virtue of their behavior.273

Punishing non-psychopathic criminals might seem similar to coercing psychopaths, given that criminals have similarly placed themselves outside of the law. But coercively punishing non-psychopathic criminals requires public justification, since non-psychopathic criminals typically break laws that are publicly justified for them, such as murdering or stealing from others.274 In that case, in breaking the law, criminals impose punishment upon themselves such that the punishment to be authoritative for the criminal.

Punishment in public reason raises some difficult questions. First, which conception of punishment should we adopt? And second, how do we prevent under-punishment and over-punishment? The answer to the first question is hard. Different members of the public will have different views about punishment. Some will emphasize that justice requires retribution, whereas others will focus on the restorative and rehabilitative power of punishment. So it is hard to know which forms of punishment can be publicly justified. I think the theory of punishment is an important new research avenue for public reason liberals, but I simply lack the

273 As Locke wrote, such persons refuse “to recognize that reason is the rule between men, and that man ‘becomes liable to be destroyed by the injured person and the rest of mankind, as any other wild beast or noxious brute hat is destructive to their being.” Locke [1690] 1988, p. 96.
274 I set aside cases where someone breaks a defeated law.
space to answer the question here to any adequate degree of detail. The second problem is more tractable. A publicly justified polity will avoid under-punishment and over-punishment through a variety of judicial and legislative requirements, but also by preventing many proposed judicial and legislative requirements from achieving public recognition. For instance, a number of American laws are extremely punitive, making punishment last much too long, such as laws punishing non-violent drug offenders. We should also abolish laws for which punishment is always impermissible, such as legally punishing those who smoke marijuana. To protect against over-punishment, then, legislation should be used sparingly and modest penalties prescribed.

V. The Main Line of Argument Revisited

We have arrived at a critical juncture in the book, for I have completed my argument that the establishment of moral peace requires publicly justified, authoritative coercion. The foregoing provides a rich explanation of how we derive a public justification requirement from a foundational normative value. Let’s review the argument, picking up from Chapter 2.

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For a review a theories of punishment, see Bedau and Kelly 2010 I leave aside the complex question of how punishment is justified for the criminal, though given my other commitments in the book, my account will have affinities with Hegelian theories, where punishment is required as a way to realize and honor the rational will of the criminal. Hegel: “The injury which the criminal experiences is inherently just because it expresses his own inherent will, is a visible proof of his freedom and is his right. … This law he has recognized in his act, and has consented to be placed under it as under his right.” Hegel 1991, Sec. 100.
11. A morally peaceful society, in virtue of containing a great deal of
compliance with rationally scrutable moral conventions, has a great deal of
intrinsic (and extrinsic) moral value.

12. A moral convention is rationally scrutable if and only if it is publicly
justified.

13. Therefore, a morally peaceful society, in virtue of containing a great deal of
compliance with \textit{publicly justified} moral conventions, has a great deal of
intrinsic (and extrinsic) moral value (11, 12).

Now we can add the two premises defended in the chapter:

14. To adequately realize moral peace, a morally peaceful society requires a
legal system, in order to perform necessary and valuable social functions to
a sufficient degree.

15. To realize moral peace better than a morally peaceful society without a
legal system, or with an unjustified legal system, a legal system must be
publicly justified (14).

I have defended premise 14 at length. A legal system preserves moral peace
between persons because it enables an order of moral conventions to perform
necessary and valuable social functions better than the moral order could
otherwise accomplish. A non-coercive legal order can realize some moral peace,
but not to a sufficient degree given what human social orders are capable of. So a legal system is required to realize an adequate amount of moral peace.

I have argued that publicly defeated laws break the moral peace for much the same reason that publicly defeated moral conventions break the moral peace—both involve attempts to direct and control the behavior of others. This provides one defense of premise 15. I have also argued that premise 15 partly follows from premise 14 because a publicly justified legal system better performs necessary social functions than one that is not publicly justified.

However, premise 15 has a critical, secondary ground. In the social-moral state of nature, people have publicly justified moral obligations to behave in various ways. For instance, they will have an obligation to not violate each other’s basic rights, and to settle disputes by appealing to fair and impartial third parties. But we have seen that a social-moral state of nature cannot effectively protect rights or settle disputes in many cases. So members of the public have obligations that they cannot easily fulfill. A legal system would make it much easier for members of the public to fulfill their obligations because a legal system can protect rights and settle disputes better than the institutions allowed in a social-moral state of nature, and so clarify what fulfilling one’s moral obligations requires by setting out clear, simple, and public lines of conduct. This means that, in complying with publicly justified law, members of the public better realize moral peace between persons because complying with publicly justified law is a way of fulfilling our social-moral obligations. And when we fulfill our social-moral
obligations, we support and strengthen social-moral trust, which entails an increase in moral peace between persons.

One could object on the grounds that persons in the social-moral state of nature cannot have obligations to protect rights and resolve disputes if they are unable to fulfill those obligations due to the absence of a legal system. However, a social-moral state of nature does not forbid the protection of rights or settling of disputes; instead, it has a hard time doing so. By complying with a publicly justified legal system, however, members of the public can more easily fulfill their obligations. Complying with the law, then, is an especially effective means of fulfilling joint social-moral obligations. Accordingly, I will argue below that we have an obligation to comply with a publicly justified legal system because, in complying, persons have chosen feasible and effective means for acting morally.

In this way, legal obligation piggybacks on the social obligation. The social obligation is publicly justified and complying with the law is the best (and frequently the easiest) way of satisfying that obligation. So if persons have a general obligation to use effective means towards discharging their obligations, then their social-moral obligations generate legal obligations.

Consequently, laws are publicly justified both on the grounds that they are improvements on the social-moral state of nature, and that because of this, members of the public can better fulfill their extant social-moral obligations by complying with these laws and the legal institutions necessary for their existence, namely norm-applying institutions.
We can now move beyond premise 15. I shall use the term “polity” to describe a system of moral and legal conventions, so the phrase “morally peaceful society” refers to a system of publicly justified moral conventions, whereas a “morally peaceful polity” refers to a system of publicly justified moral and legal conventions. My aim is to draw the following grand conclusion:

16. A morally peaceful polity, in virtue of containing a great deal of compliance with publicly justified moral and legal conventions, has a great deal of intrinsic (and extrinsic) moral value, and more than a morally peaceful society (13, 14, 15).

Premise 16 establishes the basic claim of public reason liberalism, namely that law must be publicly justified in order to realize important political goods. But let us first be sure that we understand its basis. Premise 13 is the conclusion of the argument of Chapters 1 and 2, namely (a) that a morally peaceful society has great intrinsic and extrinsic value and (b) that publicly justified moral conventions are required to have moral peace. Premise 14 holds that a morally peaceful society, when combined with a legal order, better realizes moral peace and does so to an adequate degree. Premise 15 holds that a publicly justified legal system better realizes moral peace. So with a publicly justified legal system, a morally peaceful polity realizes a great deal of intrinsic and extrinsic value, and more than a morally peaceful society.
If we accept the realist foundation for public reason that I offered in Chapter 1, we can conclude on the basis of premise 16 that there are good *objective* reasons to comply with publicly justified laws. First, compliance with law plainly realizes the extrinsic value of promoting important political goods (which themselves could have extrinsic value, intrinsic value or both). However, these instrumental reasons have only modest strength, since each person in mass society makes an extremely limited contribution to the goods realized by general compliance. So while members of the public may have instrumental reason to comply with a law, John could have weighty objective reason to disobey those laws, even if they are subjectively justified for him. In this case, his subjective and objective reasons could conflict. John might have good *objective* reason to defect from laws that are publicly justified for him.

In response, I argue that persons also have objective reason to comply with some legal conventions because acts of compliance have intrinsic value. Compliance with legal conventions aids compliance with moral conventions. Compliance with moral conventions is a way of taking the perspective of strangers into account. And taking the perspective of strangers into account is a way of taking the perspective of others into account, which is the primary way in which we deontically respond to the inherent worth of other persons. So acts of
compliance with publicly justified legal conventions are appropriate responses to the worth of persons.\textsuperscript{276}

I now turn to further explain the sources of legal obligation. To preview, I argue that, in showing that laws provide the requisite improvements on the social-moral state of nature, we will show that these laws are publicly justified. And if they are publicly justified, then they will be authoritative for members of the public. Furthermore, in providing the relevant improvements, complying with the law is an effective way of discharging one’s social-moral obligations. In the next section, I develop such an account, which I term the social obligation account of political obligation.

VI. Legal Obligation between the Moral and Political

A curious feature of contemporary political philosophy is that few theorists believe that persons are under a general obligation to obey the law.\textsuperscript{277} One reason for this has to do with the nature of the duty to obey the law, which is typically thought to have four features.\textsuperscript{278} (1) The duty to obey the law is a \textit{pro tanto} duty, implying that the duty holds under normal circumstances, but it can be overridden by

\textsuperscript{276} One might worry about this strategy, since other forms of intrinsic value might outweigh the intrinsic value of complying with moral conventions. But given that I understand the value of taking the perspective of others into account as having a side-constraint component, the good of taking the perspective of others into account is not simply weighed against other intrinsic values. I leave aside the case where it appears that someone recognizes both the categorical demand to take the perspective of others into account and a categorical demand to do something incompatible with taking the perspective of others into account. I plan to address it in a future work. [T]

\textsuperscript{277} Edmundson 2004, p. 218.

\textsuperscript{278} This review is based on Edmundson 2004, pp. 216-217 and Hasnas 2013, p. 451.
serious moral considerations. (2) The duty to obey the law is said to be *comprehensively applicable* so that those under the law have an obligation to obey all laws; people cannot pick and choose the laws they wish to follow. (3) The duty applies to everyone within the jurisdiction of the law, such that it is *universally borne*. (4) Finally, the duty to obey the law is *content-independent* which means that the law must be obeyed because it is the law, and not because the relevant laws have a particular content. As Edmundson notes, “[a] content-independent duty effectively preempts the subject’s individual assessment of the merits of the action required by law and is categorical in the sense that it is not contingent upon any motivating end or goal of the subject.”

Given these features, it can be difficult to see how anyone could have a duty with these features, especially when the content of a law appears to conflict with one’s other duties, however weak they may be. It is unclear, for instance, why we would have a content-independent duty to obey the law rather than obeying it merely due to its content. There are many accounts of the duty to obey the law, but none of them seem able to explain all four of these features.

I believe that some concerns about the duty to obey the law derive from the fact that the duty to obey the law is typically run together with duties to obey political officials and the dictates of the state in general, along with recognizing

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279 Edmundson 2004, p. 216.
280 Edmundson 2004, pp. 230-249 provides an overview of problems with three main types of accounts, natural duty accounts, volitional accounts, and associative accounts. Many of the theories simply haven’t successfully answered the classic objections found in Simmons 1981, along with Wolff 1970. Michael Huemer’s recent work continues that tradition. See Huemer 2013.
the state’s right to rule. These notions of authority build upon the duty to obey the law, adding further duties that require their own justification. But as I have noted, we can distinguish the duty to obey particular laws from the duty to obey political officials or the dictates of a legislature. I contend that if we begin with an account of legal obligation, and then gradually build duties to comply with legislative dictates and political officials out of the account of legal obligation, that we can solve the problem of political obligation.

I also think that we can build an account of the general duty to obey “the law” understood as the entirety of a society’s legal rules by explaining how individual laws acquire their normative authority. So the first step in my account of political obligation is to show how a person can have a duty to obey a particular law. I shall understand individual legal obligation, then, as pro tanto, universally borne, and content-independent. Since we are focused on the duty to obey individual laws, the condition of comprehensive applicability does not yet apply.

My argument begins with the observation that we have already explained the authority of moral conventions. Therefore, if we can explain how the authority of moral conventions gives rise to the authority of legal conventions, then we should be able to explain the authority of legal conventions.

In some respects, my account of legal obligations follows the strategy that Gaus pursues in Chapter 8 of The Order of Public Reason. There Gaus argues that, once we see that social morality stands between the individual and political order,

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281 For a review of these different notions of authority, see Shapiro 2004.
such that individual political obligations are mediated by social-moral obligations, we can both see our way towards an account of political authority. So, Gaus derives the existence of political obligations from the authority of social morality. The attraction of this approach is that the existence of social-moral obligations is much less controversial than the existence of political obligations, so if we recognize social-moral obligations, we may be able to give a less controversial justification of the authority of government.

Gaus’s strategy requires modification, however, for I have argued that legal conventions stand between moral conventions and political bodies. We therefore need to connect moral authority to political authority by means of a distinct stage of legal authority. We therefore need a three layer theory of political obligation, where we explain the authority of moral conventions, then explain the authority of moral conventions in terms of legal conventions, and finally explaining the authority of legal conventions in terms of constitutional rules and the authority of officials who occupy the roles established by constitutional rules. Chapters 1 and 2 completed the first, moral layer of the account. This chapter completes the second, legal layer. The rest of the book takes us from legal to political authority.

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283 Though some, like David Enoch, deny that there are social-moral obligations distinct from our objective obligations. See Enoch 2013, pp. 145-150.
284 I am ambivalent about whether my account of legal obligation can justify the sovereign powers claimed by modern democratic nation-states. I am much more confident that it can explain the legal authority of the common law and judicial and legislative rulings that effectively conforms the de facto legal order to a publicly justified legal order. These processes may or may not require a monopoly government.
VII. Deriving Legal Obligations from Social-Moral Obligations

We can now derive legal authority from moral authority. The social obligation approach to legal obligation, then, does not proceed directly from natural duties, the volition of individuals, or shared association, though it can appeal to elements of these views. Instead, it follows from publicly justified moral conventions, which members of the public already have an obligation to follow. The social obligation account begins by assuming the existence of publicly justified moral conventions, which prescribe social-moral obligations, and then derives legal obligation from those social obligations. In this way, I offer an “obligations in, obligations out” approach to legal obligation, rather than appealing directly to some good, personal act or duty, like our natural duties, volitions, or associations. We begin with social obligations.

The first step in defending the social obligation account is to recognize that law is publicly justified only if compliance with it helps to generate social and political goods that cannot be produced, or at least not adequately produced, in the social-moral state of nature. The second step in defending the social obligation account is to recognize that persons have social-moral obligations that can be more effectively discharged by compliance with the dictates of a legal system, that is, by obeying the law. I have defended both steps above.

The third step in defending the social obligation account is to argue that when an agent, John, has an obligation $O$ to $\Phi$, he has a sub-duty to choose
necessary means towards discharging O. John’s sub-duty might not be a social-moral obligation itself, in that a failure to do his duty would give others standing to criticize him, but it must be a duty of some sort. This third step is not hard to defend, since it has the characteristics of a conceptual truth. For Reba to have an obligation to Φ implies a duty to choose necessary means to Φ, since she cannot otherwise discharge her obligation. As a corollary, she should choose effective means to Φ. Ineffective means are not necessary since they are ineffective.

In this way, I follow Edmundson’s characterization of one kind of argument for a duty to obey the law, which he describes as follows:

\[(P1)\text{ whatever is typically a necessary means to a morally compelling end is at least a } pro\ tanto \text{ duty; } (P2)\text{ law-abidingness is typically a necessary means to a morally compelling end; therefore } (C)\text{ law-abidingness is at least a } pro\ tanto \text{ duty.}\]

On my view, the morally compelling end is complying with publicly justified moral conventions, that is, with our social-moral obligations. I have also argued that complying with certain legal conventions is typically a necessary means to that morally compelling end. And since whatever is typically a necessary means to complying with our social-moral obligations is at least a \(pro\ tanto\) duty, then complying with the relevant legal conventions is at least a \(pro\ tanto\) duty.

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I would caution against conceiving of the idea of a “necessary means” too strictly. Consider two cases. In the first case, we might support one of two laws that, when complied with, enable one to discharge her social-moral obligations. Neither law is necessary in itself, but at least one of the laws is necessary. So if a decision procedure imposes one of the two laws, then one has a pro tanto duty to comply with it, since it is one of two necessary means towards discharging one's social-moral obligations. In the second case, there may be ways of discharging one’s social-moral obligations in the social-moral state of nature but complying with a law is an enormous improvement in one’s presently weak capacity to comply her obligations. In that case, I also think that the law, when imposed, creates a legal obligation, given how much more effectively it enables one to discharge her duties. So we can qualify my account of legal obligation to hold that one is under a legal obligation when compliance with a law is one of several necessary means of discharging one’s social-moral obligations, or highly effective means given one’s presently weak capacity to discharge her social-moral obligations.

We must clear up an ambiguity in the notion of effective means. I understand effectiveness as a threshold notion, as opposed to a maximizing notion, based on the intuition that Reba need not choose the very best means towards discharging her obligations, so long as she discharges them. So the case for a legal obligation partly depends upon the idea of an agent having an improved ability to discharge some of her social-moral obligations in a social order with a legal system than without one.
Laws can also constitute improvements by either (i) *transitioning* members of the public from one practice to another or (ii) *stabilizing* a practice that would otherwise not be in equilibrium. Focusing on (i), a law might improve upon the social-moral order by moving members of the public from a defeated convention to a new, eligible norm that becomes the incumbent convention. The defeated convention permits or encourages persons to continue to sustain or enforce a social practice that cannot be publicly justified to all who are subject to the convention. In this way, by enforcing the social practice, people violate their social-moral obligations to others. By complying with a law that transitions the social group from the defeated convention to an undefeated norm, compliant agents better fulfill their social-moral obligation. So in case (i), the social obligation view implies that the coercion involved in establishing a new, eligible convention can be publicly justified. A simple case of transition is the use of the Civil Rights Act to undermine defeated Jim Crow laws and private acts of discrimination that maintained defeated conventions that diminished the social status of Southern blacks.

Case (ii) is more complex. We presume that prior to the ratification and enforcement of the law, a social group is stuck in a defeated practice. Since the practice is in equilibrium, no agent can deviate from it unilaterally without paying a significant cost. The practice can be in equilibrium either on its own, or solely with the aid of legal coercion that stabilizes the practice. So the practice is either a convention with or without legal punishment. But if we wish to escape that
practice in the long-term, we may need law to continue to keep the relevant convention in place, as the convention might not be stable in the absence of legal coercion. For example, if the Civil Rights Act had been repealed two years after it was enacted, it seems likely that Jim Crow would have been restored in at least some states. Non-racist social practices take time to take hold, such that legal coercion might be required to keep the practice in place. The attractive feature of legal coercion is that it can turn otherwise unstable practices into equilibria. And in these cases, persons have an obligation to comply with the stabilizing coercion because it stabilizes a convention that is eligible.

Law can also improve upon the social-moral order by moving members of the public from a *dominated* but justified social practice to an undominated practice.²⁸⁶ Perhaps a law moves a society from a safety-preserving traffic-governing convention to a new convention that engineers believe to be even safer. However, in this case, it is less clear how compliance with the new law is authoritative, since it was not required to help John effectively discharge his social-moral obligations. In reply, I note two points. First, once the new convention is established, if legal coercion is required maintain the new convention, John has an obligation to comply with it, given that it is publicly justified and because it allows John to effectively discharge his social obligations. Second, the *transitional* part of a law may not need authority, given that persons already have an interest in

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²⁸⁶ Recall my Borda-Condorcet rule in Chapter 2, section 9c. I will discuss it further in Chapter 5.
changing conventions, and so have sufficient reason to change their behavior without the feelings of guilt and fear of reprisal generated by a law.

However, it may be the case that participants in this social group can change conventions by appealing to a publicly justified decision procedure. In that case, if the decision procedure is publicly justified, then the decision it generates is authoritative so long as it only moves the social group from ineligible norms to eligible norms or from one eligible norm to another; if the procedure veers outside of the eligible set by enforcing a defeated law, then those for whom the law is defeated have no obligation to comply with it.

I will argue in Chapter 5 that members of the public will accept a Pareto criterion when ranking eligible, undefeated proposals for legal and moral conventions. If so, they are already committed to complying with conventions that all regard as improvements. Thus, from their own understanding of the ranking of moral requirements, they should generally comply with new legal conventions that dominate the previous convention.

A still harder case is when a law moves a social order from a publicly justified moral convention to another publicly justified moral convention, *neither of which dominates the other*. In this case, members of the public who prefer the status quo will be obligated to acquiesce in a convention they consider inferior. Yet how could persons have a *de jure* legal obligation to comply with legal interventions they personally regard as inferior to the previous alternative? In this case, the legal obligation derives *solely* from the independent authority of a
publicly justified decision procedure used to change the extant convention. Since the procedure moves a member of the public to another eligible, undominated alternative, she lacks a sufficiently strong complaint against the move, given that the decision procedure is publicly justified in choosing a convention from the optimal eligible set of conventions.

Perhaps the hardest case is when a law moves us from a defeated practice to a superior defeated practice. Suppose a law forbids slavery but imposes segregation. The law brings us closer to a publicly justified polity, but it is defeated all the same. I submit that in this case, we lack a legal obligation to comply with the defeated portion of the law but we have a legal obligation to comply with the undefeated portion of the law. We have a legal obligation to release any slaves we own, but we have no legal obligation to comply with segregation laws.

Consider two more points. First, thus far I have argued that complying with a law is obligatory when it is an effective means of fulfilling our social-moral obligations in comparison to what we are generally capable of in the social-moral state of nature. But law is typically coercive and members of the public will acknowledge the badness of coercion all else equal. If there are two equally effective laws, but one is more coercive than the other, the less coercive law is publicly justified because the additional coercion in the more coercive law is unnecessary. This implies that small improvements are usually not worth making given transition costs and the coercion involved in the transition, such that mere improvements do not typically generate legal obligations if more coercion is
involved. Second, the improvement must be significant and clear to all moderately idealized agents. The improvements must also be ones that persons can see as improvements. Otherwise, our understanding of legal obligation is not rooted in the justificatory force of subjective, specifically intelligible, reasons.

VIII. The Social Obligation Account Defined

In light of the foregoing, we can define the conditions for legal obligation:

\[
LO: A \text{ has a legal obligation } O \text{ to comply with law } L \text{ iff } A \text{ is epistemically entitled to believe (i) that general compliance with } L \text{ will significantly improve her moral order’s capacity to perform one of its primary functions and (ii) that her compliance with } L \text{ with allow her to effectively discharge or considerably improve upon her ability to discharge her social-moral obligation(s) } S.\]

Some comments are in order. First, recall the notion of epistemic entitlement from my definition of intelligible reasons. Reba is epistemically entitled to believe p when she makes no rational error in believing p, not necessarily when her evidence uniquely favors p. So the epistemic pro-status required to have a legal obligation is

\[287\text{ And since more coercion is involved, there is a sense in which the improvement is less of an improvement than it would otherwise be.}\]
\[288\text{ Legal obligations involve the internalization of a law as the agent’s own, but I omit discussion of internalization here.}\]
weak. I also employ the idea of epistemic entitlement to account for the fact that the effects of laws are often hard to predict and may not do what we had reason to think they would do. So a legal obligation can be undermined if the law does not turn out to help an agent fulfill her social-moral obligations. The law has pro tanto authority when an agent, ex ante (or even ex post where effects are hard to discern at the present moment), justifiably believes the law will have the relevant effect. But this authority can be overridden if the law does not perform its requisite function. We should also include the agent’s belief that the law is both feasible and will produce the required behavior over a relatively long and stable period of time. She must also be epistemically entitled to believe as much.

Second, notice the key distinction between conditions (i) and (ii). Condition (i) requires that Reba believe that general compliance will realize some good, whereas condition (ii) requires that Reba believe that her compliance will realize some good for her. The difference is due to the two conditions under which a law can be publicly justified. If Reba does not believe that the law improves upon her order’s ability to perform its primary functions, then the legal coercion cannot be publicly justified given the priority of social morality. Legal coercion can only be publicly justified if it is improves upon moral conventions in a social-moral state of nature. But condition (ii) is equally important, since it secures the “obligation in, obligation out” foundation of legal obligations. If Reba does not believe that her compliance with L will better enable her to comply with her social obligations, such that she can discharge her obligations without compliance with
the law, then she has no obligation to comply with L, since part of the point of law is to either allow Reba to discharge obligations she has but cannot discharge in the social-moral state of nature or that significantly improve upon Reba's presently weak capacity to discharge her social-moral obligations. Law enables Reba to act in accord with, or much more in accord with, what she (rationally) takes her moral obligations to be. So a necessary condition for a legal obligation is the presence of a social-moral obligation combined with the rational belief that compliance with a law is an effective means towards discharging that obligation. Again, without this feature, we are stuck with traditional theories of political obligation that cannot generate legal obligations by appeal to natural duties, volitions, or associations.

LO is not satisfactory because it does not recognize the fact that A’s political obligations depend upon what others are doing, particularly whether they are complying with the law or not. This raises the complex question of how to determine when a law is a legal convention. If the law is not a convention, it is not clear whether one can be obliged to follow it, or whether it is a law at all. It is at least a bit strange to hold that A has a duty to comply with a law that almost everyone else ignores. For one thing, she owes obedience to members of the public, but by stipulation they are disobeying the law.\footnote{We do not here rule out, then, that A may have a private duty or a duty to God to comply with the law. Instead, the person lacks an obligation to comply with a law others are violating.} For another, the law is ignored, so it may not be a law in the first place. In that case, there is even less reason to follow it. In the case of widespread disobedience, then, I submit that the legal obligation in question is defeated. Finally, A cannot be obligated to comply with a
law that requires that she violate her other social-moral obligations, or at least those obligations that have greater or equal weight with respect to the obligations derived from the moral conventions that apply to her.

In light of these considerations, we must modify LO:

**LO':** A has a legal obligation O to comply with law L iff A is epistemically entitled to believe (i) that *general* compliance with L will significantly improve her moral order’s capacity to perform one of its primary functions and (ii) that *her* compliance with L with allows her to effectively discharge or considerably improves upon her presently weak ability to discharge, her social-moral obligation(s) S, so long as (iii) A rationally observes that sufficiently many other agents are complying with L and that (iv) complying with L does not violate A’s other social-moral obligations of equal or greater weight.290

If we recognize that generally obeyed laws are legal conventions, we can drop reference to general obedience to the law. We simplify further by omitting the conditions of epistemic entitlement, and the “effectively discharge” or “considerably improve upon” qualifications. I will also assume that the relevant

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290 I omit a discussion of internalization here. I think that legal obligations involve the internalization of a law as the agent’s own, but that condition is not required to explain legal obligation. [Keep this?]
social-moral obligations are not overridden, undercut or otherwise defeated by other obligations. Shortening:

\[
LO'' : A \text{ has a moral obligation to obey legal convention L iff (i) A has sufficient intelligible reason to internalize A and (ii) obeying L improves upon A's capacity to fulfill A's social-moral obligation S.}
\]

Without variables, we can state the condition like so: John is morally obligated to obey a law if and only if the law is publicly justified for him, at least in part because compliance substantially improves John’s ability to fulfill his obligations to others.

We can now specify a principle that covers the public justification of law. Recall our Public Justification Principle for moral conventions:

\[
\text{Public Justification Principle: a moral convention M is publicly justified only if each member of the public P has sufficient intelligible reason I to internalize M.}
\]

The legal version of the principle is similar:

\[
\text{Legal Justification Principle (LJP): a legal convention L is publicly justified only if each member of the public P has sufficient intelligible reason I to}
\]
internalize L because each P rationally recognizes that compliance with L improves upon her capacity to comply with M(s).

So law is only publicly justified when citizens rationally see it as necessary to improve upon an order of mere moral conventions. This does not require, of course, that citizens understand the idea of public justification; rather that, when asked, they express a belief that a given legal convention is necessary to perform an important social function that mere moral conventions cannot, and that compliance with the law is the right thing to do. This means that legal conventions cannot be publicly justified if they are not seen as required to modify or reinforce a moral convention. A society's moral constitution has priority; the legal constitution is its handmaiden.\(^{291}\)

Before going forward, I want to note the sort of legal obligation I have established. So far, I have only demonstrated the conditions for showing that persons have a pro tanto duty that is universally borne by members of the public. However, I have qualified the content-independence of the duty. This is because defeated laws generate no legal obligations for those who have defeater reasons, such that some legal contents undermine the duty to obey the law—contents that render the law defeated. Without generating content-independent obligations, it

\(^{291}\) In a later draft, I might grapple with the particularity problem. I think my account addresses it effectively since political obligations apply to persons who already have social-moral obligations to one another. Since social-moral obligations require mutual recognition, and such recognition occurs primarily among persons who interact with one another on a regular basis, such that conventions can form governing their behavior, then political obligations will be particular to those interacting groups.
may appear that there are no legal obligations per se, just moral duties to do whatever morality requires. In other words, legal authority would not be distinct from the authority of moral requirements, when that is thought to be essential to making sense of legal authority. A public reason view like mine, however, embraces quasi-independence, where legal obligations are content-independent insofar as they obligate one to comply with a member of the eligible set of legal conventions that one finds sub-optimal. So if you prefer A, but lack defeaters for B and C, then if a decision procedure selects B or C as the convention to be imposed upon you, you have an obligation to comply with B or C. So legal obligation is content-independent with respect to the eligible set but not otherwise. If the law is not publicly justified for you, you are under no obligation to comply with it, as you lack sufficient intelligible reason to internalize the law, and so lack sufficient moral reason to comply with it.292

For a contrast between my approach and Razian and natural duty views of legal obligation, see the supplementary material to chapter 3.

IX. Constitutions, Moral and Legal

This chapter provides an account of legal obligation. Its intent is not to rule out other grounds for legal obligation. But given the great weight of the side-

292 Unless you have some independent obligation to comply with the law, say if you promised a friend. But I set these cases aside, as they do not bear on my argument in any direct way.
constraint to take the perspective of others into account in determining how to act, moral peace is likely to be the main public value that establishes our obligations to one another and that ground law in moral relations and a practice of moral responsibility. The point of legal obligation is to enable persons to live morally peaceful lives with others by facilitating the creation, maintenance, and reform of moral conventions to sustain widespread social-moral trust. In doing so, we establish moral peace and its attendant intrinsic and extrinsic value.

Chapters 1 and 2 provide story about the constitution of society outside of the state, what we might call, following Rawls, our moral constitution. Our moral constitution is the complex of publicly justified moral conventions that largely cohere with one another in organizing social life between persons who are not fundamentally at odds, and who prefer to cooperate than conquer. This chapter has shown that a moral constitution, without a legal order, cannot fully realize moral peace and promote important social goods. To realize moral peace and promote these goods, we need a legal system of authoritative coercive laws. This insight provides a comprehensive explanation of the why legal coercion requires public justification.

We must now outline the shape of a political constitution that realizes moral peace between persons. Specifically, we need an account of the highest-order rules of law making—a political constitution—and an explanation of how such a constitution is to be justified. Towards this end, Chapters 4 & 5 develop a

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293 Rawls 1980, p. 539.
three-stage model of constitutional choice based on the constraints outlined in Chapter 1-3. The first stage in justifying a constitution is to settle on a scheme of “primary rights” that citizens can agree to as constraints on public coercive power. Given deep evaluative pluralism, we cannot settle on much, but we can considerably constrain the set of constitutions that can be publicly justified. I then offer an account for how to publicly justify constitutional rules in terms of the degree to which they generate publicly justified law and allow for the reform or repeal of defeated law. I then provide an account of constitutional stability, which involves both assuring conditionally cooperative agents that cooperation is practically rational and that discourages defection by merely rational, rent-seeking agents. I develop the first stage in Chapter 4 and the second two in Chapter 5.
Chapter 4: Primary Rights

The ideas of moral peace, a social moral order, and public justification explain the need for a legal system with norm-applying institutions. A legal order must be added to a publicly justified social order of moral conventions in order to correct for the defects of the social-moral state of nature by means of publicly recognized judicial systems and enforcement institutions. It corrects for the defects of the social-moral state of nature by discouraging the violation of moral conventions, facilitating private arrangements, settling unregulated disputes, and delivering key goods and services. Legal conventions, the components of the legal order, acquire moral authority when they improve upon the capacity of persons to comply with their social-moral obligations; I claimed in Chapter 3 that legal institutions improve upon this capacity by helping to realize these four social functions.

But my aim in this book is to show how political institutions can preserve moral peace between persons, and this involves justifying norm-altering institutions, bodies that can change the law. This means we need to explain how constitutional rules can be publicly justified. Constitutional rules are the highest-order rules of law-making and law-alteration. They allow persons to change the law. So our account of political authority has three layers—the moral, the legal, and the constitutional. The point of Part II of the book is to provide a three-stage process for publicly justify constitutional rules as necessary complements systems of moral and legal conventions.
This chapter develops an account of the most fundamental constraints on constitutional rules that narrow the optimal eligible set of constitutional rules. These constraints are primary rights. A primary right is a right that anyone with a rational plan of life would want for herself to realize her conception of the good and justice and is willing to extend to others on reciprocal terms. A scheme of primary rights removes a vast array of constitutional rules from the optimal eligible set, for constitutional rules that allow for the systematic violation of primary rights cannot be publicly justified. Moderately idealized members of the public will insist upon rights to realize their conceptions of the good and justice and will not insist on special rights for themselves, but be prepared to extend their rights proposals reciprocally to all. Consequently, members of the public have reason to endorse primary rights and the constitutional rules that articulate and protect those rights. They have sufficient reason to reject constitutional rules that do not articulate or protect those rights.

In justifying rights, I am not trying to justify a scheme of objective rights that persons have, say, in virtue of their natures. My view does not require denying that such objective (natural or human) rights exist. The claim, instead, is that pressing claims based on objective rights that lack public recognition disturbs moral peace between persons. So while there may be objective rights, all I attempt here is to describe which rights must be part of a public system of rights claims recognized and protected by a publicly justified legal system.
I will not attempt an extensive derivation of any particular primary right in this chapter. I leave that for Chapters 6 and 7, which cover the rights of association and private property. My aim here is to outline the nature and justification of primary rights as such and to develop a case for certain classes of rights.

In many ways, my account of rights resembles Rawls’s account of rights that protect and promote primary goods, but it differs in deriving primary rights partly based on the recognize that different moderately idealized persons will endorse different conceptions of justice, and will insist on the right to pursue their own conception of justice, as well as their conception of the good. As we saw in Chapter 2, I defend evaluative pluralism about the good and justice, which I call justice pluralism.²⁹⁴ Later in his career, Rawls came to recognize that reasonable people disagree about justice, and that political institutions are authoritative and justified when they are reasonably just, as long as they institutionalize one member of a family of reasonable liberal political conceptions of justice.²⁹⁵ But justice pluralism cannot be as restricted as Rawlsians would like. A society treats persons that preserves moral peace between persons will not feature agreement on general principles of justice or even a small set of such principles.

I assume justice pluralism because the Rawlsian and Hayekian burdens of judgment apply just as forcefully to conceptions of justice as they do to conceptions of the good. Unfortunately, I lack the space to defend that assumption.

²⁹⁴ I even allow, following Gaus 2016 and Muldoon 2017, in allowing for reasonable disagreement about social ontology
²⁹⁵ Rawls 2005, p. xxxvi.
against Jonathan Quong's recent defense of treating disagreements about the good and justice \textit{asymmetrically}.\textsuperscript{296} His defense is based on two main lines of argument. First, Quong adopts an internal conception of political liberalism that expressly restricts the subjects of public justification to a highly idealized constituency of reasonable people who already affirm liberal values.\textsuperscript{297} This assumption helps Quong defend his claim that reasonable disagreements about justice are necessarily based on thick common assumptions about what considerations are relevant to resolving such disputes. But, as I have argued elsewhere, I think the internal conception is in tension with the fundamental aims of political liberalism because it limits the number of persons to whom justification is owed to an extremely narrow group of people, probably the set of theorists who affirm political liberalism.\textsuperscript{298} This makes Quong's political liberalism \textit{objectionably sectarian}.

The second part of Quong's argument is that when we impose policies or principles on persons who reject those policies or principles despite affirming the thick common assumptions about value and the world that accompany reasonable disagreements about justice, we do not violate any plausible principle of legitimacy. This means that we can publicly justify coercing persons who disagree about justice without treating them disrespectfully or in an authoritative manner. I

\textsuperscript{296} Quong 2011, p. 193.
\textsuperscript{297} Quong 2011, p. 8. For a discussion justifying this restriction based on Quong's internal conception of political liberalism, see Quong 2011, pp. 137-160.
\textsuperscript{298} Vallier 2016, forthcoming.
argue that imposing upon persons in this way is, contra Quong, disrespectful and authoritarian.\textsuperscript{299}

My moral peace foundation for public reason also provides reason to reject Quong’s approach. First, Quong’s entire project involves a fundamentally different approach to idealization than the view I developed in Chapters 1 and 2. His goal is to try to show that political liberalism is internally coherent in accord with the way in which Quong understands that project. In contrast, I am concerned to show that liberal institutions are justified because they can establish moral peace between real-world persons. And we establish moral peace by showing that persons has reason to embrace common moral, legal, and political conventions that will gradually become the subject of rationally scrutable social-moral trust. For this reason, the internal conception is a non-starter given my foundation for public reason. In particular, enforcing political institutions on a Quongian basis necessarily involves radical idealization, and so cannot claim to specify the justificatory reasons of real-world persons. Further, moderate idealization invariably leads to justice pluralism, and Quong’s strategy for restricting justice pluralism must appeal to radical idealization built into the internal conception. So given the moral peace foundation of public reason, we can set the main competitor account of public reason liberalism aside for the remainder of the book.

Section I introduces the motivation for and basic definition of primary rights, while Section II explains the main features of primary rights. In Section III, I

\textsuperscript{299} Vallier 2017 (justice pluralism piece).
discuss how the selection of primary rights can avoid the trappings of a thick veil of ignorance while still identifying a relatively determinate set of rights. Sections IV-VIII develop five classes of primary rights: rights of agency, rights of association, jurisdictional rights, procedural rights, and international rights. In Section IX, I address the question of the extent to which the idea of social justice has been eliminated from my account of public reason or just reinterpreted. To buttress the case for the latter, I introduce what I take to be a reasonable classical liberal conception of justice. I conclude in X by laying the groundwork for the transition to the public justification of constitutional rules.

I. Primary Rights

Justice pluralism implies that public reason liberals are not entitled to assume that moderately idealized persons will converge on a single set of principles of justice. Few principles of justice will be uncontroversial enough to serve as the uniquely justified, central normative role of organizing all of a society’s major social, political, and economic institutions. I contend that once public reason liberals recognize justice pluralism, they must restrict their focus to determining which generic schemes of rights can be justified to persons who disagree about justice and the good.\textsuperscript{300} Moderately idealized members of the public will be unable to

\textsuperscript{300} By initiating my model of constitutional choice with the selection of rights, I am on solid ground, as this first stage is extremely common among contractarian theorists, from egalitarians
agree on anything much more extensive than those schemes of rights and constitutional rules that articulate, protect, and stabilize those rights. In fact, the only additional thing they will be able to agree upon is to have part of the state’s duties include the provision of some public goods to which persons do not already have a primary right.

Members of the public will agree on what I call primary rights.  

Like Rawls’s notion of a primary good, a good anyone would want regardless of their rational plan of life, primary rights are rights that anyone would (a) want for themselves to pursue their conception of the good and exercise their sense of justice and (b) are willing to extend to everyone (and not just the reasonable) on the same terms.  

Condition (a) specifies the extent of primary rights as including all rights necessary or helpful for enabling persons to pursue their conception of the good by giving them the social space and/or positive aid to form life plans and to live out those plans. For instance, a qualified right to private property is critical form forming life plans, and so is likely to be a primary right. Condition (a) also includes the rights necessary or helpful for enabling persons to pursue their conception of justice, so long as that conception is minimally moral and rational. For this reason, we can expect political rights to be primary rights, as persons live out their conceptions of justice by fighting to realize principles of justice in the

\footnotesize{\textsuperscript{301} This approach owes much to Lomasky 1987, pp. 56-83.  
\textsuperscript{302} Rawls would later qualify his definition of primary goods to be the goods “persons need in their status as free and equal citizens, and as normal and fully cooperating members of society over a complete life.” Rawls 1971, p. xliii.}
political institutions they share with others. Condition (b) restricts the scope of primary rights by subjecting them to an equality condition. All primary rights are limited by the degree to which persons are prepared to extend those rights to others. If I propose that my society recognize a right of private property for myself, I must be prepared to accept the right of private property for others, and to accept moral limits on my ability to violate those rights. No one may insist on special privileges.

Primary rights must be *authoritative* for persons based on modest idealization, which means that the paradigmatic legal rights in a morally peaceful regime are *claim-rights*, not mere permissions to take certain actions, but rather permissions combined with a duty for others to allow rights-holders to take those actions. So publicly justified rights impose duties on others. This condition is critical for two reasons. First, only authoritative rights can preserve moral peace between persons, just as only authoritative demands and coercion can preserve moral peace. Second, if primary rights must be authoritative, this places limits on which rights can be publicly justified, as persons will only endorse rights that they believe rightly limit their liberty, since the protection of the rights of others limits our liberty in various ways.\(^{303}\)

Some publicly justified rights go beyond claim rights. Many persons, especially those who validly hold a publicly justified legal office, have publicly justified power-rights—rights to create duties others must follow. But all power-

\(^{303}\) I grant exceptions, such as life-boat situations where persons are morally permitted to stop each other from pursuing a very scarce resource but neither is obliged to defer to the other.
rights must be justified as necessary to establish a functional legal system of norm-applying and norm-changing institutions. The quick case for publicly justified power rights is that a functional legal system requires that officials have the authority to apply and change the law, which in turn can impose new duties on persons. I have defended the necessity of judicial officials in Chapter 3; the case for legislative authority is outlined in Chapter 5.

A system of publicly recognized rights must also be more or less coherent, in that there are publicly recognized mechanisms for resolving competing rights claims. This is not to say that all rights are compossible in the strong sense that there exist no contradictory, yet valid rights claims, but rather that the normal operation of a publicly justified legal order harmonizes rights-claims over time.\textsuperscript{304} Social change, be it political, technological, cultural, etc., will frequently generate new rights conflicts, so systems of publicly justified rights never reach full compossibility. But a publicly justified legal system will gradually render legal rights compossible were other forms of social change to grind to a halt. The process is analogous to the notion that a price will reach equilibrium in the absence of constantly changing market conditions. So in an important sense, compossibility is a kind of current that draws legal rights into an increasingly coherent whole, even if the current can be thrown off by other factors.

A publicly justified scheme of rights must be equal. That is, if anyone has the right in a given circumstance, then everyone has the right in that

\textsuperscript{304} See Steiner 1977 for a classic account of the compossibility of rights, both as exposition and defense.
circumstance. If, for instance, someone wants to claim a right to free speech for herself, she must be prepared to extend it to others on the same terms. She cannot insist on free speech for herself and not for others. Similarly, if a citizen takes a legal office, the rights and duties associated with that office should apply equally to anyone who holds that office. This equality constraint is not meant to commit a publicly justified polity to some form of distributive egalitarianism. Instead, it is a restriction on valid rights proposals: no unequal scheme of rights can be publicly justified, since some will always have a complaint that they should have as much protection and liberty as others.

Some primary rights and negative and others are positive. Negative rights are rights against certain kinds of interference or obstacles to action. To have a negative right to free speech, then, is to have a right against anyone interfering with the right-holder’s speech. Some publicly justified rights are negative rights because negative rights are required to realize rational plans of life of sufficient worth that most people expect to be able to pursue their own rational plan of life with others granting her deference to do so. This means that many proposed forms of interference will be defeated for many members of the public, and so for the public as a whole.

