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NOVEL PUBLIC REASONS[†]

Lawrence B. Sohum*

I. INTRODUCTION

One important strand of the debate over the role of religion in the public square concerns the notion of “public reason”—the common reason of members of the public in their capacity as citizens constituting a polity. John Rawls has argued that citizens in a modern pluralist democracy owe each other a duty of civility in public debate; meeting this obligation requires each citizen to offer public reasons—reasons that their fellow citizens would not reject as unreasonable—when engaging in public debate about the constitutional essentials.¹ Rawls’s view, his liberal *ideal of public reason*, has been the subject of considerable interest and discussion.

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* Professor of Law and William M. Rains Fellow, Loyola Law School, Loyola Marymount University. I owe thanks to Sharon Lloyd and John Rawls for their illuminating comments on a draft. This Essay is dedicated to Jean Hampton and Greg Kauka, my first teachers in political philosophy. They are greatly missed.

1. Rawls’s views about public reason are complex and have evolved over a period of several years. Several qualifications to the statement in the text will be introduced later in this Essay. The remainder of this footnote provides references to the work in which Rawls has developed his views on public reason. I have been unable to locate the phrase “public reason” in JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter RAWLS, *THEORY OF JUSTICE*]; it does not appear in the index. A very similar idea does appear, however, in his discussions of “publicity.” See RAWLS, *THEORY OF JUSTICE*, *supra*, § 69, at 454; John Rawls, *Kantian Constructivism in Moral Theory: The Dewey Lectures 1980*, 77 J. PHIL. 515, 537 (1980) (“Citizens in a well-ordered society roughly agree on these beliefs because they can be supported . . . by publicly shared methods of inquiry . . . familiar from common sense and [including] . . . the procedures and conclusions of science, when these are well established and not controversial.”).

The idea of public reason was introduced in several of Rawls’s essays in the 1980s. See John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 244 (1989); John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987); John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985). Rawls extensively developed the idea in his Melden Lectures delivered in 1990. John Rawls, *The Idea of Free Public Reason*, Inaugural Abraham Melden Lectures, Department of Philosophy, University of California at Irvine (Feb. 27 and Mar. 1, 1990). These lectures were published in revised form in 1993. JOHN RAWLS, *POLITICAL LIBERALISM* (1993) [hereinafter RAWLS, *POLITICAL LIBERALISM*]. Rawls has further revised his views since the publication of *Political Liberalism*; revisions

This Essay takes up one important and influential objection to a Rawlsian conception of the ideal of public reason.² This objection, made by Jeremy Waldron,³ is premised on the notion that compliance with the Rawlsian ideal would impoverish political discourse by banishing novel arguments from the public sphere. Call Waldron's thesis *the novelty objection*. This objection is misguided. Although public political debate would be impoverished *if* it were confined to a static set of universally accepted premises and modes of reasoning, Waldron errs when he charges that a Rawlsian ideal of public reason would require such sterility. Rather, a sympathetic reading of Rawls suggests that general acceptance of a liberal ideal of public reason would permit the robust evolution of political discourse.

My exposition begins with a brief introduction to the public reason debate. Rawls's ideal of public reason and Waldron's objection connect to two intersecting clusters of issues. The first cluster, which is the focus of this Symposium, concerns the role of religion in law and politics. The second cluster, which deals with the fundamental questions of political philosophy, revolves around Rawls's theory of justice as fairness. In this Essay, my topic is the role of the novelty objection at the intersection of the two clusters of issues: the implications of a Rawlsian view of novel public reasons for debates about religion and politics. My views have been shaped by the substantial literature concerning the role of religion in the public

are expected in John Rawls, *The Idea of Public Reason: Further Considerations*, U. CHI. L. REV. (forthcoming 1996) and in the introduction to the paperback edition of JOHN RAWLS, *POLITICAL LIBERALISM* (paperback ed. forthcoming 1996) [hereinafter RAWLS, *POLITICAL LIBERALISM* (paperback ed.)] (manuscript on file with *Loyola of Los Angeles Law Review*).

2. Although I believe that the positions that I take here are compatible with Rawls's current views and with the central premises of his general theory—justice as fairness—the views that I defend here might be better termed as Rawlsian than as those of Rawls. Rawls's views continue to evolve, as discussed *supra* note 1, and there are some terminological differences between my formulations and those in Rawls's unpublished work. For my views on other aspects of the public reason debate, see Lawrence B. Solum, *Inclusive Public Reason*, 75 PAC. PHIL. Q. 217 (1994) [hereinafter Solum, *Inclusive Public Reason*]; Lawrence B. Solum, *Situating Political Liberalism*, 69 CHI.-KENT L. REV. 549 (1994) [hereinafter Solum, *Situating Political Liberalism*]; Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729 (1993) [hereinafter Solum, *Constructing an Ideal*]; Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083 (1990).

3. Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 SAN DIEGO L. REV. 817 (1993).

square, including work by Robert Audi,⁴ Kent Greenawalt,⁵ Michael Perry,⁶ and others.

The idea of public reason has been debated by legal scholars and philosophers, and Rawls's notion has been deployed as a premise for argumentation in both legal theory and doctrine.⁷ The phrase "public

4. See Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677 (1993); Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259 (1989).

5. See KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY (1987); Kent Greenawalt, *Religious Expression in the Public Square—The Building Blocks for an Intermediate Position*, 29 LOY. L.A. L. REV. 1411 (1996); Kent Greenawalt, *Some Problems With Public Reason in John Rawls's Political Liberalism*, 28 LOY. L.A. L. REV. 1303 (1995); Kent Greenawalt, *On Public Reason*, 69 CHI.-KENT L. REV. 669 (1994) [hereinafter Greenawalt, *Public Reason*]; Kent Greenawalt, *Grounds for Political Judgment: The Status of Personal Experience and the Autonomy and Generality of Principles of Restraint*, 30 SAN DIEGO L. REV. 647 (1993).

6. See MICHAEL J. PERRY, LOVE AND POWER (1991); Michael J. Perry, *Religious Arguments in Public Political Debate*, 29 LOY. L.A. L. REV. 1421 (1996) [hereinafter Perry, *Religious Arguments*]; Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts—and Second Thoughts—on LOVE AND POWER*, 30 SAN DIEGO L. REV. 703 (1993); Michael J. Perry, *Toward an Ecumenical Politics*, 60 GEO. WASH. L. REV. 599 (1992). Perry's recent views are expressed more fully in MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (forthcoming).

7. The brief introduction in text only touches on some of the many issues raised by the growing literature on Rawls's notion of public reason. Moreover, there is extensive literature on the role of religion in politics apart from that specifically concerned with Rawls's notion of public reason. The following sources directly discuss or apply the idea of public reason. See Catherine Audard, *The Idea of "Free Public Reason"*, 8 RATIO JURIS 15 (1995); Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273, 312 n.224 (1993); James F. Bohman, *Public Reason and Cultural Pluralism: Political Liberalism and the Problem of Moral Conflict*, 23 POL. THEORY 253 (1995); Bruce W. Brower, *The Limits of Public Reason*, 91 J. PHIL. 5 (1994); Paul F. Campos, *Secular Fundamentalism*, 94 COLUM. L. REV. 1814, 1817-21 (1994); David S. Caudill, *Lagan's Social Psychoanalysis: Religion and Community in a Pluralistic Society*, 26 CUMB. L. REV. 125, 137-38 (1995); David S. Caudill, *Pluralism and the Quality of Religious Discourse in Law and Politics*, 6 U. FLA. J.L. & PUB. POL'Y 135, 145-55 (1994); Peter De Marneffe, *Rawls's Idea of Public Reason*, 75 PAC. PHIL. Q. 232 (1994); Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 365 n.67 (1995); James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 293 (1993); Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963, 967 n.14 (1993); Leslie Pickering Francis, *Law and Philosophy: From Skepticism to Value Theory*, 27 LOY. L.A. L. REV. 65, 78-85 (1993); Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 CHI.-KENT L. REV. 619, 646-58 (1994); Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 8-9 (1996); Jean Hampton, *How You Can Be Both a Liberal and a Retributivist: Comments on Legal Moralism and Liberalism by Jeffrie Murphy*, 37 ARIZ. L. REV. 105 (1995); Jean Hampton, *Retribution and the Liberal State*, 1994 J. CONTEMP. LEGAL ISSUES 117 (1994); Jean Hampton, *Should Political*

reason” is ambiguous and might be used to express any of a number of distinct ideas.⁸ As used in the context of debates over the role of religion in the public square, “public reason” refers to the common reason of the public in its capacity as citizens constituting a polity.

Philosophy Be Done without Metaphysics?, 99 *ETHICS* 791 (1989); Peter F. Lake, *Liberalism Within the Limits of the Reasonable Alone: Developments of John Rawls' Political Philosophy, its Political Positivism, and the Limits on its Applicability*, 19 *VT. L. REV.* 603, 634-41 (1995); Gary C. Leedes, *Rawls's Excessively Secular Political Conception*, 27 *U. RICH. L. REV.* 1083 (1993); Percy B. Lehning, *The Idea of Public Reason: Can It Fulfill Its Task?*, 8 *RATIO JURIS* 30 (1995); S.A. Lloyd, *Situating a Feminist Criticism of John Rawls's POLITICAL LIBERALISM*, 28 *LOY. L.A. L. REV.* 1319 (1995); Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 *YALE L.J.* 595, 644 n.174 (1993); Linda C. McClain, *Rights and Irresponsibility*, 43 *DUKE L.J.* 989 (1994); Frank I. Michelman, *Always Under Law?*, 12 *CONST. COMMENTARY* 227 (1995); Chantal Mouffe, *Democracy And Pluralism: A Critique of the Rationalist Approach*, 16 *CARDOZO L. REV.* 1533 (1995); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 *WM. & MARY L. REV.* 267 (1991); Philip L. Quinn, *Political Liberalisms and Their Exclusions of the Religious*, 69 *PROC. & ADDRESSES AM. PHIL. ASS'N* 49 (1995); R. Randall Rainey, *Law And Religion: Is Reconciliation Still Possible?*, 27 *LOY. L.A. L. REV.* 147 (1993); David A.J. Richards, *Liberal Political Culture and the Marginalized Voice: Interpretive Responsibility and the American Law School*, 1995 *STAN. L. REV.* 28 (1993); David M. Smolin, *The Religious Root and Branch of Anti-Abortion Lawlessness*, 47 *BAYLOR L. REV.* 119 (1995); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 *HARV. L. REV.* 1733 (1995); Paul J. Weithman, *Taking Rites Seriously*, 75 *PAC. PHIL. Q.* 272 (1994); Michael P. Zuckert, *The New Rawls and Constitutional Theory: Does It Really Taste That Much Better?*, 11 *CONST. COMMENTARY* 227 (1994); Susan K. Houser, Comment, *Metaethics and the Overlapping Consensus*, 54 *OHIO ST. L.J.* 1139 (1993); Christopher L. Kutz, Note, *Just Disagreement: Indeterminacy And Rationality in the Rule of Law*, 103 *YALE L.J.* 997 (1994); Rachel Mariner, Note, *Burdens Hard to Bear: A Theology of Civil Rights*, 27 *HARV. C.R.-C.L. L. REV.* 657, 671 n.75 (1992); Christina Engstrom Martin, Comment, *Student-Initiated Religious Expression After Mergens and Weisman*, 61 *U. CHI. L. REV.* 1565 (1994); Joshua Cohen, *A More Democratic Liberalism*, 92 *MICH. L. REV.* 1503 (1994) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)); Richard H. Fallon, Jr., *Of Speakable Ethics and Constitutional Law: A Review Essay*, 56 *U. CHI. L. REV.* 1523, 1549 n.80 (1989) (reviewing MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY* (1988)); Abner S. Greene, *Uncommon Ground*, 62 *GEO. WASH. L. REV.* 646 (1994) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993) and RONALD DWORKIN, *LIFE'S DOMINION* (1993)); William Powers, Jr., *Constructing Liberal Political Theory*, 72 *TEX. L. REV.* 443 (1993) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993) and T.K. SEUNG, *INTUITION AND CONSTRUCTION* (1993)); David A.J. Richards, Book Review, 23 *G.A. L. REV.* 1189 (1989) (reviewing KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* (1987) and KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988)); Michael J. Sandel, Book Review, 107 *HARV. L. REV.* 1765 (1994) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)); Elizabeth Wolgast, *The Demands of Public Reason*, 94 *COLUM. L. REV.* 1936 (1994) (book review).

8. For a brief review of historical uses of the idea of public reason, see Solum, *Constructing an Ideal of Public Reason*, *supra* note 2, at 754-62.

An ideal of public reason is a normative standard for the use of public reason.

Early on, borrowing a phrase from Kant,⁹ Rawls introduced what he then called the "idea of free public reason":

[G]reat values fall under the idea of free public reason, and are expressed in the guidelines for public inquiry and in the steps taken to secure that such inquiry is free and public, as well as informed and reasonable. These values include not only the appropriate use of the fundamental concepts of judgment, inference, and evidence, but also the virtues of reasonableness and fair-mindedness as shown in the adherence to the criteria and procedures of common sense knowledge, and to the methods and conclusion of science when not controversial, as well as respect for the precepts governing reasonable political discussion.¹⁰

Although this discussion contains the core of Rawls's position, a few additional points deserve separate mention.