Further, all public justification must meet a presumption against coercion, and a presumption against coercion is an effective recognition of a negative ur-right to not be interfered with in the absence of a public justification. This is to say

305 Gaus 2000, p. 82. For the classic formulation of the negative-positive liberty distinction, see “Two Concepts of Liberty” in Berlin 1969.
that, within the domain of moral conventions, there is a publicly justified convention where coercion stands in need of justification, whereas non-coercion does not.\footnote{For discussion and defense, see Gaus 2011, pp. 479-487.}

Turning to positive rights, primary rights can be positive in one of two senses—the right to freedom-as-self-rule sense and the welfare-rights sense.\footnote{Gaus 2000, pp. 82-84. For a proponent of the freedom-as-self-rule sense, see Green 2011.} The self-rule account construes rights as entitlement to social conditions that protect and promote one’s capacity to rule one’s self, both against external interference \textit{and} against internal blockages to self-rule, such as addiction or poor character. A person is positively free in this sense when she is ruled by reason rather than by others or by her own unruly passions. The welfare-account of a positive right is a right to the provision of certain goods and services, such as healthcare, clothing, shelter, and the like.

In one way, all publicly justified primary rights are positive in the self-rule sense, since a right is only publicly justified when it is rooted in the reasons that persons possess and their prima facie entitlement to act as those reasons direct. But in another sense, publicly justified rights typically are not positive in the self-rule sense because persons lack rights to force others to help them become better self-rulers. Others also lack the right to interfere with us in order to improve our capacity for self-rule, since anti-paternalist members of the public will have defeaters for those rights claims.
Welfare rights can sometimes be publicly justified, but not in the straightforward sense that John has a right that Reba provide him with healthcare such that he can violently force her to help him become healthy. Reba may often have defeater reasons for such acts of violence if she does not regard herself as morally obliged to help John, or if she does not regard herself as having reason to permit the coercive enforcement of that moral obligation. Instead, I understand welfare rights as rights that all persons have that their fellow citizens act to sustain institutions whose normal operation, be it deliberate or decentralized, provide the goods to which persons have a positive right. So if healthcare is best provided to persons via a market, and members of the public can agree upon this fact under conditions of moderate idealization, then the welfare right to healthcare is the right to participate in a functioning healthcare market.

Penultimately, all publicly justified rights must promote the achievement of primary goods, the goods which are required to realize nearly any rational plan of life. I do not endorse the entire Rawlsian account of primary goods, however. I will explain why by first reproducing Rawls’s list:

(1) The basic rights and liberties;

(2) Freedom of movement, and free choice among a wide range of occupations;

(3) The powers of offices and positions of responsibility;

(4) Income and wealth;
(5) The social bases of self-respect: the recognition by social institutions that gives citizens a sense of self-worth and the confidence to carry out their plans.

I term each class of goods a type indexed to their number; for instance, type-1 goods are the basic rights and liberties, and among type-2 goods is freedom of movement.

It is obvious enough that just about anyone with a rational plan of life will want certain basic rights and liberties to pursue the just and the good in a socially secure fashion. The list of type-1 goods arguably includes the standard litany of liberal rights recognized across most societies, especially liberal societies. There is widespread recognition, then, that some rights are ones that anyone, or nearly anyone, will find of vital use. I would add economic liberties to the list that Rawlsians reject, such as the ownership of private property, which I explore below and elaborate upon in detail in Chapter 7.

My approach to primary rights contains a lacuna: in defining primary rights as rights to primary goods, we run into the odd implication that type-1 goods—basic rights and liberties—are the ultimate object of primary rights. That is, there is a primary right to possess the primary good of having a basic right. However, the apparent redundancy dissolves once we recognize that the basic rights and liberties are de facto rights that persons enjoy as a matter of real moral and legal

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practice. So type-1 goods, basic rights and liberties, are not *de jure* rights, but real legal, institutionalized practices. So one has a *de jure* primary right to the good of *de facto* legal rights.

Now consider type-2, type-3, and type-4 goods. Freedom of movement is a primary good because anyone with a rational conception of the good wants to be able to move around the world secure in their person and possessions. The same goes for freedom of occupation, since persons will want the ability to choose their occupation. I argue below that freedom of occupation includes the right to go into business for yourself, which in turn implies that owning and operating capital goods is a primary good, given that owning and operating capital *partly constitutes* working for yourself. Primary goods of type-3 include access to offices and positions of responsibility, especially those that affect the institutional rules persons live under, which includes both political office and influential positions of economic power. Obviously people will prefer to have access to those positions rather than being shut out of them; the ability to hold positions of influence is an important part of many forms of life. Goods of type-4—access to income and wealth—are the easiest to justify. Income and wealth are the keys to the acquisition of a wide array of goods and services. The right to own and operate private capital is also a type-4 primary good.

I have concerns about the social bases of self-respect—type-5 goods. I presume people do not have a primary right to self-respect, or to the respectful attitude of others, but rather to the resources that would be required for a person
to respect herself. This is consistent with Rawls’s claim that the social bases of self-respect are “those basic institutions normally essential if citizens are to have a lively sense of their worth as persons and to be able to advance their ends with self-confidence.”\textsuperscript{309} Sam Freeman further explains that the social bases of self-respect are “features of institutions that are needed to enable people to have the confidence that they and their position in society are respected and that their conception of the good is worth pursuing and achievable.”\textsuperscript{310} So we look for institutional rules and goods that give people the ability to become confident in themselves. I would argue that goods of types 1-4 largely capture the social bases of self-respect.\textsuperscript{311} For instance, if people are afraid to appear impoverished in public, the social bases of self-respect could include wealth. And if people feel diminished by their inability to achieve positions associated with high social status, then access to certain officials could be part of the social-bases of self-respect. The main basis of self-respect that is not captured by other primary goods is the basis for resisting public stigma against, say, one’s race, gender, or sexual orientation. Income, wealth, freedom of movement, and other basic rights and liberties may not be enough to allow oppressed persons to develop self-respect. Perhaps some form of affirmative action would be required to undermine, say, racial patterns of discrimination, and so to secure the bases of self-respect for the group discriminated against. But these cases aside, I will build the social bases of self-

\textsuperscript{309} Rawls 2001, p. 59.
\textsuperscript{310} Freeman 2014. Emphasis mine.
\textsuperscript{311} Even if they do not do so entirely.
respect into the other four types of goods, particularly into type-1 goods, as de
facto rights might include a right to compensation for being placed in
disadvantaged social positions by historical circumstance and past oppression.

So I would modify the list of primary goods as follows:

(1) The basic rights and liberties, including economic and associational rights;
(2) Free movement and free choice of occupation, including self-employment;
(3) The powers of offices and positions of responsibility;
(4) Income, wealth, and capital.

These are the goods to which persons have primary rights. These rights are largely
negative in character: they are rights not to be interfered with in the pursuit of
these goods. Or, in the case of type-1 goods, they are rights to certain kinds of legal
protection. However, when protection against non-interference is insufficient to
secure an adequate level of these goods, government intervention can be justified
so long as it can be shown with an adequate degree of justification that it can
improve upon the circumstances typically produced by negative rights.

To further detail this list, recall that persons not only need the goods
required to pursue their good, they also need the goods required to pursue their
conception of justice. My account of public reason assumes substantial justice
pluralism, as many people will have private conceptions of justice, much like they
have private conceptions of the good. But if we treat the good and justice
symmetrically, it follows that individuals will have a claim to order their social world in accord with what they believe justice requires. Critically, theories of justice conflict, and this implies that people have a claim to social resources to structure the justice system in ways that comport with their values. I think that, in practice, the only way to realize this right is to adopt strong rights to freedom of association and federalism, including rights against the centralization of decision-making in the hands of the central state, which I discuss in Chapters 6 and 9 respectively. Pursuing a conception of justice is inevitably social and so requires association with others. This final condition therefore plays an important role in justifying strong rights to freedom of association, which explains why I enumerated them among type-1 goods. I will defend this position at length in Chapter 6 regarding freedom of association. In Chapter 9, I argue that the right to pursue one’s conception of justice, under conditions of pluralism, will require a considerable degree of institutional autonomy, and federal organization.

In sum, primary rights are a special kind of right. They are equal, publicly recognized claim-rights that legal systems attempt to define and harmonize over time. Primary rights must also secure for persons my revised list of primary goods, such that rights-holders can pursue their conceptions of the good and justice within an effective public system of rights.
II. A Veil with Normative Significance

Now we must determine how we can settle on a substantive scheme of rights that satisfies these conditions. Some may worry that no scheme of rights could satisfy all these conditions, but I think that is clearly incorrect. For remember the alternative—effectively living in a state of war with others, forgoing the intrinsic and extrinsic value of moral peace between persons. There are at least some rights that survive this test, given the badness of moral war, even if the rights are restricted to extremely basic rights of bodily integrity and freedom of thought.

The traditional contractarian approach identifies a scheme of justified rights by constructing a choice situation where parties are denied certain information that would bias the rights or principles of justice they would choose. The choice situation is structured so as to ensure that the choice is not influenced by factors that are morally irrelevant, like race, gender, or religion. In this way, contractarians typically appeal to veils of ignorance. I find that the idea of a veil generates simple misunderstandings about the normative relevance of a contractarian bargain. They suggest, for instance, that the rules or principles chosen are morally binding because hypothetical persons (persons behind a veil) would accept them.

So let me be clear about what I’m after. The normative foundation of the book is moral peace. Primary rights are justified based on what moral relationships persons must bear to one another to preserve moral peace. So while I will appeal to
a thin veil of ignorance to determine which primary rights can be publicly justified, I do so *purely as a heuristic* to economize on the search costs of locating a single scheme or small set of justifiable schemes of primary rights. The veil has *no normative significance other than as an economizing device*. Further, the *agents* in the veil have normative significance in the specific sense that their choices provide theorists with evidence about what practical reasons real-world persons have. We are not *treating* any real-world person based on what her idealized counterpart would accept. Instead, we are constructing a model to determine what real persons have most reason to do.

The veil I propose is thin. The choosers are moderately idealized members of the public, and are only committed to jointly preserving the great value of moral peace, given that pluralism precludes stronger forms of social unity based on a shared conception of the good or justice. In virtue of their moderate idealization, parties know their own conceptions of the good and their conception of justice. Feminists may appeal to feminist conceptions of justice, just as Catholics may appeal to Catholic social thought. Persons may offer any of their reasons to accept or reject proposals in attempting to secure agreement. In practice, this means that a variety of rights schemes will be proposed and many will be rejected.

I allow for biased proposals, either because the proposal violates the formal conditions for having primary rights or because it is biased in content, say towards the political ideology of the proposer. However, biased *proposals* do not matter, since moderately idealized agents can detect the bias and reject proposals on that
basis. Even if the input proposals are biased, the rights schemes that are the output of the contractarian procedure should not be problematically biased.

Members of the public will appeal to a *Pareto criterion*. They will prefer greater rights to fewer rights. If all members of the public prefer scheme $S_1$ to $S_2$, then the eligible set of rights-schemes only contains $S_1$. However, there are bound to be a great number of Pareto optimal schemes, as different schemes will secure different amounts of different primary goods. This means that the Pareto frontier will be defined by all the maximal, feasible bundles of primary rights schemes. To illustrate, imagine two rights schemes, one that secures many type-1 rights but not much income and wealth, and another that secures income and wealth but fewer type-1 rights. From the perspective of members of the public as a whole, the two rights schemes might be equally choiceworthy, despite their differences. I assume, therefore, that all rights schemes on the Pareto frontier are indifferent from the social point of view. I also assume that these schemes can vary in content, though they must provide all persons with the same bundle of rights.\footnote{What about rights schemes that are unequal but maximize or increase the bundle of rights available to the least-advantaged in comparison to other schemes? If there are such schemes, schemes that are unequal but are nonetheless Pareto superior to all egalitarian rights bundles, then they might be able to be publicly justified despite the equality constraint, since disadvantaged persons will prefer more rights to less. But until one can show that an unequal bundle of rights is Pareto superior for the least-advantaged to all egalitarian rights schemes, I set this option aside.}

Another question a choice model must answer is what the baseline of choice is. For Rawls, the baseline is equality, and departures from equality can only be justified if they maximize the position of the least advantaged.\footnote{Rawls 1971, pp. 52-57.} For James Buchanan, the baseline is the holdings that persons secure following the state of
I reject both accounts. The scheme of primary rights is built from a baseline of the social-moral state of nature. Primary rights are legally enforced rights that help to complete the capacity of a society to establish moral peace between persons. The baseline is also understood in terms of the position of a representative person in the social-moral state of nature. If some have more recognized rights than others in the social-moral state of nature, that fact does not play a role in setting the Paretian baseline, such that all rights schemes would have to increase the rights available to those who have special privileges in the social-moral state of nature.

Finally, moderately idealized members of the public choose a scheme of primary rights that not only secures a bundle of primary goods on the Pareto frontier but that maximizes the growth of the frontier over time. If parties prefer more primary goods to fewer goods at one time, they should prefer more primary goods to fewer goods across times. This implies that members of the public might choose a scheme of primary rights that entitles persons to fewer primary goods at present in order for them to secure a larger bundle of primary goods in the future. We should therefore expect the parties to engage in the intertemporal maximization of the bundles of primary goods.

Notice that this is not a principle of just “savings” as Rawls described it. Instead, the parties adopt a principle of sustainable improvements. The authoritative scheme of rights is the one that promotes improvements for all over

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34 Buchanan 1975, p. 25.
35 Rawls 1971, pp. 251-258.
time, such that each person is entitled to sufficient primary goods that allow her to sustain herself and her family at present and to partake in social and economic growth. For instance, the principle of sustainable improvements almost certainly requires expanding the division of labor such that a national or global order has an ever-increasing number of plans to pursue as economic cooperation and production becomes more complex and sophisticated.

Improvement must be sustainable in that the forms of growth and civilizational development are ones that our best natural and social science suggest can be maintained over time. I grant that there is widespread disagreement about which forms of economic development are sustainable, and that the term "sustainable" is often used by people who are pessimistic about our capacity for development. But I use the term capaciously to refer to what our best social science suggests we’re capable of. I personally think that, as a matter of course, human ingenuity proves more powerful than we typically expect, given the long history of erroneous predictions that modern industrial production will fully deplete many natural resources.\(^{36}\) I think we should err in judgment on whether we are pushing forward too little rather than too much. But there is surely room for debate about which improvements are sustainable. My point here is simply to advocate for a generic principle of sustainable improvements, not to provide an account of which improvements are sustainable.

\(^{36}\) Here I follow the reasoning that lead economist Julian Simon to win his bet with biologist Paul Ehrlich about the future prices and availability of various economic goods, which involved the assumption that human ingenuity would resolve industrial limitations in ways that could not be foreseen at the time. For analysis and discussion of the bet and its implications, see Sabin 2014.
I want to stress how much that principle of sustainable improvements alters the landscape of publicly justified public policies. Public reason liberals have almost universally ignored the moral benefits of economic growth, seemingly preferring to follow Rawls, J.M. Keynes, and J.S. Mill in decrying excessive focus on economic growth.\footnote{For a discussion of the continuity between their views, see Tomasi 2012, pp. 32-37. I disagree somewhat with Tomasi’s characterization of Mill, but the difference is not relevant for my purposes in this chapter.} But if we care about maximizing each person’s bundle of primary goods, then, again, we should care about maximizing the bundle over time, and this requires that governments promote the sustainable growth of the bundles of primary goods. This suggests that policies that stymie economic growth are \textit{prima facie} suspect, as an increase in income and wealth involves an increase in the bundle of primary goods.\footnote{Though, of course, economic growth alone does not guarantee that the bundle of rights available to the poor will grow, or grow at a morally adequate rate. For some social democratic proposals for ensuring that growth promotes progress for the poor, see Kenworthy 2013.}

So moderately idealized members of the public committed to the value of moral peace can propose schemes of primary rights based on their diverse reasons drawn from their conceptions of the good and of justice. They will eliminate from consideration any schemes that do not meet the formal conditions of primary rights (like an unequal proposal), and some members of the public will have defeaters for a number of rights schemes, restricting the eligible set of such schemes. Among the undefeated schemes are those that maximize the each person’s secure possession of a bundle of primary goods (as I have understood primary goods). The bundle will be maximized not only at the present time, but
over time. The baseline for choice is the position of the representative person in the social-moral state of nature.

Given these limitations, we can establish the existence of various primary rights by arguing that members of the public will converge on a non-empty, non-singleton set of undefeated schemes of primary rights.\textsuperscript{39} First, members will prefer a scheme of primary rights to none given their varied and diverse ends. Some rights schemes will be eligible for justification as ways of maintaining that peace. This is because schemes of rights are required to maintain moral peace between diverse persons with diverse goals, as rights protect the social space for each person to live her own life according to her own evaluative commitments. Second, parties will recognize more than one scheme as eligible; since members of the public are moderately idealized and diverse, they will not agree to jointly rank a single scheme of primary rights above all other undefeated options. The scheme of rights includes five types of rights: rights of agency, associational rights, jurisdictional rights, procedural rights, and international rights.

III. Rights of Agency

I begin with the fundamental rights of agency, or rights that permit the formation of coherent agent psychologies and provide for and protect the minimal capacity of persons to exercise their agency. Since agency is required to pursue any

\textsuperscript{39} Gaus 2011, p. 43.
conception of the good or justice, everyone will want some substantive, weighty rights of agency.\textsuperscript{320} Given how important that agency is, they will sacrifice their potential authority to control others so as to secure authoritative protection for themselves. To protect their own agency under conditions of moral peace, then, members of the public must extend authoritative protection to others. Moral peace requires interpersonal moral authority, such that ensuring the protection of one’s own agency requires acknowledging that others have the justified moral authority to protect their own agency.

Rights of agency come in two varieties—negative and positive. The most fundamental right of agency is the negative right against coercive interference with one’s pursuit of justice and the good. This fundamental right is primary because it is the right of each person to authoritatively pursue her good and justice without control or interference—a claim right, not a mere liberty right. So the negative right of agency generates justified prohibitions on coercion and interference to protect one’s agency from control or by private parties or the state. The negative right of agency also includes rights against harm. Harm is a terribly complicated moral concept, and I cannot say much about it here, but I follow Joel Feinberg’s classic understanding of harm as a substantive setback to her welfare interests and ulterior interests.\textsuperscript{321} We can also follow Joel Feinberg in distinguishing between welfare interests, like the protection of one’s health and bodily integrity, one’s

\textsuperscript{320} Gaus 2011, pp. 337-357 discusses rights of agency, as I understand them here.

\textsuperscript{321} Feinberg 1987 contains the classic, great discussion. For a discussion of welfare interests, see p. 112. For discussion and analysis of Feinberg’s view, among others, see Gaus 1999, pp. 136-159.
emotional stability, financial security, and so on, and ulterior interests, like a person's ability to pursue her fundamental goals and aspirations.\footnote{322}{Feinberg 1987, p. 37.} Harm is a setback to either sort of interest. However, my normative foundation for public reason is understood in terms of taking the perspective of others into account, and not their interests. This means that we should understand harm intersubjectively, so I modify Feinberg's conception of a harm to understand it as a substantive setback of what a moderately idealized member of the public regards as her welfare interests and ulterior interests. Persons lack a primary right (though they may have a natural right) to not suffer objective harms, harms that in reality setback one’s interests. Instead, they have a primary right against what members of the public regard as a setback to her interests.\footnote{323}{I leave aside here whether all members of the public must recognize the harm as a harm in general, or just whether they must recognize that the person putatively harmed is harmed in her own eyes. The latter formulation, however, fits better with my intelligibility requirement.} This formulation is sufficiently specific for our purposes.

It follows from the adoption of equal authoritative rights of agency that persons have a long list of primary rights, including the right to life and bodily integrity, freedom of thought, freedom of speech, the formation of intimate relations with others, say through marriage or other contractual arrangements. They also have a primary right to own personal property, including photo albums, family heirlooms, clothes, and the right to own a home. Persons possess the primary right to freedom of occupation, such that the state may not forcibly
determine what her job will be. This much should not be controversial. I know of no contractualist or contractarian theory that rejects these rights claims.

However, I do think that these primary rights, taken together, imply further primary rights that Rawls did not recognize. The combination of the right of freedom of occupation and the right to own personal property imply a right to self-employment. Freedom of occupation is insufficiently robust if persons only have the right to work for someone else and not for themselves. Further, the right to own personal property extends to one’s home, and so arguably the right to use one’s home for commercial purposes of some varieties. But if persons have a right to self-employment and the right to use their homes for commercial purposes, we have the foundations for a right to own private capital, since capital is just a good that produces other goods that can be sold for consumption or investment. If persons have a right to own and operate their home, and they have a right to self-employment, then they at least have the right to use their home as capital. And if this is so, then I think that there is a strong case to be made that persons have the right to acquire private capital outside of the home.

I do not mean to imply that the fundamental negative rights of agency require capitalism understood as complete private property in the means of production and voluntary exchange. I will argue in chapter 7 that government may abrogate the property rights claims characteristic of libertarianism. But it does imply that full socialism, understood as the planned economy and the public ownership of the means of production, violates the fundamental rights of agency,
since socialism fails to protect a fundamental right of self-employment and the right to own and operate private capital. While some philosophers and communists may find this right controversial, it is not controversial in any extant liberal democratic order.

The *positive* right of agency is a right to resources or welfare, or at least to have access to goods and services required for an agent to freely develop and exercise her agency. Welfare includes uncontroversial needs, such as food, healthcare, housing, clothing, education, and non-discrimination. So persons have a primary welfare right to possess and consume these goods. Notice, though, that these welfare rights are emphatically *not* rights to state provision of these goods. Instead, they are rights to have social institutions organized such that these rights are available and adequately protected. This means that, if free market orders are as productive as their proponents believe, these orders could respect these welfare rights through cheap, abundant products, and voluntary charity, perhaps with a basic social minimum guaranteed by the state.

In fact, given the negative rights of agency, there are *strong* reasons to favor non-coercive, voluntary means of respecting welfare rights. It is best to kill two birds with one stone—the protection of negative and positive rights of agency. This means that using market mechanisms and voluntary donations to respect positive rights is morally superior to the use of government coercion, all else equal. Therefore, in seeking to secure the positive rights of agents, we should first remove any coercive restrictions preventing them from securing resources and exercise
their agency. For instance, suppose we have a choice between lowering the cost of healthcare through a single-payer system, which creates a health insurance monopsony and associated queuing, or allowing health insurance competition via health insurance exchanges subsidized by government. In that case, public reason liberals have strong reason to favor with the latter system of provision, given that it involves much less coercion: more companies can enter the market for health insurance provision, and people have more choices. In that way, a positive right to healthcare is respected, along with a negative right to choose one’s own health insurance or to go into business offering healthcare insurance.

Importantly, primary rights to assistance, while publicly justified, can be seriously qualified by the presence of citizens who believe that rights to assistance are desert-sensitive. Many people believe, and may believe even if moderately idealized, that the poor are, by and large, responsible for their poverty. If so, then the poor persons do not automatically merit coercively imposed assistance from those who rationally believe that many persons are poor due to their own poor decisions. For instance, if middle-class John gives all his money to his church to live a life of poverty, many will believe that he does not have a right to assistance since he freely donated his income and wealth. The same would be true of people who freely engage in various forms of gambling or who become poor through indolence that is freely chosen. So there are reasonable conservative objections to
extensive social insurance schemes that do not distinguish between the deserving and the undeserving poor.\footnote{This is one hurdle towards the public justification of a policy I favor—an unconditional basic income. Some will reasonably reject having their wealth redistributed to provide everyone with money no matter what choices they make. In response, I would argue that the efficiency of the basic income is sufficient to trump concerns about the undeserving poor, and that most moderately idealized members of the public would be open to the policy after recognizing this fact, which I think can be demonstrated via the standards of policy epistemology, as I discuss in Chapter 7.}

IV. Associational Rights

We now branch out from personal rights to analyze the rights of associations, such as families, churches, service organizations, and unions. Given how many conceptions of the good and fights for justice require membership in social organizations, the rights of freedom of association are bound to be strong. Most people, and I suspect all moderately idealized persons, will so value their right to form associations like families and churches that they would happily extend the same right to others. Even the most authoritarian religious and political organizations prefer a state of affairs where they and others are free to exercise their faith than a state of affairs where neither has that right. And the equality constraint on primary rights rules out special privileges that dominant faiths or political groups may seek for themselves. Associations are critical exercises of agency, and in many ways are preconditions for the formation of agency at all. This is especially true of families, but is also true of civic organizations and churches.
Another basis for freedom of association that is critical but less obvious is that associations, like individuals, are normatively prior to the legislative order. That is, they are not the mere creatures the modern legislative state, but rather can function in the absence of a modern nation-state. Families, churches, service organizations, and unions would exist in the absence of modern democratic states given that they serve critical needs. Further, we know that such organizations in fact existed prior to nation-states, as evidenced by the medieval period in Europe, where few political organizations had the powers of the modern state but associations proliferated. This means that, while these institutions are comprised of conventions, the priority of moral conventions and non-state legal conventions gives strong protection for the autonomy of these associations against the powers of the state. This is the theme of Chapter 6.

Given these two foundations for the right of freedom of association, we can conclude that a legal system that abrogates and controls organizations cannot realize moral peace because it destroys and undermines publicly justified moral conventions that constitute these associations. I will say much more about the rights of associations in Chapter 6. But given the priority of social morality and the centrality of pre-political organizations like the family, religious institutions, labor unions, and universities, a public legal system cannot be publicly justified in violating the freedom of persons to form associations, set their own rules of operation, or even to discipline or remove people from their organization.
Before transitioning to jurisdictional rights, I should add a controversial point, which is that many for-profit institutions are associations on a par with non-profit institutions. This means that some commercial enterprises will enjoy the same extensive protections afforded to non-profit organizations like service organizations or churches. But given that this claim is controversial, I will revisit it in Chapters 6 and 7.

V. Jurisdictional Rights

To secure agency rights and the rights of associations, members of the public must have rights over jurisdictions. Jurisdictions are spheres of social control where an individual or group has the sole authority to authoritatively determine what occurs within that social space. To explain, let’s begin with the simple case of ownership of a home and a yard. A legal right to a home and a yard is not a mere liberty-right. The homeowner also has a de facto claim-right against others interfering with her yard, her house, and her belongings. And the claim-right is held against both private parties and against government. The central public justification for this claim-right is that the right of a person to be safe in her property and possessions is fundamental to being able to pursue her conception of the good and of justice. Use of one’s home also includes a huge range of activities, including forming and maintaining romantic relationships and conceiving and

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raising children. I think it extends to holding social events, like celebrations, political meetings, or house churches. The right to one’s home includes the right to run a business out of one’s home. So the right to one’s home is not a mere right of agency; it is also a jurisdictional right.

The reason that jurisdictional rights are not the same as agency rights is two-fold: (a) they involve protections that are not strictly speaking required for one to exercise her agency and (b) they have a unique grounding in the fact that evaluative pluralism prevents persons from making publicly justified collective decisions on a variety of matters. Regarding (a), jurisdictional rights might include the right to private property in a commercial enterprise, but if the state restricted this right, few people would endure a significant setback to their interests or regard their agency as plainly frustrated or violated. Rights of agency are especially critical to one’s fundamental coherence as a doer and planner and to safety of one’s person and conscience. Regarding (b), and following Gaus, jurisdictional rights are partly grounded in the fact that they are devices for resolving unresolvable conflicts among diverse members of the public. As we will see in Chapter 7, one problem for liberal socialism—the combination of liberal rights and democratic decision procedures with the planned economy—is that people will not be able to agree on a central plan. A market order avoids this disagreement by allowing different people to develop and live out their own economic plans. Jurisdictional rights operate similarly: they protect social space for persons to make decisions for themselves that cannot be settled collectively.
Gaus has argued that the two fundamental jurisdictional rights are the right to privacy and the right to private property.\textsuperscript{326} The case for the right to privacy is relatively straightforward and uncontentious in principle. Persons, Gaus argues, have immunity against certain forms of monitoring, searches, and seizures. Not only must private parties refrain from engaging in some forms of monitoring, searching, and seizing, but governments lack the normative authority to permissibly allow government officials to engage in the same activities.\textsuperscript{327} The right to privacy is grounded not only in the protection of agency but in the fact that members of the public cannot collectively decide questions about what one may do in the privacy of her own home, such as whether the use of pornography is morally appropriate.

The case for the right to private property is similar. The right to private property not only allows us to protect our fundamental agency and to extend it into the world via complex life plans. It also allows people to individually or locally resolve disputes that cannot be resolved collectively. In this case, there is more than a mere analogy with liberal socialism. Private property solves the insuperable collective decision problem posed by liberal socialism, as markets allow people to live their own lives according to their own evaluative standards.

However, in contrast to the right to privacy, the right to private property generates vast, intense disagreement. The extent of the right to private property animates the greatest political debates in the United States as well as the global

\textsuperscript{326} Gaus 2011, pp. 374-386.
\textsuperscript{327} Gaus 2011, pp. 382-4.
contest between capitalism and socialism in the 20th century. I think we can sidestep any general resolution of this question by dividing the right to private property into components. For instance, the right to private property in one's home and yard is nowhere near as controversial as the right to the productive use of property. A right to own property to be used for non-profit purposes is also relatively uncontroversial. Few reasonable socialists would grant a federal legislative body the right to bulldoze a church against the will of its members, at least not without sufficient compensation. Further, good Rawlsian property-owning democrats probably don't want to give the government the power to take over or directly regulate their places of employment—colleges and universities. Congress not only lacks the constitutional right to shut down Harvard, it lacks the primary right. The same goes for historical sites, cemeteries, and the like.

The core point of disagreement in most liberal democracies is the extent to which the jurisdictional right of private property includes the use of property for commercial purposes. The heart of controversy concerns the primary right to acquire and control private capital for profit.

To begin assessing whether persons have a jurisdictional right to own and operate private capital, let us note that every developed liberal democracy protects

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328 We have seen that they already have a limited agency right to own some private capital, but that right is sharply limited to owning capital required to exercise one's agency. A jurisdictional right promises to be more extensive.

329 Few dispute that governments are permitted to establish the constitutional or legal right to own and acquire private capital. The question is whether the right is primary, limiting government interference.
extensive private property rights in capital. While controversial among philosophers, the right is not controversial in any developed order that realizes some degree of moral peace between persons. The philosophical justification for this arrangement is that it is hard to draw any principled distinction between uncontroversial liberal rights on the one hand and rights to own and operate productive property on the other. We can surely own our homes, and it seems natural to think that we should be permitted to use our homes to run a small business, say for piano lessons, counseling, massage, dog breeding, etc. I fully grant that the right to one’s home is limited. Property is widely regarded as legitimately subject to taxation and zoning regulations, such that the government can prohibit building a place of residence in a particular area (though excessively strict zoning laws may be sufficiently intrusive to be defeated in many social orders). Further, homeowners can be prevented from imposing negative externalities on their neighbors. So running a rock concert in one’s backyard at night can be limited because it imposes significant aural disruption on others. That said, despite these limitations, the right to operate a massage parlor, or host piano lessons, or baby-sit are uses of productive capital on the same order as one’s right to safety and protection in one’s personal possessions, one’s home, and one’s church. Government should keep its hands off church bake-sales, making wine for sale in monasteries, running lemonade stands, and mowing the neighbor’s lawn.

The question before us, then, is even more specific; it is whether there is a primary right to own and operate productive capital beyond one’s home. But we have already seen reason to think that moderately idealized members of the public will embrace this primary right—the considerations that justify the primary right to own and use a home apply to public commercial enterprises. All liberal orders agree that, by and large, people must have the freedom to choose one’s occupation, at least between employers. They also agree that people must have the freedom to go into business for themselves. For persons on the left who worry about the treatment of workers under capitalism, the idea that the government can wholly abrogate the right to start one’s own business is an absurdity. Owning capital is critical for starting worker-owned businesses and for many of the rights that Rawlsians would give to unions. Without this primary right, governments could legitimately prohibit the formation of syndicates. If Reba’s home is not suitable for business, or if she wants to work outside of her home because she is more productive that way, she should have the primary right to contract with others to rent a space or to buy a building where they can run their business.

In this way, we can identify a weakness in the egalitarian liberal commitment to "economic exceptionalism," where economic liberties are treated differently than other liberal rights.33 I have argued that the basic right to own and operate productive resources is on all fours with rights that liberals find much less controversial. Egalitarian liberals push back primarily when a business becomes

33 Tomasi 2012, p. 42.
large enough to have major economic effects on large groups of people. These effects include the ability to hire and fire a large number of wage-laborers, to impact the direction of markets, to impose large negative externalities on society, and to influence the political process. Based on this observation, it seems to me the specific issue that animates the indignation of people on the left is not even the right to own productive property, but rather the right of persons to form large private firms that can control the livelihood and freedoms of their workers. We have narrowed the leftist concern even further.

Due to the reasonable controversy, I think we should reject a strong primary right to own and operate large commercial enterprises with the same latitude that one might have in a freelance operation, running a small business, or operating a business out of one’s home in general. True, being able to create and run a large, successful firm can be part of someone’s conception of the good. It can even be part of living out one’s conception of justice, such as creating an environmentally conscious manufacturing company. But if the right to own and operate large commercial enterprises involves enormous latitude in the treatment of workers, a strong primary right to operate a firm could be used to restrict the right of workers to press for better working conditions. But workers probably have a strong right of freedom of association, such that large commercial enterprises do not have a primary right to prohibit this behavior. The primary right to unionize will generate conflicts between capital and labor, and an extensive right to own productive capital would tip the balance of reasonable objections in favor of capital
and against labor in a way that many people have sufficient reason to reject. Large commercial enterprises may therefore be permissibly regulated to protect primary rights, including the primary rights of workers. The primary right to own capital is therefore limited by previously justified rights of agency and freedom of association.

All that said, legitimate owners of large commercial enterprises have a primary right from expropriation by governments, despite having limited rights to control and determine the behavior of their employees. Governmental expropriation generally involves a massive amount of redistribution and control, which seriously curtails the ability of persons to live out their life plans. I would also argue that workers have a right against government expropriation. If Congress nationalized Google, it would violate the primary rights of Google’s shareholders and Google’s employees who freely agreed to work there. Similarly, unions are not pre-social organizations, but they are pre-political in the sense that they would exist in the social-moral state of nature. They therefore set limits on the law and legislation like other pre-political organizations such as families and churches. They have a right against their own destruction or diminishment.

I also think we should be careful to craft economic liberties so that the interests of capital and labor are better aligned. Classical Marxists see this conflict as ineliminable short of socialist revolution, but their concerns have always struck me as exaggerated. If workers have the primary right to unionize, if governments can regulate business activity on behalf of the common good (when the
regulations promote the common good as understood by a diverse public), and encourage competition within those industries, it has quite a bit of power to protect its citizens from dangerous corporate activity. No government needs the right to seize the means of production to protect the primary rights of its citizens, but every government will violate the primary rights of citizens if it expropriates industries. Classical state socialism, therefore, is the enemy of moral peace.

There are many other questions about the status of economic rights and liberties, particularly with respect to freedom of contract and the right to keep a portion of one’s wealth and income. We must also address questions about how a morally peaceful order regulates economic inequalities. I will address these issues in Chapter 7 in more detail.

VI. Procedural Rights

We now turn to the procedural rights of citizens, both with respect to legal procedures and with respect to political decision-making. Legal procedural rights include the right to a fair trial, the right to a public defender, the right against self-incrimination, and so on. Political procedural rights include the right to vote, the right to financially contribute to campaigns, the right to run for office, and the right to engage in public deliberation. While aspects of these rights are controversial, especially the right to financially contribute to campaigns, they are deeply entrenched in every free society, and with good reason. Anyone with a
conception of the good and a conception of justice will want to be treated fairly by a legal system that could destroy their lives, and in some cases, kill them. Just about any suitably idealized person would want this right sufficiently badly that they would gladly extend the same right to others on reciprocal terms.

Political rights can be justified on similar grounds, as each reasonable person will want the right to influence the political process, and to be able to have a genuine effect inasmuch as this is possible. In the vast majority of cases, citizens are not able to impact the political process because there are simply too many citizens for any one person to have a major impact. But, collectively, the right to vote has a critical role in preventing governments from engaging in disastrous policies. Democracies have many bad policies. But they are typically dramatically superior to policies in non-democracies, such as authoritarian regimes like China, and other dictatorships. So even if no one person can significantly impact an election through the right to vote, nearly all suitably idealized persons will recognize the easily accessible information on the record of democratic states in reducing violence, fighting relatively fewer wars, and preventing mass starvation. As Mill noted, the right to vote is the right to control others, and so the right to vote should be limited to the right to vote over issues that do not violate primary

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For instance, democracies are thought to fight few wars against other democracies, and to avoid famines. On the former, see Köchler 2001 and Hensel, et al. 2000. On the latter, see Sen 1981 and Rubin 2011.
rights.\textsuperscript{333} But moderately idealized citizens will know that giving the people political input makes for better governance than the alternatives.

Further, many citizens see political rights as their only effective means of pursuing justice. Political organizing, for instance, gives meaning to the lives of millions of people across the world’s democratic states, and even in non-democratic states with groups attempting to create a democratic order. So the reasons persons have to pursue justice only strengthen democratic rights (though, again, democratic rights can be used to control others, and so set back their capacity to pursue justice, so this rationale only goes so far).

I can really only think of one serious and significant exception to this rule: libertarians. Many libertarians would gladly give up their right to vote in exchange for financial compensation or for more economic liberties, given that libertarians are those least enthused about the power and goodness of the democratic process. But libertarians, with rare exception, prefer democratic regimes to real-world authoritarian alternatives. And since progressive and conservative members of the public arguably have sufficient reasons to defeat libertarian regimes, a system with the limited right to vote is the best regime libertarians can insist upon.

However, all is not lost for libertarians. I will argue that rights of exit can be serve moral peace as much as rights of voice. And in some cases, the right of exit will be more important, since it can substantially improve the life prospects of rightsholders in comparison to the right to vote and engage in democratic

\textsuperscript{333} Here Mill speaks of the right that a Member of Parliament has over others, but that there can be no right to power over others. Mill 1963, Volume XIX, p. 326.
deliberation. From this, I think, primary rights to federalist regimes, a limited right of secession, and rights of emigration will become an important part of a morally peaceful institutional order. These arguments can be found in Chapter 9 in the supplementary material.

VII. International Rights

Finally, we turn toward international rights, or rights to engage with other political orders and members of those orders. I set aside questions of war and international peace entirely, as they raise complications beyond the scope of the book. Instead, I will focus on international freedom of movement and freedom of trade. I think persons have primary rights to freedom of movement because Reba’s ability to exercise her conception of the good and justice depends upon the availability of opportunities to escape institutions that significantly undermine one’s welfare and violate her other primary rights. Immigration restrictions impose incredible harms on immigrants, especially those who wish to move from very poor countries to rich countries, and so it is hard to see how they don’t have defeaters for those restrictions. I grant that citizens may have the right to deny immigrants citizenship and some non-essential social services, but they do not have the right to exclude immigrants from entering the country unless they present a clear and

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334 In this way, the primary rights to immigration and trade are on all fours with other primary rights. They have the same justificatory basis. For a powerful, recent argument that rights to immigrate have the same ground as other liberal rights, see Hildalgo and Freiman 2016.

present danger to the stability of efficacy of political and economic institutions. I would make the same argument for a primary right to trade with persons internationally. The right to free exchange is vital for the livelihood of many people, and so limitations on trade will be defeated.

The main counterargument to primary rights of immigration and trade is that many people will be made worse off by free immigration and free trade, in particular those who will lose their jobs to immigrant workers and workers who live in other countries. But economists agree more on the economic benefits of free trade and immigration than almost any other issue. This strongly suggests that the evidence supporting the economic benefits of free trade and free immigration will meet the standards of policy epistemology, which I explain in Chapter 7. Moderately idealized persons will understand and accept these benefits and so support primary rights to free trade and free immigration, as it stands to benefit them all. In response to concerns about displaced workers, moderately idealized persons are much more likely to pursue ways of mitigating these losses other than restricting trade and immigration. Consequently, persons displaced from their jobs by free immigration and free trade may have a primary right to a job-retraining program, financed by taxpayers if necessary.

336 On immigration, see Kerr and Kerr 2011. On free trade, the consensus is even greater. See http://www.igmchicago.org/igm-economic-experts-panel/poll-results?SurveyID=SV_odfrqyvlnDcLh7m. Regarding the statement that “Freer trade improves productive efficiency and offers consumers better choices, and in the long run these gains are much larger than any effects on employment” 29% of over 100 top economists strongly agreed, 56% agreed, and 5% were uncertain. 0% disagreed, 0% strongly disagreed, and 0% had no opinion.
VIII. Whither Social Justice?

So far I have used a thin veil of ignorance to show that certain rights are so valuable to persons who wish to pursue justice and the good that they will extend them to others on reciprocal terms. The set of rights I have justified are presently stable among highly educated citizens of democratic societies and social elites in those orders make an effort to protect them, save for some international rights. Together, both the idealization and present recognition of these rights suggest that these primary rights are publicly justified and so supply persons with defeaters for laws violating primary rights.

Many economic liberties, however, are extremely controversial even across the developed world. There are deep disagreements about the extent to which economic liberties limit permissible taxes, both their degree and progressivity. There is also extensive disagreement about whether governments have the right to compress income and wealth distributions merely because of the intrinsic value of equality. Since I cannot resolve these issues here, I leave them largely to Chapter 7.

At this point, readers may detect a mild resemblance to Rawls’s view, even though my list of primary rights is more extensive than the liberties covered in Rawls’s first principle. But, unlike Rawls, I have no other principle to add. This is because I think many reasonable members of the public will reject additional principles. Instead, members the public will insist that states remove obstacles to their pursuit of the good and of justice. I suspect that in a diverse society, justice is
realized differently across different social contexts, such that different values specify what justice requires depending on the circumstance. David Schmidtz divides the elements of justice governing different social circumstances into desert, equality, reciprocity, and need.\textsuperscript{337} This contextual approach to more extensive principles of justice suggest that there will be no single, unified explanation of the justice of distributions in terms of overarching distributive principles.

To stress a point I made early in the chapter, Rawlsians who insist that their conceptions of justice should be the organizing political ideas of a free order ignore justice pluralism and so are prepared, unwittingly or no, to break the moral peace in their society in order to impose their conception of justice on others. Rawls’s second principles, Fair Equality of Opportunity and the Difference Principle, are both highly contestable by reasonable people. Rawls himself admitted this about the difference principle, but it’s clear even with fair equality of opportunity.\textsuperscript{338} A reasonable person could deny that society is a race to garner positional goods, such that the fact that Reba has more opportunities than John requires no justification. The opportunities Reba has could easily improve John’s opportunities and he has no natural entitlement to have as many opportunities as Reba because life and a just society are not a matter of starting from an equal distribution of primary goods.\textsuperscript{339} I do think a principle of sufficient opportunity is plausible, and that these opportunities could be built into the revised list of primary goods that I’ve

\textsuperscript{337} In this way, my approach to theorizing about justice resembles that in Schmidtz 2006, though my account is located within a theory of public reason and Schmidtz’s is not. See especially pp. 17-21.

\textsuperscript{338} Rawls 2005, p. xlvii.

\textsuperscript{339} Schmidtz 2006, pp. 109-114.
outlined above, though I suspect that when persons have a maximal, growing bundle of primary rights, many opportunities will flow naturally from the possession of those goods. As for distributional issues, I think a desert-sensitive sufficientarian principle is quite hard to reject, but we have already established a primary right to welfare.\textsuperscript{340} So we do not need to articulate an additional principle.

If we understand Rawls’s two principles as offering a theory of \textit{social} justice, a notion of justice that regulates society’s main institutions and that is concerned with the distribution of primary goods, then we can understand my theory of primary rights as a theory of social justice. So, on my view, social justice requires the systematic recognition and protection of equal primary rights. Importantly, I do not thereby reject the critique of social justice offered by Hayek\textsuperscript{341}, since the conception of social justice I adopt does not involve judging the justice of particular economic distributions, but rather concerning principles governing the basic structure of the moral and political order. Hayek had no problem with this understanding of social justice.\textsuperscript{342} However, unlike Rawls, I place my theory of social justice within an account of the justification of moral conventions and the value of moral peace. This means that the conception of justice developed here is bound by a prior set of social rules; it is public reason within social-moral rules.\textsuperscript{343}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{340}] For a discussion of sufficientarianism, see Arneson 2013, esp http://plato.stanford.edu/entries/egalitarianism/#Suf.
\item[\textsuperscript{341}] Hayek 1978.
\item[\textsuperscript{342}] See Hayek 1978, p. 100. For discussion of the sense in which the Rawlsian project does not conflict with Hayek’s hostility to social justice, see Tomasi 2012, pp. 142-150.
\item[\textsuperscript{343}] In this way, I follow the much neglected, Buchanan and Brennan 1985.
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IX. Onward to Constitutional Choice

Legal systems establish moral peace between persons only if they establish, recognize, and protect primary rights. But primary rights are invariably vague and so require legal codification, modification, interpretation, application, and harmonization. For that, we cannot rely on the rights themselves, nor can we rely entirely on moral and legal conventions to settle these complex issues in an effective fashion. For that we need constitutional rules that can achieve alter moral and legal conventions. I therefore turn to develop an account of constitutional choice.
Chapter 5: Constitutional Choice

The conclusion of Part I of this book is that publicly justified moral conventions can establish moral peace between persons. However, they cannot do so by themselves. I argued in Chapter 3 that a system of moral conventions requires a legal system to enforce, protect, harmonize, and alter many of the moral conventions in that order if the moral order is to be both coherent and publicly justified. But even the legal order needs help in realizing its social functions because we sometimes need to change the law. Towards this end, I introduce a three-stage model for how to choose constitutional rules to govern the adoption, alteration, and repeal of laws. Constitutional rules are publicly justified under three conditions. First, constitutional rules must identify, codify, protect, and elaborate a system of primary rights. Second, constitutional rules must minimize errors in the imposition of law, minimizing both the passage of unjustified law and the failure to pass publicly justified law. Third, constitutional rules must be self-stabilizing in the sense that they can maintain themselves in existence against both external shocks and the provision of assurance among those who comply with constitutional rules because they are publicly justified.

Chapter 4 outlined the first stage of constitutional choice. Chapter 5 is devoted to the second and third stages. The first aim of the chapter, then, is to determine how to publicly justify law-altering institutions, specifically legislatures,

\[344\text{ This second stage draws partly on Gaus 2008, part of the argument of which Gaus notes in correspondence he has abandoned.}\]
or law-making bodies. I understand a constitutional rule as a highest order rule of law-making that governs the recognition, alteration, creation, and repeal of laws and policies. We know that constitutional rules must recognize and protect primary rights, which involve, among other things, institutionalizing social systems whose normal operation provides an adequate amount of social and economic goods. But we know little else about how to choose constitutional rules that preserve moral peace between persons.

I follow James Buchanan in distinguishing two stages of constitutional choice: protective and productive.\textsuperscript{345} First, a political constitution specifies the protective function of the state, which is to protect, elaborate, develop, systematize, etc. the range of primary rights in that society. Second, a political constitution specifies the productive function of the state, which is to produce goods and services that cannot be produced in adequate supply via the moral order alone and that are not themselves required for the protection of primary rights.

To execute its protective and productive functions, an order of constitutional rules must minimize two types of errors in the production of law: the passage of unjustified law (a type-1 error) and the failure to pass justified law (a type-2 error). Members of the public will have different priorities in selecting constitutional rules. Progressive members of the public will be more concerned that much-needed legislation will not be passed, and so will worry more about

\textsuperscript{345} Buchanan 1975, p. 68.
type-2 errors than type-1 errors. In contrast, libertarian and conservative members of the public will be more concerned that bad law will be passed. To treat all parties as free equals, then, we must find a method of taking their variable weightings into account. I argue that the best method involves aggregating the personal error weighting of each member of the public. I then suggest a candidate aggregation rule, one that chooses a social error weighting by means of both the Borda Count and the Condorcet Rule.

In explaining constitutional choice, I proceed in five parts, with four additional parts in the supplementary material. I first introduce the idea of constitutional rules and the general approach I advance to determine which rules are publicly justified. I advocate drawing on the constitutional political economy advanced by public choice economists, in particular the approach to constitutional choice championed by Buchanan and Gordon Tullock. In section II, I explain the promise of this approach. However, public reason liberals have cause for concern in appealing to this framework, so I spend the first two sections of the supplementary material modifying the public choice approach to avoid these concerns. In the third section, I outline how constitutional decision rules can be chosen within public reason. I then face up to the powerful challenge that evaluative pluralism will prevent the selection of constitutional rules because members of the public cannot agree on which sorts of errors constitutional rules should more effectively avoid. So in section IV, I argue that we must appeal to social choice theory to generate an aggregate judgment. Gaus has criticized the
modestly ambitious approach that I think is required, so I answer his argument in third section of the supplementary material. I then introduce, in section V, my preferred decision procedure, the Borda-Condorcet Rule, which combines the Borda count and the Condorcet voting rule in order to remedy the defects of both. I then address another powerful objection that diversity among members of the public will guarantee cyclical preferences, undermining the Condorcet part of the Borda-Condorcet Rule. In section IV of the supplementary material, I try to solve this problem by postulating that members of the public will be able to settle on an error function by choosing among error weightings along a single dimension and that members of the public will have single-peaked preferences across this dimension—the dimension of the relative weights of false positives and false negatives.

I next introduce the conceptions of stability required to explain how constitutional rules that respect primary rights can self-stabilize in the face of internal dynamics and external shocks. In Section VI, I summarize the account of constitutional choice and connect it to the idea of stability. Section VII motivates and explains the need for an account of stability, and I define stability in Section VIII. Section IX introduces the idea of an agent-based model of stability and section X reviews the implications of the model. Section XI works out the implication that constitutional stability is achieved when a constitution is both *durable* and *immune* for the right reasons. The details of the agent-based model can be found in Sections five through ten of the supplementary material.
I. Constitutional Rules

Primary rights are general and vague. Constitutions must therefore do more than protect them; they must also identify institutions practices that codify these rights, extend them to new situations, and harmonize them in cases of conflict. Further, constitutions must govern the choice of laws that execute the productive functions of the state, which appeals to primary rights even less to fix their content. Consequently, we need additional sources of information about how to choose among constitutional rules that remain eligible once we protect primary rights. I propose that this information be drawn from the empirical and normative evaluation of particular acts of law and legislation. As I argued in Chapter 2.2, public reason liberals should individuate the objects of public justification at the level of specific moral and legal conventions. Laws are the proper unit of justification. My claim is that we can publicly justify the remaining eligible constitutional rules by how effectively they generate publicly justified law and how effectively they block, reform, or repeal unacceptable laws. We can use the specific information we have to evaluate particular laws to make these more generic judgments.

My approach may seem backward—many may prefer to justify laws by first justifying constitutional rules, whereas I propose that we justify the constitutional rules that survive the winnowing of primary rights by appealing to the laws we expect the rules to produce under normal conditions. So I would like to give some further arguments for individuating the objects of coercion at the level of laws, as this can justify my approach to constitutional rules by ensuring that laws are justified first and constitutional rules second.

First, moderately idealized agents cannot rationally evaluate the justifiability of constitutional rules and principles of justice in the abstract because of difficulties in determining the effects of institutionalizing rules that general. We cannot say with much specificity how those institutions will function. We cannot reasonably evaluate judicial review without evaluating the laws and policies that the courts have historically affected. If we review the historical impact of judicial review by looking at particular cases, we can come to a richer and better informed, though far from definitive, judgment. If we evaluate institutional structures in terms of the laws they produce, then we can hopefully develop a cumulative case for a particular constitutional rule by looking at its history. We can also appeal to detailed social scientific models in order to organize and interpret that history.

Second, coarse-grained objects of justification allow too many regimes and laws to be publicly justified. If we justify at the level of constitutions, any regime

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347 Buchanan and Brennan 1985, p. 30. This is Buchanan’s “veil of uncertainty.”
type or constitution that members of the public regard as (a) better than no
constitution and that (b) is not Pareto-dominated by another alternative will be
eligible for public justification.\(^{348}\) Given the importance of having some
constitutional order, members may be prepared to endorse illiberal constitutions.
Fine-grained individuation helps us to restrict the set of potentially justified laws
to options that better fit with our sense of the genuinely eligible options for public
justification in a free society.

Third, we focus on the public justification of moral conventions is that
they’re the forms of social practice that can be internalized by most moral agents.
Moral life is not based on generic moral principles like the categorical imperative,
but on local rules governing local behavior. Based on an analogy between moral
and legal conventions, we should stick to legal conventions as the right level of
evaluation simply because of our limitations in internalizing principles rather than
specific rules.

A fourth argument for individuating objects of coercion at the level of laws
is that there is too much disagreement at the level of principles to get traction on
what is or is not justified. As we saw in chapter 4, justice pluralism ensures that we
cannot agree to implement substantive principles of justice. Instead, we need to
look towards moral and legal conventions concrete and specific enough to be
evaluated, ranked, and approved, or rejected.

\(^{348}\) Gaus 2011, section 23.2.
If we individuate coercion at the level of specific legal conventions, then working out the second stage of constitutional choice becomes clear. In the second stage of constitutional choice, public reason liberals should judge constitutional rules by the *relative frequencies* with which they generate publicly justified law and allow for the reform or repeal of defeated law. A type-1 error is produced by the passage of a defeated law or the failure to reform or repeal that law—a false positive. A type-2 error is the failure to pass publicly justified law—a false negative. The second stage of constitutional choice is to minimize the *weighted sum* of type-1 and type-2 errors it produces over the course of its normal operation.

I argue that we can follow Buchanan and Tullock in choosing political decision rules. Buchanan and Tullock’s famous k-rule analysis can be modified and updated to include not merely the internal costs of decision-making within a legislative body, but the external costs of enduring *both* publicly defeated law and failing to enjoy a regime comprised of publicly justified law. We can aggregate these three cost curves and select the number of persons required to pass a law at the minima of the three curves.

Importantly, constitutional rules involve much more than settling on a number of decision-makers, so the k-rule analysis is only one piece of the puzzle. A fuller picture of the relevant components will be required in order to fully elaborate the public justification of a constitutional rule. But we must begin the justification of my approach somewhere, so I focus on the constitutional rules specifying the proportion of voters or officials required to pass a law.
II. The Promise of Public Choice

I believe that by appealing to public choice approaches to constitutional choice, we can make considerable progress in specifying the institutions of a just society, far beyond what can be established in Rawls's model. In this book, I shall understand public choice primarily as a normative framework that aids in selecting normatively binding institutional rules and norms, and not merely as a positive research program. Like Rawls's work, the public choice framework lies squarely within the social contract tradition. However, the project as articulated by James Buchanan has three unique features that commend themselves to the public reason liberal. Buchanan’s contract (i) does not depend on agreement on principles of justice, (ii) provides a much more detailed account of the parts of constitutional choice, and (iii) due to its greater realism, offers a much broader source of information for determining which constitutional rules can be publicly justified.349

Starting with (i), Buchanan’s contract never attempted to use principles of justice to substantially limit constitutional choice.350 Instead, his contract begins with the selection of constitutional rules via a unanimity or consensus standard, where everyone must agree to a set of constitutional rules to make them

349 A fourth feature of Buchanan’s theory of constitutional choice is that it does not assume full compliance with principles of justice. Further, Buchanan has a dramatically more developed theory about how compliance breaks down and how to handle it. I hope to adapt Buchanan’s tools for reducing non-compliance to a public reason framework in future work.

350 As the paper’s epigraph illustrates.
legitimate. Buchanan’s contract is thereby insulated from the threat of pluralism about justice.

Regarding (ii), Buchanan’s model of constitutional and legislative choice offers much more detail than the Rawlsian model. First, while Rawls distinguishes between the constitutional stage and legislative stage, Buchanan postulates a more complex and subtle relationship between constitutional and “post-constitutional” choice. Buchananite constitutional choice proceeds via the integration of two cost curves, one that tracks the external cost of a decision-making rule and one that tracks the internal cost of a decision-making rule. The external cost is understood as the cost an individual pays due to a single rule imposed by other voters. The internal cost is understood as the cost of decision-making itself. The aggregate cost curve gives us a method of selecting voting rules based on an assessment of their net external and internal costs.

Second, Buchanan differentiates sharply between the protective and productive functions of the state. Rawls recognizes that the state should protect rights and produce public goods, of course. In fact, Rawls’s two principles reflect the distinction, as the first principle protects a set of basic liberties and the second organizes the production and distribution of wealth. But Buchanan’s distinction emphasizes that there are two types of rational justification at the constitutional stage of political choice. By adopting his distinction, we can identify two types of

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353 Ibid., pp. 68-9.
public justification at each stage. I will explain the protective-productive distinction further below.

Finally, concerning (iii), Buchanan’s contract allows us to select constitutional rules by appealing to information concerning patterns of non-compliance among officials and citizens. Buchanan thereby provides two types of information to the public reason liberal—information about how to design a constitution to produce generally just and effective laws and information on the functioning of non-compliant institutional actors.

Rawls and Buchanan sharply disagree about which information is relevant to constitutional choice. Rawlsians object to including information on non-compliance in ideal theory, rather than nonideal theory. For Rawls extends his assumption of compliance to constitutional choice, the second stage in his four-stage sequence. He even claims that constitutional choice is purely a part of “moral theory” and criticizes Buchanan and Tullock for making the process of constitutional choice too realistic.

Contra Rawls, I believe that problems of non-compliance are relevant to ideal theory, even as Rawls understands it, because ideal theory only assumes conditional compliance with the principles of justice. Non-compliance also

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356 One could try to pack this information into the knowledge of social science that Rawls gives the parties to the original position. But Rawls was never very specific about what he meant and clearly means for a lot of the information public choice economists appeal to be excluded from the process of political justification in the second stage. See ibid., p. 119.
357 Ibid., pp. 171-6 details the structure of the four-stage sequence.
358 Rawls, Collected Papers, p. 74, n.1. Also see A Theory of Justice, p. 173, n. 2.
359 Rawls, A Theory of Justice, sec. 86 discusses cases where defection is rational.
enters Rawlsian ideal theory in Rawls’s discussion of the strains of commitment. These problems are even more acute in Political Liberalism, for stability for the right reasons depends on persons with reasonable comprehensive doctrines regarding themselves, arguably contingently, as having reason to comply with a constitution, the essentials of which are specified by a political conception of justice. Justice pluralism only exacerbates the problem, as people may find reason not to comply with their institutions when it fails to embody an adequately just political conception. Finally, we will see below that non-ideal theory is relevant to political stability, since stability requires both the capacity of a social system to assure its agents that they can rely on cooperative behavior, such that when their assurance is weakened, even reasonable agents may defect from cooperation. Another aspect of stability is whether a system can resist external shocks from defector populations, which also involves dealing with defection of the sort that public choice approaches take on that Rawlsian approaches do not.

Furthermore, while I think it makes sense to choose principles of justice assuming strict compliance, it is far less plausible to choose constitutional essentials with this strong and unrealistic assumption. It is one thing to say that justice should not be tainted by real-world failures on the part of citizens and officials. It is entirely another to say that a constitution should not be structured around accounting for the weaknesses of real-world individuals. So I believe that

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360 Ibid., sec. 29.
constitutional choice within Rawlsian political theory should relax the assumption of strict compliance.361

But even if the reader is unconvinced that Rawlsians should take on the revisions I propose, surely my approach to constitutional choice is enriched and improved by appealing to the formal and empirical work in the public choice research program. Public choice promises public reason liberals a systematic, social scientific method of identifying publicly justified constitutional rules.

Public choice contractarianism requires a number of modifications before we can use it. I discuss those modifications in detail in the first two sections of the supplementary material. For now, it is enough to point out that public reason liberalism replaces the idea of consent in public choice contractarianism with the intelligible reasons standard and replaces Buchanan’s conception of costs with the idea of a balance of reasons.

III. Constitutional Decision Rules in Public Reason

Buchanan provides us with a method for selecting constitutional rules based on the minimization of external and internal costs. I argue in the supplement that we must translate Buchanan’s preference-cost framework into the public reason framework of sufficient reasons. Thus, the Buchananite attempt to minimize the internal and external cost of decision-making should be understood as an attempt

361 Insofar as the distinction between strict compliance and partial compliance remains theoretically useful, and I’m not sure that it will.
to identify rules that citizens have *most reason* to endorse given their values and commitments *along with* the internal and external preference-cost of various decision-making rules (since the costs one faces bear on the reasons one has). I have argued above that the public reason liberal should judge constitutional rules by the relative frequencies with which they generate publicly justified law and allow for the reform or repeal of defeated law. We shall therefore understand the *external cost* of a decision-rule as the *weighted sum* of type-1 and type-2 errors it produces over the course of its normal operation for a given period.\(^362\) The rules with the lowest external costs are those that produce the lowest weighted sum of type-1 and type-2 errors, and other rules can be ranked in accordance with the sum of errors they produce.

Importantly, preference costs still play a role in choosing between decision-rules, but these costs only matter insofar as they affect the balance of reasons each person has to accept or reject a decision-rule. Preference-costs are relevant to determining our reasons to act, but public reason liberalism denies that preference-costs are the *only* factor relevant to fixing what we have reason to do.

Obviously the balance of type-1 and type-2 errors is not a simple quantity. To come up with a balance, we need some trade-off rate between the two. Further, we need to distinguish between better and worse errors of *each* type. Some type-1 errors are bound to be much worse than others; if a constitutional rule typically produces laws that place enormous costs on a particularly vulnerable sub-group

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\(^{362}\) The idea of a “weighted sum” contains considerable complexity that I focus on in the next section.
within a society, then this type-1 error (a false positive, a law treated as justified that is in fact defeated) is much worse than the consistent generation of laws that prove to be mildly annoying to the same sub-group. So total external costs must be understood as a complex function of different sorts of type-1 and type-2 errors. I will address problems determining the shape of the function below.

Let us assume for the remainder of the section that we can identify a total error function that expresses some adequately accurate weighted sum of type-1 and type-2 errors, and can thereby rank constitutional rules in terms of their external costs. If so, we should be able to use public choice theory to select decision-rules as a rational bargain between parties. I suggest that we employ the k-rule analysis that Buchanan and Tullock popularized.\textsuperscript{363} Let’s briefly review Buchanan’s generic approach, as understood in \textit{The Calculus of Consent}.

In the original model, the \textit{internal costs} are the rising costs of deliberating and forming coalitions as we increase the proportion of the population that must support the policy, approaching the limit case of unanimity.\textsuperscript{364} The \textit{external cost} curve is understood in terms of the costs imposed on an individual for legislation passed by other coalitions. These costs fall as we approach unanimity, as the only collective actions that will be taken are ones that all regard as better than nothing. The more people required to pass a bill, the lower the external costs.\textsuperscript{365} Buchanan and Tullock then combine the two cost curves like so:

\textsuperscript{363} Buchanan and Tullock, \textit{The Calculus of Consent}., p. 76.
\textsuperscript{364} Buchanan and Tullock 1962, pp. 65-67.
\textsuperscript{365} Ibid., pp. 60-65 covers an argument that external costs are not negative.
In the standard analysis, represented in Display 5-1, D represents internal costs, which increase from 0 to N at a low but increasing rate. C represents the external costs, which decrease as we move from 0 to N. The C + D line aggregates the two cost curves into one, and point K is where aggregate costs are minimized. The k-rule prescribes the decision-rule at K. When applied to voting rules, some economists think K is a simple majority rule, others supermajoritarian.

We can now introduce the modifications proposed above. The external costs are the reliability with which voting rules will output publicly justified legislation and block, revise, or repeal publicly unjustified legislation, the degree to which they minimize the balance of type-1 and type-2 errors. That is, the external costs are described by an *error function*. The internal costs resemble the standard
public choice model, as I assume there should be some monotonic relation
between preferences and reasons with respect to assessing the costs of organizing
calions.\textsuperscript{366} But the external cost curve needs to be split\textsuperscript{367} in order to represent
an individual member of the public's two broad priorities: blocking unjustified
legislation (avoiding type-1 errors) and passing justified legislation (avoiding type-2
errors).\textsuperscript{368} To simplify, let's assume that each voter's reasons include only those
focused on her personal projects and moral principles, not external views about
others.

Given these two priorities, I draw two curves, one for publicly justified
legislation and the other for publicly unjustified legislation. Here I assume an
extremely simple error function: an equal weighting of type-1 and type 2 errors,
with no quality weights. Further, I leave aside the effect voting rules have on the
ability of voting bodies to alter false positives and false negatives after some law
has been passed.

In Display 5-2, the x-axis represents the number of voters required to pass
or repeal a law, understood as the percentage of members of the public that have a
say in the legislative process (or that have a representative that has a say). At \(1\%\),

\begin{footnotesize}
\footnote{366 I'm simplifying, of course, but it seems reasonable to hold that the primary considerations
involved with internal costs are the strategic challenges that people prefer to avoid when they can.
Moral reasons that conflict with self-interest seem less important here.}

\footnote{367 Buchanan and Tullock's cost curves already include the interest in getting "justified" legislation
passed, but I split up the representation of this interest into one's interest in avoiding false positives
and one's interest in avoiding false negatives.}

\footnote{368 Publicly justified legislation, I must stress, is not costless. There is still a cost to being coerced,
but with publicly justified legislation, the individual's reasons-function holds that the law has net
benefits. So, even the rule for passing publicly justified legislation must include the costs of
coercion, which will interfere further with the capacity of a decision rule to generate coercive law. I
set this complication aside, as it needlessly complicates the model. But see Gaus 2011, pp. 500-501.}
\end{footnotesize}
only 1% of members of the public are required to pass a law, whereas at 100%, 100% of members of the public are required to pass law. The y-axis represents benefits to the evaluative standards of members of the public, the degree to which members of the public get laws that advance their values and commitments. Increases along the y-axis thus represent social states of affairs where members of the public are more able to realize their ideals within their social lives. I represent these external benefit curves as red and blue lines.369

![Diagram](image)

Display 5-2: External Benefit Curves

In Display 5-2, the blue line represents the reliability with which a voting rule outputs publicly justified legislation—how well it enables and facilitates the passage of laws that are publicly justified to all suitably idealized members of the public. I assume that the benefits to the evaluative standards of members of the public are low when a small minority of individuals can pass a law because a

369 Representing the minimization of type-1 and type-2 errors as maximizing benefits allows for clearer representation than representing the minimization as the minimization of costs.
plurality rule of this sort allows for many contradictory legal changes. A plurality can pass a law, and another plurality can pass an opposing law, and then we need another plurality still to resolve the conflict. We run into other problems as we approach unanimity, since requiring that all agree to a law ensures that holdouts can defeat any law they like, making it next to impossible to pass publicly justified legislation. I assume that the benefits increase at some point in between plurality and unanimity. The second line in red represents the reliability with which a voting rule blocks publicly unjustified legislation. The red curve differs because unanimity will guarantee that no publicly unjustified law will be passed, which will be of great benefit to the evaluative standards of members of the public. But when any individual can pass a law, we’ll end up with enormous amounts of defeated legislation. So the line increases in value as the number of required voters increases. The lavender line combines the two functions into the error function, much as Buchanan and Tullock do in their k-rule analysis. In Display 5-3, we can aggregate the external curves with the internal cost curve.

370 Now, there is a case to be made that members of the public get benefits from unjustified legislation, not the benefits from the law, but the benefits from getting a law that is less unjustified than another. I will leave these costs aside to keep the model simple.
Here I introduce the internal cost curve in green. The internal costs of decision-making are the costs of collectively organizing a clear vote in a decision-making body. These costs are understood in terms of setbacks to the evaluative standards of members of produced by the organizational costs of voting. The costs are high far below majority rule because, again, voters can pass and repeal legislation with extremely small minorities, so organizing to produce good law is difficult. The same is true at unanimity, when any holdout can spoil the vote. In this graph, again for purposes of illustration, I assume that the curve rises as we approach a large plurality, organization will be relatively easy and the possibility of contradictory coalitions is reduced. The curve then falls at an increasing rate as we approach majority rule and then unanimity, due to the costs of convincing holdouts. I next introduce the external benefit curve from Display 5-2 (again in

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371 One famous result of Buchanan and Tullock’s work, however, is that contradictory coalitions can form even with majority rule.
lavender). The total utility line, the error function, is in yellow.\textsuperscript{372} The analysis tells us to select the decision rule that maximizes the benefits to the evaluative standards of members of the public, which in this case lies at 60 votes. I do not mean to commit myself to supermajority rules here. Instead, these numbers serve merely to illustrate my model.

Allow me to introduce another of Buchanan’s distinctions to refine the model. As mentioned, Buchanan distinguishes between the protective and productive functions of the state. The protective function protects primary rights, whereas the productive functions promote the production of public goods. In my view, we should carve up the selection of voting rules by indexing them to the protective and productive functions of the state. The reason for this is relatively straightforward: it is much more important for government to protect primary rights than to produce public goods. If government fails to protect primary rights, it is deeply unjust and illegitimate. If government fails to produce collective goods, but still protects rights, it is merely derelict and incompetent. Consequently, if we must choose between selecting the strong protective rule and a strong productive rule, we will want to select the protective rule.\textsuperscript{373}

Based on the foregoing, then, we can distinguish between constitutional rules that execute the protective and productive functions of the state and the external and internal cost curves generated by constitutional rules that can govern

\textsuperscript{372} In aggregation, I weighted the internal and external costs equally, but this too is a simplifying assumption, as was the weighting choice in Display 5-2.

\textsuperscript{373} This weighting should not be a general matter of controversy among members of the public, given that the scheme of primary rights is justified prior to the constitutional stage that we're examining in this paper.
one function or the other. We can now distinguish between two eligible sets of constitutional rules governing these two functions, where the members of each set are ranked in accord with their respective error functions, again after we have ruled out rules that unacceptably violate primary rights.

I must now address a serious problem that plagues the formulation of the weightings of type-1 and type-2 errors that the functions appeal to. This problem is a version of the familiar problem of generating a social welfare function.

IV. The Need for Aggregation

Given that constitutional choice is sensitive to evaluative pluralism, it must allow different members of the public to endorse different balances of type-1 and type-2 errors in formulating their individual rankings of constitutional rules. Some persons may be most concerned about unjustified coercion, whereas other persons may be more concerned about the failure to pass certain publicly justified laws. This means that different members of the public will have different error functions that specify the costliness of a rule in terms of that person's balance of type-1 and type-2 errors. If we wish to construct a social ranking of constitutional rules, a ranking that applies to society as a whole, however, we need a social error function that is generated by aggregating individual error functions. Unless we aggregate, we invariably privilege one person's individual error function over the functions
affirmed by other citizens. Such privileging fails to treat persons as equals and will undermine moral peace between persons.

A constitutional rule $c_1$ is superior to $c_2$ from the social or collective perspective in at least two cases: (i) when some members of the public think $c_2$ is unacceptable but none have good objections to $c_1$, and (ii) when all members of the public regard $c_1$ as superior to $c_2$, despite lacking good objections to either. In the former case, the society’s optimal eligible set only contains $c_1$ because $c_2$ is defeated or vetoed. In the latter case, both $c_1$ and $c_2$ are in a society’s eligible set of acceptable proposals, but $c_2$ is not contained in that society’s optimal eligible set because it is dominated by other proposals.\footnote{Gaus 2011, p. 323.} So, to determine which constitutional rules are publicly justified, we have two tools at our disposal: vetoes and dominance reasoning.

If we restrict ourselves to these tools, we must grapple with a great deal of social indifference, even in cases where it appears that one option should almost certainly be ranked above another. Consider, for illustration, the Gausian model, which acknowledges that political theory alone will not reduce the eligible set of proposals to a singleton.\footnote{Gaus 2011, p. 323.} To narrow the eligible set, Gaus only appeals to a Pareto extension rule, where some law is a member of the eligible set of proposals so long as all members of the public rank it above no law and as superior to other alternatives. The optimal eligible set includes all and only those proposals that are neither defeated nor Pareto dominated. If we apply a Pareto extension rule to the
selection of constitutional rules, then we would be left with an optimal eligible set of constitutional rules governing some issue that are neither defeated nor dominated. The set could be enormous. Gaus acknowledges that his model is highly indeterminate.

To see the indeterminacy, suppose that \( c_3 \) and \( c_i \) are part of the optimal eligible set and that both can be assigned values for four variables. A constitutional rule \( c_x \) generates publicly justified law with: success frequency A for portion of members of the public B and blocks C percent of defeated law for portion of members of the public D.

<table>
<thead>
<tr>
<th>Rule</th>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
</tr>
</thead>
<tbody>
<tr>
<td>( c_i )</td>
<td>90%</td>
<td>90%</td>
<td>80%</td>
<td>70%</td>
</tr>
<tr>
<td>( c_3 )</td>
<td>70%</td>
<td>70%</td>
<td>70%</td>
<td>72%</td>
</tr>
</tbody>
</table>

Display 5-4: Eligible Constitutional Rules

Suppose that \( c_i \) will generate publicly justified law with a 90% success rate for 90% of members of the public, and block 80% of publicly unjustified law for 70% of the public and that \( c_3 \) will generate publicly justified law with a 70% success rate for 70% of members of the public, and block 70% of publicly unjustified law for 72% of members of the public. In this case, so long as some members of the public think it is especially important to avoid publicly unjustified coercion for as many members of the public as possible—a reasonable priority—then a few members of the public will rank \( c_3 \) below \( c_i \). In this case, from the social perspective, \( c_i \) and \( c_3 \) cannot be ranked. The social ranking is incomplete.
This is *not* the same as members of the public being *indifferent* between \( c_1 \) and \( c_3 \). But we can nonetheless represent incomplete rankings as a kind of indifference. Following Gaus and Amartya Sen, we can express this relationship with an \( R^+ \) relation, where \( xR^+y \) if and only if it is *not* the case that \( y \) is *socially* preferred to \( x \).\(^{375}\) Gaus uses \( R^+ \) to model incomplete preferences as a kind of indifference.\(^{376}\) If we follow Gaus, then, our sample case yields \( c_1R^+c_3 \).

The cost of the Gausian approach is that we cannot rank \( c_1 \) and \( c_3 \) when it seems obvious that, on the whole, \( c_1 \) is superior to \( c_3 \). Gaus notes that traditional “social contract theory has sought to reduce the eligible social contracts to a single option,” so most public reason liberals will find this degree of indifference unacceptable.\(^{377}\) In fact, they will probably find any indifference unacceptable. But in our case, indifference seems especially hard to tolerate. Rule \( c_1 \) is superior to \( c_3 \) along almost every dimension, and is only slightly inferior to \( c_3 \) on the fourth. And we can imagine further dimensions, with \( c_1 \) continuing to outscore \( c_3 \) on each, with the Gaussian approach still unable to say that \( c_1Pc_3 \).

V. The Borda-Condorcet Rule

I would now like to identify at least one aggregation rule that will help determine whether any undefeated, un-dominated constitutional rule can be *socially* superior

\(^{376}\) Gaus 2011, p. 309.
\(^{377}\) Gaus 2011, p. 327.
to another undefeated, un-dominated constitutional rule. Given the strictures of public reason, we must look for aggregation rules that are themselves undefeated and un-dominated.

Showing that an aggregation rule is eligible is tantamount to showing that all suitably idealized members of the public think that employing the rule is better than appealing to no rule at all. That is, they compare their capacities for social choice in two scenarios. In the first case, they may appeal only to defeater and dominance reasoning; in the second case, they may also appeal to an aggregation rule. If members of the public prefer the second case, then the aggregation rule should be eligible.

There are two arguments that at least one aggregation rule is eligible. First, members of the public prefer more determinacy to less, and so would like to appeal to aggregation to yield a more determinate social choice. If we can aggregate, then in at least some cases we'll be able to generate more determinacy than if we appeal to defeat and dominance alone. Second, members of the public prefer to satisfy as much of their evaluative standards as they can, and an aggregation rule will, in some cases, allow them to uncover a social choice that they may regard as a superior rule on balance. Take, for example, the constitutional rules in Display 5-5. The potential advantage of an aggregation rule is the ability to choose \( c_1 \) over \( c_3 \).

Importantly, the aggregation rule will never stick a member of the public with a social choice that, from that member's perspective, is either defeated or
dominated. The aggregation rule operates merely on the set of undominated, defeated proposals. So one major worry about employing aggregation rules, that in doing so, some members of the public will be stuck with options they reject, is mistaken. An aggregation rule, again, only derives a social choice from an optimal eligible set of proposals.

In light of these considerations, we should now propose candidates for an eligible aggregation rule. I propose two: the Borda rule and the Condorcet rule. Borda assigns each choice a value that is a function of the rank assigned to each option by each voter; the option with the lowest point total is the social choice. Condorcet chooses the option that beats all other options in a head to head as the social choice. Both rules have flaws. The Borda count is thought to be more subject to manipulation because it permits the violation of some versions of independence of irrelevant alternatives. The Condorcet rule is thought to be more subject to cycling, and so permits violations of transitivity. The question is whether members of the public will be prepared to bite these bullets in order to narrow the optimal eligible set beyond what defeater and dominance reasoning permit.

The reason to think that both rules are eligible is that they are derived from attractive rational and moral principles, and together embody the best features of both majoritarian voting methods (of which Condorcet is one) and positional voting methods (of which Borda is one). Condorcet seems to be a natural extension of majority rule to three or more options, whereas Borda includes
positional information, which some believe is a nice proxy for cardinal intensities when cardinal information is unavailable.

But what if members of the public find potential violations of transitivity and independence so unacceptable that they would rather not avail themselves of either rule? I believe we can answer the concern by offering a conjunction of the two rules as the eligible aggregation rule. In cases where the Borda winner and the Condorcet winner are the same, this is a very attractive proposal. After all, it shows that the winner remains the winner if we drop independence (as Borda allows) or transitivity (as Condorcet allows). Further, in cases where one rule yields a winner and the other yields a tie (as in Borda) or no winner (as in Condorcet), it is natural to let the rule that yields a winner represent the social choice. If two attractive, if flawed, social choice rules are used to aggregate individual preferences, and one malfunctions or yields a tie, then it seems relatively unproblematic to represent the social choice as arising out of a positive valence (via the rule that chooses the winner) and a neutral valence (via the rule that generates a tie or no winner). So in cases where the two rules together yield a positive valence for a winner, we can generate a social choice on the grounds that the winner is either favored by both rules or favored by one rule and not disfavored by the other.

Of course, the foregoing raises the question of what to do when the Borda winner and the Condorcet winner differ. Going with either rule over the other suggests that only one of the rules is normatively fundamental. My view is that we treat cases of an optimal eligible set where the Condorcet and Borda winners differ
as social indifference between the two winning options. If, in an optimal eligible set of 5 proposals \([A, B, C, D, E]\), the Condorcet winner is B and the Borda winner is C, then we can shrink the optimal eligible set to \([B, C]\), such that society is represented as indifferent between the two winners. One reason for this is that two attractive aggregation rules yielded different results. A second reason is that, in cases where Borda and Condorcet differ, we should typically expect the second-place winner of one vote to be the winner of the other vote and vice versa. Consider a case from William Riker where the Condorcet winner has a majority of first-place votes while a different Borda winner has a much higher score than the Condorcet Winner.\(^{378}\) Here D represents a decision maker:

\[D_1, D_2, D_3: b > a > c > d\]
\[D_4, D_5, D_6: b > a > d > c\]
\[D_7, D_8, D_9: a > c > d > b\]
\[D_{10}, D_{11}: a > d > c > b\]

![Table](image)

Display 5-5: Condorcet Vote (b wins)

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\(^{378}\) Riker 1988, p. 84. Display 4-10.
With respect to this profile, b is the Condorcet winner; b gets 6 votes against all the alternatives in a two-proposal match-up. However, while a loses to b, a beats c and d. So a is the runner up. In contrast, a is the Borda winner, as it gets 27 points, but b is still the runner up at 18 points. Options c and d get 11 and 10 points respectively.

<table>
<thead>
<tr>
<th></th>
<th>D₁</th>
<th>D₂</th>
<th>D₃</th>
<th>D₄</th>
<th>D₅</th>
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<th>D₁₀</th>
<th>D₁₁</th>
<th>Total</th>
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<tbody>
<tr>
<td>a</td>
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<td>3</td>
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<td>27</td>
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<td>b</td>
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<td>c</td>
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<td>11</td>
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<td>d</td>
<td>0</td>
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<td>1</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>10</td>
</tr>
</tbody>
</table>

Display 5-6: Borda Count (a wins)

In this case, it seems entirely appropriate to shrink the optimal eligible set to [a, b] from [a, b, c, d], given that a and b either win or almost win. In this case, on the Borda-Condorcet standard, society will be indifferent between a and b.

Let’s call the Borda-Condorcet addition to Gaus’s Pareto extension rule the BC rule. I define the BC rule as a rule that selects an undominated, undefeated proposal as socially optimal when it wins both the Borda Count and the Condorcet vote over all other undominated, undefeated proposals. The BC rule will also return a winner when one rule returns a tie or an error (as Condorcet does in a
cycle) and the other vote selects a winner. In cases that return a tie, society is understood as indifferent between the two winners.

For more on Gaus, challenges to aggregation, and a response to worries about the Condorcet part of the BC Rule, see sections III and IV of the supplement to Chapter 5.

VI. Onward from Constitutional Choice

The goal of Part II of the book is to explain how to identify constitutional rules that enable a society to realize moral peace among its members. It proceeds in three steps. Step 3a recognizes that members of the public, despite disagreeing about the good and justice, can converge on a range of primary rights, some substantive, and others procedural.

This chapter has thus far focused on step 3b, selecting among the constitutional rules that we have already determined adequately protect primary rights. The remaining eligible constitutional rules are those that, in practice, adequately realize the protective and productive functions of law-altering institutions. Once we have ruled out the remaining defeated and dominated rules, we are left with what will likely be a non-empty, non-singleton set of constitutional rules that the public cannot yet rank vis-à-vis one another. Recognizing this problem, members of the public will be prepared to appeal to
aggregation rules in order to avoid what many regard as an essentially arbitrary outcome. Consequently, I argued that the eligible constitutional rules could be ranked by the spread of type-1 and type-2 errors that they can be expected to produce under normal circumstances. But due to evaluative pluralism, different members of the public will be more worried about one kind of error than the other. This lead me to explore the possibility of choosing an aggregation rule to allow members of the public to settle on a collective weighting of type-1 and type-2 errors so that they can rank eligible constitutional rules vis-à-vis one another. I have offered the Borda-Condorcet rule as such a method on the grounds that using both the Borda Count and the Condorcet rule will allow members of the public to settle on a social error function in accordance with morally and rationally attractive principles of social choice, despite the fact that both Borda and Condorcet have serious flaws.

One drawback of this chapter is that, in order to simplify, I have focused on ranking constitutional rules in accord the proportion of voters required to pass or repeal a law. For there are many other features of constitutional rules that affect how members of the public will rank them, such as how many legislative houses to have, the acceptability of judicial review, or whether a democracy should have an independent executive branch. However, my framework should help address these other questions. After the protection of primary rights, what matters in constitutional choice is selecting rules that will produce publicly justified law and
block, repeal, or reform defeated law. Members of the public will select whatever constitutional rules minimize legislative error.

VII. Stability

The last step in selecting constitutional rules involves determining whether otherwise eligible constitutional rules can be *stable for the right reasons*—whether they can be self-stabilizing for moral reasons, rather than by compliance with non-moral practical reasons alone. We have already discussed this form of stability in developing the idea of a moral convention in Chapters 1 and 2. Moral conventions are internalized moral norms backed by the threat of characteristically moral punishment. The stability of moral conventions derives in part from the motivation of the person’s moral emotions that result from internalization and the fear of moral ostracism if the norm were publicly disobeyed. But in this chapter we are concerned with the stability of constitutional rules in relation to how they preserve publicly justified moral and legal conventions. I will call this the *moral stability* of constitutional rules. Sometimes I will simply use the term “stability.”

The moral stability of constitutional rules has two parts. First, constitutional rules must be stable because *officials* comply with them directly. If a constitutional rule specifies that Congress may make no law abridging free speech, then that constitutional rule is stable insofar as legislators do not attempt or ultimately fail to pass laws abridging free speech. If officials do not comply with
constitutional rules, then since constitutional rules are themselves conventions, the convention will collapse and the constitution, or at least the ignored part of the constitution, will become, at best, sentences on a sheet of paper. Second, constitutional rules must be stable because citizens comply with the laws produced or permitted by those rules. Constitutional rules are stabilized by citizens who take themselves to have reason to comply with the laws it produces. Since the constitutional rule is a convention governing the imposition, revision, and repeal of laws, the constitutional rule can only count as effectively stable when its outputs are obeyed.

Since my model evaluates constitutional rules under normal conditions, we must also consider the threat noncompliant agents pose to stability, persons who lack an effective motivation to act morally and respond to cooperation with cooperation. My conception of stability, then, includes stabilization under conditions of non-compliance, an assumption found in the contractarian theory common among public choice economists like Buchanan, but absent among public reason liberals like Rawls. I claim that an appropriate model of constitutional choice should treat non-compliance as an endogenous variable: some constitutional rules will encourage more compliance than others. If so, we should model constitutional choice by assuming that some real-world agents (not the contracting parties) are prepared to defect under a variety of conditions. So an important kind of stability obtains when compliant agents can successfully repel
non-compliant agents, preventing non-compliant agents from getting a foothold in controlling the constitutional rules for their own ends.

Some have criticized public reason accounts of stability, especially Rawls's, as redundant.\(^{379}\) A constitutional regime will be stable for the right reasons just because it is publicly justified, since citizens will comply with the regime in virtue of being reasonable. So once we’ve identified a publicly justified regime, then it will be stable for the right reasons—morally stable—by definition. If so, the third stage of my model of constitutional choice might be redundant as well. But consider two replies to this complaint. First, stability is determined in part based on whether citizens believe that other citizens will cooperate. Even with proper moral motivation, if citizens are convinced that others are not properly motivated, they will lack sufficient practical reason to comply, given that public justification does not require persons to make themselves vulnerable to negative political outcomes that result when they cooperate and others defect. If justice is connected to reciprocity, cooperative people are not morally required to cooperate with the uncooperative. So stability is not redundant because even eligible constitutional rules might fail the stability test if a society lacks social mechanisms that provide assurance to cooperatively disposed persons. We will see below that providing assurance is complicated given potential social dynamics that can undermine stability in unexpected circumstances and in unanticipated ways. So the

achievement of stability is even more of a non-redundant question than it may seem even for orthodox Rawlsians.

A second reason that stability is not redundant is that we want a society of reciprocal cooperators to be immune from various kinds of external shocks, shocks not due to dynamics present among reciprocally cooperative agents alone. A collapse in assurance due to “cheap talk” can be understood as an internal shock or dynamic, as the agents could generate it without the entry of new agent strategies or a substantial change in the social parameters governing that society.\textsuperscript{380} An external shock is a significant change in social conditions due to changes other than what transpires among reciprocal cooperators, such as a collapse in their environment’s carrying capacity, perhaps due to famine or war, or invasion by uncooperative agents who pursue their own gain at the expense of others whenever they can get away with it. So we cannot assume that stability is guaranteed by public justification because external system shocks can undermine stability, even if its constitutional rules are publicly justified.