First, public reason is the reason of a political society, its "way of formulating its plans, of putting its ends in an order of priority and of making its decisions accordingly."¹¹ Thus, public reason contrasts with the "nonpublic reasons of churches and universities and of many other associations in civil society."¹² Public and nonpublic reason share simple rules of inference and evidence, features which are essential to reason itself.¹³ Public reasons, however, are limited to premises and modes of reasoning that can appeal to the public at large. Indeed, the criterion for public reason is availability to the public at large. Rawls argues that these include, but are not necessarily limited to, "presently accepted general beliefs and forms

9. See Immanuel Kant, *An Answer to the Question: 'What is Enlightenment', in POLITICAL WRITINGS* 54 (H. Reiss ed. & H.B. Nisbet trans., 2d ed. 1991):

The *public* use of man's reason must always be free, and it alone can bring about enlightenment among men; the *private use* of reason may quite often be very narrowly restricted, however, without undue hindrance to the progress of enlightenment. But by the public use of one's own reason I mean that use anyone may make of it *as a man of learning* addressing the entire *reading public*. What I term the private use of reason is that which a person may make of it in a particularly *civil* post or office with which he is entrusted.

Id. at 55.

10. John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 244 (1989).

11. RAWLS, *POLITICAL LIBERALISM*, *supra* note 1, at 212.

12. *Id.* at 213.

13. *Id.* at 220.

of reasoning found in common sense, and the methods and conclusions of science when these are not controversial."¹⁴

Nonpublic reasons would include reasons located within the deep premises of a comprehensive religious doctrine or philosophical moral theory. Consider two examples of nonpublic reasons: first, the hedonistic utilitarian premise that only pleasures and pains are of fundamental value; and second, a religious belief that a particular text is sacred and that its authoritative interpretation by church leaders is the source of binding moral reasons. Although the utilitarian premise is secular and the theological premise is religious, both are nonpublic reasons because neither can be accepted as a reasonable ground for action by the public at large, which is understood as the body of citizens who are in full possession of the powers of human reason and who nevertheless believe in a variety of reasonable comprehensive doctrines.

Second, Rawls limits his exposition of an ideal of public reason to a special case. He does not consider whether an ideal of public reason applies to all actions by the state, or even to all coercive uses of state power. Rather, he limits his analysis to the case that he considers clearest—the case of the “constitutional essentials” and “questions of basic justice.”¹⁵ Thus, the scope of the freedom of speech and qualifications for the franchise would be subject to the Rawlsian ideal. But he leaves open the question whether the details of tax legislation and the regulation of pollution control would also be covered.¹⁶

14. *Id.* at 224.

15. *Id.* at 214; *see also id.* § 5, at 227-30 (discussing the idea of constitutional essentials).

16. Rawls notes that a full account of public reason would need to offer an account of these subjects and how they differ from the constitutional essentials and questions of basic justice. *Id.* at 215. Kent Greenawalt has argued that the distinction between the constitutional essentials and other subjects for public political debate may be difficult to draw in practice. *See Greenawalt, Public Reason, supra* note 5, at 687. I have argued elsewhere that Greenawalt's interpretation of Rawls's position is not quite right: Rawls limits himself to the case of the constitutional essentials and the basic structure, and therefore does not take a position on the application of his ideal to other cases. *See Solum, Situating Political Liberalism, supra* note 2, at 580. Greenawalt's arguments can therefore be read as making a case for the extension of the Rawlsian ideal to all coercive use of state power—an argument with which I would be sympathetic. On the other hand, if Rawls were to conclude that the requirements of public reason are different in cases other than the constitutional essentials, then he would need to answer Greenawalt's objection.

Third, Rawls argues that the duty of civility and hence his ideal of public reason applies to citizens and public officials when they engage in political advocacy in a public forum; it also governs the decisions that officials make and the votes that citizens cast in elections. The ideal does not, however, apply to what Rawls calls the background culture; the reason of civil society includes discussion within a variety of special institutions, such as universities and churches, as well as dialogue between the adherents of a variety of comprehensive religious and secular doctrines. Moreover, the ideal does not apply to personal reflection and deliberation about political questions. Finally, it does not apply to such reflection or deliberation about questions that are not political in nature.¹⁷

Fourth, Rawls opts for an inclusive—as opposed to an exclusive—interpretation of the ideal of public reason. Citizens and public officials do not breach the duty of civility when they offer nonpublic reasons as the foundations for, or supplements to, public ones. Although Rawls has been read as advocating a view of public reason that would exclude religious reasons from public debate, that is not the best reading of his work as a whole. My interpretation flows from several considerations that I have explored at length elsewhere.¹⁸ Perhaps the most important evidence for the proposition that a Rawlsian ideal of public reason is inclusive is that this interpretation best fits the fundamental justification that Rawls offers for the ideal. This justification is based on the liberal principle of legitimacy: “[O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in light of principles and ideals acceptable to them as reasonable and rational.”¹⁹ It is because of this principle that “the ideal of citizenship imposes . . . the duty of civility—to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of

17. RAWLS, *POLITICAL LIBERALISM*, *supra* note 1, at 215.

18. See Solum, *Inclusive Public Reason*, *supra* note 2; Solum, *Constructing an Ideal*, *supra* note 2. In the Introduction to RAWLS, *POLITICAL LIBERALISM* (paperback ed.), *supra* note 1, Rawls states:

[W]hen engaged in public reasoning may we also include reasons of our comprehensive doctrines? I now believe . . . that reasonable such doctrines may be introduced in public reason at any time provided that in due course public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support.

19. RAWLS, *POLITICAL LIBERALISM*, *supra* note 1, at 217.

public reason."²⁰ While the duty of civility requires citizens to offer public reasons, it does not itself require abstention from the disclosure of nonpublic reasons that play a foundational or supporting role in either political deliberation or public political debate. Moreover, the giving of nonpublic reasons, which—while not shared—are the foundations of public reasons—which are shared—may foster mutual civility and tolerance. I may see that you and I agree about fundamental public values but disagree about the moral foundations of those values. Despite my unwillingness to accept them as true, I may nevertheless come to see your fundamental views as reasonable.²¹

Fifth, and finally, the obligations imposed by the duty of civility are obligations of political morality. The ideal of public reason does not justify legal restrictions on what can be said in public debate; it does not imply that citizens should be punished when they fail to include public reasons for their actions. Rather, an ideal of public reason is an ideal of democratic citizenship.²² A good citizen will recognize a duty of civility, and all citizens have a moral obligation to comply with it. In addition, citizens may have collateral political obligations, such as to praise others who comply under difficult circumstances and to criticize those who fail to meet the duty.

With these features in mind,²³ we can offer a summary of a Rawlsian ideal of public reason; this ideal has five main features:

1. *Content of Public Reason:* The ideal specifies public reason as reason which relies on premises and modes of reason that are available to the public at large, including (a) the general features of all reason, such as rules of inference and evidence, and (b) generally shared beliefs, common-sense reasoning, and the noncontroversial methods of science.
2. *Scope of Application:* As a minimum, the ideal applies to deliberation and discussion concerning the basic structure and the constitutional essentials.

20. *Id.*

21. *Id.* at 249. Although Rawls acknowledges Seana Shiffrin and myself as the source of this argument, my first encounter of the argument was in discussion with Sharon Lloyd following Rawls's Melden Lectures.

22. *Id.* at 216.

23. Many important points are not included in this summary. For example, a full statement of the ideal would include an obligation to refrain from intolerant or disrespectful speech—for example, racial bigotry—in public political debate. See Solum, *Constructing an Ideal*, *supra* note 2, at 752.

3. *Persons Obligated:* The duty of civility specified by the ideal creates obligations (a) for both citizens and public officials when they engage in public political debate, (b) for citizens when they vote, and (c) for public officials when they engage in official action—so long as the debate, vote, or action concerns the subjects specified in (2).

4. *Structure of the Obligation:* The ideal requires (a) citizens and public officials (i) to include public reasons in public political debate, but (ii) nonpublic reasons may be included, so long as public reasons are offered in due course, and (b) in special contexts, such as the decision of a legal dispute or the passage of a bill, public officials should exclude nonpublic reasons from official pronouncements such as judicial opinions or statements of legislative purpose.

5. *Nature of the Obligation:* The duty of civility implied by the idea is an obligation of political morality, and the ideal does not necessarily justify legal restrictions on public political discourse.

As we have seen, Rawls's ideal of public reason is controversial for a number of reasons. One strand of the public reason debate has proceeded from the assumption that a liberal ideal of public reason would exclude religion from public debate. As I have briefly outlined above and argued extensively elsewhere, I believe that this assumption is incorrect. Moreover, many of the objections to a liberal ideal of public reason make the erroneous assumption that such ideals exclude religious morality from public debate and allow secular moral beliefs to participate on unequal terms.²⁴ Again, I will put this problem to the side in this Essay.

II. THE NOVELTY OBJECTION

This Essay focuses on only one objection to a liberal ideal of public reason: the novelty objection.²⁵ The gist of the novelty objection is that a Rawlsian ideal of public reason would drain public political debate of its vitality by excluding novel arguments. As I shall demonstrate, the best interpretation of Rawls's position is that novel arguments are not excluded from public political debate except

24. See *id.* at 741.

25. The novelty objection was first articulated by Jeremy Waldron and then taken up by Philip Quinn and Michael Perry. See Quinn, *supra* note 7, at 49; Perry, *Religious Arguments*, *supra* note 6, at 1436-37.

in very narrow circumstances. In this Part of the Essay, I present an exposition and reconstruction of Waldron's argument.

A. *Waldron's Interpretation of the Rawlsian Ideal of Public Reason*

Waldron's statement of the objection is worth quoting at length. He articulates an interpretation of Rawls that establishes the basic premise of the objection as follows:

John Rawls offers what, in my opinion, is an overly narrow conception of the matrix of public reason, suggesting that it must always proceed from some consensus—"from premises that we and others recognize as true, or as reasonable for the purpose of reaching a working agreement." He suggests that public deliberation be limited to "the shared methods of, and the public knowledge available to, common sense, and the procedures and conclusions of science when these are not controversial." What this conception seems to rule out is the novel or disconcerting move in political argumentation: the premise that no one has ever thought of before, but which, once stated, sounds plausible or interesting. Rawls' conception seems to assume an inherent limit in the human capacity for imagination and creativity in politics, implying as it does that something counts as a legitimate move in public reasoning only to the extent that it latches onto existing premises that everybody already shares.²⁶

Thus, Waldron argues that Rawls's conception of public reason is too narrow.

What is Waldron getting at? Before I provide a detailed reconstruction of Waldron's argument, let me state what I take to be Waldron's core intuition. Waldron believes that Rawls's idea of public reason would limit public discourse to the least common denominator, that is, the premises on which we all agreed. But that would be a nightmare for everyone, even for those whose beliefs were the most common-sensical. It is as if someone were to propose that cooking should be governed by an ideal that rules out all the ingredients to which anyone might object. What would be left? There would be only a tiny number of ingredients, and hence a diet without spice or variety. Suppose that the only ingredients allowed

26. Waldron, *supra* note 3, at 837-38 (citations omitted) (quoting John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 8 (1987)).

were sugar, flour, and milk. From these, we could make only a very few dishes, perhaps a bland pudding. But if we were allowed to use eggs, we could make a soufflé! Some would object to eggs because of the cholesterol in the yolk. And since we would never get to experiment with eggs, we would never learn that we could make a soufflé by using just the whites. Any real innovation in cooking would be made impossible, and this would operate to everyone's disadvantage, even to those who were on very restricted diets.

Waldron imagines that an ideal of public reason might operate in this way. We would all be fed a bland diet of familiar ideas. And because we would never be able to experiment with new ideas, all of us would be harmed, even those of us who would dislike almost any new idea. If we never experimented with new arguments, we would never have the opportunity to discover the really good ones—the novel premises that lead to the discovery of important new truths.

1. Two problems with a Rawlsian ideal of public reason

Now that we have an intuitive sense of the novelty objection, let us consider the details of Waldron's argument. Why does Waldron believe that Rawls's conception is too narrow? Waldron considers this question at two different levels.²⁷ The first level concerns the possibility of public political discourse that is not limited by an ideal of public reason that excludes premises that are novel or controversial. The second level concerns the fairness of an ideal of public reason that does not so limit public political discourse.

2. The problem with the alleged impossibility of novel reasons

Consider first Waldron's position with respect to possibility. Characterizing Rawls's position, Waldron writes:

It suggests that justificatory moves must always connect with an existent consensus, with the stock of ideas already "implicit in the political culture" of our society. In fact, justificatory consensus may be invented in or constituted by

27. For our current purposes, we can suspend any questions about Waldron's separation of the two levels. At some level, the question of whether citizens can be persuaded by novel reasons will blur into the question of whether they should be persuaded. Standards of reason are normative and open to argument; in this sense, the answer to the question whether public reason *can* include novel reasons depends, at least in part, on whether good reasons can be given for whether public reason *should* include such reasons.

a political discourse that does not presuppose or assume its existence. Moves may be made in political argument that bear no relation to existing conventions or commonly held opinions, but which nevertheless gain a foothold as soon as they are considered and discussed by persons with open minds.²⁸

At this point, Waldron is not analyzing a normative question. The issue is not how *should* we deliberate, but is rather how *can* we deliberate. Waldron believes that Rawls's ideal of public reason rests in part on the notion that public reason "must always proceed from some consensus."²⁹

On what grounds does Waldron hold this interpretation of Rawls? The answer to this question is not entirely clear, for Waldron does not engage in extensive textual exegesis of Rawls. Rawls states that to comply with a liberal ideal of public reason as applied to the constitutional essentials:

[W]e are not to appeal to comprehensive religious and philosophical doctrines—to what we as individuals or members of associations see as the whole truth—nor to elaborate economic theories of general equilibrium, say, if these are in dispute. As far as possible, the knowledge and ways of reasoning that ground our affirming the principles of justice and their application to the constitutional essentials are to rest on plain truths now widely accepted, or available, to citizens in general. Otherwise, the political conception would not provide a public basis of justification.³⁰

There is evidence here for part of Waldron's interpretation. In particular, "plain truths now widely accepted" does suggest that public reason must "proceed from some consensus."³¹

It is still not clear what Waldron means when he uses the modal operator "must" in "must always proceed from some consensus." It is possible that the "must" here is intended in a normative sense.