VIII. Constitutional Stability Defined and Disaggregated

Groundwork laid, I will now define the conditions for the moral stability of a constitutional rule. A constitutional rule C is morally stable if and only if:

\textsuperscript{380} Farrell and Rabin 1996.
(i) Officials acquire and fulfill their roles regarding C as specified by some C_x.

(ii) C’s regular operation produces publicly justified legal conventions (Ls);

(iii) Citizens generally comply with the publicly justified Ls produced by C;

(iv) Violations of C and Ls are discouraged by moral and/or legal pressure.

Constitutional rules do not typically issue direct commands to citizens qua citizens; rather, they specify the roles of officials, including requirements, prohibitions, and permissions, along with their normative powers, and rights of enforcement. The third amendment to the US constitution forbids Congress from forcibly quartering troops in the homes of citizens. So the rule does not directly apply coercion to everyone. It forbids legislative and executive powers from passing laws that permit or require troop quartering. A constitutional provision for collecting government revenue is similar. It does not directly impose upon citizens, but it gives Congress the power to do so.

Let us now expand upon the four conditions of stability. First, and most importantly, officials must acquire and fulfill their roles regarding C in accordance with C or other constitutional rules. Officials have to acquire and fulfill their C-specified role. Second, C should typically produce publicly justified legal conventions. If it tends to produce defeated conventions, people will lack sufficient reason to comply with those conventions and so many will defect. And by disobeying the laws generated by C, C is destabilized since it consists in a

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381 Stability might involve disobeying unjustified laws. But this case raises complications that would take us too far afield, so I set it aside.
procedure that attempts to successfully impose laws on citizens (or prohibit laws from being imposed). Third, while morally stable Cs can withstand some defection, they cannot survive if violations are considerable and regular. So a constitutional rule can only be stable if citizens comply with its legal outputs.

Fourth, moral and legal pressure must be used to enforce C in many cases. Sometimes a rule C is so obviously good and moral that few officials or citizens will violate it. Few people, for instance, are itching for the chance to violate the third amendment. But citizens and officials will be tempted to disobey constitutional rules that impose costs upon them. And if too many people are allowed to disobey a constitutional rule and the laws it produces, the rule will destabilize. So we need punishment to enforce many constitutional rules. Punishment need not be legal in nature; it might be merely moral. But there must be some pressure applied to violators for C to be fully stable.

Destabilization can occur due to two types of factors—internal dynamics and external shocks. An internal dynamic is a factor that arises from within a system of conditionally cooperative agents complying with publicly justified rules. The primary internal dynamic that can lead to instability is a collapse in assurance between agents.\(^{382}\) This can easily happen in large N-person systems, given how frequently we misinterpret speech or behavior, and so acquire doubts about how committed other agents are to cooperating with some rule (a constitutional rule, or more likely, a law produced by the rule). Assurance failures could result in

\(^{382}\) Another internal dynamic could be an overly demanding system of norms that would lead persons to defect due to the strains of commitment.
violations of any of the four conditions for stability. If officials become suspicious of the motives of other officials, they might violate constitutional rules; a prime illustration of this might be the contemporary use of the filibuster in the Senate, which makes it much more difficult to pass laws that even a significant majority of legislators (not to mention citizens) would like and probably regard as justified. Failures of assurance could affect the error rate of the constitutional rule, given that it could be commandeered by less cooperative agents. And in many cases, failures of assurance will lead to defection even from publicly justified laws. In that case, moral and legal pressure might be insufficient to keep C stable, given that mass violations are hard to police and deter. To establish stability in the face of internal dynamics, we need to identify assurance mechanisms. This is not easy. John Thrasher and I have argued that the use of public reasons to assure others that one is committed to their shared political institutions is subject to instabilities even among reasonable agents.383

Second, a constitutional rule can be destabilized if it can be easily disrupted by external shocks. External shocks include, among other things, invasion by uncooperative and purely self-interested agents. The kind of external shock to a constitutional rule most relevant for our public choice-inspired approach to constitutional choice is the agglomeration of rent-seeking agents, agents that manipulate constitutional rules to benefit themselves at the expense of others.384

383 Thrasher and Vallier 2015.
384 For several articles on the nature of rent-seeking, see Tullock 2005. For the thesis of agglomeration of rent-seeking groups, see Olson 1984.
We can focus on constitutional rules governing taxation and the distribution of revenue as the most obvious sites for rent-seeking.\footnote{Mueller 2003, pp. 333-335 reviews the concept of rent-seeking.} In those cases, legislators frequently abuse their roles by misappropriating funds, violating stability condition (i). Second, rules can be used to produce publicly unjustified legislation, violating condition (ii). Third, there may be considerable defection by legislators, special interest groups, lobbyists, and the like, violating condition (iii). Sufficient corruption can also increase citizen defection since people observe some people escaping punishment or detection due to their rent-seeking activities, which violates condition (iii). Finally, since these people escape punishment, adequate moral or legal pressure is not applied to them, violating condition (iv).

I term the ability to resist internal dynamics \textit{durability}, and the ability to resist external dynamics \textit{immunity}. These are first-order forms of stability, as they are concerned with the capacity of a system to maintain a high level of cooperation and social trust in the face of threats. But there is a third factor that determines whether a constitutional rule is stable—the level of \textit{variance} in the system in response to internal dynamics and external shocks. I understand variance in an internal dynamic in terms of the level of variation in a system's level of social trust, whereas variance in an external shock relates to how predictably and regularly a system copes with an external shock. We can understand this form of stability, which I call \textit{balance}, as second-order \textit{stability} or the stability of measures of stability.
These three types of stability—durability, immunity, and balance—are new to the public reason literature, but I believe they will prove helpful in developing an attractive account of stability for public reason liberalism. For example, my conception of durability ties stability to the idea of social trust, which I used to ground public reason in Chapters 1 and 2. Durability will be understood as the capacity of a polity, and constitutional rules, to preserve a high degree of social trust among persons. Second, immunity refers to the ability of a system to survive invasion by merely self-interested agents like rent-seekers, and so to maintain social trust among cooperative agents. Balance just refers to a society’s variance in social trust levels.

IX. Agent-Based Modeling of Stability

In the supplementary material, I examine how these different conceptions of stability interact. To study the interactions, I use an agent-based model (ABM) of stability. Advances in computer science have produced modeling software that allows us to explore a dramatically richer model of a well-ordered society, specifically through computational agent-based modeling.³⁸⁶ An agent-based model is a class of computational models that simulate the actions and interactions of autonomous agents (either individual or collective agents, like groups) with an aim to assessing their effects on the system as a whole. ABMs

³⁸⁶ I promise that “MPP” and “ABM” are the only acronyms I use in the chapter. For discussion of the power of ABM models within social science, see Miller and Page 2007.
encode “the behavior of individual agents in simple rules so that we can observe
the results of these agents’ interactions.” ABMs contrast with standard
mathematical modeling in describing a system, not by variables representing the
state of the whole system, but rather with a system’s individual components and
their behaviors. ABMs model the individual, and determine system states by the
emergent properties of agents interacting with the environment and other agents,
which is why ABMs are sometimes referred to as individual-based models.

The main point of building an ABM of a morally peaceful polity is to
distinguish between types of stability, not to illustrate a morally peaceful polity
(MPP) in full detail. Many of my simplifying assumptions are grounded in the goal
of distinguishing types of stability rather than constructing a plausible
representation of the most important dynamics of a morally peaceful polity. My
overarching aim is to make the implicitly agent-based elements of a morally
peaceful polity explicit in order to uncover system-level properties that emerge
from this complex adaptive system.

To simplify, my model focuses entirely on whether citizens will comply or
defect from the laws generated by a constitutional rule. This will capture elements
(ii) and (iii) of constitutional stability, as the ABM models citizen compliance with
rules in terms of persons playing games with one another. Cooperation consists in
rule compliance, whereas defection involves breaking a rule. High levels of

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\(^{387}\) Wilensky and Rand 2015, p. 22.
\(^{388}\) Railsback and Grimm 2012, p. 10.
\(^{389}\) I thank Steven Stich for encouraging me to make more explicit my reasons for building an ABM.
cooperation, then, indicate that a rule is stable and effective; high levels of defection indicate the breakdown of the stability of a rule.

I do not attempt to model official behavior alongside citizen behavior, as that would require a much more complicated model. We can use my model to represent the behavior of political officials with respect to one another, say as to how often they cooperate by performing their constitutional duties. What my ABM cannot do is model the dynamics between citizens and political officials.

While I do not have the space to review my model in detail here, I can sketch the details. In the supplementary material, I introduce my ABM in three stages. First, I develop a simple model that contains only reasonable agents choosing whether to comply or defect from norms of cooperation. This simple model generates an account of the capacity of a system (in our case, the system is a constitutional rule and the norms and agents it governs) to stabilize its constituent norms via the production and maintenance of durability and balance.

In stage two, I relax the assumption of full compliance by introducing a small number of agents who maximize their expected utility in their interactions with others. They are merely rational in that they are not conditional cooperators, and so are not reasonable. I show that a dynamic found among groups of reasonable agents—network reciprocity—can, under favorable

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391 Rawls 2005 pp. 48-54.
conditions, enable them to maintain some durability and balance despite relentless defection from merely rational agents.\textsuperscript{392}

The third feature of the model specifies conditions for the entry and exit of agents in the system. This enables merely rational agents or reasonable agents to take over the population. A morally peaceful polity whose reasonable agents can resist invasion and replacement by merely rational agents is immune.\textsuperscript{393}

I employ the idea of an N-person Nash equilibrium, where agents play strategies in pairs, and generate a stable, high degree of cooperation as an emergent property of the system. A morally peaceful polity is comprised of constitutional rules, such that its macro-level equilibrium emerges as a series of equilibria on different constitutional rules. So an MPP is not in equilibrium on some general set of principles of justice. But its constituent constitutional rules should each be understood as achieving or reaching a macro-level equilibrium. This macro-level equilibrium is a function of agent compliance, but it does not require compliance by individuals in every case. As we will see, the dominant mixed-strategy of agents is to adopt a high probability of compliance with rules and directives established by just institutions, such that across the history of their interactions with others, agents cannot improve their position by adopting a non-cooperative strategy.\textsuperscript{394}

\textsuperscript{392} Nowak 2006, p. 1561.
\textsuperscript{393} Since immunity describes the ability of a system to recover from external shocks, and there are many kinds of external shocks, that there will be many types of immunity. I expand on this point below.
\textsuperscript{394} Here I understand an agent’s position and improvements upon that position as including their moral commitments and personal projects.
I forgo appeals to common knowledge. Instead, agents within a constitutional environment, one governed by a constitutional rule that forms part of an MPP, merely make reliable judgments about the level of compliance within their environment. They do not know what other players know. My ABM instructs each agent to observe the fraction of cooperative plays in the constitutional environment at any one time, and partly base her choice in her next encounter on that observation. Agents develop a tendency to gravitate in the general direction of cooperative agents partly on this observational basis.

When agents cooperate, I assume they are complying with the dictates of the constitutional rule that forms their constitutional environment. They are subjected to the decision rule through the imposition of law, associated adjudication, and legal penalties for violation. Further, since the political and legal system sits atop a system of social-moral rules, agents are complying with moral conventions enforced by social punishment.395

To illustrate, suppose we analyze the stability of constitutional rules protecting political officials from taking bribes. If Congress bans taking bribes, but Congressmen take bribes anyway, a stable constitutional rule will tend to detect and punish non-compliant congressmen. Other Congressmen will pass laws imposing high legal penalties for bribe taking, for instance. And perhaps in private, less corrupt officials will take more corrupt officials to task. In this way, the constitutional rule considerably restricts bribe taking. Defectors are caught and

395 I agree with Rawls that a WOS is best modeled as requiring some coercion but whose stability is driven almost entirely by the voluntary choices of citizens.
punished by means of laws passed by the legislature. In this scenario, citizens interact within the constitutional environment of bribe-punishment. Compliance can be understood as both refusing to take bribes and detecting and morally and legally punishing bribe-takers. The constitutional rule is thus self-stabilizing.

In general, given the importance of assurance and the idea of social trust discussed below, I understand cooperative behavior as *trusting* behavior, where persons comply with expectations set by social conventions within that society. This means that they will not only forgo pursuing gains from defection not merely because they act in public, but because they are independently motivated to cooperate. In the bribe-taking case, most officials refuse to take bribes not merely because they trust that others will not corrupt the system but because they are independently motivated not to take bribes.

We can understand defection, following David Rose, as a kind of *opportunism*.³⁹⁶ Rose defines opportunism as “acting to promote one’s welfare by taking advantage of a trust extended by an individual, group, or society as a whole.”³⁹⁷ This trust is based on the expectation that everyone complies with the publicly justified constitutional rules present in that society. A critical feature of opportunism is that it does not always cause perceptible harm, or even any harm at all. If a society is sufficiently large, small acts of opportunism are not in themselves sources of harm. Returning to the case of taking bribes, taking any particular bribe may do not perceptible harm, but it is opportunistic. With

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³⁹⁶ Rose 2014.
³⁹⁷ Rose 2014, p. 21.
sufficient opportunism, some parties will be harmed, say when the legal system becomes less fair because judges can be convinced to rule in the favor of the bribing party. Officials who take bribes may gradually reduce the will of less corrupt political officials, leading to a breakdown in the moral convention that forbids bribe-taking. We can understand bribe-taking and similar kinds of defection as first-degree opportunism, which involves taking advantage of the imperfect enforceability of contracts by reneging on contracts. In our example, taking a bribe or offering one is a case of first-order opportunism.

X. Implications

For a detailed review of my ABM and an explanation of how the relevant notions of stability are related, please see sections V-X of the supplementary material. Here I simply report my overall results.

My main finding is that durability, balance, and immunity are functionally distinct even though they interact. The agent-based model’s key input values result in distinctive dynamics, the first having to do with the average level of social trust (durability), the second with the variance in social trust (balance), and the last with the capacity of cooperative agents to survive invasion by non-cooperative agents (immunity). I find no strong interaction between durability and balance,

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but I hypothesize that in a more complex model, a relatively unbalanced order will prove less durable than a balanced order. I also find that low levels of immunity quickly undermine a system’s durability, such that high immunity becomes a critically necessary precondition to maintain high level of social trust, to have a durable order with low opportunism. What these results suggest is that an order that is stable for the right reasons must be durable, balanced, and immune for the right reasons.

The ABM has several further implications. First, even setting immunity aside, distinguishing durability and balance reveals that we may not be able to establish stability via a single social mechanism. Consequently, the arguments made on behalf of various assurance mechanisms in a well-ordered society are threatened. For example, some political liberals have argued that complying with the requirements of public reason can help citizens of a well-ordered society assure one another that they are committed to one or a small set of political conceptions of justice. The point of assurance is to generate a political order that is stable for the right reasons. But if the ideal of political stability is deeply ambiguous, it is no longer clear what assurance accomplishes.

Second, the ABM identifies three new lines of research within the public reason project: (i) identifying different assurance mechanisms for different types of stability and (ii) figuring out how socially sensitive reasonable persons must be, or the extent to which we should allow their social sensitivity to vary. (iii) The fact that, under my weak assumptions, a social system can maintain a high degree of
immunity across variable conditions suggests that there may be many transitional paths from a society that is not morally peaceful to one that is. So a non-ideal morally peaceful polity can transition into a more ideal polity so long as cooperative agents can form cooperative networks that allow them to systematically out-produce and replace merely rational (purely utility-maximizing) agents.\textsuperscript{399} Immunity connects ideal and non-ideal theory by helping us understand how a non-ideal order can transition into a morally peaceful order.

XI. Constitutional Durability and Immunity

We've seen that a constitutional rule should be durable, balanced, and immune for the right reasons. However, given our definition of constitutional stability, we can go further and index the different forms of stability to different necessary and sufficient conditions for constitutional stability. To see, this, recall our earlier definition of constitutional stability. A constitutional rule C is morally stable if and only if:

(i) Officials acquire and fulfill their roles regarding C as specified by some $C_x$.

(ii) C’s regular operation produces publicly justified legal conventions (Ls);

(iii) Citizens generally comply with the publicly justified Ls produced by C;

\textsuperscript{399} An underanalyzed assumption in the paper is that agents interacting over time can accumulate resources, building on previous cooperative effort. Thus, immunity might be a function of a growing economy. I hope to explore this effect in a future paper.
(iv) Violations of C and Ls are discouraged by moral and/or legal pressure.

The first condition requires that officials fulfill their roles as specified by C; this typically involves avoiding some violation. All of the Bill of Rights expressly forbids Congress from making certain types of laws. So constitutional rules like the first Ten Amendments to the US constitution requires that officials simply not pass laws that violate the conditions specified by the amendment. The first condition is most naturally the subject of *immunity*. We want to prevent those disposed to defect from constitutional rules from benefitting themselves or their constituents at the expense of the public as a whole. There will be assurance problems among officials, but typically legislative bodies are small enough that the assurance problems that arise in mass society, such as trusting complete strangers, is of lesser importance. Balance, since it is a measure of the variance of durability, is similarly of limited importance.

Condition (ii) requires that the laws produced by C be publicly justified, on the whole. This also implies that a constitutional rule should consistently undermine defeated proposals. If a constitutional rule has high immunity, it will be more effective at producing publicly justified laws. This is because non-compliant officials will tend to pass laws that cannot be publicly justified more often than officials that comply with their constitutional duties. A common example is when legislators abuse budgetary rules by passing rent-seeking legislation, since those hurt by rent-seeking will typically have defeaters for the
legislation. Condition (ii) need not be especially concerned with durability or balance. The rule is destabilized by persistently corrupt or rent-seeking officials, or ideologues who seek to impose defeated legislation on citizens.

Given that most citizens comply with most laws, and that most people are conditional cooperators in most social contexts, immunity becomes less important with respect to the stability of rules amongst the citizenry. So condition (iii), which requires that citizens regularly comply with publicly justified laws, should be more focused on assurance than in preventing defection by generally non-compliant or exploitative citizens. Most citizens will only defect from laws when they find that others aren’t obeying them; the conditions for rational reciprocity break down. So durability is relevant here. Citizens exhibit durability when they tend to comply with the laws imposed by a constitutional rule. Without assurance, citizens will defect from the laws, and as defection accumulates, the constitutional rule, while still on the books, may destabilize and dissolve from social practice and recognition, ending up not unlike the rights contained in the Soviet constitution. Balance is also important, since we want socially trusting agents to be able to maintain a predictably high level of social trust, and to avoid substantial variation in compliance with a rule.

Condition (iv) involves the enforcement of both constitutional rules and the laws they produce. Violations must be punished by formal and informal pressure. When officials violate constitutional rules, they should be subject to punishment, and when citizens violate the law, they should be subject to the same. Punishment
should take the form of both legal and moral punishment when the constitutional or legal conventions are publicly justified, though in many cases, we might restrict punishment to legal mechanisms due to concerns about moral punishment being too informal, erratic, and unfair. All three notions of stability are at play in condition (iv). Immunity is relevant to the punishment of officials, as a system that lacks immunity will experience a breakdown in appropriate punishment, given the presence of defectors and the limited ability to force them to comply. Durability and balance are relevant to citizen compliance, as they too require some forms of punishment if they are to remain at high levels. My model does not include punishment, but it is fair to assume that were punishment possible and reliable, we would find higher levels of durability and immunity.\footnote{Punishment, we know, is a powerful mechanism for enforcing compliance; the problem is that it can stabilize almost any norm, justified or not. Boyd and Richerson 2005 discuss the power of punishment; Gaus 2011 draws on their work in employing punishment as a stability mechanism.}

Given that different notions of stability are relevant to different components of a morally peaceful policy, I suggest that we generalize in the following way. A constitutional rule is stable if and only if it is immune against abuse by political officials and durable and balanced among citizens subject to the rule and the laws it produces.

I have said little in this chapter about the mechanisms that generate immunity, durability, and balance. The reason for this is that I think it takes a lot of work just to show that we can and should distinguish between different concepts of stability. And I think outlining the role of different conceptions of
stability in the third part of my model of constitutional choice is a significant enough advance that details about assurance and compliance mechanisms can wait until future work.

Part II of the book is completed. We have a full model of political public reason that proceeds in three stages: the selection of primary rights, the minimization of the social error function with respect to the choice of constitutional rules, and determining whether these eligible constitutional rules exhibit the requisite degrees of immunity, durability, and balance.

We can now step back and look at the complete model of public justification. A morally peaceful polity, by establishing a publicly justified legal system, helps to complete the order of publicly justified moral conventions, and so helps to realize moral peace between persons. And a publicly justified legal system is established by means of a constitution that is publicly justified according to my three-stage model. *Politics is not war when it proceeds in accord with such a constitution.*

Part III of this book uses the model of constitutional choice in order to defend certain institutional structures, specifically the primary rights of freedom of association and private property, and constitutional decision rules I call process democracy (along with the federal order defended in the supplementary Chapter 9). We will see that my model of public justification can vindicate a liberal social order as capable of establishing moral peace between persons and showing that it
is within the grasp of real human beings to have a politics that is something more than institutionalized aggression, a war between sects.
Chapter 6: Associations

Part III applies the justificatory framework developed in Chapters 4 and 5 to identifying justifying primary rights and constitutional rules. Chapters 6 and 7 focus on identifying two kinds of primary rights—freedom of association and economic liberties. This chapter focuses on freedom of association. In Chapter 4, I briefly defended a right to freedom of association as a right that anyone with a rational plan of life or commitment to justice would want for herself and would be prepared to extend to others on reciprocal terms. But there is much more to say about freedom of association because it plays a special role in shaping both the moral and political orders. The argument from primary rights is merely that a legitimate constitutional order must protect the freedom of association of its members. In this chapter, I show that if we understand associations as organizations of moral conventions, then we must acknowledge that (a) associations are fundamental sources of moral authority, (b) that they have pre-political authority that limits the authority of the state, and (c) that associations play a critical role in creating and sustaining social trust. Respect for freedom of association, then, is a precondition for the legitimacy of any public legal system because it sets the appropriate bounds of state power and establishes moral peace between persons.

Few public reason liberals have focused on publicly justifying freedom of association, as I will in this chapter. The closest attempt is Gaus’s argument for the priority of moral conventions in The Order of Public Reason. There Gaus makes a
powerful argument for the priority of moral conventions, but he did not explore the connection between the priority of the moral order and the right of freedom of association. I think this is because Gaus regards moral conventions as general rules that govern all members of the relevant public, such that violations of those conventions are, in a sense, “everyone’s business.” But associations are characterized by rules that only apply to members, and so do not fit neatly into the Gaussian framework. In response, I will argue that moral violations are not always everyone’s business because some moral conventions restrict the standing of persons to criticize the practices of civic associations to members of those associations. So moral conventions whose violations are everyone’s business establish and legitimate moral conventions whose violations are not everyone’s business.

Once we see that associations are constituted by authoritative moral conventions, we can understand how associations are sources of moral and political authority that place limits on the state. Associations are sources of moral and political authority in virtue of their being publicly justified sets of moral conventions. Associations place limits on the state in virtue of performing important social functions that the political order need not, and indeed often should not, duplicate. As I argued in Chapter 3, legal conventions can only be publicly justified if moral conventions cannot perform key social functions. But given that many associations can perform social functions often left to the political
order, there is no way to justify the displacement of associations by the political order.

A critical part of my case for the centrality of associations in public reason is the idea of the social-moral state of nature, a state of nature with moral conventions but no legal conventions. The associations with the strongest priority are those that can exist in the social-moral state of nature. To make the case for freedom of association, then, I need to review types of associations and the varying degrees to which they merit protection. I focus on three such types—families, civic associations, and commercial organizations. Each of these institutional types will exist in the social-moral state of nature, and each therefore has a special claim to protection from state intervention and other threats to their associational liberty.

I will then argue that publicly justified associations play a critical role in creating and sustaining moral peace because they will be especially effective at sustaining social trust vis-à-vis associations whose conventions cannot be publicly justified. Much of the freedom of association literature, in both philosophy and political science, has focused on arguing that associations have a critical role to play in establishing social trust, and so make liberal democratic institutions work well. This civil society argument holds that “a robust, strong, and vibrant civil society strengthens and enhances liberal democracy.”\(^4\) I contend that associations best strengthens the moral and political orders when their constituent moral conventions are publicly justified.

In the first section of the supplementary material, I address three traditional liberal worries about robust freedom of association. First, I will argue that my account of freedom of association limits concerns about associations forming unacceptable private tyrannies that are beyond state control. This is because moral conventions must be publicly justified and that there is some case for legal intervention into an association when its constituent moral conventions cannot be publicly justified. Second, I will argue that my account of freedom of association does not allow for excessive or harmful discrimination. Third, I claim that my account of freedom of association should not produce many associations that will balkanize civil society into organizations that undermine the well-functioning political institutions. This is true both because moral conventions must meet the test of public justification, but also because publicly justified constituent rules contribute to social trust.

A fourth challenge to my account of associational freedom derives from a common egalitarian liberal criticism of libertarians who claim that people have well-defined, pre-political private property rights that prohibit state interference. The criticism is that property rights are entirely conventional in that they are created and maintained by the state and that these rights could not exist without state-created and state-maintained conventions. A broader version of the objection can be run against the view I defend in this chapter, for associations are also conventional orders, and one might argue that they could not exist in the absence of the state-as-convention-maker. The previous chapters show just how weak this
objection is, since we will see that the objection plainly runs together legislative-conventions with all legal conventions and all legal conventions with all moral conventions. Once we distinguish between these three types of conventions, it becomes obvious that, even though many associations would not and could not exist without norm-creating institutions, many obviously could exist because they obviously did exist without a nation-state. Families are the most obvious case. And larger groups like tribes, churches, firms, and guilds all preceded legislative bodies that fell short of states, not to mention that nation-states of the post-Westphalian period. I address this concern in section II of the supplementary material.

In the supplementary material, in section III, we will also see our way towards a reconciliation between two distinct strands in liberal political thought which Jacob Levy calls “rationalist” liberalism and “pluralist” liberalism:

On one side of this divide lies a liberalism I will call “pluralist”; skeptical of the central state and friendly toward local, customary, voluntary, or intermediate bodies, communities, and associations. On the other we see a liberalism I will call “rationalist”: committed to intellectual progress, universalism, and equality before a unified law, opposed to arbitrary and irrational distinctions and inequalities, and determined to disrupt local tyrannies in religious and ethnic groups, closed associations, families, plantations, and the feudal countryside, and so on.402

402 Levy 2015, p. 2.
Social contract liberalisms, as Levy understands them, are rationalist liberalisms, and the critics of social contract theory are often pluralist liberals. Levy is right to characterize many of the great social contract theories as rationalist. But the place of civic associations in my own account of public reason is so expansive that readers will likely criticize my position for being insufficiently responsive to rationalist concerns, despite my protestations to the contrary. So we will have what I believe is a form of theory that Levy does not countenance: pluralist contractarianism. Pluralist contractarianism accepts the liberal pluralist thesis that there are multiple, in many ways competing sources of political legitimacy beyond the state and that these institutions may be stuck in some respects in constant tension with one another, while nonetheless insisting that the authority of institutions is judged at the tribunal of the reason of each person.\footnote{403} It also insists that social and legal order “can emerge and survive pluralistically, whether as the internal norms of such groups or as norms that regulate relations among them” and judges those structures to be “normatively attractive.”\footnote{404} I believe this is a genuinely new form of contractarianism.

I explain these ideas across seven sections, along with three sections in the supplementary material. Section I explains why moral violations are not everyone’s business and how some moral conventions restrict the standing of persons to enforce moral conventions. This insight opens the door to placing associations at the heart of public reason. Section II outlines the idea of a social-moral institution,
a complex of formal and informal moral conventions aimed at uniting a group of persons around some project or common goal. Sections III-V identify three types of social-moral institutions—families, civic associations like churches, and commercial organizations like firms and unions. Section VI explains the way in which the moral conventions comprising these institutions are sources of legitimacy and how they restrain state power. Section VII explains how publicly justified social-moral institutions add to social trust and so to moral peace. Section VIII transitions into the next chapter.

I. Moral Conventions and Standing

Gaus has correctly argued that moral conventions are backed by and enforced with (in part) the moral emotions of resentment and indignation. These go beyond anger, since “one who holds them insists that others take certain appropriate” actions.405 If John resents Reba for harming him, he must also insist that she stop harming him and/or compensate him for the harm. Gaus is right that it would be “puzzling” for John to both resent Reba and not think that she should stop. For Gaus, the moral practice that is generated by resentment and indignation is one where we not only care about what others do, but “hold ourselves to have standing to insist on actions on their part.”406 Following Kurt Baier, Gaus argues that moral violations where reactive attitudes are relevant are ones where we think it is “[our]
business” because we “have standing to insist on performance and standing to hold the violator responsible for what she has done.” Baier was a bit more modest, since he argued that moral violations cannot be entirely the business of the person who engaged in the moral violation: “whether a person conforms to the mores and laws of the group is not entirely his own business.”

In general, the Baier-Gaus idea is that moral conventions are public entities that are created, enforced, and maintained by the community, such that moral violations license indignation among those who observe an infraction of the convention, and resentment from those who were harmed or insulted by the infraction. But there are many thousands of moral conventions that not everyone has standing to enforce. In the Catholic Church, for instance, only some people have standing to insist that a member confess her sins or obey the directives of the church hierarchy. If an atheist insists that her Catholic friend go to confession, even when the Catholic friend herself acknowledges that she should go to confession, the atheist nonetheless lacks standing to insist on compliance with the Catholic moral convention of confessing sin. In this case, the Catholic friend is liable to think that the atheist has violated a moral convention of minding her own business because she is not a member of the group.

To recognize the fact of restricted standing, we do not have to deny that all moral conventions are subject to the scrutiny of public justification. Instead, we need only argue that some publicly justified moral conventions deny standing to

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408 Baier 1958, pp. xviii-xix.
non-group members to hold members of the group to the norms and practices of that group. So there may be a publicly justified moral convention that deprives non-members of standing to influence or direct the decisions and practices of a group. Consequently, we feel appropriate resentment and indignation at the non-member who sticks her nose in the business of a group. Within the group, members of the organization are governed by moral conventions that function for them much as generic moral conventions function for members of a given public. To put it another way, all moral conventions are publicly justified or not with respect to some public, and some moral conventions have more limited publics than others.

Conventions can be relative to all sorts of groups, from generic groups like races and genders, to self-consciously organized religious organizations like the Latter-Day Saints or the AFLCIO. In this chapter, I am focused specifically on associations, groups that have an expressly recognized set of goals and rules for admitting, removing, and governing members. Once we grasp the nature of what I shall call social-moral institutions, we can see how the priority of social morality commits the public reason liberal to respecting the integrity of those institutions by prohibiting the law from interfering in their internal organization, save in cases where some rule defeated for association members can be better altered or reformed by legal institutions than the group can do for themselves.

II. Social-Moral Institutions
A social-moral institution is a local unity of moral conventions (and other conventions) organized to promote a common end or a commitment shared among its members; in this I follow Lon Fuller’s first principle of associations. Of course, all institutions are comprised of some non-moral conventions, such as conventions governing etiquette, decorum, aesthetics, and the like. But an institution’s constitutive moral conventions are those that mark it out as an institution, since moral conventions specify conditions of membership, decision-making rights, and so on that, if violated, generate the reactive attitudes in its members, and perhaps even among non-members who recognize that a member has violated a moral convention of the institution that would be inappropriate or wrong in other, more public contexts.

The second feature of social-moral institutions is the inclusion of a “legal principle,” which “refers to the situation where an association is held together and enabled to function by formal rules of duty and entitlement.” Most social-moral institutions have express, formal rules of operation, but others are simpler, like families, whose moral rules are more tacit and unarticulated. But generally, speaking, social-moral institutions have mechanisms for their own preservation and these mechanisms typically involve the articulation and enforcement of internal rules.

Fuller contends that while all associations have both shared commitment and a legal principle, the two properties “stand in a relation of polarity—they fight

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409 Fuller 1969, p. 6.
410 Fuller 1969.
and reinforce each other at the same time.\textsuperscript{41}\footnote{Fuller 1969, p. 8.} So associations have legal principles that facilitate its shared commitments, but in some cases its legal procedures may frustrate its shared commitment. Similarly, the shared commitments of associations might undermine the proper functioning of its internal procedures, just as it might sustain those procedures in operation. Fuller contends that as associations grow larger, the legal principle tends to dominate; and as the associations shrink, the shared commitment tends to dominate.

Despite the tension created by shared commitment and legal principle, a third critical feature of social-moral institutions is that the moral conventions that comprise them be broadly coherent with one another. If an institution’s core moral conventions contradict one another, at least in some obvious and direct fashion, then the institution has structural weakness. It will be subject to deep conflict that could potentially lead to the dissolution of the institution, or at least severely hamper its mission. So while moral conventions need not always be consistent within an institution, they should be generally consistent and the institution should employ procedures, explicit and deliberative, or implicit and evolutionary, for resolving those conflicts. The criterion for resolving these conflicts is the shared commitment that members pursue. Members typically expect constituent conventions to be harmonized in ways that further the mission, goal, or the good of members of the institution. This does not mean that they will always be so harmonized, but rather that there is a built-in normative expectation that
decision-makers will resolve these conflicts in ways that help rather than hinder the institution.

To illustrate, consider a specific example—the functioning of a Lutheran church. The aim of a Lutheran church is a ministry of Word and Sacrament. Members of the church, led by the pastor and associate pastors, share both the promise of God’s saving grace through the teaching and preaching of Scripture and the promise of grace found in baptism, the Lord’s supper, and other rites like confirmation and confession. Those are the shared Lutheran commitments that sustain Lutheran churches as organizations.

Lutheran churches also have constitutional structures meant to realize these aims, which form their legal principles. Many of these rules specify the ordinary decision-making rules within the church that empower pastors and elders to manage the church’s membership, services, finances, charities, and so on. Rules are constrained further by the national and regional leadership bodies. Some of these rules are merely procedural, but all have a thoroughly social-moral content. Rule violations are met with the reactive attitudes, though these are typically defused through repentance and forgiveness. The decision-making process is similarly moralized. While Lutherans preach the priesthood of the believer, we find it prudent to set pastors and bishops over us through a call from God and a

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412 Though Lutherans officially only use the word “sacrament” to describe baptism and the Lord’s Supper, they effectively affirm other sacraments as well, understood as material means of conferring God’s grace.
congregation. We empower the pastor to make decisions for us, such that resisting the pastor’s decisions is a source of reactive attitudes.

These moral conventions are widely regarded as justified to all members, though we seldom miss an opportunity to disagree about them. We disagree about worships styles (traditional or contemporary?), adherence to Lutheran tradition (confessional or no?), and social issues surrounding the role of women in the church. So there are lively disputes about the rules, both their authority and their content. Nonetheless, through voluntarily membership and confirmation for new members, the decisions we make are publicly justified to members of the church.

Notice how the moral conventions constituting Lutheran churches establish who has standing to enforce, revise, create, or abolish moral conventions. Church leadership has the authority to alter the moral conventions of the church, but church leadership is chosen through democratic voting by Lutheran parishioners. So members have standing to hold the leadership to account, and in some cases, only leaders have the authority to perform certain functions, like ordination. In contrast, non-members have no standing to hold violators of moral conventions within the church to account. They are not even licensed to have the reactive attitudes about most violations. Violations simply are not their business. Lutherans would (rightly) express indignation against a non-Christian, or perhaps even a non-Lutheran, who tried to hold their fellow parishioners to account for these moral violations or who even thought it his or her business to care. Members of other organizations frequently feel similarly.
If we imagine that moral conventions can combine into bundles, there is a certain sense in which the larger, structural, or architectonic rules, the rules that institutions share with one another, are everyone’s business. If the church violated other moral conventions, ones that we all must follow, then that would be everyone’s business. If a Lutheran Church, for instance, spread rumors about the behavior of other churches in the area, people in the area would have license to hold the reactive attitudes. But so long as the moral violations are violations of moral conventions held primarily by members of the church, others lack standing to criticize and even to appropriately experience the moral emotions of resentment and indignation. And this is all to the good. We should not want moral violations to be everyone’s business, as any member of the broader public would have license to impose the costs of moral conventions upon us. Satisfying the public would be an enormous potential burden. By allowing that some moral conventions are somewhat private, we protect the formation of these ever so useful and beneficial institutions.

We know from Chapter 2 that moral conventions, when publicly justified, establish moral peace between persons. We can now see that one of the primary methods of establishing moral peace is via membership in social-moral institutions. Through voluntary agreement, persons take on and are prepared to internalize and comply with a wide variety of moral conventions. And their ability to live out their lives within their own institutions helps them to create a space to pursue ends that are not shared with others. Social-moral institutions function as
jurisdictions where decision-making is made in a decentralized rather than a collective fashion on matters where agreement cannot be secured.

Emphasizing the notion of local unities that bind persons together also better reflects the deeply social nature of the human person. We are partly constituted by the moral conventions that suffuse our lives, and especially by the nests of rules we known as social-moral institutions. This point is critical in a chapter about associations, since contractarian views are often unfairly and forcibly wedded to excessively individualistic assumptions about how it understands the nature of the person. By placing social-moral institutions at the heart of public reason, we can see the social nature of the person at work in the theory.

III. Varieties of Social-Moral Institutions – Families

I would now like to distinguish three generic types of social-moral institutions: families, civic associations, and commercial organizations. Each of these types meet the definition of a social-moral institution as a more or less coherent body of moral conventions organized around a common end or purpose.

Families are the least formalized social-moral institution, and so are much closer to the shared commitment pole of Fuller’s distinction. “The family” does not have a constitution or bylaws, but is rather comprised of a host of informal norms that evolve without explicit specification or codification. The shared commitment
of the family is the good of its members, intimacy between partners, and, in many cases, the rearing of children. People disagree about how to balance these different goals, but all agree that families are particularly well-suited to promote these enormous social goods. Families give people sources of intense love, belonging, and meaning. Bonds are formed between people that are so intimate that they shape our behavior throughout our lives.

The rules that comprise families vary, but they have some common threads. Spouses are supposed to be kind to one another and to be loving in at least some general sense. Spouses are expected to be loyal and not to abandon one another for other persons or when the spousal relationship, typically a marriage, comes under stress. Spouses are expected to care for children if the couple chooses to reproduce and to raise the children to be competent, healthy adults who embody the values of the culture of which that family is a part.

Beyond this, almost everything else is up for dispute. Different cultures assign different roles to men and women. Sometimes the relations are egalitarian, though historically they have almost always been patriarchal. Children are to obey parents in general, but the extent fluctuates considerably. Sometimes children are not to speak unless spoken to and they are sometimes allowed to speak freely. Parents value children to different degrees. Some, if not most, are prepared to die to protect their children, but in some cases children can be sacrificed for important social goals, such as the preservation of the rest of the family. The terms

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\[413\] For a documentation of the variability of martial norms, see Abbott 2011.
of separation and divorce also vary dramatically. And over the last fifty years, norms restricting interracial and homosexual marriage have broken down across the developed world.

We also expect that these disputes have an answer that can be reached over time. This is because the constituent moral conventions of families are supposed to facilitate the good of the family as a whole, which is sometimes understood as including the individual good, but in other cases the individual good is wholly sublimated to the collective good. So while we disagree about the relationship between the individual good and the collective good, and we disagree about what is good for the family, the good of the family is the touchstone of resolving disputes about the moral conventions governing the family. Nearly all debates about the moral conventions governing families are disputes about whether certain kinds of practices and relationships preserve the happiness of the family or whether they are healthy or appropriate.

Importantly, however, families are bulwarks of privacy. Families expect a great degree of privacy with respect to their inner-workings. People outside of the family lack the standing to interfere save in the most dire and threatening circumstances. Sometimes this includes domestic violence, but often not, and sometimes this includes infidelity, but sometimes not. So while it is true that people consider the generic rules that govern the family to be everyone's business, this does not compromise the privacy of families.
Unlike many social-moral institutions, everyone agrees that families are of critical importance and that some set of moral conventions governing family life can be publicly justified. Many people think that society can do without religious institutions, and some even without profit-seeking institutions, but almost no one thinks that families should cease to exist. So the existence of the family is almost universally affirmed, as well as its general telos of promoting the good of its members.

A final point. It is obvious that families as such predate the state, so they will exist in a social-moral state of nature. Families are the oldest human organization by a hundred thousand years, so we cannot say that families are a special creation of the legislative power of the modern nation-state. The family is a conventional order, but it is a creation of moral conventions and biological imperatives, not necessarily formal law, and certainly not the creation of modern legislation. Yes, legislation shapes the family today, sometimes for the better, but the institution of the family outlasts all others. In this way, the social organization of the family precedes and restricts the scope of all other systems of moral conventions. Moral conventions that threaten to undermine families and their social functions, or to replace them, cannot be publicly justified. The only formal interference into families that can be justified are ones required to help families realize their own ends or to protect some family members from others that cannot be protected without the law.
IV. Civic Associations

The second type of social-moral institution is the civic association not based on familial bonds. These civic associations are extraordinarily diverse: religious organizations, sports teams, universities, and colleges, charitable organizations and service clubs, hospitals, media organizations, and neighborhood associations, or “any kind of formalized, non-governmental, human interaction.”

The great British pluralist G. D. H. Cole defines associations as,

... any group of persons pursuing a common purpose or aggregation of purposes by a course of cooperative action extending beyond a single act, and, for this purpose, agreeing together upon certain methods and procedures and laying down, in however rudimentary a form, rules for common action.

So, like Fuller, Cole finds in associations two principles of organization – shared commitment and legal principle. But in the case of civic associations, the legal principle is much more developed than it is within the family. So civic associations typically have explicit shared commitments or aims. Christian churches aim to produce and disciple Christians, to provide the forgiveness of sins, and the path to

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415 Cole 1920, p. 37.
eternal life. A university aspires to educate persons for professions and, in some cases, for citizenship.

Also unlike families, membership in civic associations is typically voluntary, as even associations who assign membership by birth typically allow adult members to exit the group. This does not mean that members can always choose the rules of the association, though this too is sometimes the case.

Civic associations are distinguished from commercial organizations because they are typically non-profit organizations. That is, while civic associations seek economic resources and attempt to benefit their members economically, they seldom recognize as an explicit aim the sale of goods and services in order to make a profit. In fact, in many cases civic associations strongly prohibit all profit-seeking activity in its name or by its officials. Simony laws, the prohibition on the sale of ecclesiastical offices and privileges, are recognized and enforced by basically all religious institutions.

Like families, the rules that constitute civic associations are often considered matters of public dispute. However, unlike families, not everyone is part of a civic association. Accordingly, the standing to criticize these organizations for their generic operating principles is largely restricted to members. For example, not everyone has a stake in the internal behavior of the Catholic Church, so non-Catholics typically lack standing to criticize matters of internal church decision. We all have an opinion about how parents should treat their kids, and we all have standing to speak out about it, but most people lack
that standing with respect to whether the Catholic church should ordain female priests or allow divorce in more circumstances than it does now.