28. Waldron, *supra* note 3, at 838 (citation omitted).

29. *Id.* at 837.

30. RAWLS, POLITICAL LIBERALISM, *supra* note 1, at 224-25.

31. On the other hand, this passage does not admit of the more extreme interpretation, quoted above, where Waldron states that Rawls holds "that something counts as a legitimate move in public reasoning only to the extent that it latches onto existing premises that everybody already shares." *Id.* at 838. There is a substantial difference between Rawls's statement, "plain truths now widely accepted" and Waldron's "existing premises that everybody already shares."

Waldron might be reading Rawls as saying, "one must argue from premises that are the subject of consensus in order to comply with the requirements of political morality expressed in a normative ideal of public reason." If this is what Waldron intends, then my two level reading of Waldron is off the mark, and what I call the level of possibility collapses into the level of fairness.

There is, however, evidence that Waldron intends "must" to convey the concept of necessity. For example, Waldron states, "[m]uch of what Rawls and others say about the exigencies of public reason is based on concerns about the possibility of public debate."³² On this reading, Rawls believes that it is impossible for public political debate to go forward unless such debate is limited to arguments with premises that are already accepted. One must be very careful here, for clearly Waldron would not contend that Rawls believes that nonpublic reasons cannot be uttered in public political debate. That interpretation is silly. Rather, Waldron's interpretation would be that Rawls believes that public political debate about the constitutional essentials cannot serve its purpose or be effective unless nonpublic reasons are excluded.³³

In particular, Waldron seems to be worried that Rawls may believe that novel reasons would be "incomprehensible" and hence that reasons which are novel could never persuade. Waldron argues that such a belief would rely on what Karl Popper calls "the myth of the framework,"³⁴ a supposed myth based on the Wittgensteinian thought that "[i]f language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments."³⁵

Waldron argues that radical disagreement does not preclude comprehensibility. The background necessary to get a conversation going may turn out to be surprisingly "thin."³⁶ In his exposition of this point, Waldron contrasts two different conceptions of public

32. *Id.* at 840 (emphasis omitted).

33. At this point, I am accepting the assumption that Rawls believes nonpublic reasons must be excluded from public political debate about the constitutional essentials. As I indicated above, that assumption is incorrect, because Rawls adheres to an inclusive or wide view of public reason. See *supra* text accompanying note 18.

34. Waldron, *supra* note 3, at 835 (citing KARL R. POPPER, OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH (1972)).

35. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 88e, ¶ 242 (G.E.M. Anscombe trans., 1968).

36. Waldron, *supra* note 3, at 835.

deliberation, the Aristotelian and the Millian. The Aristotelian conception, resting on the notion that the collective deliberation of all citizens may be better than the individual deliberation of the most excellent individual citizen,³⁷ requires each contribution to political discourse "be made in a way that is . . . *apt to be received* by other members of the community."³⁸ Thus, the Aristotelian conception implies limitations similar to those expressed by Rawls's notion of a duty of civility. The Millian conception, analogous to the metaphor of the marketplace of ideas,³⁹ postulates public discourse that is not constrained by civility, but is instead conducted in an arena in which, "people simply fling their views and opinions into the public forum of ideas,"⁴⁰ or as Mill puts it, "the rough process of a struggle between combatants fighting under hostile banners."⁴¹

What is the point of Waldron's discussion of the two conceptions of public deliberation? The point is not to endorse Mill's conception: Waldron thinks the Aristotelian conception is superior.⁴² Rather, Mill's conception is invoked to suggest that political deliberation is possible, even when argument is not civil. Millian public deliberation may not be civil, but it is also not impossible.

Waldron argues that public debate can do its work so long as the arguments that are used are "likely to have an *effect* on the existing consensus."⁴³ Waldron's central idea here is quite important. Waldron argues that the path to a new consensus may go through

37. Waldron quotes the following passage from *The Politics*:

There is this to be said for the Many. Each of them by himself may not be of a good quality; but when they all come together it is possible that they may surpass—collectively and as a body, although not individually—the ability of the few best. Feasts to which many contribute may excel those provided at one man's expense. In the same way, when there are many [who contribute to the process of deliberation], each can bring his share of goodness and moral prudence; and when all meet together the people may thus become something in the nature of a single person who—as he has many feet, many hands, and many senses—may also have many of the qualities of character and intelligence.

Id. at 835-36 (quoting ARISTOTLE, *THE POLITICS* 123, bk. III, ch. 11, *1281b (E. Barker trans., 1946)).

38. *Id.* at 836.

39. See *id.* at 836-37 & n.65; cf. Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 68-72 (1988-1989) (providing exposition of marketplace of ideas metaphor).

40. See Waldron, *supra* note 3, at 836.

41. JOHN STUART MILL, *ON LIBERTY* 58 (Currin V. Shields ed., 1956).

42. Waldron, *supra* note 3, at 837.

43. *Id.* at 838.

political arguments that are novel or that are currently the subject of strong disagreement:

In fact, justificatory consensus may be invented in or constituted by a political discourse that does not presuppose or assume its existence. Moves may be made in political argument that bear no relation to existing conventions or commonly held opinions, but which nevertheless gain a foothold as soon as they are considered and discussed by persons with open minds.⁴⁴

3. The problem with the alleged unfairness of novel reasons

Recall that Waldron's contention is that a Rawlsian conception of public reason is too narrow. In this section, I explicate Waldron's contention that Rawls believes that the inclusion of novel reasons in public discourse would be unfair.

As understood by Waldron, Rawls's fairness argument relies on the notion that it would be unfair for adherents of one comprehensive view—religious or secular—to use the power of the state to impose a policy supported only by their view on those who do not share it: this would involve, “a privileged place for the views of some over others.”⁴⁵ Waldron then argues:

Instead of saying positively that we must be sure that a reason is part of an existing consensus before we can appeal to it, we may phrase the doctrine as a narrower, negative claim. We must not appeal to considerations which we know, or have good reason to believe, are not shared in the society. Religious considerations fall into this category, for it is common knowledge in our society that no agreement may reasonably be expected on matters of religion.⁴⁶

Even when narrowed in this way, Waldron argues, the requirement of a Rawlsian ideal of public reason would be unnecessarily strict. Religious reasons are not usually given as the sole or sufficient justification for government action; rather, they are put forward as part of a larger dialogue or discussion: “A contribution may be put forward as something for one's fellow citizens to ponder and consider along with the other views that they are listening to, something for

44. *Id.*

45. RAWLS, *THEORY OF JUSTICE*, *supra* note 1, at 213.

46. Waldron, *supra* note 3, at 840 (emphasis omitted).

them to take into account. What they make of it may be left up to them.⁴⁷

Thus, the first step in Waldron's critique of the fairness argument is to argue that the strict limits imposed by the Waldron interpretation of Rawls's ideal of public reason are unnecessary: fairness can be achieved with a more inclusive ideal. Novel reasons can be included in public discourse, at least if one of two conditions is met. First, the novel reason should not be of the kind with respect to which we know no agreement may reasonably be expected, or second, the novel reason is offered as part of a background discussion and not as a proposal to use public power to forcibly impose something on everyone else.⁴⁸

The second step in Waldron's critique proceeds differently. Waldron argues that the inclusion of novel reasons in public debate is not unfair, because such reasons should be viewed as a good by those to whom they are given. This argument has two strands. The first strand concerns the quality of public deliberations; the inclusion of novel reasons will make for better deliberations:

[W]e think it part of the point of public deliberation to expose citizens and other decision makers to perspectives and experiences with which they are initially unfamiliar. Only on the basis of such exposure is there any reason to believe . . . that the decision which results at the end of the deliberations will be any improvement over the prejudices with which the people went into the forum. Only on this basis can we expect the participants in dialogue themselves to be improved by the exposure.⁴⁹

Presumably, better deliberations result in better decisions, and hence in benefits to those who are members of the polity that is deliberating.

The second strand concerns the benefit to the individuals who participate in deliberations in which novel reasons are included. Put the other way round, the argument is that citizens would be harmed intellectually if they were denied access to novel reasons:

[I]t is important for people to be acquainted with the views that others hold. Even more important, however, is the

47. *Id.* at 841.

48. *Id.*

49. *Id.* (footnotes omitted).

possibility that my own view may be improved, in its subtlety and depth, by exposure to a religion or a metaphysics that I am initially inclined to reject. . . . I mean to draw attention to an experience we all have had at one time or another, of having argued with someone whose world view was quite at odds with our own, and of having come away thinking, "I'm sure he's wrong, and I can't follow much of it, but, still, it makes you think" The prospect of losing that sort of effect in public discourse is, frankly, frightening—terrifying, even, if we are to imagine it being replaced by a form of "deliberation" that, in the name of "fairness" or "reasonableness" (or worse still, "balance") consists of bland appeals to harmless nostrums that are accepted without question on all sides. That is to imagine open-ended public debate reduced to the formal trivia of American television networks.⁵⁰

Thus, the giving of novel reasons in public political debate should not be seen as unfair, because such reasons are actually of benefit to those who are exposed to them. There is a missing step to Waldron's argument. It is possible that reliance on novel arguments is unfair, even though novel arguments are beneficial to those who find them unreasonable.⁵¹ With this last point in place, we can now summarize the novelty objection.

C. *A Reconstruction of the Novelty Objection*

Waldron's argument might be reconstructed as follows:

1. Rawls's ideal of public reason counts a reason as public if and only if that reason is (a) itself an existing premise that everybody already shares, or (b) it follows from an argument that has only existing premises that everybody already shares as premises. *Assumption.*
2. A reason is a conclusion if it is asserted to follow from a premise and a valid method of reasoning; a reason is a premise if it does not so follow. *Definition.*

50. *Id.* at 841-42.

51. Frequently, a restriction on autonomy will be justified on the ground that there is a benefit to the person whose autonomy is restricted. The fact of benefit is not sufficient to establish that the denial of autonomy is fair. If I force you to pursue a career against your wishes, I have treated you unfairly, even if it turns out that my preference produced a greater benefit to you than my respect for your self-determination would have produced.

3. Rawls's ideal of public reason excludes premises from public political debate unless the premises are public reasons. *Assumption.*

4. A premise is novel relative to a political culture if the premise has not been introduced in public deliberation before and almost all the members of the culture have not considered the premise before. *Definition.*

5. A novel premise is not a public reason. *From 1, 2, and 4.*

6. Rawls's ideal of public reason excludes novel premises from public debate. *From 3 and 5.*

7. There are novel premises that once stated are plausible or interesting. *Assumption.*

8. The inclusion of plausible or interesting novel premises in public debate is desirable, (a) because inclusion of novel premises will improve the quality and hence the outcome of public deliberations, and (b) because the inclusion of novel premises will be of benefit to those who are exposed to them. *Assumption.*

9. Rawls's ideal of public reason will have the undesirable consequence of excluding novel reasons from public political debate. *From 6, 7, and 8.*

III. EVALUATING THE NOVELTY OBJECTION

With this statement of the novelty objection in place, we are now in a position to evaluate it. I will develop five replies to the objection. First, I point out that the novelty objection confuses availability with universal acceptance. Second, I demonstrate that the novelty objection confuses universal agreement with wide agreement among reasonable persons. Third, the objection fails to explain why novel conclusions cannot suffice to fulfill the need for novelty in the public debate. Fourth, I argue the novelty objection incorrectly assumes the exclusive view of public reason. Fifth, and finally, I contend that the case for a Rawlsian ideal of public reason does not rest on the so-called "myth of the framework."

A. *The Novelty Objection Fails to Distinguish Availability from Acceptance*

The first and most fundamental problem with Waldron's statement of Rawls's position is that Waldron misunderstands the criteria for public reasons. Waldron assumes that for a reason to be

public in Rawls's sense, it must be accepted by the public at large. Recall, however, that what Rawls said was a bit different; Rawls referred to reasons "now widely accepted, or available, to citizens in general." A reason may be available to the public, even if it is not yet accepted by the public. Indeed, there is no reason for the inclusive or wide ideal of public reason to exclude a novel argument if the argument is one that could be widely accepted if it were considered by the public at large—in other words, if it were publicly available. The liberal principle of legitimacy states that the exercise of political power is justifiable only when it is exercised in accordance with constitutional essentials that all citizens may reasonably be expected to endorse in light of principles and ideals acceptable to them as reasonable and rational. Although Rawls may occasionally have stated his ideal of public reason in terms of preexisting agreement among citizens about the premises of political argument, there is nothing in his underlying arguments that requires this restriction.

Once this misconception is cleared away, Waldron's objection loses most of its force. The criterion for public reason is not universal prior acceptance. Rather, public reasons are those that *could* be widely shared by those who considered them, and these can be as novel as one likes. No prior conditions to the admissibility of an idea into public reason attach, except those which are directly attendant to whether the reason is available. Prior acceptance is one route to availability, but it is not the only route. For example, a reason can be available to a given citizen because it fits with the citizen's other beliefs. Another route of availability would be deductive; a reason is available to a citizen if that reason follows from the citizen's other beliefs. A reason may be available if it is intuitively plausible and does not contradict any of the citizen's other firmly held beliefs. A reason might be available, because it can be accommodated by natural expansions or extensions of the citizen's current system of belief. Even a reason that contradicts current beliefs might be available if minor adjustments would render the whole system of belief more attractive with addition of the novel reason. This list of possibilities is just the beginning, for we can surely imagine a host of other mechanisms by which a novel reason could become available.