While families long predate all other social-moral institutions, most civic associations are new, historically speaking. While tribes are important social-moral institutions, they share enough features with political institutions that they are not true civic associations. Furthermore, civic associations as an idea are much newer than the institutions themselves. This is because associations are now typically thought of as institutions that constitute “civil society” or an arena “within which voluntary associative relations are dominant.” The idea of civil society gradually arose starting in the 17th century as a contrast to both the nation-state and the growing commercial order. Since then, a literature has arisen within political theory that focuses on characterizing the relationship between civil society and the state, and a variety of relations have been described, such as the idea of civil society “apart from” the state, “against” the state, “in support of” the state, and “beyond” the state. But for most of human history, social institutions could not be divided into these neat categories because the functions of government were spread across these institutions. Churches had coercively enforced legal systems, for instance, such that the medieval Catholic Church was no mere religious organization.

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Despite our modern understanding of civil society and civic associations, there is still good reason to think that many civic associations would be formed and preserved in the social-moral state of nature. People would still form churches, schools, hospitals, and professional organizations. The institutions would be less stable and effective, and could not benefit from many of the legal conventions protected and established by governments. But they still are fundamental to social order in a way that modern nation-states are not. In this way, civic associations also constrain the reach of state power. If civic associations and families can perform various important social functions adequately and in ways that can be publicly justified to its members alone, then the state should not interfere unless the organization imposes some harm or restriction on non-members. It is for this reason that the state has no role in determining the curriculum of universities, but does have a role in regulating how universities handle cases of sexual assault. In the former, the state has no particular expertise over the university and the harms of poor curriculum are modest. But in handling cases of sexual assault, universities are poorly equipped vis-à-vis states and seek to preserve their interests more than states do in these specific sorts of cases. Further, the costs of getting incorrect judgments are enormous. So the latitude afforded to civic associations is by no means absolute, though it is hard to override.
V. Commercial Organizations

We turn now to the most controversial and contested of our three types of social-moral institutions—for-profit institutions like the firm, and associations associated with ensuring a certain distribution of profit, like unions and professional bodies. Their common goal is typically to maximize the economic resources of their members, or at least some of their members. The shared moral conventions of these institutions are regulated by the pursuit of profit, understood as financial gain. Seana Shiffrin identifies two main distinctions between commercial associations from others: (1) commercial organizations are centrally concerned with “access to material resources and mechanisms of power,” and commercial associations (2) “have a fairly focused singular purpose whose pursuit is largely guided by [the] aim of profitable operation.”

James Nelson argues similarly that within what he calls “organizations” people “do not integrate collective goals and values with the core aspects of their identities, and they perform their tasks largely motivated by explicit or implicit threats of coercion or offers of inducements.” Civic associations resemble his description of “collective communities” which are “constructed out of a cluster od identification relationships” where “individual members view their affiliation with the collective as a central aspect of their identities.” So in general commercial organizations are distinguished by their pursuit of material gain and the lack of collective community among their

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419 Shiffrin 2005, p. 877.
members. This is not always true, of course, as a small business owner might deeply identify with her cause, or members of a union could value their membership to realize their political ideology. But the paradigm commercial organizations are importantly different from civic associations. In Fuller's terms, they manifest the legal principle but have weak shared commitments.

It is generally harder to make a case against coercive interference with commercial organizations than civic associations. But the reasons are complex. While some commercial organizations will exist in the social-moral state of nature, they will tend to be small businesses or sole proprietors like farmers, craftsmen, lawyers, and doctors. These professions and economic activities are sufficiently essential to human society that we can expect them to exist in the absence of a public legal system. But large commercial organizations depend extensively on legal conventions that would not exist without norm-creating institutions that go beyond custom and moral convention. For example, large commercial organizations depend on complex credit-based relations and financial instruments that depend entirely on legal conventions for their existence. So commercial organizations are more conventional, and much more dependent on legal conventions, than families and civic associations are. Social morality lacks priority here, then, because there will simply be no stable moral conventions that would allow these firms to operate over long periods of time. For this reason, the moral barriers against legal interference are substantially reduced.

Lawyers would therefore be concerned with resolving legal disputes among private parties according to associational, private law.
Another reason commercial organizations will have fewer protections is because progressive and egalitarian members of the public sharply distinguish between civic associations and commercial organizations because of the way they understand the relationship between economic and political power. As Shiffrin notes, commercial organizations are especially connected to mechanisms of power and are generally not conducive to the “free, sincere, uninhibited, and undirected social interaction and consideration of ideas and ways of life” because they are hierarchical and financially focused. This attitude reflects a general sentiment on the left that economic organizations are sources of political power, much like governments. Warren has argued that we should avoid contrasting civil society with the state because it “ignores non-state power relations, ignores economic and social power effects, and ignores entanglement between state and association.” Many progressives and egalitarians claim that we make the same mistake by sharply contrasting the state and the market.

Nelson argues that the motives used by businesses involve threats and material incentives that make their activities subject to more rigorous scrutiny. Since commercial organizations are typically led and controlled by bosses and recognize that workers depend upon jobs to survive and not just to enrich their identities (like churches), they can exercise more ostracism and control. Nelson also argues that civic associations can often be said to have a “conscience” in ways

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422 Shiffrin 2005, p. 877.
that businesses frequently do not, given their different aims. 425 “For-profit businesses are not generally bound up with deep ties of identity and attachment” whereas nonprofit organizations tend to be “more hospitable to individual identification” such that associational claims should be stronger in the latter case than the former. 426

For all these reasons, then, public reason liberalism provides fewer protections for commercial organizations than civic associations. Social morality poses less of a barrier and the reasons to support interference are generally stronger. But that does not mean that the legal order may do what it wants. As mentioned above, there are some firms, especially closely-held firms and many small business whose practices and aims are much closer to civic associations and families. Small businesses come to mind, but so do large for-profit closely held firms like Hobby Lobby. 427 These businesses, then, are entitled to more protection because their operation is more tightly tied to the conscience and life projects of their owners and operators. I make the same claim on behalf of many trade unions. The mere fact that a group pursues profit is not enough to undermine its protections against state predation and control. My argument, then, is that protection is weakest for publicly traded firms, since there is a weak case that such organizations have anything like a conscience, even if members exhibit some sense of social responsibility. This is because the leadership, operation, and ownership of

426 Nelson 2015, p. 511.
427 Like John Tomasi’s example of Amy’s-Pup-in-the-Tube. Tomasi 2012, p. 66.
the firm is open to the public for a price. Ownership can easily change hands, and different people can own the firm tomorrow than owned it today.

Unions and professional organizations are harder cases.\textsuperscript{428} They are not exactly for-profit organizations, even though they attempt to increase the income of their members and engage in quality control. We are typically less friendly to interventions into these organizations, which I suspect is because these groups are seen as engaging in primarily defensive activities or have dominant non-financial motives. Unions are seen as protecting their members from the greater economic power of employers, whereas professional organizations like the American Medical Association are seen as motivated by concern for patients rather than their own bottom line.\textsuperscript{429} This is not always true, however, and to the extent it is false, to that extent these institutions may be liable to legal interference.

Another reason for providing unions and professional organizations with strong protections is that many are extremely old and have survived in premodern conditions, such as doctors’ organizations and masonic guilds. So unlike large, publicly traded commercial organizations, we can expect these commercial organizations to exist in the social-moral state of nature. That means that public reason probably supports broad protections for freedom of association for these groups. Focusing on unions, I argue that public reason liberalism implies protections for workers to unionize in whatever industry they like in whatever way they like so long as the contractual relations established do not impose direct, or

\textsuperscript{428} For some plausible arguments in favor of liberal protections for trade unions, see White 1998.
\textsuperscript{429} This is not terribly plausible for the AMA. See Blevins 1995.
predictable and indirect, harms on third parties. It is possible that some firms will prod workers into signing contracts where they give up their right to unionize. But state enforcement of these contracts might not be publicly justified, especially if the contracts are signed under duress. That said, unions have no right to use state power or their own social power to destroy competitor associations. If a group of doctors wants to start an alternative to the American Medical Association, their right to freedom of association protects them from legal retaliation by the state of the AMA. And unions have no right to coercive protections from competition by firms within the same nation, and only slightly more of a right to protection from firms outside of the nation in question.

I have ignored political organizations—groups dedicated to changing the behavior of government and the use of state coercion. This is because I am focused on institutions that could exist within the social-moral state of nature. In the social-moral state of nature, there is little reason to think these political organizations would exist, since there would be no point in having them. But the mere fact that the institutions would not exist in the social-moral state of nature does not mean they merit no protections.

VI. The Priority of Social-Moral Institutions
In *The Order of Public Reason*, Gaus argues that social morality has priority over political processes—law is *not* the preeminent response to moral disagreement.\(^{430}\)

In my terms, the law is not the only way in which we can solve problems that arise in the social-moral state of nature, since we can appeal to our capacity to create, sustain, and alter moral conventions. Law has various advantages, as noted in Chapter 3, but if you believe that moral conventions comprising your society are publicly justified, then political procedures should be limited, if for no other reason than that the coercion might force us outside of the eligible set of moral conventions. If we are coordinating around a convention in the optimal eligible set, “we should be most reluctant to modify it through the political process.”\(^{431}\) I understand the priority of moral conventions similarly. If our moral conventions are publicly justified, then the presumption against coercion cannot be overridden by any but the few political procedures that could reliably improve upon the process of moral convention-formation. These procedures count as improvements, but they do so in different ways. For instance, a procedure might keep us within the optimal eligible set of moral conventions or help us to reach an alternative convention within the set that the social error function identifies as superior. So when moral conventions can solve the various social problems humans face under normal social conditions, political institutions are prohibited from using coercion to interfere with those conditions.

\(^{430}\) Gaus 2011, p. 456.

\(^{431}\) Gaus 2011, p. 460.
But my account of the priority of social morality is stronger than Gaus’s because I am establishing the priority of social-moral institutions. The social-moral state of nature contains many of these institutions, in particular families, civic associations, and some commercial organizations. If these institutions can, through their ongoing operation and internal procedures, perform the necessary social functions, these institutions must be granted autonomy to act as the state would in their place. If families can handle the discipline of children better than government, or even nearly as well, families should have the freedom to do so. If civic associations can better organize charitable activities for impoverished members of society, the state should not redistribute wealth that would crowd out their efforts. If markets succeed in generally producing adequate levels of food, the government should avoid interfering in ways that would undermine that capacity.

Social-moral institutions often contain formal legal systems, especially larger organizations like universities and churches. This means that these institutions will have many of the same capacities as formal political institutions. Thus, they have legal authority over members that can promote the primary functions of the law as I understand them in Chapter 3. They can (1) discourage the violation of moral conventions; (2) facilitate private arrangements; (3) settle unregulated disputes, and; (4) deliver goods and services. Religious organizations have frequently performed all of these functions. They place effective restraints on members, contain their own dispute resolution system, and so on. It is true that these organizations typically provide these services only to members, though
religious institutions often serve needy and destitute non-members. So if their provision is inadequate, there is a role for political institutions in providing these goods and services on equitable terms to non-members. So in general, the state should defer to civil society since moral conventions have priority over legal conventions.\footnote{We do not here embrace a sharply “bipolar” model between civil society and the state, just that associations can perform functions that political orders can perform.} The coercion involved in imposing most laws on persons cannot be publicly justified if social-moral institutions are already providing these services adequately.

So I agree with Gaus that moral conventions have priority, but when we see that these moral conventions can be organized into social-moral institutions, the implications of the priority of social morality are more hostile to state intervention. This is part of the explanation of the “classical liberal” tilt of public reason that I will discuss in Chapter 7. Civil society has priority, such that groups have a strong right of freedom of association against the state. In this way, my view somewhat resembles Paul Hirst’s account of “associationalism” which holds that “the organization of social affairs should as far as possible be transferred from the state to voluntary and democratically self-governing associations,” though the associations need not be democratic, just publicly justified to their members.\footnote{Hirst 1997, p. 32.} Though I resist Hirst’s insistence “on recruiting associations as partners in governance,” because, as Victor Muñiz-Fraticelli has argued, we miss the “distinct
and perhaps oppositional nature” of associations.\textsuperscript{434} As Chandran Kukathas notes, freedom of association is grounded in the freedom of personal conscience and the toleration of associational difference.\textsuperscript{435} The freedom of association is in this way one of the fundamental principles that characterize a free order of public reason. It is not grounded in political authority, but rather directly in the value of moral peace between persons and the associated idea of public justification.

VII. Moral Peace, Social Trust, and Social-Moral Institutions

Another consideration that counts in favor of freedom of association is that associations are widely thought to contribute to social trust in social institutions generally. Robert Putnam has famously argued that “an effective norm of generalized reciprocity is bolstered by dense networks of social exchange” like civic associations.\textsuperscript{436} The back and forth of favors and service to one another help to “foster sturdy norms of generalized reciprocity and encourage the emergence of social trust.”\textsuperscript{437} Warren argues that associational life can produce trust, and that the forms of trust produced by reciprocity within associations can produce the sort of trust that helps sustain political institutions.\textsuperscript{438} Nancy Rosenblum argues that “the chief and constant contribution of associations to moral development is cultivating the disposition to cooperate,” even though these contributions are not

\textsuperscript{434} Muñiz-Fraticelli 2014, p. 92.  
\textsuperscript{435} Kukathas 2007, pp. 4, 15, 39.  
\textsuperscript{436} Putnam 2001, p. 136.  
\textsuperscript{437} Putnam 1995, p. 67.  
\textsuperscript{438} Warren 2001, p. 74.
guaranteed. \textsuperscript{439} Pamela Paxton has found that “membership in connected associations” ones that do not isolate themselves from society but are open to membership in other groups, increases trust such that, “at the national level, having more connected voluntary associations increases trust.”\textsuperscript{440} A survey of over thirty countries found that “at the individual level, membership in any voluntary association is a strong predictor of generalized trust.”\textsuperscript{441}

In this way, a society that protects freedom of association can foster social trust by creating social situations in which people learn to engage in reciprocal interaction with others. While there is no guarantee that the skills acquired in the associational context will transfer to other social contexts, there is good evidence for the claim that social trust is increased by associational life. It is therefore likely that a society with a vibrant associational life protected from excessive state intervention will have more social trust than societies without those protections.

Associational life can improve \textit{moral peace} between persons if the social trust it generates is rationally scrutable, and so publicly justified. And there is some reason to believe that this is the case, as voluntary membership of associations suggests that people have sufficient reason of their own to comply with the dictates and practices of the association. So we can expect compliance with the publicly justified moral conventions that constitute the association. Further, if people learn to engage in reciprocal behavior, they are more likely to

\textsuperscript{439} Rosenblum 1998, p. 59. For caution about how much these skills generalize, see p. 47.
\textsuperscript{440} Paxton 2007, p. 47.
\textsuperscript{441} Paxton 2007, p. 65.
comply with moral conventions than otherwise because they are prepared to regulate their behavior in accord with their sense of fairness, and not just their interests, which helps to maintain any moral convention in existence. So publicly justified social-moral institutions not only increase social trust in virtue of their stable, continued existence, but by training persons in the art of reciprocal behavior, which helps to sustain moral conventions that persons regard as fair and appropriate. There is a worry that a strong sense of reciprocity would lead some to comply with moral conventions that are not publicly justified, but I think we can expect that the establishment and maintenance of justified conventions will outweigh these effects due to the motivational force of intelligible reasons.

I address four objections to my account of association in the supplement to Chapter 6.

VIII. Associations and Economies

Once we modify the Gaus-Baier view that all moral violations are everyone’s business, we can see a range of new moral rules that lay the foundation for publicly justified social-moral institutions, which include families, civic associations, and commercial enterprises. I have argued that this factor strengthens the right to freedom of association already present as a primary right. The presumption against coercion combined with the social recognition of the centrality of social-moral institutions other than the state implies that these institutions place limits on the
state when associations can perform their functions well. The state may only intervene where it is plainly and obviously needed, and not when voluntary associations and families can adequately perform the relevant social functions. This means that public reason liberals must reconceive of the place of the state within public reason liberalism. It is no longer the primary subject of public justification, but rather only a piece of the broader moral order. Further, once we recognize the non-legislative and non-statist sources of social order, we can see that state power is limited by the demands of public justification. So there is a robust primary right of association.

In the supplementary material, I argue that my account of association can also resolve four objections—tyranny, discrimination, balkanization, and conventionalism. Many problematic tyrannical and discriminatory norms are defeated for a diverse, moderately idealized public, and associational power can be limited when it undermines moral peace between persons. And when we recognize that conventions come in moral, legal, and legislative types, we acknowledge a role for conventions in limiting the right of association while insisting that these conventional orders are rarely merely legislative in nature.

Now I turn to focus on controversial questions that concern the status of economic liberties and the appropriate role of government on economic matters. These are hard issues because commercial property rights are more intrusive and controversial than other liberal rights, so we must grapple with a wide range of reasonable views on the matter.
Chapter 7: Property and Economy

We have seen in the previous chapter, and in Chapter 4, that citizens have pre-political property rights and the right to form commercial associations for the pursuit of profit. The social-moral state of nature will contain commercial institutions, such that the presence of the relevant moral conventions crowds out the public justification of coercive laws that would interfere with at least some of the characteristic operations of various commercial enterprises. Further, families and civic associations have rather extensive property rights, given their inward focus, organizational integrity, and lack of direct effect on outsiders.

But questions about the proper extent of private property rights and the role of the government in the economy have gone unanswered thus far. I have allowed for the public justification of states and state intervention into the economy. I have not explained how to distinguish between licit and illicit interventions. The point of this chapter is to do just that. I shall argue that public reason liberalism is not egalitarian in that it does not embrace an extensive state devoted to equalizing holdings of property, income, and wealth, nor does it advocate an extensive regulatory apparatus. The more radically left-wing proposals advanced by Rawls and Rawlsians – property-owning democracy and liberal socialism – cannot be publicly justified to a diverse public. However, a fully libertarian regime that protects extensive private property rights cannot be publicly justified either. Reasonable non-libertarian members of the public will have defeaters for a fully libertarian regime. The question that remains is how to
determine which, if any, property regime is eligible for all moderately idealized members of the public. On my view, we land somewhere between what Rawls called the system of natural liberty and welfare-state capitalism.\textsuperscript{442} I will argue that a principle of social insurance is publicly justified and so requires that we move away from pure capitalism. The additional institutions of heavy state regulation and redistributive taxation aimed at equalizing holdings cannot be publicly justified. However, we must still extend political power beyond the mere protection of a market order and a social minimum because many reasonable people fear that negative externalities and inequalities of wealth and income are sufficient risks to freedom and equality. Consequently, they have defeaters for extensive property rights in productive resources that would otherwise prohibit redistribution and regulation.

The argument of the chapter begins with a review of the idea of public justification and an explanation of how, in principle, it resolves disputes about economic policy and economic rights. I then explain why we must back away from political libertarianism, or a purely capitalistic regime. I next explain how the dramatic economic growth over the last 150 years in Western nations places a presumption in favor of the market economy when combined with the principle of sustainable improvements. These matters are covered in Sections I-III. I then proceed through a series of assessments of government intervention into the economic institutions present in the social-moral order, from a principle of social

\textsuperscript{442} Rawls 1971, p. 57.
insurance, to regulation and policy, redistribution in the name of democratic equality, and the further interventions involved in property-owning democracy and liberal socialism. These issues are discussed in sections IV-IX. I expand upon my case against the public justifiability of property-owning democracy in three sections in this chapter's supplement. I end the chapter with a characterization of my economic approach that I call neoclassical liberal public reason.

I. Public Reason and Economic Liberties

Recall that moral conventions are merely the first of three stages of layered justifications of conventions, with the justification of legal conventions and legislative conventions coming second and third. This led, in Chapter 3, to the development of a legal justification principle:

*Legal Justification Principle*: a legal convention L is publicly justified only if each member of the public P has sufficient intelligible reason I to internalize L because each P rationally recognizes that compliance with L improves upon her capacity to comply with M(s).

So laws require public justification, and the justification proceeds partly in terms of the capacity of laws, when followed, to improve upon the ability of members of the public to comply with publicly justified moral conventions. This means there is
a presumption against legal conventions: we must show that they are required to enable persons to better act on their social-moral obligations than they would be able to in the social-moral state of nature. A principle of political obligation arises in the same way, as I will explain in detail in Chapter 8. I argue there that constitutional rules and associated political bodies are only publicly justified when compliance with their directives helps us to better comply with our legal obligations, and the moral obligations associated with those legal obligations. Part II explained what this reliability consists in. Political bodies must respect primary rights, minimize legislative errors according to the social error function, and achieve adequate degrees of durability and immunity.

A critical feature of publicly justifying economic regimes that has gone unnoticed in the public reason literature is that publicly justifying a legal regime is not the same as publicly justifying a series of laws. This is because we have to publicly justify the constitutional rules that create and sustain legislative bodies based on their general reliability with respect to producing publicly justified laws. Determining which laws are publicly justified is only one step towards showing that governmental powers and agencies have authority, and so are publicly justified. So even if we show that, say, property-owning democratic legislation can be publicly justified, we have not yet shown that property-owning democracy per se is publicly justified. That would require showing that the political bodies constitutive of property-owning democracy are publicly justified based on the standards established in Part II of the book.
Let’s review the features of the political and legal justification principles that bear on the public justification of economic regimes. The first thing to remember is the bulwark against state power created by primary rights such as the freedoms of associations, which includes commercial institutions. These rights prohibit state coercion where property rights are justified as primary rights, where intervention would excessively abrogate freedom of association, or when it would merely replace or reduce the effectiveness of moral conventions that sustain commercial institutions. Also remember the failure of the conventionalist challenge discussed in the supplement to Chapter 6. I have not postulated pre-conventional property rights or economic rights generally. There are pre-political property rights and economic rights, but not pre-conventional, at least not with respect to the rights with which public reason liberalism is concerned.\footnote{Publicly justified rights contrast with mind-independently valid rights like natural rights, which could have a variety of contents different than those I postulate here.}

Now let’s review how hostile these principles are to coercion. First, recall that intelligible reasons are the currency of public justification. Publicly justified political bodies and laws must be justified by the diverse, dispersed reasons of citizens. This means public justification can be quite difficult, for given the diverse reasons of members of the public, many moderately idealized normal moral agents will have sufficient intelligible reason to reject a vast panoply of laws. In previous work, I have addressed the concern that my view is too hostile to coercion, but there, and now here, I remind the reader that there is a distinction between
finding a law or regime to be *sub-optimal* and regarding it as *defeated*. Among the optimal eligible set of laws governing some issue, some laws will be defeated, or outside of the set, but many laws might be seen as better than nothing. Given the great benefit of having at least some laws, we can expect the optimal eligible set to contain a number of laws, such that many can be publicly justified. Consequently, intelligible reasons are unlikely to lead to anarchy or, as we shall see, radical forms of libertarianism.

Second, members of the public are moderately, rather than radically, idealized. They do not always reason perfectly, nor do they have all the relevant evidence available to them. Moderately idealized agents are boundedly rational and reason well with respect to their cognitive restraints. As a result, idealization cannot fully normalize the parties to a political agreement, since the justificatory reasons of citizens will be relative to their distinct epistemic circumstances. Consequently, moderately idealized persons will have diverse defeaters for coercion.

Third, we finely individuate moral and legal conventions, meaning that we evaluate these issues on their own terms, independently from our evaluation of a wide range of other issues. So instead of attempting to publicly justify entire regime types, or whole constitutions, the unit of public justification is the moral and legal convention. I have already argued for this conclusion for moral conventions in Chapter 2, and for legal conventions in Chapter 5. The implication

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445 Though moderately idealized agents might also find more points of overlap.
of fine-grained individuation is that less coercion can be publicly justified than on more coarse-grained approaches to individuation. The reason has everything to do with the formation of the optimal eligible set of proposals. Given the disaster of anarchy with respect to regime types, there will be many eligible but terrible regimes that can be publicly justified if we individuate according to regime types. For instance, we can justify a Hobbesian sovereign as eligible if anarchy is worse. But if we individuate more finely, the no agreement point, the point just outside of the optimal eligible set, is merely having no law governing *that particular issue*, and anarchy with respect to almost any issue will be less worrisome than anarchy with respect to regime types. That is because we only risk being deprived of the benefit of particular laws, not entire legal regimes. So coercion is easier to defeat the more finely we individuate. I agree with Gaus that there is no looming “libertarian dictator” issue here. The worry is that libertarians will have defeaters for any increases in coercion, such that their wills will carry the justificatory day over all other members of the public, making them effective social dictators. But this is not so, since libertarians advocate extensive coercion themselves, as we shall see below.

Finally, I want to stress the order of justification. We first publicly justify moral conventions, then, when inadequacies are identified, we publicly justify legal conventions. When we identify inadequacies with law and mere norm-applying institutions, then we can publicly justify political bodies and legislation.

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446 Gaus 2011, pp. 490-497.
But these bodies are constitutionally bound to respect primary rights, to minimize legislative error, and to generate adequate degrees of stability. If we are to demonstrate that an economic regime is publicly justified, then, we must move through all of these steps. Otherwise, the political body cannot be publicly justified.

So we can seethat the idea of public justification is going to “tilt” in a classical liberal direction, as Gaus has argued. But now we must demonstrate this with respect to different proposed interventions.

II. Backing Away from Political Libertarianism

Many people will accuse my account of public reason of being “libertarian” because of its hostility to the use of state coercion. This is wrong, but to explain why, I need to outline the conception of libertarianism at stake in the argument. I will understand libertarianism, for our purposes, not in terms of foundational commitments to, say, self-ownership and the free acquisition and transfer of resources, but rather as the defense of an extensive set of legal incidents over an extensive set of items. We can understand the notion of having full private property rights over P as an agent, Reba, having the following scheme of rights:

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448 Gaus 2011, p. 526.
449 Gaus 2009.
(1) The right to use P as she wishes so long as this is not harmful to others or their property;

(2) The right to exclude others from using P;

(3) The right to manage: Reba may give permission to any others she wishes to use P, and determine how it may be used by them;

(4) The right to compensation: If someone damages or uses P without Reba’s consent, Reba has a right to compensation for the loss of P’s value from that person.

(5) The rights to destroy, waste or modify: Reba may destroy P, waste it or change it.

(6) The right to income: Reba has a right to the financial benefits of forgoing his own use of P and letting someone else use it.

(7) Immunity from expropriation: P (or any part of P) may not be made the property of another or the government without Reba’s consent, with the exception of a few items such as taxation.

(8) Liability to execution: P may be taken away from Reba by authorized persons for repayment of a debt.

(9) Absence of term: Reba’s rights over P are of indefinite duration. Rights to rent and sale (transfer rights): Reba may temporarily or permanently transfer all or some of his rights over P to anyone he chooses.\(^{450}\)

\(^{450}\) Honore 1961.
A libertarian holds that persons have the moral ability to acquire all of these rights over property through the acquisition of resources in the state of nature or through the free, express, and voluntary exchange or gift between persons. She also advocates few, or no, restrictions on which items can be owned in this way, such that she believes in legalizing markets in just about everything, including sex, drugs, guns, assisted suicide, paying incredibly low wages, charging incredibly high prices, protecting vast inequalities of wealth, and prohibiting the redistribution of wealth to help the least-advantaged.\footnote{451} We can understand libertarianism, then, as the support of \textit{capitalism}, defined as an economic system that allows persons to acquire the maximal set of legal incidents over a maximal set of items.

Defined in this way, there isn’t much coercion under capitalism. There is definitely less coercion than our present form of government. And yet it is \textit{surely} a coercive system. Every one of the rights listed are meant to be coercively enforced against violators by someone, be it the officers of the minimal state or the agents of private protection services. For instance, today Bill Gates has billions of dollars that the government coercively protects against expropriation by private persons and, in part, from the government. In a libertarian society, protection services would also be expected to protect Gates against anyone who would take any amount his holdings without his consent.\footnote{452}

\footnote{451 For discussion of libertarian arguments for legalizing markets in an enormous range of goods and services, see Brennan and Jaworski 2016.} \footnote{452 Now, critically, a libertarian society might not, in practice, allow anyone to become rich in the way that Gates became rich, since Gates’s wealth derives from government interventions like extensive intellectual property rights, which libertarians oppose. Any long-term attempt to amass}
Since we individuate finely, we can ask whether the specific moral and legal conventions that require the coercive protection of these rights can be publicly justified. I think it is quite clear that the coercion required to enforce maximally extensive private property rights cannot be publicly justified. To show this, let’s imagine a progressive egalitarian, Reba. Reba affirms the justice of redistributive taxation and has serious worries that capitalism will hurt the poor and produce unjust economic inequalities. Reba would surely prefer no law protecting all of Gates’s holdings than a law that did so. So if Reba were to use the political process to redistribute wealth from Gates, Gates lacks the de jure authority to forcibly prevent Reba from doing so, or to prevent someone from doing so on her behalf. If Gates prevents the expropriation of his holdings in at least a handful of cases, it is Gates who uses coercion without a public justification.

The libertarian is bound to reply that the state will coercively prevent Gates from protecting his holdings from expropriation, and that this coercion cannot be publicly justified to Gates. But in this case, Gates could reasonably be seen as the initiator of coercion. Some would argue that the state would merely use coercion to stop Gates from interfering with their expropriation.

The libertarian could complicate matters by arguing that without a background of property rights, there is no way to determine who initiates coercion in this case. If Gates is the rightful owner of his property, then the expropriators initiate coercion against his property, and so the coercion must be publicly

wealth would attract competitors, who would bid down the large profit margins that the very rich use to become very rich.
justified for Gates. But if Gates is not the rightful owner, then his acts of putative defense are not defensive. For the question of who initiates coercion is parasitic on a theory of entitlement, and not the other way around, as a public reason view postulates. In response, I argue that while people have primary property rights, they are socially vague, in that reasonable people disagree about how to flesh out the right. Few people would extend property rights to cover every single form of expropriation. So even if the libertarian is right that we need a theory of property to determine who initiates coercion, this reply cannot justify protecting Gates and others with large property holdings.

The challenge remains, though, that the public reason liberal cannot say that Gates is initiating coercion, and so whose actions purport to have authority over others. In this case, I think members of the public should reason as follows. Given that we face a potential violent conflict, where each party regards the other as initiating coercion, and given the undesirability of violent conflict, there may be property conventions that can forestall these violent conflicts that are eligible for both sides—the redistributive state officials and the rich. If so, then acts of expropriation should follow the justified legal procedure that both sides deem appropriate to avoid violent conflict in cases where the rights conflict cannot be adjudicated between them. So even if we cannot agree on who initiates coercion, we could publicly justify legal procedures that violate libertarian proposals. So we must back off of libertarianism.
We can also back off of libertarianism because many on the left reasonably (if falsely) believe that a pure capitalist system would create a mass of extremely poor people who would be subject to considerable coercion. Many agree with Marx’s remark:

Capital further developed into a coercive relation, which compels the working class to do more work than the narrow round of its own life-wants prescribes.453

Marx argued, and many non-Marxists still agree, that pure capitalism is coercive because the working classes must work in order to survive and that this subjects them to enormous coercion by their employers or by a society that keeps them poor by depriving them of the social means to better their condition. Since sincere, informed people of good will can still continue to affirm Marx’s complaint, if not his positive project (which cannot be publicly justified), particular rights allowing employers to coercively direct their workers and for society to deprive workers of sustenance, will be defeated by many members of the public. This is a further reason for the public reason liberal to back off of capitalism.

III. The Great Enrichment and Sustainable Improvements

While we must back off of pure capitalism, it is worth emphasizing the importance of the fact that nearly everyone recognizes today that capitalism is an enormously productive economic system. Capitalism has produced gigantic improvements in economic well-being, along with many other measures of well-being, such as quality and quantity of life. It is worth focusing on the stunning empirical fact that economist Deirdre McCloskey calls “The Great Enrichment.” Here is a representation of economic growth across the world over the last 2000 years:

![Graph showing Economic Growth in Major World Regions](image)

Figure 7-1: The Great Enrichment

Few today would dispute that a competitive marketplace, where firms are free to experiment with new methods of production that are subjected to the withering scrutiny of millions of consumers, is a kind of golden goose. And it is a golden

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454 McCloskey 2016, p. x.
goose that we can kill; command economies nearly killed it. When we back off of capitalism, then, we must be mindful not to strangle the productive process. Even small costs to the growth rate have gigantic effects over time due to the compounding of growth rates over time. Without growth, we will lose enormous social goods, and not merely for the rich, but the middle classes and the least-advantaged.

It is remarkable how many liberal political philosophers have failed to grapple with one of the most incredible empirical facts available to social scientific researchers. Rawls speaks only of just savings, and not appropriate social investment. The paucity of the importance of the Great Enrichment seems to have been irrelevant to determining which moral and legal conventions we should endorse. McCloskey argues that the Great Enrichment is the result of the collapse of moral conventions that discourage entrepreneurship and commercial activity. But even if she is wrong about this, members of the public will judge moral and legal conventions by their effects of robust, energetic economic activity. Given that nearly everyone has an interest in greater economic well-being, that some moral and legal conventions restrict economic growth is an enormous mark against them. Obviously economic wealth is not the same as human well-being, but it surely has something to do with it, given that economic wealth is a necessary conditions for all kinds of goods, including food, healthcare, shelter, clothing, leisure time, enjoyable work, and so on.

\[^{455}\text{That is the thesis of Bourgeois Equality.}\]
And note that we have already established the importance of economic improvement in Chapter 4 in my argument that members of the public will embrace a *Principle of Sustainable Improvements*. They will not only insist on moral and legal conventions that work to their benefit, but that work to their benefit over time. Environmentalists of various stripes object, not unreasonably, that our present economic growth path is unsustainable. But the Principle of Sustainable Improvements only requires *sustainable* improvements. If the objections of environmentalists survive moderate idealization and the standards of what I call *policy epistemology* below, then growth can be restricted to ensure that it is sustainable over the long run. But restrictions on capitalism that undermine growth, especially those that restrict improvement of the economic well-being of the least-advantaged, will be incredibly hard to justify. Long-term economic restrictions, as well as short-term legal restrictions that stand the risk of sticking around long past their intended expiration date, also decreasing growth rates, are enormous problems. Again, members of the public will insist that we not kill the golden goose. Capitalism’s productivity, in my view, is the single most important factor that speaks in its favor from the diverse perspectives of members of the public, and this factor serves to undermine various moral and legal conventions and helps to publicly justify others.

IV. The Principle of Social Insurance
Progressive and egalitarian defeaters do not undermine the public justification of a social system of private property. We individuate finely, and so any proposed defeat must proceed piecemeal. Further, progressive and egalitarian defeaters do not license state intervention to redistribute wealth in general. The redistribution of wealth, as a recurrent social process, is coercive in many respects, and so must itself be publicly justified as an ongoing, official governmental process.

This means that the redistribution of wealth must be publicly justified on the basis of the intelligible reasons of citizens. And few reasons will carry the day. For instance, some reasons for redistribution are sectarian, such as luck egalitarian reasons that will be rejected by many members of the public. Many thoughtful and sincere philosophers reject luck egalitarianism because it requires leveling down. And few people think that the mere fact that one wins the natural lottery means that one should not benefit from the exercise of her talents. The same is true for taxation meant to fund sectarian groups, like churches, in pursuing their reasonably rejectable mission and final ends.

Other reasons for redistribution are not sectarian, such as the widespread belief that government provides some essential services that cannot be adequately provided by the market process and civil society. The relevant goods, like roads, defense, and police services, are universally regarded as good and taxation for those purposes is widely regarded as publicly justified. The only people who

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457 I think theists have quite good reason to reject luck egalitarianism, since we tend to believe that God deliberately gives people their talents to be used to serve him. So there is nothing random about the distribution of natural talents (as opposed to natural deficits, which are not intended by God).
disagree are anarchists and radical libertarians. And their numbers are small enough that they can be accommodated in different ways.

The first controversy arises with respect to what I shall call the *principle of social insurance*. I understand social insurance as a type of public policy where government provides income and resources to people who, for one reason or another, have lost access to goods and services vital for them to remain normally functioning persons and citizens. Varieties of social insurance include government health insurance, unemployment insurance, disability insurance, old-age pensions, and food stamps. All of these policies are typically justified based on the widely recognized badness of not having access to food, healthcare, shelter, and other resources required to meet basic needs. Less common, but still popular, are arguments that social insurance is required to alleviate *injustice* against the poor and needy. Because the poor and needy have welfare rights, rights to goods and services required for basic physical, mental, and social functioning, social insurance is a means of protecting those rights.

(1) Critics of the principle of social insurance typically offer four objections to it. First, and most commonly, people complain that many recipients of social insurance are *undeserving*, either because their need is *their fault* or because they are not in need in the first place. An example of the former would be giving an alcoholic unemployment insurance when he loses his job for being drunk on the

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458 I think that the radical libertarian is unreasonable if she insists that the only acceptable scheme of social institutions is the one she advocates, but she is reasonable if she insists on the right to secede or partially separate from her state in conjunction with other libertarians.

459 Goodin and Schmidt 1998, pp. 10-12 reviews the question of blame and its importance.
job. An example of the latter would be extending giving food stamps to individuals making over $40,000/year. Importantly, however, this is not an objection to the principle of social insurance *itself*, but rather that it is hard to implement because cheaters are hard to detect. Worries about abuse are insufficient to justify ending social insurance programs in general. The government must simply be pushed to be more scrupulous and efficient, even if that is a difficult project. Some also complain, along similar lines, that social insurance incentivizes sloth, which is considered an immoral use of taxpayer funds, but the same reply is appropriate here – the government should try to take steps to avoid incentivizing sloth. Those who genuinely need social insurance have morally urgent needs that can be easily met, such that taking away their social insurance cannot be justified based on the potential sloth of other recipients of government funds. We cannot deprive the genuinely needy to avoid rewarding the slothful, unless the slothful overwhelmingly dominate the deserving poor.

(2) The second objection is that social insurance is economically inefficient. Social insurance reduces the cost of making bad economic choices, such as not keeping one’s job, or not saving enough money for retirement. By rewarding poor decisions, we can expect more poor decisions in the future.\footnote{Goodin and Schmidt 1998, pp. 14-20.} Similarly, the relevant forms of social insurance are funded typically by taxing the rich, who typically work and produce significant economic value. By taxing the rich, they are discouraged from being economically productive—not entirely, but somewhat.
Between hurting the productive and paying the unproductive, we can expect a slowdown in economic growth, which when growth rates are compounded, can lead to dramatically reduced levels of economic prosperity over time. This objection is more serious than complaints about deservingness for several reasons. First, it does not appeal to controversial moral ideas like desert, but rather makes a straightforward empirical claim about a country’s economic well-being, something everyone has reason to care about. Second, the model of human behavior at work is relatively simple and easy for members of the public to grasp: people respond to incentives in the long run such that if you pay people for something, you get more of it (in this case, poverty) and that if you reduce the pay of people, you get less of it (in this case, economic production).

I think these objections have sufficient force to justify a number of limits on social insurance. It is trivially true that at some level of taxation, and some degree of social insurance, economic growth will slow, making many millions of people worse off. It is also trivially true that at some level of taxation and some degree of social insurance that over a generation or more the recipients of social insurance will be poorer than they would have been without it, given that their own income and the wealth available to them through social programs will be smaller than it would have been following a period of greater growth. Everyone should be able to agree that this greater level of taxation and redistribution is defeated, and they should also be able to agree that forms of social insurance that reduce growth rates, reducing the economic well-being of millions of people, are likely also
defeated. This is also an implication of the principle of sustainable improvements. Beyond this, however, it is a matter of reasonable dispute where the line should be drawn, and so should be left open to the moral and political orders to settle upon the appropriate levels of tax and the extensiveness of social insurance.

(3) Third, critics of the principle of social insurance argue that government provision of social services and the regulation of service provision crowds out non-governmental groups from providing those goods and services.\textsuperscript{461} The groups include both civic associations and commercial institutions. When government gives money to the poor directly, it is sometimes argued that non-governmental charities are crowded out because the needs of the poor are being taken care of. For instance, the people who provide services to the poor are now relying on public funds rather than private funds. One could argue, for instance, that food stamps crowd out private food kitchens. Second, government provision sometimes crowds out private for-profit providers, such as private employers who would have otherwise offered jobs to the unemployment and private providers of medical insurance.\textsuperscript{462} There is good reason to think that government welfare policies crowd out fraternal organizations and that government involvement in healthcare leads to tight regulations of insurers, such that small insurers are not financially viable, meaning that many associations cannot provide themselves with adequate medical insurance.

\textsuperscript{461} This is part of the argument in Beito 2000, which documents the robust fraternal order system that once alleviated poverty but that was gradually replaced by the welfare state.

\textsuperscript{462} Abrams and Schmidt 1984, Bolton and Elena 1998 find significant crowding out effects. For counterevidence, see Boberg-Fazlić and Sharp 2013.
The defenders of the principle of social insurance will counter that government provision is both more effective and just and that crowding out private institutions is not a problem so long as the needy are cared for. They may also dispute the claim that the degree of crowding out is morally significant. But the critics can argue, reasonably, that many forms of social insurance are inefficient, particularly in large, diverse social orders like the United States. They can also argue that, empirically speaking, crowding out is a genuine problem, and that market-based solutions will be more efficient in the long run. But most significant for our purposes, critics of the principle of social insurance can and should argue that non-government groups have moral priority over the government, such that if institutions within the social-moral order can satisfy the demands of social morality (such as the demand that the poor be cared for) to an adequate degree, that the coercion involved in government provision cannot be publicly justified. This means there is a presumption on behalf of civil society regarding provision of social insurance that must be overridden. It must be overridden with solid empirical data demonstrating the greater effectiveness of government-provided services. Otherwise, the coercion is defeated.

However, members of the public who happen to justifiably believe that these services will be less effective than private organizations cannot defeat government-provided services based on these concerns alone. These individuals

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463 See Tanner 1996 for a discussion of the now infamous program Aid to Families with Dependent Children (AFDC).
464 In my view, there are works available that meet this standard of evidence. See Kenworthy 2013.
will presumably think that some government provision is better than none and that the coercion involved with government intervention, while unfortunate, is morally sub-optimal rather than unacceptable. So if it is a matter of reasonable dispute among members of the public about whether government provision is a necessary supplement to civil society, given that some social insurance is eligible for even many conservative and libertarian members of the public, government provision can still be publicly justified. If civil society and the market can adequately provide resources to the needy through charity and cheap, competitive prices, then the social-moral order takes priority. But insofar as that claim is a matter of reasonable contestation—and it certainly is—some social insurance cannot be defeated.

(4) The final objection is that the taxation required to provide social insurance is unjust and excessively coercive. I take it as trivially true that taxation is very often coercive. In many cases, people don’t care about paying taxes and so have no disposition to resist or even dissent government extraction of their income. In that case, since no coercion is needed there is an important sense in which there is no coercion, even though these people would be fined and ultimately imprisoned for refusing to pay their taxes should they change their minds. But in cases where people want to build their projects and plans around having access to a higher enough amount of income and wealth, government

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\(^{465}\) Again, there will be some holdouts, like radical libertarians, but these groups are likely small in number and may be able to be accommodated in another way. See Appendix A.
expropriation can prove quite coercive indeed. Higher tax rates will tend to be more coercive because they will reduce the choice options of the taxed to use their own money in their own way. Many of these choices will be morally trivial, even from the perspective of those who value those choices. Bill Gates has no real complaint if his taxes increase from 0% to 1% of his yearly income and earnings. Such a small level of taxation does not set back Gates’s projects and plans. But if all of Gates’s income in excess of $100,000/year were taxed at 90%, this would be massively coercive. Such a high level of taxation would have prevented him from accumulating enough wealth to create the Bill and Melinda Gates Foundation, which is arguably helping save the lives and improve the living conditions of millions of people around the world. Now, Gates is an unusual case because he could not have acquired this much money in a free, publicly justified moral order because much of his wealth depends on the coercive enforcement of intellectual property laws that cannot be publicly justified. But people who acquire their wealth through publicly justified laws have a legitimate complaint against progressives and egalitarians that their policies would coercively reduce his ability to live his own life in his own way.

Progressives and egalitarians are likely to respond that a world in which people would tolerate a 90% tax rate on the rich would increase the choice options of sufficiently many people that the tax rate could be justified. But plenty of sincere, informed people of good will not only reject this claim, but think it is

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466 Gaus 2011, p. 522.
obviously false. They will have sufficient reason to reject this economic forecast, such that the rich persons who reject the claim will experience the extraction of their income as coercive and alienating, and so probably not publicly justified. Progressives and egalitarians might also respond by emphasizing that, while the rich might be coercively taxed, the state “interacts with citizens” ... “no less coercively” ... than “when it uses the threat of legal punishment to protect private property.” This would be a mistake, however, as few people are coercively prevented from expropriating the rich, given that our background moral conventions and many legal conventions are sufficiently widely accepted that no coercion is required to prevent expropriation. It will not do to respond that the revenue collected could be used to provide more options for recipients of the revenue, not merely because we might end up with less wealth and so fewer options overall, but because public reason is not in the business of maximizing or generating good options, but responding to the worth of persons and so insisting that the coercion applied to them can be publicly justified, even if other persons are coercively prevented from coercing them.

My claim that taxation is coercive does not commit me to a natural rights approach to property rights or to pre-conventional property rights. Instead, I’m simply combining a basic primary right to private property with the presumption against coercion and in favor of the civil society, along with the model of diverse

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468 Bou-Habib is mistaken, therefore, to see all coercive enforcement of economic arrangements by the state as equally coercive. His view also has the absurd implication that all economic regimes are equally coercive, as thought Denmark’s market economy were just as coercive as Soviet Russia’s planned economy.
public justification defended in previous chapters. The social moral order will contain property conventions that will protect income and wealth from expropriation by any group, at least up to a certain level of economic holdings. Many members of the public will think that social insurance can be adequately provided without high levels of taxation and will think that the high levels of taxation are inefficient and excessively limit the choice options of some members of the public. Consequently, they will have sufficient reason to reject left-wing policies.

Let’s briefly consider a particular social insurance policy in order to illustrate how a public reason liberal should approach the complexities raised by social insurance proposals. My own personal view is that social insurance should take the form of a Basic Income Guarantee (BIG), where everyone below a certain income threshold would have access to a certain level of cash with no strings attached.469 The BIG can be justified not merely on a left-wing basis, but even on a libertarian basis.470 For instance, BIGs avoid many of the inefficiencies of standard forms of social insurance by bypassing government bureaucracy. Serious concerns about a BIG is that implementing it will require publicly defeated levels of taxation, that they will crowd out private organizations, and generate economic inefficiency due to the incentives involved. I also worry that a BIG cannot be justified because it will provoke an enormous amount of resentment among those who work for a living, since the BIG is unconditional. We cannot discount the

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469 For a survey discussion, see Van Parijs 2004.
470 Murray 2006, Zwolinski 2014
objections of those who think that unconditional redistribution is unfair to the economically productive. This means that the only publicly justified means of providing social insurance might involve means-testing. But my suspicion is that the benefits of a BIG are sufficiently great as to render BIGs eligible even for those who think that BIGs are undeserved. Even people who resent welfare recipients think that some people are deserving, and they may think that, while a BIG is a morally sub-optimal way to provide social insurance, they nonetheless think, on the basis of the considerations raised above, that a BIG is better than nothing. If so, the principle of social insurance could render a BIG justified, depending on the diverse reasons of citizens.

In sum, the basic principle of social insurance can be publicly justified, though there are many reasonable restrictions that a free moral order can place on realizing and applying the principle.

V. Regulation and Policy

In this section, I discuss regulation and the public evaluation of public policy. So far, we have only backed off of political libertarianism by endorsing a principle of social insurance. Now we attempt to back off further still, by determining how extensive an administrative apparatus can be for a free people living in a publicly justified polity.
The biggest hurdle in determining the appropriate bounds on the administrative state is that different members of the public will disagree about whether some regulations are coercive impositions or reductions in coercion. Libertarian members of the public will have defeaters for a variety of regulations. But progressive and egalitarian members of the public will reject coercively enforced protection of private property as unjustified coercion. Fortunately, most regulations do not raise these complications. So I suggest that in this section we focus on regulations that different members of the public can agree are increases in coercion, even if the coercive regulation reduces interference elsewhere in an economic system (such as carbon taxes that reduce the rise of sea levels that would impinge upon the land of many property holders).

The simplest public justification for a coercive regulation is that the regulation prevents a harm, a setback to the general interests of members of the public, given that moderately idealized members of the public recognize the wrong in harming others. So many regulations required to protect people from workplace harms, like health and safety regulations, should be publicly justified. Importantly, we must have reason to think that the regulation prevents the relevant harm without imposing a greater harm, but there are plenty of regulations that plausibly meet this requirement.

(1) There are three barriers to the imposition of coercive government regulations. First, in many cases, the non-state legal system can address the various harms that regulations are meant to prohibit. They do so through the tort
law, the law of damages, which long predates state intervention. The tortfeasor, the one who commits a tort, is frequently forced by the legal system to compensate the person whom she has harmed and that the law recognizes her as liable for the harm. These private legal conventions will appear within the social-moral state of nature, since they perform the absolutely vital function of resolving property disputes. No legislative apparatus is required for the existence and functioning of a tort law system. Since people with a financial interest at stake will often recognize, at least in vague terms, that they are liable to civil suit for harming others, this threat may prove enough to discourage them from creating the harm or damage in the first place. In this case, then, state regulation is not needed. And in many cases, torts are obviously superior ways to handle the threats of damages, as they’re capable of being made responsive to particular cases than general regulations imposed by a central bureaucracy. Of course, in other cases a regulatory solution may be superior, especially when it must be enforced by the state against a large economic power that has the ability to control or distort the tort law process. These large economic powers, like large firms, can distort the regulatory process as well. But if it can be demonstrated that the regulation is more likely to protect people from the relevant harms or damages, even given the threat of regulatory capture (where the regulated group comes to control the regulatory body), then state regulations can be publicly justified.

(2) Second, there must be some public method of demonstrating to members of the public that the regulation is worth the costs associated with the
loss of a choice option, along with the cost imposed by the coercion itself, a secondary cost that matters given the badness of coercion. That means that public reason contains guidelines of inquiry governing policy epistemology. A policy epistemology is a set of standards that specify the level of evidence required to show that a coercive regulation or policy will have predicted results. Policy epistemology further specifies the level of evidence that should convince any moderately idealized member of the public that the regulation or policy will have certain predicted result within a range of probabilities. For instance, a policy epistemology might establish standards of evidence that would give progressive members of the public reason to adopt a probability of .8 that a proposed policy will produce a .2% increase in the growth rate, but that would also give libertarian members of the public reason to adopt a .55 probability that the proposed policy will produce the relevant results. We do not, then, expect policy epistemology to provide evidence that should convince everyone to the same degree that some policy will have certain results. That would set an impossibly high bar that no policy could pass. But note that policy epistemology only specifies standards of evidence relevant for predicting results and not for publicly justifying a policy as a whole, since factors other than the results of a policy are relevant to evaluating whether it is publicly justified.

As far as I can tell, policy epistemology is severely under-addressed by contemporary political philosophy, but it is critical for determining which regulations and public policies can be publicly justified. Remember that there is a
presumption against coercion that must be met by sufficient intelligible reasons affirmed by the coerced. Part of showing that persons have reason to submit to coercion is that the coercion in question can be reasonably demonstrated to be an improvement according to the evaluative standards of members of the public. This will require, at a minimum, some serious public method of counting the economic costs and benefits of various regulations and policies. Otherwise, only those who think that the policy realizes moral values that override economic well-being will lack defeaters for the proposed law or policy.471

I do not have the space to develop an account of the standards of policy epistemology. But I think what I’ve said is sufficiently intuitive that it can help us to evaluate the standards of evidence that American politicians and bureaucrats often have available. I have in mind organizations like the Congressional Budget Office and the Office of Management and Budget that try to determine the budgetary impact of various pieces of legislation. Importantly, these determinations are extremely difficult. The CBO, for instance, fully admits, “it is often difficult or impossible to determine, even in retrospect, the incremental impact on the budget of a particular piece of legislation.”472 Their admission is remarkable, so I reproduce its process in some detail:

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471 And perhaps not even then, as whether a policy realizes certain moral values will have an empirical dimension.

472 CBO website.
CBO regularly prepares cost estimates for legislation when bills are reported by committees of the House of Representatives or the Senate. In some cases, such legislation is changed before enactment. Although CBO often provides updated cost estimates (especially for direct spending provisions) prior to the enactment of legislation, proposals are sometimes amended after cost estimates are prepared. Moreover, in many cases the actual costs or savings resulting from enacting legislation cannot be identified; they may be a small part of a large budget account or revenue stream, and there may be no way to know for certain what would have happened if the legislation was not enacted. In fact, most of the cost estimates that CBO completes are for legislative proposals that are not enacted, so it is not possible to determine their accuracy.\footnote{CBO website 2013.}

Anyone worried about the coerciveness of legislation ought to find this admission deeply troubling. The CBO is not able to demonstrate the cost-effectiveness of public policy by measuring its effects even after the legislation passes. In many cases, it is not merely difficult, but impossible, \emph{in their own words}, to determine the impact of the legislation that they rate.

Sometimes legislation can be subject to monitoring. The CBO uses Medicare Part D as an example, which they originally estimated to cost $552 billion in 2003 but that has turned out to cost $358 billion. The original estimate was
based on the assumption that the growth rates for drug spending would remain close to the long-term trend from 2003-2013, but growth rates did not follow the trend. So one of the CBO’s best, self-selected, cases is one where they plainly overestimated initial cost. The CBO has recently touted its forecasting error for general economic trends as equivalent to administration and private sector consensus, where its largest errors are the same as the large errors of other forecasters. But its forecasts are only for general economic trends, and not for the costs and benefits of social programs. General forecasts are typically much less cognitively demanding than determining the specifics of the effects of policies. For determining overall economic numbers does not require specific knowledge of particular legal conditions, but overall aggregate measures.

What we see, then, is the full admission by the CBO itself that it is difficult to determine the costs and benefits of public policies in advance. This suggests that whatever standard of policy epistemology we might adopt, the actual practice of the CBO will fall far short of what would be required. It is not even clear that, when it comes to the set of actually imposed legislation, the CBO is generally reliable, since the CBO cannot measure the effects of legislation that is altered after their scoring process.

This is bad news for defenders of an extensive administrative apparatus. Public reason liberalism requires a policy epistemology where the costs and benefits of major legislation can at least be generally assessed as economically efficient even in the rough and inadequate sense of the program being in the
black—making more money than it loses. While the principle of social insurance can be publicly justified, this means that many forms of social insurance will not be, as groups like the CBO cannot demonstrate to members of the public that the actual legislation creating or revising some form of social insurance will be worthwhile. It is even more difficult to justify regulations and policies that go beyond the provision of social insurance, given that these have a greater presumption against them and so must meet a higher justificatory bar.

Yet all is not lost for the policy wonk. Yes, determining whether policies are economically worthwhile is often difficult, if not impossible. But policy epistemology cannot be so demanding that no public policy or regulation is ever publicly justified. There will be at least some targeted regulations whose effects are specific enough that proper estimates can be made, or at least generally approximated. And some public policies will be such no-brainers that they can meet the bar of the appropriately demanding but feasible standard of policy epistemology. Further, we do not want to impose such strong epistemic standards that policy-makers are never publicly justified in engaging in policy experiments to uncover just the sort of information that they need to justify the public policies they favor. In some cases, policies can be temporarily justified as attempts to learn what works and what doesn’t, though we will want to take care that the coercion involved in imposing the policy can be publicly justified on that experimental basis.
Two more considerations are relevant to determining the standards of policy epistemology. First, we must be clear about the potential costs of regulation to economic growth. Regulations generally restrict choice options, and so invariably reduce the ability of businesses to engage in economic experimentation. One comprehensive study of economic regulations imposed between 1977 and 2012 found that economic growth since 1980 has probably been reduced by about 0.8% per year. The authors claim that if regulation had been held to its 1980 level, “that the economy would have been nearly 25 percent larger by 2012 (i.e., regulatory growth since 1980 cost GDP $4 trillion in 2012, or about $13,000 per capita).” The study is impressive, though defenders of a more extensive administrative state will surely quickly and reasonably criticize it. But if the reader looks at the study cited, she will find an honest and sophisticated attempt to add to an existing literature on the economic costs of regulation. Given that the costs of regulation are so enormous, if the authors are even merely likely to be correct, say at a probability of 0.51, then we have serious reason to worry about regulation as a severe economic harm. The principle of sustainable improvements, then, will tell against bureaucracies that incentivize a glut of destructive economic regulations.

The second consideration, which is ultimately much more important, is that recent work on the ability of experts to predict social outcomes across a wide range of fields has shown that their abilities are much more limited than we might have otherwise expected. Philip Tetlock has found that even the least ideological

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and open-minded experts, those with diverse and eclectic cognitive styles, are not much better than random predictors, and still fall behind basic statistical models. And the “foxes” are in various respects better than the comprehensive thinkers, the “hedgehogs” who stick much more resolutely to one theoretical approach. Expert political judgment isn’t hopeless, but the best empirical study of expert ability is remarkably humbling. This means that even the most honest attempts to predict the outcomes of public policy are bound to find limited success. So meeting even adequate standards of policy epistemology is going to be a tall order.

I now want to use the admittedly implicit standards of policy epistemology to examine the complicated case of countercyclical policy. Consider, for instance, estimates of the effects of stimulus packages in advance of their passage. Determining whether the Obama Administration’s 2009 stimulus package was effective depends notoriously on counterfactual determinations that are extremely difficult to perform. Paul Krugman has famously argued that our prolonged economic difficulties in the United States are due in part to the fact that Obama’s stimulus package was too small. But many others think the package was just right, too large, or wholly ineffective. While they do not represent anything near

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475 Tetlock 2006.
476 Tetlock 2006, pp. 73-4.
477 Krugman 2012, p. 118. Also see Krugman’s explanation of his old-Keynesian approach: http://krugman.blogs.nytimes.com/2011/10/09/is-lementary/
an academic consensus, 200+ academic economists agreed with the following statement:

Notwithstanding reports that all economists are now Keynesians and that we all support a big increase in the burden of government, we the undersigned do not believe that more government spending is a way to improve economic performance. More government spending by Hoover and Roosevelt did not pull the United States economy out of the Great Depression in the 1930s. More government spending did not solve Japan’s “lost decade” in the 1990s. As such, it is a triumph of hope over experience to believe that more government spending will help the U.S. today. To improve the economy, policymakers should focus on reforms that remove impediments to work, saving, investment and production. Lower tax rates and a reduction in the burden of government are the best ways of using fiscal policy to boost growth.  

I tried to follow the discussion in the economics blogosphere at the time, and it was rather dizzying. After reading economics blogs regularly from 2008 through 2012, I came to the following conclusions. First, my prior Austrian understanding of the business cycle was complicated by the fact that Austrians had predicted inflation on the grounds that the Fed response to the Great Recession was making

money too easy, but the inflation never materialized. For this reason, I no longer consider myself an adherent of the Austrian theory of the business cycle.\footnote{For classical formulations of the Austrian theory of the business cycle, see the writings of Ludwig von Mises, F.A. Hayek, and Murray Rothbard in Ebeling 1996.} I also realized that my conviction that Keynesian policies would be ineffective was much too strong. I have since become more convinced by market monetarist views, though my confidence level is relatively low.\footnote{Market monetarism is a new school of monetary economics. For discussion, see Nunes and Cole 2013.}

However, I also became more convinced that the certainty of pop-Keynesians like Krugman that their policies would be effective was much too great. In particular, Krugman loudly and repeatedly asserted that monetary policy could not be effective at the zero bound, such that fiscal policy was required to prevent the economic depression.\footnote{In response to Nobel Laureate Gary Becker’s concerns about Keynesian deficit spending, Krugman writes: “Urp. Gack. Glug. If even Nobel laureates misunderstand the issue this badly, what hope is there for the general public? It’s not about the size of the multiplier; it’s about the zero lower bound. In 1982, interest rates — elevated in part thanks to high expected inflation, in part because a tight-money policy was what caused the recession — were high. This meant that conventional monetary policy had plenty of room for action, and thus offered an adequate response to the slump.”} But whether monetary policy can be effective at the zero bound is an extremely complicated and difficult question within monetary economics.\footnote{http://krugman.blogs.nytimes.com/2009/01/19/getting-fiscal/} Krugman probably convinced hundreds of thousands of people to make a judgment about a matter that is beyond even most trained economists’ ability to perform, and so to support fiscal stimulus in response. But the stimulus must eventually be paid for, even if it was worthwhile, and so requires tax

http://econlog.econlib.org/archives/2014/01/the_parrot_is_s.html
increases in the future (even Keynesians acknowledge that debts should be paid off by higher taxes during booms so that they can be afforded comfortably during busts). This coercive threat is plain, but the benefits of fiscal policy are not. In particular, if monetary policy is effective at the zero bound, there is little reason to support fiscal stimulus, as it is invariably a blunter tool (Congress is less careful, less intelligent, and more morally suspect than the economists at the Fed) and requires coercion in ways that monetary policy does not. What we saw in the economics blogosphere, continuing to this day, was deep, reasonable disagreement about the theory of money and credit most appropriate to combat the recession. But the disagreement was sufficiently deep, that it is hard to see how any policies that would increase coercion or stick us with the need for future coercion could be publicly justified. For that reason, it seems to me that what was publicly justified was to allow the Fed to experiment with monetary offset, perhaps to an even greater extent than was actually pursued. Fiscal policy commits one to coercive taxation in the future, and tight money risks the collapse of the monetary base, which could lead to enormous governmental coercion as the economy collapses. The opposing risk—hyperinflation undermining the economy—now strikes me as sufficiently remote that erring on the side of excessive inflation was a reasonable, relatively non-coercive policy path for addressing the recession.

The policy epistemology involved in making countercyclical policy decisions involves standards that are hard to apply. Even economic specialists were accusing one another of making simple mistakes. Consequently, it is hard to see
how any policy could be publicly justified, given the strong objections posed by opposing views. For that reason, we must stick with the non-coercive default, which I believe is the use of monetary policy, though in this case, determining the non-coercive default is fraught with difficulty. In light of Tetlock’s work, I am more or less in the position of a skeptic. My degree of confidence in the market monetarist prediction that the business cycle is best managed through NGDP targeting is not much greater than half.

(3) The third barrier to justifying coercive regulations and public policy is the threat of rent-seeking. Remember from chapter 5 that the stability of a regime includes an ideal of immunity, where the legal system is not easily captured and manipulated by self-interested officials and lobbyists who seek to use the regulatory apparatus to benefit themselves at the expense of the public. As we saw in chapter 5, there are serious concerns that rent-seeking agents have a strong incentive to engage in regulatory capture when an administrative state is particularly powerful, as those affected by the regulations can sometimes control which regulations are passed down. And in many cases, those regulations hurt the rent-seeker’s competitors and pass on costs to members of the public as a whole. So if a regulatory body decreases the immunity of the liberal constitutional order, then that counts against its public justification, since it is less immune than it would be if its powers were more limited in scope and reliably tracked what is

484 What’s worse, rent-seeker produces regulations and rent-seeking groups can accumulate around a liberal state over time, dragging down the overall efficiency of the economy, and so violating the principle of sustainable improvements. For a classic account of the accumulation process, see Olson 1984.
publicly justified. Systems vulnerable to rent-seeking, then, are harder to publicly justify than systems that are less vulnerable.

Obviously regulations that are instances of rent-seeking will be vulnerable to defect. But even good regulations can be defeated on the grounds that the regulatory body required to impose them is too vulnerable to rent-seeking, say through regulatory capture. If a regulation can only be sustained by a low-immunity bureaucracy, then the regulation cannot be publicly justified.

In sum, state regulations and public policies can be publicly justified under the following conditions: (i) the regulation or policy must not reduce economic efficiency too much, (ii) the empirical case for the regulation or policy must meet the standards of policy epistemology, and (iii) the regulation or policy is sufficiently insulated from rent-seeking groups, inside and outside of the government. These three conditions suggest that few regulations and public policies can be justified, but not, I submit, all of them. While I cannot make the case here, I think that carbon taxes may be sufficiently important to reduce the threat of climate change that the economic costs will be worth paying, that the scientific standards of evidence satisfy the standards of policy epistemology, and while carbon taxes will be subject to some rent-seeking, a tax policy could be designed that is transparent and simple enough that tampering will be easily detected by the public.

VI. Inequality and the Democratic Process
Economic inequality has become an increasingly important focus in US politics and in left-wing intellectual circles. For several decades, the left has focused primarily on defending and extending the welfare state, largely on what appear to be sufficiency grounds. The dispute with the political right is whether the government should provide all persons with a basic standard of living and whether persons have a right to that support. But with the increasing divergence between income quintiles in the US, with similar divergences in European nations, some have argued that welfare programs are not enough to realize economic justice. Instead, the differences in income and wealth must be compressed. The reasons for income and wealth compression come in two forms – intrinsic and extrinsic. Income equality is said to be intrinsically valuable because it is required by principles of justice; that is, equal incomes and wealth are just, and so have intrinsic value. A number of conceptions of justice are rooted in this commitment, such as luck-egalitarianism.

I regard these views as too radical and sectarian, and so the reasons generated by these doctrines will be neutralized by reasonable disagreement about justice. The luck-egalitarian advocates coercive redistribution based on a doctrine that many, if not most people reasonably reject.

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485 Piketty 2014 provides the most extensive empirical documentation of these claims, though his data has been the subject of considerable public controversy, such as the criticisms of Piketty’s data by Chris Giles of the Financial Times. See: [http://www.ft.com/cms/s/2/e1f343ca-e281-11e3-89fd-00144feabdco.html](http://www.ft.com/cms/s/2/e1f343ca-e281-11e3-89fd-00144feabdco.html) and Piketty’s response: [http://piketty.pse.ens.fr/files/capital21c/en/Piketty2014TechnicalAppendixResponsetoFT.pdf](http://piketty.pse.ens.fr/files/capital21c/en/Piketty2014TechnicalAppendixResponsetoFT.pdf)

486 Piketty, for instance, advocates an annual, global tax on capital to constrain inequalities. See Piketty 2014, pp. 515-539. Rawlsians, of course, have long maintained that the welfare state is insufficiently attentive to reducing economic inequalities.

487 For a discussion of luck egalitarianism, see Arneson 2013.

488 For a variety of objections to various forms of egalitarianism from the left, see Frankfurt 2015.
A second issue must concern the public reason liberal, namely the *extrinsic* value of income and wealth inequality, particularly with respect to the effective functioning of democratic institutions. A number of people have argued that societies with greater income inequality have more poorly functioning democratic institutions, and that the greater inequality *causes* this greater level of dysfunction, rather than both being caused by some third factor, or by distinct factors.\(^{489}\) I find these causal connection claims hard to assess, as they invariably involve complex economic models. In particular, I am skeptical of views that super rich individuals and small groups are powerful enough to systematically distort the democratic process.\(^{490}\) Our best evidence, instead, is that the difference in the responsiveness of democratic institutions to economic classes is their greater responsiveness to the top income decile rather than the top .01%\(^{491}\). Say what you will about the Koch Brothers, George Soros, Warren Buffet, Sheldon Adelson, Bill Gates, Mark Zuckerberg, and other super rich Americans who attempt to influence elections and policy, but they cannot undermine democratic institutions on their own. They simply have too little power with respect to other political forces, and their work and contributions are plagued both by principal-agent programs and by their divergent political moves may often cancel one another out. The *real* worry, as

\(^{489}\) Bartels 2010.

\(^{490}\) For instance, there is no significant correlation between levels of wealth inequality across the advanced democracies and how well their democratic institutions function. For discussion, see Gaus 2011, pp. 517-521.

\(^{491}\) Gilens 2012, pp. 70-96.
Martin Gilens has argued, is that democratic institutions in the United States are solely responsive to the top 10% of income earners.\footnote{Gilens 2012.}

I take it that the primary empirical case that US democratic institutions are not responsive to the wishes of the populace is the recent major study by Gilens and Page on the correlation between the wishes of different economic groups and their policy outcomes, based on data that Gilens turned into a book.\footnote{Gilens and Page 2014.} Gilens and Page find that the top 10% of income earners and large corporate powers and interest groups have a huge effect on policy vis-à-vis everyone else. In fact, disturbingly, they find that when the top 10% wants X and the bottom 90% wants not-X, the top 10% always gets their way. Given that all members of the public that are of age have primary rights to vote and influence the political process, and that certain democratic institutions can be publicly justified (as I show in Chapter 8), if income inequality causes this lack of responsiveness, then we have little reason to think that democratic institutions have a tendency to track what is publicly justified for members of the public. While Gilens acknowledges that the top 10% and bottom 90% often agree on policy, such that in many cases, the poor get what they want\footnote{Gilens 2012, p. 78.}, in cases of disagreement, the top 10% win out, such that democratic processes under conditions of economic inequality will ignore what the bottom 90% believe is best or good for the country. This means that constitutional rules governing the policy process function poorly because their production of

\footnote{Gilens 2012.}
\footnote{Gilens and Page 2014.}
\footnote{Gilens 2012, p. 78.}
legislation is not responsive to the preferences of the poorest Americans, which strongly suggests that the legislation may not be publicly justified for them, not to mention that poor Americans will have ineffective political rights, something about which they are bound to have a reasonable complaint.

Of course, it is possible that the top 10% have a better sense for what is publicly justified for everyone, such that their getting their way politically means a higher number of publicly justified policies and a lower number of defeated policies. But given the difficulties in determining what is publicly justified in a world of diverse and dispersed defeated, we have reason to defer to the judgments that members of the public make concerning themselves, rather than consulting the judgments of elite members of society.

Gilens and Page’s work has now come under significant scrutiny. And we need more than an interpretation of a single, albeit impressive, data set to determine whether Gilens and Page’s work meets the standards of policy epistemology, such that their work could be the evidential base for policy that attempts to compress income and wealth inequality. But let’s assume, at least for the moment, that their interpretation is the only reasonable interpretation of the data, and that the data is sufficiently strong evidence to justify the belief that in the United States, over the last several decades, the preferences of the poor count

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495 For a critique of Gilens’s focus on “responsiveness” as the appropriate standard of democratic equality, see Sabl 2015. For reinterpretations with the Gilens-Page data, see Enns 2015 and Branham, et al. 2016, both of which purport to show that the middle class has far more influence than Gilens and Page acknowledge.
for little or nothing in democratic outcomes, in contrast with the middle class, and especially with the rich. What policies can we publicly justify in response?

The argument from the left will be that our high levels of income and wealth inequality are generated by coercive property rules. Given that these property rules produce inequalities that undermine primary political rights and lead constitutional rules to not track what is publicly justified for the poor, the rules are defeated. If government imposes policies aimed at compressing these inequalities, the rich can have no successful objection given the relatively greater importance of having a rights-protecting and well-functioning democracy than having enough of their own money to live out their dreams.

However, recall the presumption against coercion and in favor of solutions offered by voluntary, civic institutions. This means that we should look for coercion-reducing policies that can reduce income inequality. I think two coercion-reducing policies can go a long way towards reducing income inequality in the United States – abolishing many residential zoning laws and intellectual property protections. One of the controversies raised by Thomas Piketty’s recent work on income inequality is that much of the inequality can be explained by the differing values of real estate held by the very rich and by everyone else. If so, then reforming zoning laws to prevent them from creating artificial shortages of real estate should be an excellent way to reduce inequalities of wealth specifically. We help solve the inequality problem with a coercion-reducing policies.

\[496\] Rognlie 2015.
The same is true of intellectual property laws that artificially inflate the wealth of the creators of intellectual property, especially with respect to information technology like various forms of software copyrights. It has also been estimated that extremely strict and long-term intellectual property rights have promoted the spectacular growth in the wealth of Silicon Valley billionaires and the many people who work at these firms, becoming ever richer and more powerful.\textsuperscript{497} Many libertarians oppose \textit{all} intellectual property rights, not to mention the extended protections that information technology firms insist upon for themselves, so a libertarian-egalitarian alliance on this issue could generate intelligible defeaters for the intense coercion involved in imposing intellectual property laws.\textsuperscript{498}

The hard question is whether the reductions in inequality wrought by less restrictive zoning laws and intellectual property rights will be enough to make the democratic process sufficiently responsive to the wishes of the people as a whole sufficient to ensure that primary political rights are respected and that our constitutional rules minimize legislative error. I find this extremely difficult to determine, given all the counterfactual judgments involved, the limitations of our empirical tools, and the other difficulties in ranking constitutional rules. My thought is that we should first pursue coercion-reducing methods of compressing income inequality rather than coercion-increasing methods, assuming that

\begin{footnotes}
\item[497] See Joseph Stiglitz’s discussion at: \url{http://opinionator.blogs.nytimes.com/2013/07/14/how-intellectual-property-reinforces-inequality/}
\item[498] \url{http://freenation.org/a/f3il.html}, \url{https://mises.org/library/ideas-are-free-case-against-intellectual-property}
\end{footnotes}
economic inequality causes democracy to function less well. We should also pursue the relatively modest coercive restrictions brought about through campaign finance reform before we attempt to substantially restructure the economy through taxes, regulations, and even the redistribution of capital holdings.499

My skepticism about coercively compressing inequality is driven by the concern that inequalities in wealth and income cannot by themselves cause democratic institutions to function poorly. Both factors could have some further cause, such as a constitution that allows for excessive rent-seeking that leads to the formation of inequality-increasing rules. If it is relatively easy for people to gain special government favors that others are denied, we can expect the politically well connected to benefit from these favors by becoming richer than others. And if it is relatively easy for people to gain special government favors that others are denied, then of course democracy is more responsive to their wishes than the wishes of everyone else. The concentrated benefits and dispersed costs of a rent-seeking society could explain both the failure of democracy to track the will of the people and increases in inequality between the rich and the poor.500 Before we can justify the use of redistributive taxation, we would need to determine that we lack alternative feasible, less coercive methods of trying to protect the integrity of the democratic process.

499 Gilens 2012 is long on diagnosis and extremely short on remedies; he focuses almost exclusively on campaign finance reform and gerrymandering. See pp. 247-252.

500 Gilens 2012 and Gilens and Page 2014 find that interest groups have powerful effects on legislative outcomes, though they frequently lose when their policy preferences diverge from the top 10% of the income distribution.
There are other confounding factors with respect to the social traits of the politically influential classes. The rich, for instance, may secure greater influence through better education about the political process. So if we could increase the quality of civics education for most members of the public, then we might be able to increase the responsiveness of democratic institutions to the will of the people because the people as a whole will have become better players in the democratic game. Fixing educational inequality may not require extensive redistribution to compress inequalities of wealth and income.

It is also possible that the influence of the rich is due less to how much more wealth they hold vis-à-vis the poor rather than their higher social rank, which could persist even with lower levels of economic inequality. If influence is due to social status, and wealth is a function of social status as well, then even if we coercively compress income inequality, we will not make the democratic process more reliable with respect to the will of the people because the process will remain tied to persons with high social status. Let’s combine this point with the old observation by Gordon Tullock that, given how high the stakes are in politics, it is peculiar that more isn’t spent on campaigns.\footnote{Tullock 1972. For a much more detailed discussion, see Ansolabehere, et al. 2003.} Given how much influence the rich have, and how little they spend on purchasing politicians, this strongly suggests that they’re affecting political outcomes in some other way, and I think status is a plausible alternative.\footnote{I thank Will Wilkinson for this important point.}
The absence of a clear, decisive cause of economic inequality shows the importance of policy epistemology. The standards of evidence for determining causal connections between social variables might be relatively permissive with respect to what individuals are entitled to belief but the standards of evidence required to publicly justify coercion are invariably much higher. If you’re going to tax someone making $1,000,000/year at 80% rather than 40%, you’d better be able to show with an adequate degree of certainty that reducing their income increases the protections of primary political rights. Otherwise, the coercion required to redistribute cannot be publicly justified to the person coerced.

Right now, in my estimation, coercively redistributing wealth acquired by justifiable fiscal policy cannot be publicly justified, and so such coercion undermines moral peace between persons. At the time of this writing, Vermont Senator Bernie Sanders spent his entire presidential campaign criticizing income inequality. On my view, he paints with too broad a brush, criticizing everyone who is rich rather than those who have become rich through rent-seeking. Sanders is absolutely right that many economically advantaged persons have been able to rig the political system in their favor, and these persons have no valid objection to having their wealth redistributed, or to changes in legal rules that would make it difficult for them to stay wealthy or increase their wealth. Yet blanket redistribution cannot be publicly justified until we have much better data demonstrating cause and effect with respect to inequality and undermining the democratic process. The Gilens and Page study is an important empirical
breakthrough in connecting economic inequality to the responsiveness of
democratic institutions, but to justify the coercive policies favored by the political
left, they have yet to satisfy adequate standards of evidence.

I feel similarly about the work of Thomas Piketty, which attempts to explain
increasing income and wealth inequality in industrialized nations by arguing that
the natural rate of return to capital \( r \) exceeds the general rate of growth \( g \), as it
did in the 19th century.\textsuperscript{503} His large data sets are used to buttress his claim
However, Piketty does not spend much time in such an enormous work to explain
why \( r \) exceeds \( g \). He also ignores further problems, such as the inevitable
diminishing marginal return to holding capital, such that at some \( r:g \) inequality,
the rates of return should equalize.\textsuperscript{504} Here again we have a purported connection
between relatively free economic conditions and dangerous levels of income and
wealth inequality without a clear causal connection between the two. Without a
causal connection demonstrable by means of the appropriate standards of policy
epistemology, Piketty’s work cannot by itself publicly justify the coercive
redistribution of wealth.

VII. Property-Owning Democracy

\textsuperscript{503} Piketty 2014, pp. 25-7.
\textsuperscript{504} For an accessible version of the criticism that Piketty’s model doesn’t address diminishing
returns to capital holdings, see http://larrysummers.com/2014/05/14/piketty-book-review-the-
inequality-puzzle/.
Property-owning democracies combine the regulative and redistributive functions of the welfare state with the governmental aim of ensuring that wealth and capital are widely dispersed. Rawls, political philosophy’s most famous property-owning democrat, argued that property-owning democracy was one of two regime types that best realized his principles of justice (the other being liberal socialism), though he was notoriously vague about how a property-owning democracy’s institutions are meant to realize his principles. To compensate for this deficiency, a number of political philosophers have recently tried to add institutional and policy content to the idea. I argue that, in comparison to a market-based order combined with social insurance, property-owning democracy cannot be publicly justified because in normal liberal democracies many members of the public will have defeaters for the additional coercion involved in establishing a property-owning democracy over and above the coercion required to establish a welfare state. Once we acknowledge justice pluralism, I think it is fairly obvious that property-owning democracy cannot be publicly justified. Elsewhere I have argued that the case for property-owning democracy fails on expressly Rawlsian terms, on the grounds that it is inefficient and unjust compared to the welfare state. So I think one can make an even stronger case against POD.

Martin O’Neill and Thad Williamson have done more than anyone to develop a Rawlsian defense of POD by outlining both the theoretical justifications

505 VALLIER POD CITE.
for property-owning democracy and its characteristic public policies. I shall focus on their work here. I criticize these property-owning democrats on two grounds. First, property-owning democracy faces serious economic challenges. It generates bad incentives and faces severe information problems in comparison to more market-friendly welfare states. Further, the motivations of political officials and citizens can be corrupted by perverse institutional conditions. People will have defeated for POD, then, based on the principle of sustainable improvements and on the grounds that the case for POD does not meet the standards of policy epistemology. Second, property-owning democracy involves coercive restrictions on liberty that cannot be publicly justified, such that even if POD could meet its economic challenges, some members of the public will justifiably regard it as excessively restrictive of liberty.

The familiar idea of welfare-state capitalism combines private property rights in land, labor, and capital with an activist government that engages in extensive economic regulation, countercyclical policy and the provision of social insurance. While there is no one thing referred to by “the welfare state,” we can understand it in terms of these broad institutional aims. While standard uses of the term “welfare state” can pick out regimes that merely provide social safety

506 I cite a variety of their papers throughout, but for many of their articles, see the edited volume, O’Neill and Williamson 2012. Through Rawls, political economic work on property-owning democracy began with economist James Meade. See Meade 1964. In this chapter, I focus on the Rawlsian interpretation of POD.

507 Readers may also be interested in the symposium on property-owning democracy in Analyse & Kritik vol. 1 (2013). From my read, none of the pieces address the concerns I raise in this chapter.
nets, I shall use the term more broadly here, to pick out policies characteristic of presently existing welfare states.

Property-owning democracy (hereafter POD) does more. The key governmental aim that distinguishes POD from welfare-state capitalism is the attempt to broaden capital ownership “so that income returns from capital are broadly rather than narrowly distributed” thereby producing “a more equitable pre-tax distribution.”⁵⁰⁸ In other words, PODs engage in the “predistribution” of capital, setting pre-tax incomes at a more equal level from the economic start.

To be more specific, O’Neill and Williamson propose five institutional features of a POD: (i) a right to equal public education, (ii) a right to minimum income and/or the means for supporting oneself and one’s family at a minimal level of social acceptability, (iii) a public system of campaign financing and explicit limitations on corporate political activity, (iv) a right of individuals to share a society’s productive capital and/or wealth and (v) a collective right to sufficient productive capital to sustain viable democratic communities at the local level.⁵⁰⁹ Since (iv) and (v) are the focus of this part of the chapter, I shall understand PODs as recognizing and enforcing individual capital rights and collective capital rights respectively.⁵¹⁰

Implementing (i)–(iii) only requires welfare state capitalism, but institutionalizing individual and collective capital rights require something more.

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⁵⁰⁸ O’Neill and Williamson 2012a.
⁵⁰⁹ Ibid. It is unclear what “local” refers to.
⁵¹⁰ See Williamson 2013 for a discussion of how to guarantee these rights through constitutional amendments.
In contrast to the welfare state, POD reforms the heart of the economy, purportedly ensuring that those individuals that justice bars from having too much wealth or market power never have it in the first place.

In contrast to state socialists, who seek to abolish markets in productive capital entirely, Rawls, O’Neill, and Williamson stress that PODs have markets and a price system. But price signals are used primarily for “allocation” and not “distribution.” The extent of markets is also limited, as PODs have extensive public sectors to provide public goods that would otherwise be underprovided. Nonetheless, while the POD-state will heavily regulate and control the market, PODs would still allow people to choose their careers and jobs, save for those whose existence relies on large concentrations of capital. Further, competitive markets will help to ensure that economic power is decentralized.

Rawls thought that POD requires enormous regulatory bodies, or additional “branches” of government. Rawls defended a four-branch system of economic control, including “allocation,” “stabilization,” “transfer,” and “distribution” branches. The function of the branches is as follows:

(a) The Allocation Branch keeps prices competitive, prevents formation of “unreasonable” market power, identifies and corrects market inefficiencies through taxes, subsidies and the redefinition of property rights (p. 244).

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512 It is unclear whether O’Neill and Williamson would endorse these bodies, but they endorse the basic functions of the bodies in any case.
(b) *The Stabilization Branch* brings about full employment and protects free choice of occupation along with deploying financial resources to increase aggregate demand when necessary.

(c) *The Transfer Branch* generates and distributes the social minimum by taking all needs into account and giving them the right weight with respect to other claims. A competitive price system gives no consideration to needs and “therefore it cannot be the sole device of distribution.”

(d) *The Distribution Branch* preserves approximate justice in distributive shares through taxes and redefining property titles. It imposes great inheritance and gift taxes, along with restricting rights of bequest. It taxes to achieve a certain distribution of wealth and to raise the revenue required to impose justice.513

Rawls argues that the branches will routinely require that “social resources … be released to the government.”514

Note that welfare states contain many of the same branches, but with more restrictive functions. In a welfare state, the allocation branch will not prevent the formation of “unreasonable” market power, but will correct for market inefficiencies, whereas the distribution and transfer branches will simply ensure that social safety nets are adequately funded through redistributive taxation. The function of the stabilization branch is similar under both regime types, though

513 Rawls 1971, p. 245.
514 Rawls 1971, p. 278.
welfare state capitalism will tend to realize stabilization, transfer and distribution functions through less coercive means, perhaps by relying largely on redistributive taxation and Keynesian fiscal and monetary stimulus, while forgoing the deliberate transfer of capital stock.

Williamson furthers fleshes out the functions of a POD by distinguishing between three forms of capital that must be more widely distributed: residential capital, cash, and stock (together representing the scope of individual capital rights). To ensure the dispersion of residential or real-estate holdings, Williamson argues that the government should subsidize home mortgage lending and provide grants for down payments. To distribute cash, the government should ensure that households at the bottom of the wealth distribution have at least $100,000 in wealth. The government should also provide people with savings, perhaps through a one-time lump sum derived from a fund of inheritance taxes. Of course, we can’t guarantee that all persons have the same savings, as this would “immediately create perverse incentives as well as a fiscal sinkhole.” Instead, the government could require people to see a government financial adviser before they could invest in short-term stocks or liquefy their holdings.515

To implement collective capital rights, that is, to help the economy better sustain local democratic bodies, both O’Neill and Williamson argue that the workplace should be largely democratic.516 Workers will not only govern their own terms of employment but may be given part of the task of monitoring and

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515 Williamson 2009, p. 443.
enforcing workplace regulations and, perhaps, non-tradable coupons for fixed stock ownership. Or a government institution could hold the stock for them. We can see then that POD is democratic in two senses: it protects equal civil and political liberties via a representative democracy and it protects worker control of the workplace.

To sharpen the contrast with the welfare state, we should focus on the unique ways in which PODs intervene into the economy. Initially it seems obvious that imposing a POD on otherwise normal persons will require constant (if justified) interference with their lives. While Williamson is sensitive to this concern, he disagrees:

Once the background institutions for allocating property are established, the system should operate of its own accord to produce a less concentrated, far wider distribution of property, with no “interference” in the everyday operations of the economy required beyond that present in the existing system of periodic taxation.\(^5\)

To his credit, Williamson recognizes that the transition from welfare-state capitalism to POD “would require, probably in quite a substantial degree, redistribution of assets accumulated under the ‘old’ rules defining property rights

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\(^5\) Williamson 2009, p. 449.
and taxation.”\textsuperscript{518} So while the transition might (justifiably) require enormous amounts of coercion, the system once established would not. A POD will somehow reach a social equilibrium, preventing deviation towards welfare-state capitalism, laissez-faire, and command socialism. Otherwise, significant coercion would be required to keep POD institutions in place. It is not clear why POD is a social equilibrium, but O’Neill has argued that POD will stabilize through the promotion of democratic participation in the workplace, which will in turn give citizens are more democratic “character” that they can use to construct stable institutions. O’Neill admits that this is an empirical claim that would require substantial research to establish.\textsuperscript{519} In lieu of such evidence, we cannot take for granted that POD will settle into a social equilibrium that would substantially reduce the need for constant interference. For our purposes, then, we should assume that POD states must interfere much more in the economy than traditional welfare states, since we have little reason to think otherwise. To accept O’Neill’s conjecture is tantamount to assuming away a huge range of economic challenges in maintaining POD institutions.