B. The Novelty Objection Confuses Universal Agreement with Wide Agreement Among Reasonable Persons

There is a second difficulty with step one. There is surely at least one citizen who disagrees with almost every possible premise of public

political argument. If public reason required universal agreement on premises, then public political debate would be impossible.⁵² The principle of charity in interpretation suggests that we ought to look for an interpretation of Rawls's views that does *not* render those views nonsensical. Moreover, the text of *Political Liberalism*, Rawls's most complete published statement on public reason, does not easily support this interpretation. Rawls's own statement of what is allowed by public reason—"plain truths now widely accepted, or available, to citizens in general"—suggests that "an existing premise that would, if considered, be widely accepted" would be more accurate than "an existing premise that everybody already shares."

Even an exclusive ideal of public reason—for example, one that excluded all nonpublic reason from public political debate—would allow for premises that are not already shared. To take an obvious example, an exclusionary principle of public reason would allow factual premises that are accessible to common sense or ordinary science, even though these are not "premises that everybody already shares." Moreover, when it comes to matters of political morality, there are many values that, while not the subject of universal agreement, are nonetheless widely shared.

A final point should be made with respect to this second reply to the novelty objection. The second reply combines with the first. Rawls need not limit public reasons to those which are widely accepted now. With respect to Waldron's category of novel premises, the proper question is whether the novel premise, if given due consideration, could be widely shared, that is, whether it is widely available. Neither universal acceptance nor universal availability is required.

C. The Novelty Objection Fails to Explain Why Novel Conclusions Cannot Suffice

At this point, I take up steps one and eight in my reconstructed version of the novelty objection. Recall my statement of these steps. Step one:

1. Rawls's ideal of public reason counts a reason as public if and only if that reason is (a) itself an existing premise that everybody already shares, or (b) it follows from an argument

52. See Solum, *Constructing an Ideal*, *supra* note 2, at 743-44.

that has only existing premises that everybody already shares as premises. *Assumption.*

And step eight:

8. The inclusion of plausible or interesting novel premises in public debate is desirable, (a) because inclusion of novel premises will improve the quality and hence the outcome of public deliberations, and (b) because the inclusion of novel premises will be of benefit to those who are exposed to them. *Assumption.*

If step one were to end at the conclusion of subpart (a), the resulting interpretation of Rawls results in a rather implausible version of a liberal ideal of public reason. Presumably, there is no need for public deliberation if everyone already agrees on everything. Subpart (b) allows novel conclusions to count as public reasons if they are supported by universally shared premises. We have already established that “universally shared” is too strong—and “widely available” is a more accurate statement of Rawls’s position—but at this point I focus on another issue. Thus, the contrast will be between public reasons, whatever those are on the best Rawlsian account, and novel reasons.

The inclusion of subpart (b) provides one mechanism for the introduction of novel arguments into public political debate. No violation of the principle of exclusion specified in step one would occur if a citizen used shared political values and factual arguments supported by common sense or ordinary science to argue for a new principle of political morality. I take it that something like this has occurred over the course of the last century or so with respect to the right to privacy, a principle of political morality that is, at least in some sense, new.

At this point, I think that it is important to notice an assumption that is implicit in Waldron’s use of the term “premise.” He has implicitly adopted a deductive model of argumentation. The notion is that there are premises and conclusions, and that a sharp distinction can be drawn between them. Of course, we may take something as a premise in one context and as a conclusion in another. Propositions that can be supported by good and sufficient reasons may be assumed for the purpose of argument. But there are at least some premises that are not supported by reasons. Novel premises may be like this;

recall that Waldron posits a "premise that no one has ever thought of before, but which, once stated, sounds plausible."⁵³

But of course, there are other models of political argument. In this connection, recall Rawls's idea of reflective equilibrium:

In searching for the most favored description of this situation we work from both ends. We begin by describing it so that it represents generally shared and preferably weak conditions. We then see if these conditions are strong enough to yield a significant set of principles. If not, we look for further premises equally reasonable. But if so, and these principles match our considered convictions of justice, then so far well and good. But presumably there will be discrepancies. In this case we have a choice. We can either modify the account of the initial situation or we can revise our existing judgments, for even the judgments we take provisionally as fixed points are liable to revision. By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principal, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted. This state of affairs I refer to as reflective equilibrium.⁵⁴

Thus, a reason could well be the "conclusion" of an argument from public reasons using the method of reflective equilibrium, even if the reason was not the conclusion of a deductive argument with public reasons as its only premises. The category of novel premises should be limited to those novel reasons which "no one has ever thought of before, but which, once stated, sound[] plausible or interesting,"⁵⁵ and which cannot be supported by an argument using the method of reflective equilibrium, where existing public reasons are brought into reflective equilibrium with the novel reason. The question that Waldron must answer is whether the novelty objection has much force, once the category is narrowed in this way. Recall that step eight of the reconstructed argument assumes that novel premises add

53. Waldron, *supra* note 3, at 838.

54. RAWLS, *THEORY OF JUSTICE*, *supra* note 1, at 20; *see* RAWLS, *POLITICAL LIBERALISM*, *supra* note 1, at 8.

55. Waldron, *supra* note 3, at 838.

great value to political deliberation, but it is not clear that novel conclusions will not do the job.

Thus, the third problem with the novelty objection is that it applies only to a subset of novel political arguments—those that cannot themselves be supported by considerations of public reason—and that it is at least an open question whether this category is sufficiently substantial to underwrite the novelty objection.

D. The Novelty Objection Incorrectly Assumes the Exclusive View of Public Reason

The force of Waldron's objection, as applied to Rawls's view, is further blunted by the fact that Waldron assumes a Rawlsian ideal of public reason must be exclusive, that is, it must exclude all nonpublic reasons, when the best Rawlsian view is an inclusive or wide view. This assumption is stated at step three in our reconstruction of Waldron's argument:

3. Rawls's ideal of public reason excludes premises from public political debate unless the premises are public reasons. *Assumption.*

Step three expresses an inaccurate interpretation of Rawls's position. The better interpretation is that Rawls adheres to an inclusive or wide view of public reason.

The arguments for my interpretation of Rawls on this point are referred to above.⁵⁶ The wide or inclusive ideal of public reason only excludes nonpublic reasons in those cases in which the proviso—that in due course participants in public political debate support the political measures they propose in terms of the principles and values of a public political conception of justice—is not met. One can imagine that novel political arguments would be introduced in cases in which the proviso was satisfied, that over time these novel arguments would become part of the public political culture, and thus, that eventually, the novel arguments would become public reasons.

There may remain a category of cases in which a novel political argument which could not itself be supported by public reasons would violate the proviso, because the novel argument is only relevant in contexts in which the public-reason-in-due-course proviso could not

56. See *supra* text accompanying notes 18-21. Rawls now affirms what I call the "inclusive view." See RAWLS, *POLITICAL LIBERALISM*, *supra* note 1, at 248; Rawls, *The Idea of Public Reason: Further Considerations*, *supra* note 1.

be met. Even in these cases, the nonpublic reason could be introduced outside of public political debate, in the background culture. Thus, the novel argument might first be introduced in academic discourse or even in an opinion piece in a newspaper or journal of public circulation, so long as the author did not advance the argument as an already sufficient reason for political action. Again, one can imagine a process by which such novel arguments came, over time, to be viewed as public reasons.