\textbf{For three detailed arguments concerning the moral and economic problems faced by PODs, see the supplementary material to Chapter 7.}

VIII. Property-Owning Democracy Cannot be Publicly Justified

\textsuperscript{518} Williamson 2009.
\textsuperscript{519} O’Neill 2009, p. 47.
The point of this chapter is to illustrate how the value of moral peace between persons generates an account of the proper role of the state in regulating economic affairs. I have argued that, due to diverse and dispersed defeaters, making the case for coercive state intervention is difficult. The principle of social insurance may be publicly justified, but policy epistemology requires meeting demanding standards of evidence to show that regulation and public policy can be publicly justified. Further, concerns about economic inequality are better understood as concerns raised by some less sectarian commitment, like opposing excessive intellectual property laws. And these concerns are often too sectarian to serve as a basis for public justification, or do not satisfy the standards of policy epistemology. So we have seen that it is hard to make a case for going beyond a modest welfare state.

Getting to a property-owning democracy requires surmounting these hurdles and serious concerns about whether POD hampers economic growth and the economic well-being of a publicly justified polity. In the supplement, I give a variety of arguments that POD cannot meet these barriers, given what little its proponents have argued on its behalf. To summarize, because PODs distribute capital holdings so broadly as to prevent concentrations of capital from forming even in sectors where doing so is economic efficiency, PODs will create disincentives for the accumulation of capital, which will reduce economic growth. Further, PODs must have an extensive and expensive bureaucratic apparatus that will frequently and mistakenly overtax, overregulate, and all-too-often break-up efficient and otherwise helpful capital concentrations. They will not only reduce
the incentive to produce capital, and so to generate growth, they will not have the information required to adequately perform their functions. Finally, we have reason to think that the great power of these bureaucratic organizations will attract rent-seekers, which will gradually capture the organizations and run them to their own benefit. These “public choice” problems could easily cripple POD economies vis-à-vis capitalist welfare-states.

Consequently, there is hardly a question as to whether POD is defeated or not, since there are reasonable members of the public that will accept many of the arguments I have discussed above, and in detail in the supplementary material to this chapter. The arguments I have given may be wrong, but, again, they are surely reasonable, given that they are based on rudimentary economic concerns. We can conclude, then, that POD and public reason liberalism are incompatible given the present diversity of opinion in liberal democratic orders. Perhaps the POD people can convince those of us who disagree. But until then, POD is not a viable governance structure for a free society.

I worry about two potential counterarguments to my claim. First, defenders of POD can argue that unions are civic associations who have a primary right to organize to control their economic lives. If capitalists use coercion to prevent them from exercising their freedom of association, say by threatening to fire them, then the capitalist may be using publicly defeated coercive threats to get his way. In that case, the state might have a role in prohibiting the capitalist from engaging in these threats. On this basis, we can build various labor rights protections into the
legal order of a publicly justified polity. To make a case for POD, its defenders will have to build on this legal structure, arguing that the freedom of association of workers and, arguably, their basic welfare rights, require that they be given considerable control over their workplace by in some cases redistributing capital goods from capitalists to workers. I think this will be a hard argument to make, given that labor law can go a long way towards protecting workers without worker ownership. Imagine a society in which all persons were free to unionize on whatever terms they liked and that few large firms have the right to coercively penalize them for doing so. Unionization rates would likely increase substantially, and the welfare of workers might be much better protected. Under such a regime, which could be publicly justified, workers in a free economy could do quite well. For the POD people to go further, then, would likely require the use of defeated coercion. But I am open to an argument from POD people to this effect.

The second, more serious, counterargument is that PODs are not more coercive than welfare states. Paul Bou-Habib has provided several arguments to this effect that are worth careful discussion. Bou-Habib first argues that POD’s higher tax rates are not necessarily more coercive than the lower tax rates required to have laissez-faire or a welfare state. He first argues that “the extent to which citizens will comply with tax laws depends on, among other things, their sense of justice—particularly whether they morally endorse the economic regime in question." Bou-Habib backs up this conjecture by claiming that, in cross-cultural

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520 Bou-Habib 2015, p. 6.
studies, the empirical literature on tax evasion is “decidedly mixed,” and cites empirical evidence that tax compliance may not fall as tax rates increase, and that some empirical works suggests more compliance as tax rates rise in cross-cultural studies. On the empirical evidence, my review of several tax evasion studies lead me to conclude that tax evasion rates are determined by a variety of factors, but that higher tax rates do correlate with more tax evasion. For instance, Gamze Oz Yalama and Erdal Gumus find that “increases in the tax rate and in tax burden increase tax evasion,” confirming results in five other studies. Bou-Habib cites Grant Richardson’s work on the determinants of tax evasion, but Richardson focuses on factors other than high tax rates. The main finding that Bou-Habib appeals to is that tax evasion is partly determined by “tax morale” which Erzo Luttmer and Monica Singhal define as “an umbrella term capturing nonpecuniary motivations for tax compliance as well as factors that fall outside the standard, expected utility framework” such as acting from feelings of “guilt or shame for failure to comply.” They note that tax morale can be raised when government attempts to “increase[e] voluntary compliance with tax laws” while “creating a social norm of compliance.” Attempts to raise tax morale include shaming tax evaders and instituting public campaigns to encourage tax compliance. I believe Bou-Habib’s argumentative strategy is to argue that higher tax rates might not lead

521 I cannot review this literature here, but Bou-Habib’s claim that the tax evasion literature is “decidedly mixed” seems inaccurate. Tax evasion rates are determined by a variety of factors, but higher tax rates do correlate with more tax evasion.
522 Oz Yalama and Gumus 2013, p. 21.
523 Richardson 2006.
524 Luttmer and Singhal 2014, p. 150.
525 Luttmer and Singhal 2014, p. 149.
to more tax evasion on the grounds that those taxed might have a high tax morale, which would lead them to comply with higher tax rates, perhaps because they believe the higher tax rates are fairer. The problem with Bou-Habib’s view is that the fact of evaluative pluralism suggests that moving to property-owning democracy will not raise tax morale across a diverse population. Some may be sufficiently inspired by POD institutions that they will happily pay higher taxes, but people who do not endorse POD, even if they think some POD policies are eligible, may nonetheless be strongly tempted to evade higher taxes, and so experience the higher tax burden as coercive. Unless POD institutions transform the populace in a direction towards higher tax morale, Bou-Habib’s first argument fails to discharge the connection between coercion and tax level.

Bou-Habib also disputes the idea that higher tax rates are more coercive on the grounds that taxation is a cost on options. The only reason that higher tax rates appear to be a greater cost on options is because “we fail to appreciate that the structure of social relations that make up a distribution of private property in our society is a revocable product of social choice.”\(^{526}\) Property rights are generally products of coercive enforcement such that the state interacts with citizens no less coercively when it protects private property than when it imposes high tax rates.

The problem with this argument is that it is subject to a simple *reductio ad absurdum*. I have already granted that the enforcement of property rights is coercive, but the enforcement of different schemes of property rights are not

\(^{526}\) Bou-Habib 2015, p. 7.
equally coercive. If they were, then the Soviet Union’s enforcement of collective property rights would be no less coercive than the enforcement of property rights in present-day Denmark.

There must, therefore, be some way to distinguish more and less coercive regimes while simultaneously recognizing that property rights are coercively enforced. One way to do so is to compare the options available to citizens under different regimes, and this is partly a function of a society’s level of economic prosperity, as greater riches are associated with more choices. If free-market orders are likely to be more efficient than property-owning democracies, as I have argued, then generally people should have more options under welfare-state capitalism than POD. Increases in taxes that move us towards POD should therefore prove more coercive over the long run in virtue of reducing economic growth.

But there is also a more immediate effect due to the fact that property rights are established against a background set by the social-moral state of nature, where we can expect moral and private legal conventions to form around the basic property holdings of citizens, such that legislatively-imposed taxation will increase coercion by disrupting the conventions in the social-moral statue of nature. While the state acts coercively to protect property rights, legislation and legislative bodies are not required to enforce them in general, such that state interference with these rights is an increase in coercion.

The property rights justified early in the order of justification are vague and so do not rule out redistributive taxation in principle. However, moral and legal
conventions that specify property rights in ways that are within the optimal eligible set must rule out some redistributive taxation, or they are hardly property rights at all. Consequently, we can expect redistributive taxation to become less optimal, and eventually less than eligible, as tax rates increase. Given the massive amount of taxation required to maintain a POD over and above a welfare state, since POD requires heavy levels of capital taxation, we have reason to think that POD levels of taxes, not to mention regulations, will violate property rights by being excessively coercive.\textsuperscript{527} It is not hard to see, then, that PODs cannot “constitute the correct way in which to partition social space into individual spheres of authority.”\textsuperscript{528}

IX. Liberal Socialism \textsuperscript{add Edmundson here in v2}

I want to end the chapter with a criticism of liberal socialism, which I take to combine the standard list of liberal liberties with government ownership and operation of productive resources.\textsuperscript{529} This regime is defeated for many reasons. The first and most obvious reason is that we have strong reason to believe that such an order will dramatically reduce the bundle of primary goods available to each person, given the inefficiencies in a planned economy due both to information problems and incentive problems. The same concerns that apply to the efficiency of property-owning democracies apply much more strongly to liberal socialism,

\textsuperscript{527} In this way, I reject another of Bou-Habib’s arguments. See Bou-Habib 2015, p. 9.
\textsuperscript{528} Bou-Habib 2015, p. 11.
\textsuperscript{529} Rawls 2001, p. 138.
given that it lacks a competitive pricing mechanism for capital.\textsuperscript{530} A further problem can be drawn from Hayek’s famous work, \textit{The Road to Serfdom}.\textsuperscript{531} I read \textit{Road} not as a defense of laissez-faire, but rather as an argument that liberal socialism cannot be stable for the right reasons. Hayek’s argument is that the liberal rule of law and individual freedoms are incompatible with a socialist economic order, and that a socialist economic order must invariably collapse into a totalitarian socialist order. The argument is remarkably proto-Rawlsian, as the “scales of value” of rational and moral persons “are inevitably different and often inconsistent with each other.”\textsuperscript{532} Given that everyone’s fate is bound-up in the details of the central plan, disagreement about how to proceed collectively will be rampant, and we can expect little agreement among democratic leaders. But given how much is at stake, Hayek foresaw interminable squabbling that would make democratic leaders look weak and ineffectual, particularly during economic downturns when public social anxiety increases. This would leave the liberal socialist regime vulnerable to take-over by some group or sect that promises to end the debate and impose a single plan based on the sect leader’s empathic connection with the people themselves. Under liberal socialism, people are not allowed to go their separate ways when it comes to decisions about economic production, freedoms that markets protect. This will lead to ferocious fights about

\textsuperscript{530} Just as described in Hayek 1945, remarkably ignored by Rawls and other advocates of liberal socialism.
\textsuperscript{531} Hayek 2007
\textsuperscript{532} Hayek 2007, p. 102.
how to plan the economy, and the fights will undermine the stability of democratic regimes, leading to totalitarian regimes.

Some have attacked Hayek for making a bad slippery slope argument, say based on his purported claim (not his real claim) that welfare states must lead to totalitarianism. Critically, Hayek expressly embraces the principle of social insurance by supporting “the assurance of a certain minimum income for everyone.” Without getting into the weeds of Hayek exegesis, I will simply note that I have elsewhere weighed in on the debate about Hayek’s concerns about the welfare state by distinguishing, as Hayek does implicitly, between the welfare state of law and the welfare state of administration. The welfare state of administration is not the same as a social insurance or safety-net state, but rather a state based on a robust conception of distributive justice applied to its economic components, not the system as a whole. Hayek is concerned only about coercive redistributive institutions that permit constant state tinkering. Hayek affirms the welfare state law, where clear, public, general principles, rather than extensive administrative bodies, regulate social insurance and other state functions.

The problem with liberal socialism, then, is that it is a welfare state of administration on steroids. It does far more than engage in regulation and the

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533 Farrant and McPhail 2010 both advance and discuss other versions of this criticism. They argue that Hayek thought the welfare state would lead to serfdom, in contrast to Hayek scholar Bruce Caldwell in Hayek 2007, pp. 29-31.
equalization of incomes, but pursues distributive justice by owning and operating a society’s major concentrations of capital according to a central plan. Such a regime will prove unstable for the reasons outlined, and this argument holds without even the hint of a commitment to the claim that a principle of social insurance leads to serfdom. If we understand Hayek in this way, we can see how the logic of evaluative pluralism applies to deciding what to produce. Deep disagreement will lead to the intense struggles that weaken democratic orders and their ability to resist totalitarianism. And understood in this way, I think Hayek was obviously right. We have never seen a liberal socialist regime, only liberal welfare states and authoritarian socialist regimes. While many liberal welfare states moved in a socialist direction following World War II, they did not approach the liberal socialist ideal. For instance, Attlee’s Labour government in Britain socialized only 20% of society’s productive resources. Furthermore, after a few decades, all liberal socialist leaning parties retreated from their programs and started selling off state enterprises. The regimes that went for socialism always destroyed their democratic institutions; the regimes that were liberal backed off of socialism.

X. Neoclassical Liberal Public Reason

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This chapter began by reviewing public reason liberalism’s hostility to state coercion. Public justification begins with the moral order, then adds the legal order and protections of primary rights before political institutions can be publicly justified. But, as we saw, we are not left with political libertarianism. Instead, a principle of social insurance can be publicly justified. Further, we can justify regulations and additional public policies so long as they meet the standards set by the appropriate policy epistemology. We can justify redistribution in the name of preserving the integrity of the democratic process as well, though the present empirical evidence linking inequalities of wealth and democratic dysfunction is inconclusive. And public reason does rule out redistribution for the sake of egalitarian conceptions of distributive justice. And property-owning democracy and liberal socialism are much too inefficient and coercive to be publicly justified.

Public reason is therefore neither libertarian nor egalitarian, but rather tends to favor modest welfare-state capitalism—a market economy combined with a principle of social insurance, the strong right to unionize, relatively low taxes, demonstrably effective regulations and public policies, and strong protections for the integrity of the democratic process.\(^{537}\) Such a regime is one that all members of the public can see as superior to a social-moral state of nature. Even socialists and libertarians will prefer such a regime to a return to the state of nature. This does not mean that either libertarians or socialists must acquiesce in such a condition. They are free to agitate for their preferred regime types. But at present, neither the

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\(^{537}\) Compare Gaus 2011, p. 526.
imposition of either a radically free market economy or an extensive state can be publicly justified to diverse members of the public.

I term this form of public reason liberalism a *neoclassical liberalism*, which Jason Brennan and John Tomasi understand as a combination of an extensive set of basic economic liberties with a commitment to a certain form of social or distributive justice.\(^{538}\) The public justification of primary rights to economic liberty and the principle of social insurance both flesh out a doctrine of social justice, which concerns how social institutions should be organized to give others their due, and embraces a classical liberal conception of economic freedom.

Thus far, I have not discussed the form that government must take and the justification for liberal governmental structures. I turn to this task in the next chapter. Chapter 8 justifies an approach to democratic governance I call *process democracy* in contrast to agonistic, aggregative, and deliberative approaches.

\(^{538}\) Brennan and Tomasi 2011, p. 115.
Chapter 8: Process Democracy

The first two chapters of Part III applied my model of public justification to the derivation of primary rights, specifically the rights of freedom of association and property rights. I now apply the second two stages of the model of constitutional choice to questions about the structure of political institutions, specifically how to determine which constitutional rules can be publicly justified.

The only eligible constitutional rules are those that adequately execute the protective and productive functions of law-altering institutions. Rules are then ranked by the spread of type-1 and type-2 errors that they can be expected to produce under normal circumstances. A type-1 error, recall, is a false positive, where a constitutional rule produces a law that is not publicly justified; a type-2 error is a failure to produce publicly justified laws that are, in some sense, necessary or important. A problem arose when we attempted to assign a social weighting to these two types of errors. Due to evaluative pluralism, different members of the public will be more worried about one kind of error than the other. This lead me to explore the possibility of choosing an aggregation rule to allow members of the public to settle on a collective weighting of type-1 and type-2 errors so that they can rank eligible constitutional rules vis-à-vis one another. I offered the Borda-Condorcet rule to provide the weighting, so that constitutional rules can be ranked based on the rankings output by both the Borda Count and the Condorcet rule.
Chapter 5 outlined the conceptions of moralized stability appropriate for selecting constitutional rules. I argued that a constitutional rule C is stable in the right way if and only if:

(i) Officials acquire and fulfill their roles regarding C as specified by some C_x.
(ii) C’s regular operation produces publicly justified legal conventions (Ls);
(iii) Citizens generally comply with and internalize the publicly justified Ls produces by C;
(iv) Violations of C and Ls are discouraged by moral and/or legal pressure.

In understanding the conditions of moralized stability, we must also identify the ways in which a constitutional rule can be destabilized. Destabilization can occur due to two types of factors—internal dynamics and external shocks. An internal dynamic arises from within a system of reasonable, cooperative agents complying with publicly justified rules, whereas an external shock is generated by factors outside of the cooperative system, such as the invasion of defectors. The primary internal dynamic with which I am concerned is a collapse in assurance between agents. The primary external shock with which I am concerned is the invasion of merely rational agents who will defect from norms for their own benefit. By engaging in rent-seeking, agents will undermine social trust and discourage cooperation from reasonable, conditionally cooperating agents. A constitutional rule is stable in the right way when it manages its dysfunctional internal dynamics
and remains resilient in the fact of external shocks. When the rule adequately executes the protective and productive functions of the state in a stable fashion, then the rule is publicly justified.

I have two aims in applying the second two stages of my model to justify political decision-making procedures. I first seek to develop a principle of political obligation understood as a duty to comply with *legislation*. I specified the conditions for social-moral obligation in Chapters 1 and 2 and the conditions for legal obligation in Chapter 3, but I have yet to outline the conditions for political obligation. But if we are to establish that political institutions are compatible with moral peace between persons, we must have an account of political obligation.

I then seek to justify certain forms of *democratic* decision-making. I want to show not merely that publicly justified constitutional rules can generate political obligations but that, to do so, those institutions should be democratic. My conception of democracy focuses not on a specific sort of democratic process, like *deliberative* or *aggregative* democracy, but rather on the careful selection of various and diverse democratic processes at different stages of the political process. Accordingly, this chapter develops a conception of *process democracy*.

Given my goals, I proceed in eight parts. In Section I, I outline a general principle for publicly justifying a constitutional rule and derive a principle of political obligation from that principle. Section II reviews James Fishkin’s work on different conceptions of democratic procedures and Section III argues that Fishkin’s different conceptions of democracy apply to different stages of the
political process. In short, different parts of the political process should exemplify different values and so call for different kinds of democratic procedure. Sections IV-VII divide up the political process into four stages, discusses the conception of democracy most appropriate for that stage, and addresses the possibility of democratic failure at that stage. Section IV covers the selection of political officials. Section V covers the choice of policies relevant to executing the state’s protective functions, whereas Section VI covers the choice of policies relevant to executing the state’s productive functions. Section VII covers the review process, where legislative errors can be corrected after a law goes into effect. Finally, Section VIII contrasts my process democratic approach to the familiar alternatives—deliberative democracy, aggregative democracy, and agonistic democracy.

I. A Formula for Constitutional Authority and Political Obligation

Public reason requires an account of legal obligation, but we also need to account for the authority of law-selecting decision procedures—constitutional authority. Unless constitutions have authority, then no law-changing institutions can have authority, but we need that authority to complete the social-moral order and so establish moral peace between persons.540

539 Fishkin 2009.
540 All real-world constitutions cover the actions of nation-states. I will not here attempt to justify a nation-state, understood as a monopolist on the use of force and adjudication (for further parts of
Recall from Chapter 3 that my account of political authority has three layers—moral, legal, and political. The moral layer is focused on the public justification of moral conventions; the legal layer is focused on the public justification of legal conventions; and the political layer is focused on the public justification of political conventions understood as law-creating and law-altering institutions. The justification of the political layer depends upon the deeper legal layer. Specifically, the principle of constitutional justification builds on the Legal Justification Principle (LJP) just as the Legal Justification Principle builds on the Public Justification Principle (PJP). To see this, recall the PJP and the LJP:

*Public Justification Principle*: a moral convention M is publicly justified only if each member of the public P has sufficient intelligible reason I to internalize M.

*Legal Justification Principle*: a legal convention L is publicly justified only if each member of the public P has sufficient intelligible reason I to internalize L because each P rationally recognizes that compliance with L improves upon her capacity to comply with M(s).

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the definition of the modern nation-state, see Morris 2002, pp. 45-6; rather, I will take it for granted to simplify my argument. But in granting that states can be publicly justified for purposes of discussion, I do not thereby commit myself to state legitimacy. In fact, I think it an open question as to whether states can be publicly justified if and when there are polycentric alternatives, alternatives I analyze in Chapter 9 in the supplementary material.
Laws are justified insofar as each person has sufficient reason to internalize them because they recognize that compliance with laws improve upon their capacity to comply with the moral conventions that apply to them. The Political Justification Principle is constructed likewise. Let’s begin with the most formal and complex statement of the Legal Justification Principle and build an analogous Political Justification Principle (POJP) before simplifying the latter.

LO': A has a legal obligation O to comply with law L iff A is epistemically entitled to believe (i) that general compliance with L will significantly improve her moral order’s capacity to perform one of its primary functions and (ii) that her compliance with L with allows her to effectively discharge or considerably improves upon her presently weak ability to discharge, her social-moral obligation(s) S, so long as (iii) A rationally observes that sufficiently many other agents are complying with L and (iv) that complying with L does not violate A’s other social-moral obligations of equal or greater weight.⁵⁴¹

From here, can build a principle of political obligation, the Political Justification Principle (PO):

⁵⁴¹ I omit a discussion of internalization here. I think that legal obligations involve the internalization of a law as the agent’s own, but that condition is not required to explain legal obligation. [Keep this?]
PO: A has a political obligation Ψ to comply with constitutional rule C iff A is epistemically entitled to believe (i) that general compliance with C will significantly improve her legal order’s capacity to perform one of its primary functions and (ii) that her compliance with C will allow her to effectively discharge or considerably improve upon her ability to discharge her legal obligation(s) L, so long as (iii) A rationally observes that sufficiently many other agents are complying with Ψ and (iv) that complying with Ψ does not violate A’s other legal obligations of equal or greater weight.

Again, constitutional rules are related to legal conventions as legal conventions are related to moral conventions; and political obligations are related to legal obligations as legal obligations are related to social-moral obligations. The arguments that derive political obligation from legal obligations are isometric with the arguments that derive legal obligations from social-moral obligations. To review once more, Reba has an obligation to follow the law when it better enables her to comply with her social obligations than she could in its absence; similarly, John has an obligation to follow a constitutional rule when it better enables him to comply with his legal obligations than he could in its absence.

We can imagine a state of mere law that runs parallel to the social-moral state of nature; in such an order, there are only moral and legal conventions, but no decision procedures. In Razian terms, in the state of mere law, only duty-imposing laws exist; there are no laws that govern the process of laying down laws
or adjudicating disputes about them. In other words, there are no constitutional rules. In the state of mere law, laws can secure moral peace by structuring moral conventions, but they cannot structure other laws, since there are no decision procedures for resolving conflicts between laws. This means that the law cannot effectively realize its four functions. Without legislative bodies, understood as self-conscious legal decision-making mechanisms, the law will be unable to perform its four primary functions.

Before proceeding, I should note that political decision procedures are imperfect and will often generate bad law. Further, constitutional rules might be unfair or corrupt in themselves. In these cases, persons lack moral obligations to comply with and internalize those rules. However, constitutional rules can continue to have authority even if they make legal mistakes. Reba will have no obligation to comply with laws that cannot be publicly justified for her; but if her constitutional decision procedures do a reasonably good job of providing publicly justified law, she must not seek to overthrow or undermine her constitution. This is how a constitution can be legitimate when it is not fully just, because we can be obliged not to undermine the constitution even if it is fallible. So constitutional rules can retain their authority even if they make mistakes, so long as they meet the other conditions of public justification. To do this, they must be limited in certain respects, and I will discuss those limits later in the chapter.

With this, I offer a simplified Political Justification Principle (POJP):

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542 Raz 1970, p. 147.
Political Justification Principle: a constitutional rule C is publicly justified only if each member of the public P has sufficient intelligible reason I to internalize C because each P rationally recognizes that compliance with C improves upon her capacity to comply with the relevant sub-set of L(s).\textsuperscript{543}

To determine whether C improves upon her capacity to comply with L(s), we must introduce the framework developed in Part II of the book. C improves upon a citizens’ capacity to comply with the relevant sub-set of L(s) produced or protected by C when C (a) protects and respects primary rights, including political rights like the right to vote, (b) minimizes legislative errors according to the social error function, and (c) proves durable in the face of internal instability and is largely immune to external shocks.\textsuperscript{544}

Now we can determine which familiar forms of democratic decision-making can be publicly justified.

II. Fishkin’s Taxonomy of Democratic Procedures

In When the People Speak, James Fishkin develops a useful taxonomy of democratic decision procedures based on the realization of certain attractive moral

\textsuperscript{543} Notice here that my view diverges from Hasnas’s social peace view, since he claims that the scoail pace view “cannot give rise to a duty to obey the law of a state-administered legal system” because legislative rules “are not necessarily peace-promoting rules.” Hasnas 2013, p. 471. My view, in contrast, is that \textit{insofar} as legislation improves upon our ability to comply with our legal obligations, that the moral peace view can ground the authority of legislation.

\textsuperscript{544} I will set aside balance in this chapter, as I believe it will be achieved largely through appropriate punishments for deviation from publicly justified norms.
qualities that ultimately conflict with one another. These four principles are deliberation, political equality, mass participation, and non-tyranny.\textsuperscript{545} I agree with Fishkin that these principles are attractive, so let’s examine his definition of these principles:

(1) Deliberation. Fishkin understands deliberation as “the process by which individuals sincerely weigh the merits of competing arguments in discussions together.”\textsuperscript{546} Thus, deliberation looks to achieve a certain level of quality, such that good legislative and policy options can be identified and decided upon. The goal of deliberation is to realize five properties: information, substantive balance, diversity, conscientiousness, and equal consideration.\textsuperscript{547} Information should be reasonably accurate, arguments should be offered by different perspectives to achieve balance, viewpoints should be diverse and so representative of diverse views among the public, and participants should conscientiously evaluate arguments; and each person’s arguments should be given equal consideration.

(2) Political Equality. Fishkin understands political equality as “the equal consideration of political preferences.”\textsuperscript{548} In other words, each person’s preference or choice should be counted the same. The way that political

\begin{footnotesize}
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\item[545] Fishkin 2009, p. 46, 60.
\item[546] Fishkin 2009, p. 33.
\item[547] Fishkin 2009, p. 34.
\item[548] Fishkin 2009, p. 43.
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equality has typically been realized is through a one person, one vote standard, where each member of the public is given a vote over the relevant issues. Fishkin stresses the indeterminacy of the idea of political equality because it is neutral between one man, one vote and “microcosmic experiments” where deliberative bodies are chosen through a random selection mechanism from the public, such that the public’s views are represented in discussion by representative persons. He also notes that political equality is usually understood more broadly as including not just a vote, but an equal opportunity to affect the political process. But for our purposes, let’s understand political equality as equal voting power in politically competitive conditions.\(^{549}\)

To generate more substantive notions of equality, we can appeal to earlier parts of my theory.

(3) Participation – Fishkin understands participation as mass political participation that engages “the bulk of the population in participation that is political” in nature.\(^{550}\) Political participation can be understood more directly as “behavior on the part of members of the mass public directed at influencing, directly or indirectly, the formulation, adoption, or implementation of governmental or policy choices.”\(^{551}\) Participation includes all sorts of activities, from writing letters to one’s

\(^{549}\) Fishkin 2009, p. 44.
\(^{550}\) Fishkin 2009, p. 45.
\(^{551}\) Fishkin 2009
representative, to take part in demonstrations, to sign petitions, to publish editorials, and organize get-out-the-vote efforts.

Despite valuing all three principles, Fishkin acknowledges that in real political practice, we face a democratic trilemma because we can only adequately realize two of these principles if we partly sack the third. Fishkin’s mass democracy realizes political equality and political participation because it gives everyone an opportunity to vote for politicians and participate in elections. But in large, mass elections, there is little incentive for citizens to deliberate in any responsible way since their deliberatively-formed opinions have no impact on the political process. The costs of becoming informed are too high.552

Mobilized deliberation combines participation and deliberation by encouraging members of the mass public to participate in deliberative forums.553 Deliberation is highly structured in order to realize the values of deliberation. However, Fishkin acknowledges that most will not participate because it is not generally possible to “reliably motivate millions to deliberate without either incentives or compulsion.”554 In this way, we partly give up on political equality because some citizens will have much more influence than others.

Third, Fishkin introduces deliberative equality, which combines deliberation and political equality. Under a system of deliberative equality, people are selected

552 As famously argued in Downs 1957 For further discussion of Downs and related “rational ignorance” theories of voting, see Caplan 2007, pp. 94-113. Also see Gaus 2007, pp. 178-184.
553 Fishkin 2009, p. 53.
554 Fishkin 2009, p. 54.
at random for *microcosmic deliberation*, “a representative mini-public of participants” who “become informed as they weigh competing arguments on their merits.” Since people are placed within highly structured deliberative contexts, the value of deliberation can be realized, and since people are chosen at random, political equality endures. But due to random sampling the vast majority of people will not be full participants in the political process, since only a handful of people will be chosen as deliberators.

Matters become more complicated when we add Fishkin’s fourth condition of non-tyranny.

(4) Non-Tyranny. Tyranny is “the choice of a policy that imposes severe deprivations of essential interests when an alternative policy could have been chosen that would not have imposed comparable severe deprivations on anyone.” Fishkin admits that people can do bad things, “even if they decide democratically.” I understand severe deprivations as severe violations of primary rights. If a democratic procedure reliably, severely violates primary rights, then that democratic procedure cannot be publicly justified. So non-tyranny places a sharp outer boundary on which democratic procedures can even be considered for public justification.

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555 Fishkin 2009
557 Fishkin 2009, p. 60.
I want to avoid running non-tyranny and the political justification principle together. The values of non-tyranny, deliberation, participation, and political equality all come in degrees, on Fishkin’s understanding, and different democratic procedures and practices will realize them to different degrees. Only with a general assessment of the extent to which a democratic procedure realizes all four values can we determine which procedures are publicly justified. So avoiding primary rights violations, that is non-tyranny, is only one factor that speaks to the public justification of a democratic procedure.

Ideally, we want a democratic procedure to realize political equality, to prompt high participation and quality deliberation, and to reliably avoid tyranny. But Fishkin recognizes that there is no democratic procedure that reliably realizes all four values, and that means we must choose among imperfect procedures. In particular, there is no conception of democracy that can even reliably guarantee *three* of these four values.

Fishkin introduces four democratic theories—competitive democracy, elite deliberation, participatory democracy, and deliberative democracy. He classifies their strengths and weaknesses according to the values they realize:

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<tr>
<td>Participation</td>
<td>?</td>
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<td>Deliberation</td>
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<td>Non-Tyranny</td>
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Figure 8-1: Fishkin’s Taxonomy
Competitive democracy “focuses on competitive elections and on the institutionalization of rights that might protect against tyranny of the majority.”

Fishkin cites Joseph Schumpeter as an advocate of competitive democracy, since he defines the “democratic method” as “that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”

Riker is arguably another proponent of the view, as his “liberal” theory of the function of voting “is to control officials, and no more.”

Competitive democrats, then, are less concerned with deliberation and participation because they hold that there is little reason to believe that feasible forms of deliberation and participation can generate meaningful reflections of a society’s general will. For Riker, for instance, social choice “depends not simply on the wills of individuals, but also on the method used to summarize these wills”; democratic outcomes are “just as much a function of the method as it is of the underlying tastes.”

The reason why we don’t have to guarantee voting and participation is because phenomena like agenda control and strategic voting by officials will render popular input more or less pointless even if the input is coherent, due to the absence of cycles.

Elite deliberation, like competitive democracy, is not committed to mass participation but instead focuses on filtering mass public opinion to reach a more

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558 Fishkin 2009, p. 66.
559 Schumpeter 1942, p. 269.
561 Riker 1988, pp. 31, 36.
sensible, stable underlying set of attitudes about policy.\textsuperscript{562} The goal of elite deliberation is to determine, through quality deliberation, what the public really wants, despite the fact that deliberation by the public is not a highly valued method of determining what the people want. Filtration in elite discussion provides an account of “what the people would want, on reflection.”\textsuperscript{563} Fishkin attributes this view to James Madison and John Stuart Mill, both of whom were prepared to restrict purer forms of mass democracy in order to yield more rational and considered outcomes. Madison focused on a republican, rather than democratic form of government, where the public will's expression was limited to certain branches of government, whereas Mill was open to plural voting schemes that awarded more educated persons more votes.\textsuperscript{564}

Participatory democracy, in contrast, focuses on encouraging people to vote under equal conditions but does not attempt to increase the quality of deliberation in determining policy. Participatory democracy does not imply that the public has direct control over all functions of government, but the goal is “to shift the mix [from less democratic forms of government] so that direct consultation is frequent and consequential.”\textsuperscript{565} Direct consultation concerns both the choice of

\textsuperscript{562} Fishkin 2009, p. 70.  
\textsuperscript{563} Fishkin 2009, p. 72.  
\textsuperscript{564} In particular, see Madison in Federalist 63, where representative government helps to identify the “cool and deliberate sense of the community” and Federalist 69 where Hamilton argues that “the reason, alone of the public … ought to regulate and control the government.” Hamiton, et al. 2003 For the discussion of plural voting, see Mill, p. 476. Also see Mill’s discussion of a “Congress of Opinions,” an arena where “not only the general opinion of the nation, but that of every section of it, and as far as possible of every eminent individual whom it contains, can produce itself in full light and challenge discussion…” Mill 1963 (volume XIX, p. 432.)  
\textsuperscript{565} Fishkin 2009, p. 76. Fishkin (p. 213) cites a number of advocates of participator democracy, including Barber 1984
representatives and the choice of policy. The people should be “consulted about the substance of what is to be done” and implies that “public will formation is meaningful and worth consulting.”  

Participatory democrats defend their position on the grounds that actual participation serves as a “proxy for mass consent” which legitimizes government decisions. Further, participatory democrats hope that political participation will educate ordinary citizens as well as consult them. Fishkin attributes this view to various progressive movements in the United States who fought for more direct participation of the people in government through referenda and other political mechanisms.

The final democratic theory that Fishkin discusses is deliberative democracy, which combines deliberation with political equality. Deliberative democracy tries to realize political equality through representative deliberation rather than mass participation. The problem with participatory democracy, for deliberative democrats, is that “the better-off and the more educated tend to participate more” and that the only way to equalize participation is to make voting compulsory, which “has an obvious cost in liberty.” To realize deliberation, it must take place “on a human scale, on the scale of face-to-face democracy.” And that requires what Fishkin calls microcosmic deliberation. We represent persons by selecting deliberators at random from the populace in order to achieve of

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566 Fishkin 2009, p. 77.
567 Obviously, deliberative democracy has many advocates. For what continues to be a nice range of views, see Bohman and Rehg 1998, especially the articles by Joshua Cohen, Rawls, and Habermas. Also see Gutmann and Thompson 2004 For a recent update on the state of deliberative democratic theory, see Parkinson and Mansbridge 2012
568 Fishkin 2009, p. 80.
representative sample; then these individuals are given information and are asked to engage in structured deliberation designed to determine what the informed public will on some issue is. So political equality is realized “via random sampling in the choice of participants as well as the equal counting of their views once assembled.”

Choice between the values and principles underlying these four democratic theories is difficult, but I think that it is clear on my theory that political equality and non-tyranny are the most essential. Political equality is necessary because the realization of moral peace between persons implies a commitment to equality, perhaps most obviously in the construction and assignment of equal primary rights. Even when decision-making is filtered through the process of public justification, we will want to ensure that persons have equal decision-making power, even if that power is miniscule. This is because persons have a primary right to vote and that right to vote involves everyone having the same chance to input their preferences, regardless of how small the impact of that input is. Consequently, voter input should not be restricted by elite constraints when it comes to the choice of politicians.

Non-tyranny is essential because the first duty of government is the protection of the primary rights of all persons under its direct control, usually understood as the set of citizens plus those not yet naturalized, as well as temporary residents. In a conflict between non-tyranny and participation, the

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569 Fishkin 2009, p. 82.
participation of the public loses because a state that protects rights but fails to adequately consult the public is more legitimate than a state that fails to adequately protect primary rights but consults the public reliably and regularly. Deliberation is even less essential, for a state with inadequate deliberation but that protects primary rights is obviously more legitimate than a state that fails to adequately protect primary rights but has adequate deliberation. Getting informed inputs into the political process simply has less value from the perspective of public justification than protecting primary rights.

It may appear, then, that our choice is made. Competitive democracy focuses on the protection of rights and the preservation of political equality, so what else is there to say? Well, while a political system as a whole should realize political equality and non-tyranny, there is a subtler option for appealing to these kinds of democracy; for it is possible to apply these different democratic ideals to govern different parts of the political process.

III. Different Functions, Different Values

Let’s divide up political decisions in accord with two distinctions. The first distinction is between the protective and productive functions of the state, which should be familiar to the reader by now. I think it is clear that non-tyranny is far more important for the protective function of the state than the productive function simply because non-tyranny is defined as serious violations of primary
rights and the productive function of the state focuses on political decisions that do not involve or threaten the violation of primary rights. So different approaches will probably be appropriate.

The second distinction is between the choice of political officials, the protection of rights, the choice of public policies, and the review of political decisions. The distinction between choosing officials and policies is clear enough. In most democracies, the people vote for officials, and then officials, who have more time to become expert on the relevant policies and represent their constituents accordingly, vote for policies. The review function should also be familiar, as we will want some sort of failsafe device to prevent laws and policies that cannot be justified (however justification is to be understood) from being enacted, given the flaws in decision-making by voters, flawed officials, and the flaws in the voting rules they use. In the United States, we rely heavily on judicial review, which can only decide whether policy and legislation are constitutional or not, but a review process could be broader. A publicly justified polity could have an additional legislative body that only has the power to repeal legislation. The people could also be used for review, say by means of form of legislative recall like the capacity of the people in some states to recall state officials.

In many cases, the choice of officials cannot separate the protective and productive functions of the state because we vote for officials to make decisions about both sets of concerns. It may be feasible to choose two different sets of officials, one to make policy about primary rights, and the other to make policy
about, say, fiscal policy. But the typical way in which democracies govern these issues is to protect primary rights via supermajority rules. In the United States, changing any primary right embodied in the constitution is extremely difficult, and some constitutions forbid amending themselves in ways that violate rights. Based on the foregoing, then, I will analyze the choice of officials without distinguishing between the protective and productive functions of the state.

Now let’s consider the review process, which is typically used to govern the protective functions of the state alone. The review process might include the practice of judicial review. The US Supreme Court almost exclusively concerns itself with the protection of what are arguably primary rights, like freedom of speech and religion. And even in some cases where they appear concerned with the productive functions of the state, a potential primary right is at issue, such as their judgment that the Affordable Care Act is constitutional. The Act was said to violate the Constitution's commerce clause, a clause that has, at times, been construed to protect certain economic liberties as basic constitutional rights. In general, review is used in cases of controversy about bills that purport to violate the rights protected in the constitution, all of which are arguably primary rights. Consequently, we can largely confine our account of review to the protective functions of the state.

\[570 \text{ It is true that some countries lack written constitutions, but they functionally treat rights issues as requiring huge majorities to alter.} \]

\[571 \text{ Cite in v2.} \]
We are left with four types of decision-making over which different
democratic theories might have something to offer: the selection of officials,
protective policy, productive policy, and the review of protective policy. Let’s
consider each stage separately, asking which of Fishkin’s principles are most
essential in each, and so determine which democratic theory should govern that
stage.

IV. The Selection of Officials

The ultimate focus of political public reason is the public justification of legislative
outcomes. That process typically begins with the nomination and selection of
political officials, such that the selection of officials is the political process with the
furthest causal distance from legislative outcomes. All subsequent parts of the
political process can neutralize or alter public input, such as the legislative process
and the review process.

Since citizens are so causally distant from legal coercion, I contend that
non-tyranny is a negotiable value in choosing officials in conflicts with other
values. While we might worry that citizens could select corrupt officials that will
violate rights, properly designed constitutional rules can severely limit the capacity
of officials to systematically violate primary rights.

Political equality, in contrast, is critical for justifying the selection of
political officials. This is true for two reasons, one normative and one empirical.
The normative reason is that citizens have equal primary rights to vote and participate in the political process. The only way to respect these rights is to ensure to allow for the democratic selection of officials. Otherwise, their rights are not respected since they have no input into the political process at all, since officials have relatively free reign once elected to act on their own judgment. The empirical reason is that law is probably more likely to be publicly justified for all citizens if all citizens have input into the political process. The responsiveness of political institutions will be far from perfect, but it will arguably perform better than they would if political officials could afford to ignore large swaths of the public.\footnote{Cite responsiveness literature in v2.}

Because of the way in which political equality is protected in this part of the political process, we must pair political equality with participation as the two critical values to be realized by the selection of political officials. We care more about everyone having input into the selection process than generating informed, quality choices (even though we care about quality choices a great deal). The reason for this is the need to publicly legitimize the selection of officials. If citizens were not allowed to vote, but were represented by elite deliberators or some large subset of the public, officials would not be seen as politically legitimate. For this would be to effectively nullify the primary rights of citizens to exercise their political rights even if someone else represents their views. If we choose deliberation over participation at this stage, we could end up publicly justifying a four-stage
political process that lacks direct, unmediated public input at any point. Citizens would feel as though they had no voice. I submit, then, that the durability of the political order would be threatened, as citizens would see relatively little reason to abide by legislative conventions passed by these officials. Even citizens of good will have limited reason to comply with conventions imposed by officials she had no opportunity to choose. For this reason, the selection of officials in a publicly justified polity must be governed by the ideal of participatory democracy.

There are many potential challenges to this view, including concerns about (i) the moral relevance of unreconstructed, raw mass public opinion, (ii) the coherence of public opinion, and (iii) the choice of voting rule to reflect the will of the people. The first problem holds that people should not be coerced through a process that is based primarily on uninformed, irrational, and bigoted groups of people, like much of the voting populace. This problem, I think, is the easiest to solve because the main reason to discount raw mass public opinion is that public opinion might lead to the election of an evil or tyrannical official. But with proper constraints later in the political process, the power of such officials can be sufficiently limited to make the problem manageable. So even if a bad official supports policy that cannot be publicly justified, further constraints on his power can prevent poor voting from getting out of hand.

Of course, one might reply that bad political officials can find some way around the constraints placed upon them by other branches of government or the

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573 For a striking review of public political ignorance, see Brennan 2011, chapter 7, pp. 161-178.
constitution. This is true, though it is less of a problem in some democratic systems than others. In the United States, the primary culprit is arguably the office of the presidency, which has accumulated incredible power over the course of the last 100 years, and so those powers are easily and frequently abused. A parliamentary system with the executive chosen by the leading party or parliamentary coalition might be less vulnerable to this problem. But a better reply is that abuses of power can happen under any system where social trust and legitimacy breaks down to the point where the constraints in the constitution are no longer effective, including libertarian and anarchic constitutional orders. My contention is that social trust is better maintained when everyone feels that they have some causal input into the political process than by a system where representative persons make decisions for them, even if the decision-making quality of elite deliberators would be greater. Such a system should be durable, for its participants will find a system where they have causal input more amenable than otherwise.

(ii) The potential incoherence of mass opinion is a much harder problem. A huge amount has been written on the subject, so I will limit myself to a sketch of some prominent positions. William Riker and his followers have insisted that real-world social preferences contain cycles, where individuals have transitive preferences but society has intransitive preferences over some list of candidates or

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574 Healy 2009.
575 Immunity is not an issue in this area, as merely rational agents have a hard time gaming a system with millions of actors, though immunity will become an issue in future parts of the political process.
issues. This means that group decision-making requires violating some fundamental condition of rational collective choice. But their attempts to demonstrate the existence of cycles in the real world have been forcefully challenged on empirical grounds. Gerry Mackie has done more than anyone to muddy the Rikerian waters, arguably demonstrating that Riker’s examples of important cycles, such as the US election of 1860, are controversial at best, and distortions of the truth at worst. After reading Mackie, my sense is that we cannot empirically vindicate the Rikerian claim that when “subjects are politically important enough to justify the energy and expense of contriving cycles, Arrow’s result is of great practical significance. It suggests that, on the very most important subjects, cycles may render social outcomes meaningless.” Mackie claims, in contrast, “that the cycles that are alleged to make democracy meaningless are rare” where “the question is not one of logical possibility but rather one of empirical probability.” I believe that through his intense scrutiny of common claims of cycles, Mackie has shown that, while Riker could in principle turn out to be correct about the pervasiveness of cycles, there is no decisive, or even weighty, evidence in Riker’s favor. For that reason, I set aside the question of whether mass public opinion is meaningless because it is plagued by cycles.

But even if Mackie is wrong about Riker, even Riker thinks that consulting mass opinion is important, as it should turn out to be meaningful when it comes to

576 Riker 1988
577 Mackie 2003.
578 Riker 1988, p. 128.
579 Mackie 2003, p. 17.
controlling exceptionally bad officials. This consideration should allow public reason liberals tempted by Riker to still favor choosing officials in a participatory fashion.

To my mind, the most serious empirical concerns about the value of consulting mass opinion are that the public is systematically biased. The case for systematic voter bias is based in part on the already-mentioned extensive empirical data demonstrating vast public ignorance on nearly all matters of political importance. There are a number of theories that purport to explain what explains voter psychology and whether voter psychology is problematically biased once we understand what voters are doing in the ballot box. One influential theory, advanced by Geoffrey Brennan and Loren Lomasky, is that “voting in large-scale elections is disconnected in a fundamental way from citizen preference over electoral outcomes,” and that voters in fact vote expressively, that is, to express their affiliation with a value system or some group. Importantly, since citizens vote expressively, they are much more likely to vote based on ethical considerations, for “expressive behavior will reflect various kinds of ethical and ideological principles that suppressed in the market setting”; this means that expressive political behavior “gives much freer range to ethical considerations.”

Yes, voters are ignorant because they have little incentive to become informed, but this means that citizens might vote on factors that could nonetheless have moral

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580 As documented in Caplan 2007.
582 Brennan and Lomasky 1993, p. 16.
and ideological import, such as whether a candidate’s expressed policy preferences and political principles match the voter’s own preferences.

However, Bryan Caplan has forcefully argued that we can expect voters to express opinions that are subject to systematic bias that lacks moral import.\textsuperscript{583} Caplan covers four biases in his work, identified by comparing the opinions held by the public to opinions held by economists.\textsuperscript{584} Caplan postulates that voters are guilty of rational irrationality, where the biases of voters are not the result of getting tired of searching for truth, but rather because they “actively avoid the truth.”\textsuperscript{585} Contra expressive voting theorists, Caplan argues that citizens only vote expressively when they actively believe that their ordinary “feel-good politics are ineffective” so they instead decide, however implicitly, to vote expressively.\textsuperscript{586} But Caplan thinks that voters lack an implicit belief in their causal inefficacy. Consequently, voters vote based on a false belief in their efficacy and based on systematic biases.

We must grant that voters have some systematic biases. For instance, Caplan is on strongest ground when he claims that voters are guilty of anti-foreign bias, where people underestimate the value of working with foreigners.\textsuperscript{587} It is remarkable how much people in the United States completely discount the value of immigrants and immigrant labor, as illustrated by the rabid popularity of Donald Trump in some portions of the US electorate. The vast majority of

\begin{footnotes}
\footnotetext[583]{Caplan 2007, p. 10.}
\footnotetext[584]{Caplan 2007, Ch.2 and Ch.3.}
\footnotetext[585]{Caplan 2007, p. 123.}
\footnotetext[586]{Caplan 2007, p. 138.}
\footnotetext[587]{Caplan 2007, p. 10.}
\end{footnotes}
economists agree that immigration is generally economically beneficial, and that the public vastly overestimates “the likelihood and magnitude of adverse labor market effects for natives from immigration.” So we can expect for voters to vote for candidates that promise to restrict immigration; but given the severe economic and liberty costs of immigration restrictions, these restrictions cannot be generally publicly justified. So in this way, consulting raw, unmodified public opinion will tend to yield publicly unjustified policies.

But the important question is whether Caplan’s biases make mass participation in the choice of political officials worse than the democratic alternatives, and I don’t think even Caplan would suggest as much. While voters will be problematically biased in some respects, they won’t be in others, and at the least, if a candidate presides over a regime that causes the populace enormous harm, voters will likely punish the candidate. So in this way, consulting raw public opinion can be valuable in preventing the political order from becoming tyrannical or extremely harmful to the public. So I deny that voter bias is sufficient to show that a publicly justified polity should reject mass participation; in general, we can expect public opinion to at least loosely track their broad interests. In fact, the literature on the responsiveness of policy to voter preferences is fairly strong. As we saw in Chapter 7, while American democracy is not really responsive to the poor, it is quite responsive to the preferences of the middle class and the rich, or at least, it tends to track them.

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590 For a review, see http://www.oxfordbibliographies.com/view/document/obo-9780199756223/obo-9780199756223-0103.xml. Also see Gilens 2012 As we saw in Chapter 7, while
officials isn’t too bad, then we can focus on correcting the malign influences of voters to later stages in the political process, while selecting candidates in ways that respect the principles of political equality and participation.

We should also ask if there are good ways to use deliberation to improve mass opinion. Importantly, deliberation must be understood in real-world terms; we are not concerned with highly formalized models of deliberation but rather with data about how real-world deliberation functions in a mass democracy. This means that we need to look at evidence that real-world publics who deliberate choose systematically better policies (understood in terms of public justification) than non-deliberating publics. But given that democratic will formation is almost always held under conditions of free discussion and deliberation, without the principles of restraint recommended by deliberative democrats in place, it is hard to make such a comparison. Further, the only systematic data that we have on improving opinion through deliberation is from small, focused groups. Beyond this, we have deliberative democratic claims about how deliberation should proceed under ideal conditions, along with formal a priori models of the potential benefits of deliberation. In my view, these conditions are sufficiently far removed from the conditions of real-world democracies that they cannot play a major role in the public justification of democratic procedures. That said, they should prove relevant when we look at elite deliberation later in the policy process.

591 See Fishkin 2009. Fishkin has arguably done more than anyone to try to determine whether, in the real world, the concerns raised by deliberation’s critics and the benefits cited by deliberation’s proponents actually materialize. He has a moderately favorable view of focused, small-group deliberation but acknowledges that this may be a poor proxy for public opinion. See pp. 194–6. (??)

592 For the most recent development of an a priori model of good deliberation, see Landemore 2013
Another option, common in the public reason literature, is to try to set out ethical principles to govern public deliberation, like Rawls’s duty of civility. The problem with this approach, however, is that there is little connection between what political theorists claim about how the ethics of discourse should proceed and how we can reasonably expect it to proceed under normal conditions, given the costs and benefits of personal contribution to political life. Citizens have limited reason to engage in careful deliberation given that their causal impact on their political process is miniscule. It seems to me unreasonable to push citizens around to get what political theorists can only hope will produce a better outcome. I think it much more practical to develop an ethic for political officials, who actually have an impact on the political process.

The second main question we must ask about the beginning of the policy process is which voting rules we should use to report mass participation. As Riker notes, “social choice depends not simply on the wills of individuals, but also on the method used to summarize these wills.” We also know, from social choice theory, that any voting rule that is remotely rational and fair has flaws and is potentially subject to manipulation. I have already mentioned this literature in my discussion of the Borda-Condorcet rule in Chapter 5, though there I was focused on the aggregation of rankings of type-1 and type-2 errors in the production of law, and not the aggregation of real-world votes. I nonetheless think that the rationale

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594 I provide much more detailed arguments for restricting restraint to political officials in my previous book, Liberal Politics and Public Faith, in Chapter 6.
595 Riker 1988, p. 31.
for the Borda-Condorcet rule can be used to resolve worries about arbitrary outputs and cycles in the case of real-world voters.

For real world voters choosing candidates, I propose that each voter be asked to rank candidates in accord with whatever motivations have driven them to vote. The voting mechanism can use this information to compute both the Borda Count and the Condorcet Rule. Each candidate would receive a sum total based on his or her ranking, in accord with the Borda Count, and each candidate would also be ranked by who wins a head-to-head vote, in accord with the Condorcet rule. If one candidate wins in both voting schemes, then she wins the election. This is a normatively attractive result, since each voting rule compensates for the flaws in the other; Borda allows for violations of independence of irrelevant alternatives, but Condorcet does not, whereas Condorcet allows for violations of transitivity, but Borda does not. The tough question is to determine what ought to happen when the Borda and Condorcet winners differ. In this case, we could simply follow an instant run-off rule between the two winners, which would take votes from the lowest ranked candidate and assign it to the remaining, higher ranked candidates.

Another option could use a parliamentary voting system, where citizens simply vote for a party that they like, and the seats of parliament are divided up according to the percentage of votes the candidate or party receives. This might be an alternative to the American system of voting for individual congressmen according to a first-past-the-post rule, as it would allow for the formation of robust third parties, increasing the diversity of representation among members of the
public, and lending itself to a more coalition-based moral of government, which could encourage compromise over acrimony.

The advantage of both approaches is that they all for a more comprehensive representation of what citizens will. Instead of a binary choice, citizens can express complex preferences about the relative worth of candidates and parties and governments can reflect more diverse views in virtue of having more outlets for third, fourth, and fifth choices. It also, again, could decrease partisanship and hostility between political groups and their supporters. We would need to grapple with the potential problem of a large number of parties, which can lead to serious coordination problems such as those faced by the Italian government, but this not typically a problem in most parliamentary democracies.

V. Protective Policy Choice

Protective policy choice concerns the articulation and protection of primary rights, following my Buchanan-inspired definition of the protective function of government in Chapter 5. This means that non-tyranny is a critical component of protective policy choice. Since officials are typically supposed to represent different parts of the electorate, they should be given equal power to influence the output of policy. Equal power among officials, then, is a way of expressing the value of political equality. To preserve political equality and non-tyranny, then, effective deliberation and participation can therefore be compromised; so with
respect to protective policy choice, our democratic theory should be competitive democracy. Some are bound to challenge the competitive approach on the grounds that it is elitist. But remember that competitive democracy only governs one of four parts of the democratic process. The input into the process is participatory in nature. The people have chosen officials who operate the protective policy process. So elitism in protective policy choice is tempered by mass participation at a previous stage.

Two factors control the proper form of protective policy—(i) that primary rights are typically broadly recognized and simply protected and (ii) that political officials have the capacity and even the tendency to violate some primary rights. Due to the fact that primary rights are broadly recognized and understood, and their protection is relatively straightforward in comparison to, say, the formation of productive policy, the protection of primary rights can generally be pursued without extensive legislation and with reliance on the judiciary to overrule laws that violate rights. Given the imperfections of officials, in terms of knowledge and character, we should therefore be more concerned about officials passing laws or issuing executive orders that violate rights rather than failing to produce legislation that articulates and protects rights. Both of these factors imply that we should be more concerned with false positives (passing laws that cannot be justified) than false negatives (failing to pass laws that are justified).

Most democracies protect primary rights via supermajority voting rules, where a large majority is required in order to amend constitutional protections on
basic rights. Once primary rights are properly protected at the constitutional level, there will of course be controversies about how to apply these rights to new, complex circumstances, and legislatures should have the authority to pass such laws. But a supermajority rule, by being biased against changes, protects against false positives at the expense of false negatives. And I have argued is the appropriate stance for protective policy choice. Members of the legislature and the public forgo the right to alter the protection of primary rights based on majority votes for fear that the majority will sometimes turn against primary rights. Some majoritarians are bound to challenge this risk assignment, but the balance of risks is best determined by the determinations of the great, functioning democracies over the course of their history. And there is nearly uniform agreement in political practice that rights are to be given strong, supermajoritarian protections against abolition or abrogation.

A common majoritarian complaint about supermajoritarian protections is that they are non-neutral in virtue of being biased in favor of the status quo. This may threaten to make supermajority rules sectarian or reasonably rejectable. I disagree. The authority of democratic procedures with respect to protective policy derives from the will of the people regarding the entire moral order of moral and legal conventions. The political order is only part of that general will, such that non-neutral procedures are only problematically non-neutral if they are non-neutral with respect to the protection of the moral order as a whole, rather than

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596 For discussion, see Gaus 2011, pp. 487-490 and Ganghof 2013.
the political part of the general will specifically. But I have argued that the moral order requires completion by a legal system based in primary rights, which means that primary rights are a central part of the general will. That means the general will endorses the protection of rights and, potentially, non-neutral procedures for protecting them. Legislative-decision conventions that less effectively protect primary rights, then, more poorly express the collective will of the people. In this way, we reject political neutrality based on our concern that the conventional order expresses the general will and so realizes moral peace between persons.

This means that public reason liberalism, as I understand it, rejects pure proceduralism about democratic politics, which holds that the outputs of a fair democratic process are necessarily legitimate, and that political rights are established as presuppositions of that process. Instead, our focus is on the public justification of moral conventions, and the endorsement of political primary rights as a necessary means towards the public justification of moral conventions. This means that our democratic theory bears similarities with deliberative democratic forms of proceduralism, but differs substantially in the justification of political institutions since political institutions are justified as extensions of the moral order rather than as the direct implication of the rational commitments of the people.

I would also argue that supermajority rules, in virtue of protecting primary rights, promote durability and immunity for the right reasons. The system of primary rights is durable because peoples regard themselves as having reason to

\[597\] For a brief but classic statement of pure proceduralism, with the rights of persons presupposed by the relevant democratic procedures, see Habermas 1997.
reciprocally respect the rights of others, given that the scheme of primary rights are ones that each person can endorse as worthy of compliance and internalization. Compliance with and enforcement of primary rights helps to establish public assurance that the system of rights is effective and widely agreed upon. Supermajority protections also promote immunity, as to discourage officials from attempting to game the system to distort the protection of primary rights in their favor. By requiring that large majorities ratify all amendments to rights, we make it harder for officials to game the system than under majority rules. Such a system will therefore be more stable than one in which a simple majority can undermine fundamental rights at any time.

VI. Productive Policy Choice

Now we turn to the voting procedures that should govern legislation regarding the state’s productive function, understood as the provision of goods and services where primary rights are not typically at stake.\textsuperscript{598} Paradigm cases of the state’s productive functions are the provision of infrastructure, social insurance, and countercyclical policy.

I argue that productive policy should be governed by Fishkin’s notion of deliberative democracy—decision procedures that ensure both political equality

\textsuperscript{598} I grant that the line between productive and protective policy is not sharp and must be settled upon by the constitutional process, but I think it fair to assume for the sake of argument that such a line can be drawn.
and quality deliberation. So at the productive policy stage, we allow the compromise of non-tyranny and participation. The reason we do not need to worry as much about guaranteeing non-tyranny is because non-tyranny already applies to protective policy and the protection of basic rights. When it comes to policy governing the state’s productive function, rights violations are less relevant because fewer rights are at stake. Participation is less essential because we are focused on deliberation among officials or citizens-experts appointed and educated as part of the legislative process. Further, given that we are focused on a small group of persons, and that each has strong incentive to voice their opinion and vote accordingly, there is no need to focus on guaranteeing participation; that matter should largely tend to itself. But before I can address the inputs specific to deliberation, we have to address several concerns about the functionality of the productive policy process in the United States and explore mechanisms that can improve the process.

At present, productive policy in the United States is plagued by the influence of lobbyists and special interest groups that constantly attempt to contort legislation in their favor. This is to be expected for the familiar reasons presented by public choice economists. Officials tend to be self-interested, so they can easily be tempted by campaign contributions and the promise of social and economic benefits once they leave office. Furthermore, politicians who are not

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599 See the literature reviews on the topics of rent-seeking and the inefficiencies of bureaucracy in Mueller 2003, pp. 333-384.
focused on their self-interest, and who wish to legislate based on other factors, can often be stopped and intimidated by politicians who are “bought and sold.”

Rent-seeking can corrupt the legislative process in many ways, not merely through the purchase of legislative votes, but also through legislative tactics like agenda control.\(^{600}\) While Mackie has made a convincing case that these tactics are not used as often as one might expect, there are still serious attempts to co-opt the legislative process for the benefit of the few at the expense of the many.\(^{601}\) The logic of concentrated benefits, dispersed costs will lead to legislation that cannot be publicly justified because it imposes costs on the many to benefit the few, given that the few are more easily organized into coalitions that can apply pressure to legislated officials.

I advocate constitutional structures that restrict the power of rent-seeking, such as supermajority rules and bicameralism.\(^{602}\) Both have the effect of blocking legislation, and so avoiding lots of type-1 errors. Rent-seeking tends to produce type-1 errors rather than type-2 errors. Yes, special interest groups work to defeat legislation, but more often than not, they attempt to legislate benefits through coercion, rather than increase their power through the prevention of legislation. The best counterexamples are fights to oppose regulation, such as the regulation of carbon emissions. But, on balance, lobbying and rent-seeking increase the

\(^{600}\) Mueller 2003, pp. 112-114.
\(^{601}\) Mackie 2003, pp. 158-172.
\(^{602}\) For a discussion of the effects of bicameralism, see Buchanan and Tullock 1962, p. 233-248.
incidence of type-1 errors because fewer rent-seeking benefits are garnered by defeating rather than passing legislation.

Another mechanism worth exploring is shaping the power of the purse. Right now, the US House of Representatives passes general appropriation bills and then directs the funds they have (and funds they often do not have) to specific legislative purposes. But these funds are often directed towards rent-seekers. I suggest that we can constitutionally tie expenses to methods of payment, so as to reduce the problem of excessive and badly spent funds. For instance, we could follow the recommendation of James Buchanan and require that every bill contain provisions specifying how the bill is to be financed. This would require scoring each bill to determine its costs and then specifying the taxes and forms of revenue collection that would cover those costs. Scoring need not be perfect, but tying funding and spending would help master those who would appropriate funds from a general pot that happened not to be earmarked for particular bills. Another advantage of this proposal is that it would ease the process of evaluating whether a bill can be publicly justified, as we would at least have estimates of their costs and some idea of the burdens the bill would place on some portion of the public.

The main worries about this proposal are two. First, such a constitutional requirement would dramatically reduce the amount of legislation passed. Many people would be far more hesitant to support spending bills if they also included tax increases and policy epistemology will rule out excessively vague and sketchy

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cost-benefit analysis as insufficient to justify coercion. In response, I would argue that reducing the amount of legislation passed is all to the good, given that much legislation cannot be publicly justified to members of the public. And the bills that do pass will stand a fair chance of being publicly justified, which adds to their legitimacy and stability.

The second concern is that such a proposal would be biased against Keynesian members of the public. Keynesians support the appropriation of funds to engage in countercyclical policy, and so want to ensure that governments can run a deficit in order to have extra money to spend to counteract recessions. I would counter that if Keynesian policy can be demonstrated to be sound based on the norms of policy epistemology, then bills can be passed that permit temporary deficit spending so long as they specify that taxes will be raised to cover the deficit spending once the recession is over. If Keynesian members of the public cannot convince others to support these bills, then that is tough luck.

Another broad problem with productive policy is the presence of ideologies that lead politicians to support legislation that suits their particular sectarian conception of the good or justice but that sets back the conceptions of the good or justice of others. As I have argued elsewhere, we must attend to the phenomenon of ideological rent-seeking, where officials pass bills that increase the satisfaction of their evaluative standards (their “rent”) by decreasing the satisfaction of the evaluative standards of other members of the public (where these setbacks cannot
be publicly justified). Fortunately, the mechanisms that can reduce the incidence of purely economic rent-seeking can also be used to reduce ideological rent-seeking, since much ideological rent-seeking involves redirecting public funds to sectarian causes. There will be cases when the protective process distributes ideological rents by protecting sectarian rights claims, but we already have protections in place to ameliorate that threat.

I cannot stress enough that productive policy must be protected from economic rent-seekers and ideologues, as they present pervasive problems in all advanced democracies. Mancur Olson has convincingly argued that rent-seeking groups tend to accumulate over time, gradually slowing the process of economic growth by gumming up the works with inefficient spending. Since even small decreases in the growth rate significantly reduce economic well-being over time, we must be vigilant about small, negative short-term corruptions of the productive policy process. This is especially true in light of the principle of sustainable improvements from Chapter 4.

Furthermore, checking extensive rent-seeking is critical for rendering the legislature relatively immune from invasion by rent-seeking politicians and lobbyists. Without protections, we can expect rent-seeking behavior to gradually crowd out efficient cooperation, as more rent-seekers enter the system and more people already present within the system are inclined to engage in rent-seeking since others are engaging in it. This means that agents within the system stand a

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604 Vallier, ideological rent-seeking.
605 Olson 1984.
good chance of consistently distorting the rules of the game within which they can operate.

I would now like to focus on an additional mechanism for checking rent-seeking and strengthening the immunity of the productive policy process—Fishkin’s microcosmic deliberation. My proposal is this: citizens will be selected at random, and paid a salary over the course of a month or up to half a year to engage in policy review. They will become informed about a particular policy and its costs and benefits, deliberate about whether to recommend that policy to political officials, and then vote on their recommendation. They must also sign off on changes to the policy proposals made by officials after their recommendation is received, so they may be temporarily recalled. Selection is voluntary, so the salary should be high enough to enable economically disadvantaged persons to participate in the process. Ideally, we could establish a moral convention where citizens are expected to take part in the process, not unlike jury duty, but without legal compulsion. Citizens could also decide whether to put their names in a hat to become part of the process, though that may be seen to increase the power of influential members of the public, so all voters might be included in the selection process, but once selected, they can decline to serve.

Importantly, new deliberator groups would be selected for each piece of major policy legislation. A congressional committee could decide upon what counts as a “major” piece of legislation, though this would be subject to potentially corrupting effects. We will also want to avoid having a large number of
committees, as the expense of the process could be enormous. For this reason, I envision twenty to thirty groups of fifty persons during each Congressional term evaluating significant legislative proposals. The small size of these groups is essential to their functionality. Face-to-face discussion has great benefits that anonymous discussion lacks, as persons have an incentive to behave in a calm, reasonable, and moral manner. If a group becomes too large, these dynamics are undermined and more unsavory dynamics take over.

Citizen deliberators have several powers. First, they have the ability to review the policy recommendations of legislators and make recommendations of their own. The recommendations would be public in almost all cases (save national security issues), so the public could determine whether politicians are following the recommendations of deliberators and hold them responsible if they ignore what the deliberators recommend. Then, when a bill is amended, citizens will have the right of review to see whether further review is required. At no point could the deliberators put a stop on the legislative process, but their recommendations will have substantial effects, since they will be sampled directly from the public. Their recommendations will arguably come to be seen as a proxy for informed consent by the populace. The deliberators will not be career politicians, they will represent the public, their terms would be limited, and their identities would be anonymous. So their recommendations should be regarded as

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606 The big worry I have about this part of the process is that legislators will load bills with amendments in order to exhaust the citizen deliberators, but amendment could be limited to avoid this problem.
having a high degree of democratic legitimacy. It is not unreasonable to hope that
the public will generally expect politicians to hew to citizen recommendations.
And the fact that publicly selected deliberators approved the law will arguably
increase the stability of the relevant legislation. Citizens may feel relatively assured
that they can follow the policy, since it has received approval based on their
chosen candidates and citizen-deliberators who represent them.

Following Fishkin’s work on microcosmic deliberation, we can hold out
some hope that microcosmic deliberation among citizens selected at random can
increase the quality of deliberation. Fishkin has found that citizens almost never
have cyclical collective preferences because deliberation tends to produce single-
peaked preferences, and that polarization effects only crop up from time to
time.\footnote{Fishkin 2009, pp. 143-6.} So some worries about democratic failure appear to be addressed through
careful construction of deliberative practices. However, Fishkin’s experiments have
one gigantic drawback – they tend to cover political issues of minor significance.
In cases where a deliberative microcosm could make recommendations about
important policies like healthcare policies, or stimulus bills, we can expect a
dramatic increase in attempts to influence the process. Legislators will try to
control the way in which citizen-deliberators are chosen, not unlike attorneys in
the jury selection process, along with the way in which information is presented to
them. Legislators and outside groups and may try to influence citizen deliberators
in the deliberative process, say by using ideological cues or by sowing division and
discord along racial, gender, class, religion, or cultural lines in order to distort the process in their favor or to delegitimize the deliberations of citizens. They could even promise these deliberators benefits following the process, like private sector jobs based on their policy experience.

Ideally many of the protections provided by the jury system could be used to resist these forms of tampering. The identities of the deliberators could be withheld from the public and from the majority of legislative officials. For instance, legislators could select moderators, and the moderators alone would know the identity of citizens. This would help to counteract the temptation to payoff deliberators, and so reduce the incidence of corruption. Further, deliberators would be selected at random to avoid biasing the deliberative group in favor of one ideological position or interest group. Finally, we could establish a system of influence where representatives of different ideologies and interest groups could speak to the deliberators with equal time.

Another worry is that deliberation on matters of great significance will lead to considerable polarization. And polarization would be difficult to counteract once deliberators become aware of their ideologies and the ideological balance of the group. However, the fact that they will be encouraged to interact at a personal level and to discuss policy with one another face to face may exert pressure not to polarize. To avoid slacking off, there could be some sort of contractual obligation upon taking the position to engage in some level of participation. Otherwise

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608 For evidence to this effect, see Sunstein 2011. Fishkin finds little polarization, but that is probably an artifact of the low stakes involved in the deliberative bodies he put together.
citizens may simply vote based on the heuristics given by their ideologies and so ignore the effects of deliberators.

Some effects will be very hard to counteract, such as simple apathy. Some citizens may simply take their paycheck and refuse to participate. Further, deliberation might lead to the marginalization of shy and/or insecure speakers. Some of these problems are inevitable, just as they are with ordinary democracy. The hope is that by adding microcosmic deliberation, we can improve upon the process we have.

Another potential benefit of randomly selected deliberators is that we are likely to end up with a very diverse group of deliberators, as they will represent a diverse public through random sampling. As Hélène Landemore has argued, diverse groups can often contribute to good decision making better than a group of persons with high amounts of ability, so long as deliberation is appropriately structured.\textsuperscript{609} Critically, diversity can trump ability, so elite deliberator diversity might compensate for their weak deliberative skills. The problem is that elite deliberative groups will be small, such that Landemore’s numbers-trump-ability theorem may not apply.\textsuperscript{610}

One might also worry that the information that deliberators appeal to can be limited or distorted by the political process. And even if politicians did not try to control the flow of information, the media and partisan bias would still corrupt the information citizen-deliberators are presented. An attractive remedy for this

\textsuperscript{609} Landemore 2013, pp. 102-4.
\textsuperscript{610} Landemore 2013, p. 104.
problem is to require deliberators to consult *prediction markets* for information about which policy proposals is likely to be effective. The structure of prediction markets is fairly straightforward. Participants in the market make bets on the effects of various policies in the future. Participants without good information will tend to have views that are randomly distributed across the relevant range of predictions, and so we can expect for their views to cancel one another out. But people with good information will tend to tilt the market in favor of their position and against others. So prediction markets serve as good information aggregators. They are surely imperfect, but they could dramatically improve the quality of information available to deliberators. As Robin Hanson argues, prediction markets are our most epistemically effective method of gathering information. Further, prediction markets have the advantage of anonymity of recommendation, which means that citizen-deliberators can get information untainted by the celebrity and charisma of a popular cultural figure or even the leader of a superforecasting team. Landemore has complained that prediction markets are not themselves a political decision-making mechanism, but prediction markets are still a very useful supplement for citizen deliberation. Philip Tetlock has argued that a small group of people are “superforecasters” who improve upon prediction markets, there is no reason that citizen-deliberators cannot listen to superforecasters as well.

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611 Hanson 2013.
613 Tetlock 2015.
I fully grant that deliberation has flaws, both due to discourse failure within the group and due to attempts to influence the group from the outside. But the incentives of the group, combined with Fishkin’s long experience with such small-group deliberation, gives us reason to hope that consulting elite deliberators could help to minimize the error function of the constitutional rules governing the productive policy process. We won’t eliminate error, but we might arrive at a political process that can better enable persons to comply with their legitimate legal obligations. This would, in turn, enable persons to better comply with the moral obligations prescribed by their system of moral conventions, and so better realize moral peace between persons.

VII. Legislative Review

Review can be understood as a legal process by which legislation is reviewed and then either overruled or allowed to stand. Following Jeremy Waldron, we might call this process “strong review,” where a political body can “decline to apply a statute in a particular case ... or to modify the effect of a statute to make its application conform with individual rights” and that the review body possesses “the authority to establish as a matter of law that a given statute or legislative provision will not be applied.” Here Waldron is speaking of judicial review, but I am focused more broadly on cases of strong review by any political body. In the

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United States, review is largely realized through the Supreme Court and the federal court system. Laws can be found unconstitutional on various grounds, and if a law violates the constitution, it can be overridden. But the review process need not be restricted to a court at all.

Review processes tend to be carried out by court systems in large part because determining whether a law violates the constitution requires a high degree of legal expertise. One must not only be familiar with the history of constitutional jurisprudence and all the steps of the legal process, but also aware of innumerable details of case after case. I will not argue that, due to this expertise, the US should retain its extremely powerful Supreme Court. The Supreme Court sometimes overrules legislation that can threaten its legitimacy and so create destabilization across the country.\footnote{This occurs whenever the Supreme Court makes a decision significantly at variance with the views of a large political group or the majority, regardless of whether that decision is right-leaning or left-leaning. Had the Supreme Court overruled the Affordable Care Act, this would probably not only have threatened the legitimacy of the court, but of the effective functioning of the government as a whole, which threatens both the durability and immunity of our legal order.} This occurs whenever the Supreme Court makes a decision significantly at variance with the views of a large political group or the majority, regardless of whether that decision is right-leaning or left-leaning. Had the Supreme Court overruled the Affordable Care Act, this would probably not only have threatened the legitimacy of the court, but of the effective functioning of the government as a whole, which threatens both the durability and immunity of our legal order.

Given that a review process can be structured in different ways, it should not be vulnerable to the objection that review is anti-majoritarian, given that a review body could rule by majority vote among a large number of officials whose

\footnote{This is one of Waldron’s classic concerns about it. See Waldron 2006, p. 1391.}
sole job is to engage in strong review. The only way to argue that the review body is anti-majoritarian is that the general effect of the review body is to overrule legislation supported by a majority of voters or legislators standing in for voters. However, remember that the point of the legislative process is not to represent the majority’s views. It is instead to generate publicly justified law by means of publicly justified constitutional rules. A review process is publicly justified, then, when it forms part of a broader constitutional process that respects primary rights, minimizes the social error function for constitutional rules, and generates the requisite degrees of durability and immunity. I think, in practice, these factors may tell in favor of having a review process, given the process of legislative error. In particular, if we think that the risk of type-1 legislative errors is sufficiently great even given proper structuring of the protective and productive legislative processes, then a review process may be essential for ensuring that legislation is as publicly justified as we can reasonably hope for.

While it is hard to say for sure, I think a review process is probably necessary over and above constraints already placed on the protective and productive policy processes. I take no stance on whether the review process must be led by a judiciary. For all we know, the most effective review body might be a kind of negative legislature, one whose officials are elected by the people, but that only have the right to repeal or reform laws. Alternatively, this review body might prevent type-1 errors at the expense of a vast number of type-2 errors, in which case the review body would frustrate rather than promote publicly justified law.
As general guidelines for formulating a publicly justified review process, I suggest that the review process should prize the principles of deliberation and non-tyranny. We can give up on assuring political equality because political equality is realized at all three previous stages of the political process, at the level of citizens and the level of legislative officials. And we can give up participation since we want a highly informed elite body to make complex determinations about the constitutionality of laws that ordinary citizens simply cannot make. This is why we should prize deliberation, since it helps the review body make these complex determinations. Without an appropriately high degree of deliberation, the quality of these final decisions would arguably be worse. We shouldn’t ignore the defects of officials in the review, but we should ensure that this stage of the political process appeals to quality decisions as much as we can. It should also be clear that the review process must respect non-tyranny, as the largest part of the review process is concerned with ensuring that coercive laws that violate primary rights are not imposed upon members of the public. So I suggest that the review process should guarantee deliberation and non-tyranny, generating what Fishkin calls elite deliberation.

I think we can see that, if public justification is our concern, review is potentially vital in preventing legislative error. Though the fact that review is less democratic than other processes can threaten legitimacy and stability, as Supreme Court decisions sometimes do.
VIII. Process Democracy Contrasted with Deliberative, Aggregative, and Agonistic Democracy

Following Fishkin, I have distinguished four values that a constitutional rule might embody—political equality, deliberation, participation, and non-tyranny. And I have distinguished, also following Fishkin, between regimes that guarantee the realization of two of these values, potentially at the expense of the other two—competitive democracy, elite deliberation, participatory democracy, and deliberative democracy. I argue that we should distinguish between four areas of governance—official selection by citizens, protective policy, productive policy, and the review process. Citizen input takes the form of participatory democracy, embodying the values of political equality and participation. Protective policy takes the form of competitive democracy, embodying the values of political equality and non-tyranny. Productive policy takes the form of deliberative democracy, embodying the values of political equality and deliberation. And the review process takes the form of elite deliberation, embodying the values of deliberation and non-tyranny. In each stage the relevant constitutional rules realize two of the four democratic values, and political equality is preserved at three stages of the process.

I can now contrast my approach to democracy with the three most popular democratic theories—deliberative democracy (a theoretical tradition distinct from Fishkin’s notion), aggregative democracy, and agonistic democracy. Deliberative
democracy bears deep similarities to mainstream public reason views, holding that
democratic decisions are legitimate when they are the outcome of certain
structured, egalitarian forms of deliberation. Habermas 1998
Aggregative democracy ascribes legitimacy to democratic decisions when the judgments of
citizens are aggregated in accordance with rationally and morally attractive
principles, like a Pareto principle specifying that when each member of the public
prefers p to q that society prefers p to q. Agonistic democracy rejects aggregation
and is not optimistic about the prospects for consensus following deliberation.
Democratic decisions are, therefore, supposed to balance the differing, and
invariably contradictory, interests of different social groups vying for power.

I believe that my approach to democratic theory combines the virtues of
these approaches while avoiding their flaws. Process democracy differs from
deliberative democracy by limiting the reliance on deliberation among citizens and
not imposing an ideal or principle of restraint that is meant to structure the
deliberation of citizens. It also rejects consensus as an ideal outcome of the

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66 Classic works of deliberative democracy are many, but some of the main monographs and
articles can be found in the following works: Habermas 1998, Bohman and Rehg 1998, Gutmann
and Thompson 2004, and Freeman 2000, Bowman and Richardson 2009, Parkinson and
Mansbridge 2012.
67 Rather, aggregative democrats appear to ascribe legitimacy on this basis, though in reality, they
tend to say little if anything about their normative assumptions. In fact, many people believed to be
aggregative democrats are critics of more ambitious democratic theories on the grounds that
aggregations are subject to problems. Theorists often associated with aggregative democracy
include Schumpeter 1942, Downs 1957, Riker 1988, and Dahl 1989. Riker articulates some principles
of “fairness” that include the Pareto principle and the universal admissibility of different preference
orderings in Riker 1988, pp. 116–7. I thank David Estlund, Alex Guerrero, Enzo Rossi, and Joshua
Miller for discussion about how exactly one comes to be called an aggregative democrat.
68 Ernesto Laclau, Chantal Mouffe, and William Connolly are among the best known contemporary
agonists. Laclau and Mouffe 2014, Connolly 2002, and Honig 1993. For the most recent articulation
of the agonistic democracy, see Wenman 2013. For discussion of the distinctiveness of agonistic
democratic theory and the ways in which it is distinct from deliberative democracy, see Gürsözlü
2009. I thank Alan Reynolds for helping me to understand contemporary agonistic democracy.
political process. Instead, its standard is to require that democratic institutions, insofar as they can, track what is publicly justified for citizens in accord with their intelligible reasons. But process democracy does appeal to deliberation in the political process, especially with respect to productive policy and review. Deliberation is important for increasing the quality of political decisions and, insofar as deliberation helps to realize public justification, it has great instrumental value. But we must not confuse public deliberation with public justification. Public deliberation is simply one process among many that may help to create and maintain a publicly justified policy; it should not be the central focus of a democratic order. Further, deliberation is subject to a variety of flaws even under relatively controlled conditions, so we must focus on other aspects of the design process to determine which laws we should have.

Turning to aggregative democracy, the input of citizens into the political process more or less corresponds to the approach of aggregative democrats. The idea here is to take raw mass opinion and then use good voting rules to choose candidates that can arguably be said to be the choice of the people. Deliberative democrats have often complained that aggregative democrats take citizen judgments as given, rather than as something shaped by the political process, and that this makes the aggregative approach inappropriate.699 But notice that this criticism does not damage process democracy. I do not rule out deliberation, or

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699 For an early version of the criticism, see Cohen 1991, though I think this misfires as a criticism of Dahl, who is not obviously an aggregative democrat. For an overview of the deliberative democratic narrative, see Bohman and Rehg 1998, pp. ix-xiii.
take preferences as given. The formation of preferences is an open process that is shaped by the moral order and that, as a result, may prevent the imposition of principles of deliberative restraint on citizens meant to structure deliberation. So preferences will evolve and change, but the political part of the moral order may not be entitled to use coercion or moral ostracism to control that evolution. Further, I side with deliberative democrats when it comes to governing the productive policy of the state. The goal there is to use citizen input to affect the policy process and to allow for the structuring of citizen deliberation within these citizen juries. I use aggregative approaches to help convert mass opinion into the selection of candidates, given the real-world limitations on citizen deliberation. So while aggregation is quite useful, process democracy does not rely upon aggregation alone. Process democracy avoids the flaws of aggregative democracy.

Finally, let us consider agonistic democracy. In one way, this entire book is a repudiation of the philosophical foundations of agonism, given that agonism is focused on insisting that democratic politics is invariably a power struggle; as agonistic democrat Chantal Mouffe notes, the domain of the political has a critical and inevitable “dimension of antagonism.” On the agonistic view, political foes are understood not necessarily as enemies but “adversaries” which are defined as “persons who are friends because they share a common symbolic space but also enemies because they want to organize this common symbolic space in a different

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620 Mouffe 2009, p. 11.
On this view “power is constitutive of social relations” because the values at the heart of liberal democracy are in ineradicable conflict; this means politics is invariably built on exclusion. I obviously reject the agonistic approach. However, agonistic critiques of deliberative democracy have some force for the process democrat. Agonists emphasize that political groups are not going to come to consensus on a regular basis, as deliberative democrats often expect. Agonistic democrats are also correct to emphasize that politics invariably involves disagreement and contestation and that our votes will reflect those divisions. And process democracy agrees that politics does involve contestation between diverse groups based on different values that are hard to reconcile with one another. However, against the agonistic democrat, I deny that this means we should conceive of politics as a power struggle. Instead, the real value of moral peace between persons demands that we place boundaries on political struggle so that the coercion employed by the state can be publicly justified for its members.

Given that I allow different democratic principles to govern different stages of the political process, and given that my view possesses the strengths of the three dominant democratic theories—deliberative, aggregative, and agonistic—I think the process democratic approach has much to commend it.

However, I have so far left unexplored key questions about a publicly justified polity that go beyond democratic decision procedures. In particular, I

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622 Mouffe 2009, p. 98. Also see Ernesto Laclau and Mouffe’s claim that “social objectivity is constituted through acts of power” and that “every order is ultimately political and based on some form of exclusion.” Laclau and Mouffe 2014, pp. 99-100.
have not explored non-democratic mechanisms for realizing public justification, such as exit mechanisms like federalism and secession. It turns out that a publicly justified polity might need more than democracy to achieve moral peace between persons. Moral peace might require a political and moral order that distributes power across different levels of government and different social organizations. So a publicly justified polity may need to be a polycentric polity. I explore the idea of a polycentric order in chapter 9, contained in the supplement.
Epilogue: Politics Need Not Be War

This book asks whether politics in the real world must be institutionalized aggregation between opposing groups. I have proposed to answer that question by arguing that a liberal order of moral peace is not only coherent, but institutionally familiar. I have argued that establishing moral peace requires the public justification of the moral conventional order, and the public justification of legal and constitutional conventions to repair or complete the portions of the moral order that cannot adequately establish moral peace between persons. The last three chapters have applied my model to argue that moral peace requires a robust right of freedom of association and a variety of economic rights, and that the constitutional should be organized as a process democracy. In the supplementary material, Chapter 9 argues that we can combine process democracy with a variety of exit mechanisms like markets, federalism, secession, and perhaps even a polycentric order. Such an order would establish moral peace between persons; in such a regime, politics would not be war, but rather a process of public negotiation that preserves moral relations between persons.

But now we must ask whether such an order is within our grasp. If real human beings cannot reasonably expect to achieve such an order, then perhaps politics will be war even if it doesn’t have to be war. I think it does not take much to justify the hope that such a regime is within our grasp. I have made no heroic assumptions about human nature, neither especially individualistic or collectivist, religious or secular. I have not assumed that humans are basically good or that
they will agree about what is good. I have not even assumed that people will agree upon the right conception of justice or even on social ontology. and I have persistently only modestly idealized persons, and I have accounts for morally corrupt and self-interested agents in my model of constitutional choice.

Also, the regimes I describe are not terribly different from our own. A publicly justified polity is likely to be liberal democratic market order with a rich and robustly protected associational life. The only radical dimension is my reliance on mechanisms of exit like polycentrism in chapter 9, and I advance these ideas tentatively. So to insist that a morally peaceful polity is not within our grasp strikes me as unfounded complacency. This book is a work of non-ideal theory; it concerns how to establish moral peace between real people under real conditions. We must still specify a normative ideal that we have yet to attain, but all moral and political theorizing does that. Since a morally peaceful polity is within our grasp, I conclude that the war parties in philosophy and politics are wrong. Politics can preserve moral relations between persons. Peace is within our grasp, if we want it.

Of course, I don’t expect to convince everyone. Some people will remain impressed by the depravity of humanity, our nasty history, and the relations of oppression that continue to generate injustice to this day; so much so, that they will have no hope that we can do any better than to achieve a decent balance of power. Let’s just look at the advanced liberal democratic market orders in the world today. Can their existence really justify continuing skepticism about the
capacity of human beings to organize at least decently moral and peaceful social orders? We can simply look around and not be so glum.

The message of the book, then, is that we should step back from our determination to destroy each other on the political field of battle. If we care about being reconciled to one another, about trusting those who are different from us, then we need not despair. We can find peace by pursuing certain kinds of political and economic arrangements. There is no mythical force preventing us from forming more peaceful relations with one another, no story of inevitable struggle and conflict. Moral peace is within our grasp, if we want it. Whether we establish it is up to us.
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