Once this final qualification is in place, it is not clear whether Waldron's argument has any force. Although Waldron is surely right to be terrified by the prospect of a culture where the only arguments we hear are those with which we already agree,⁵⁷ general adherence to Rawls's wide ideal of public reason would not produce such a sterile landscape.

E. The Case for a Rawlsian Ideal of Public Reason Does Not Rest on "The Myth of the Framework"

At this point, my answer to the novelty argument is essentially complete. There is one final point that needs to be addressed. Recall that Waldron argues that the notion that public reason must exclude novel arguments rests on the so-called "myth of the framework," supposedly, the Wittgensteinian view that agreement in judgments is necessary for communication to take place. Is Rawls committed to such a view? It is true that there are strongly Wittgensteinian elements in Rawls's work. Consider the following passage in Rawls's discussion of political constructivism, a topic that is to the side of the issues we have addressed so far:

I do not say that there being an objective order of political reasons consists in various activities of sound reasoning, or in the shared practice thereof, or in its success. Rather, the success of the shared practice among those reasonable and rational is what warrants our saying that there is an order of reasons. The idea is that if we can learn to use and apply the concepts of judgment and inference, and ground and evidence, as well as the principles and standards that single out the kind of facts to count as reasons of political justice; and if we find that by reasoning in the light of these mutually recognized criteria we can reach agreement in judgment;

57. Waldron, *supra* note 3, at 842.

or if not agreement, that we can in any case narrow our differences sufficiently to secure what strikes us as just or fair, honorable or decent, relations between us; then all this supports the conviction that there are objective reasons.⁵⁸

Rawls continues by stating that being able to state sufficient reasons for judgment "is already the best possible explanation of the beliefs of those who are reasonable and rational. At least for political purposes, there is no need to go beyond it to a better one, or behind it to a deeper one."⁵⁹ The insistence that there is no need for deep explanations is characteristically Wittgensteinian, and this is confirmed in the footnote to the previous quotation, in which Rawls says, "We cannot ground these principles and canons on something outside reason. Its concepts of judgment and inference, and the rest, are irreducible. With these concepts explanations come to an end; one of philosophy's tasks is to quiet our distress at this thought."⁶⁰ The parallel to Wittgenstein's *Philosophical Investigations* is unmistakable; as Wittgenstein says, "Explanations come to an end somewhere."⁶¹ This Wittgensteinian idea is connected with the passage quoted by Waldron. The fact that we agree in judgments is connected to the fact that explanations must come to an end: explanations can end precisely because we do agree in judgments.

Two points need to be made here. First, Rawls has attempted to construct his political theory so that it is not dependent on any particular views in metaphysics, epistemology, or the philosophy of language. Rawls may be a Wittgensteinian, but justice as fairness is not *per se* a Wittgensteinian theory.⁶²

Second, even if we assume that a Wittgensteinian thesis about agreements in judgments is deeply entrenched in Rawls's theory, it is not clear that this thesis is in any way inconsistent with the inclusion of startling or novel premises in public political debate.

Indeed, the Wittgensteinian thesis might offer an account of how novel premises can be included in public political debate. It may be that not all of our agreement in judgments is captured by the

58. RAWLS, *POLITICAL LIBERALISM*, *supra* note 1, at 119-20.

59. *Id.* at 120 (footnotes omitted).

60. *Id.* at 121 n.26.

61. WITTGENSTEIN, *supra* note 34, § 1.

62. The ideal of public reason itself would preclude Rawls from relying on Wittgensteinian theories about the philosophy of language. Justice as fairness, of which the ideal of public reason is a part, must be a freestanding view that can be affirmed by the public as a whole, and not only those who subscribe to particular philosophical views.

arguments that we have already made. A novel reason may express a shared judgment. Moreover, our judgments are corrigible—they can change in response, for example, to perspective altering events: the Civil War, the Holocaust, the Oklahoma City bombing. A novel reason may express a newly found agreement in judgments. There is nothing in the best Rawlsian ideal of public reason that precludes citizens from advancing novel reasons expressing changing agreements in judgments, so long as those judgments could be widely shared by—or available to—their fellow citizens.

IV. CONCLUSION

The novelty objection fails, at least if its purpose is to show that the best Rawlsian ideal of public reason is inadequate. There are several different ways in which a Rawlsian ideal of public reason can allow the expression of novel reasons. The conclusions that we have developed so far, can be restated as follows:

1. The use of novel premises in public political debate does not violate the ideal, even if they are not universally accepted by the public at large, so long as they are widely available—that is, they would not be rejected as unreasonable by substantial numbers of reasonable citizens. Because wide availability is the criterion for public reason, only novel premises that are unavailable count as nonpublic reasons.
2. The use of novel conclusions in public political debate does not violate the ideal, and the range of novel reasons that can be seen as conclusions is quite broad, once it is understood that deduction can be supplemented by the method of reflective equilibrium.
3. The introduction of nonpublic novel premises in public political argument is allowed by the inclusive or wide view of public reason, so long as the nonpublic novel premise is used in a supporting or supplementary role and the public reason is given in due course.
4. Nonpublic novel premises may be introduced in the background culture, and if such premises gain acceptance there, they may then be introduced into public political debate.

At this point, the burden is on the proponent of the novelty objection to show that there is a significant class of novel reasons that would not be allowed into public debate in one of these four ways. Rawl's

own most recent statement on public reason makes it clear that he does not conceive of public reason as static or unchanging:

It is crucial that public reason is not specified by any one political conception of justice, certainly not by justice as fairness alone. Rather, its content—the principles, ideals, and standards that may be appealed to—are those of a family of reasonable political conceptions of justice and this family changes over time. These political conceptions are not for course compatible and they may be revised as a result of their debates with one another. Social changes over generations also give rise to new groups with different political problems. Views raising new questions related to ethnicity, gender, and race are obvious examples, and the political conceptions from these will debate the current conceptions. The content of public reason is not fixed, any more than it is defined by any one reasonable political conception.⁶³

Rawl's statement of his position reinforces the arguments that have already been adduced in support of an inclusive or wide interpretation of his position. Waldron is wrong to believe that novel reasons cannot be public ones.

This is not to say that there is nothing to be learned from the objection. Confronting the objection requires the clarification of a liberal ideal of public reason. In particular, answering the objection illuminates the ways in which public reason can change over time. At any given time, a wide variety of novel arguments would be allowed by an inclusive ideal of public reason. Public reason will evolve in response to novel arguments, new knowledge, changing circumstances, and shifts in our shared judgments. The novelty objection does not give us grounds to reject the best Rawlsian ideal of public reason. We can be civil to one another and at the same time say something new.

63. RAWLS, *POLITICAL LIBERALISM* (paperback ed.), *supra* note 1, page proofs at l-li.

