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## **Legitimate, but unjust. Just, but illegitimate:**

### **Rawls on political legitimacy**

What rules should regulate cooperation between democratic citizens when they are divided not only by a pluralism of comprehensive religious and moral doctrines, but also by differing political conceptions of justice? Such rules may be unjust, yet legitimate, while more just rules by our lights may be illegitimate. This position merits attention for at least two reasons. It offers a reasonable reconstruction of John Rawls’ latest conceptualization of political legitimacy; and it may shed light on current discussions of legitimacy deficits and political legitimacy crises.

Over the last decades there has been a marked proliferation of talk about legitimacy, but the concept itself has remained contested and under-theorized. All of political philosophy’s central concepts are contested, but when we disagree about legitimacy there seems to be “less agreement about what we are disagreeing about”.<sup>1</sup> This article argues that debates about legitimacy in political philosophy and law can benefit from taking a second look at Rawls’ texts on political liberalism, and especially his latest texts. How can this be, when Paul Weithman and others maintain that “what Rawls has to say about legitimacy is maddeningly brief and vague”?<sup>2</sup> Rawls’ scattered comments about legitimacy can be pieced together in a more systematic way, or so I argue here.<sup>3</sup> Specifically, the article

submits that we can identify three distinct normative conceptualisations of political legitimacy in Rawls' works. It argues that the most significant development in Rawls' understanding of political legitimacy does not, as is often assumed, take place in the transition from TJ to PL, but in Rawls' latest texts on political liberalism, i.e. in "Introduction to the Paperback Edition" and "The Idea of Public Reason Revisited".<sup>4</sup> In these late texts Rawls assumes there to be a reasonable pluralism not only of comprehensive religious and moral doctrines, but also of political liberal conceptions of justice. This has dramatic consequences for how Rawls conceptualizes legitimacy, leading him to replace the *original position* as the linchpin of his political philosophy with a process of *public reason*. Rawls also gives his new conception of political legitimacy priority vis-à-vis political liberal conceptions of justice. The article submits that Rawls' latest conception of political legitimacy is the most convincing of the three, and that its particular strength is that it takes to heart the deep and enduring pluralism of modern constitutional democracies. The reconstruction of these three conceptions involves a certain degree of simplification, because in many of Rawls' texts "superseded thoughts appear to be retained along with later ideas",<sup>5</sup> and in some early texts Rawls hints at ideas that he only develops much later. The article focuses on the dominant strains in the respective texts and attempts to give them the most plausible and coherent interpretation.

The first part explores what Rawls says about the meaning of the concept "political legitimacy" itself, and under which conditions he considers legitimacy to be important. The article then turns to Rawls' attempts to work out a more specific normative conception of political legitimacy appropriate for a constitutional liberal democracy, and provides outlines of the conceptions he

presents in TJ, PL and his later articles, respectively. Sections VI-VIII discuss Rawls' latest conception of legitimacy in detail.

## **I. Rawls on the general meaning of the concept "legitimacy"**

Rawls uses the concept "legitimacy" in both TJ and PL, but only in his 1995 article "Reply to Habermas" does he explicitly discuss its general meaning. Max Weber famously defined political legitimacy as the *de facto* ability of a political regime to secure acceptance based on *belief* ("*Legitimitätsglaube*") as opposed to securing compliance based on *coercion* alone.<sup>6</sup> In "Reply to Habermas" Rawls dismisses the sociological or descriptive concept of political legitimacy associated with Weber as insufficient.<sup>7</sup> Not because he thinks that Weber is wrong to focus on *de facto* acceptance of political authority, but because Rawls thinks that any sufficient definition of legitimacy would have to acknowledge that there must be a benchmark of appropriate acceptance, or a benchmark for when our belief that something is legitimate is appropriate.

The most obvious contender for such a normative benchmark is to say that political authority must be *just* in order to be reasonably or appropriately accepted. Does this mean that legitimacy is essentially the same as justice? Rawls explicitly rejects this and says that "to focus on legitimacy rather than justice may seem like a minor point, as we may think "legitimate" and "just" the same. A little reflection shows that they are not".<sup>8</sup> So what is political legitimacy if it is not justice, or acceptance based on the belief that something is just?

A close reading of "Reply to Habermas" shows that Rawls provides several characterisations of the general meaning of the concept political legitimacy:

- Firstly, Rawls says that legitimacy has an essential connection to justice.<sup>9</sup>
- But he also says that “legitimacy is a weaker idea than justice and imposes weaker constraints on what can be done.”<sup>10</sup>
- He says that legitimacy allows a certain “leeway” with regard to justice,<sup>11</sup> and he connects it to a threshold of sufficient justice.<sup>12</sup>
- He specifies that legitimacy requires both sufficient *procedural justice* and sufficient *outcome justice*.<sup>13</sup>

Now, if we focus solely on these four characterizations we get the impression that “legitimate” for Rawls simply means “sufficiently just”. This may in turn lead us to think that when Rawls turns to legitimacy he is lowering his normative ambitions.<sup>14</sup> But this reading would ignore that Rawls also emphasizes four further characteristics of legitimacy:

- Rawls says that political legitimacy is *institutional*.<sup>15</sup>
- He emphasises that legitimacy connects to the *pedigree* of those who have political authority or hold political office, i.e. whether they have come to office in accordance with established rules and traditions.<sup>16</sup> Similarly, he says that legitimacy is connected to how a law or institution “came about, whether it was made in accordance with established rules and traditions”.<sup>17</sup>
- He differentiates between different levels of legitimacy; between the legitimacy of political institutions and the legitimacy of decisions and laws enacted pursuant to them.<sup>18</sup> And also between accepting a constitution as

legitimate and accepting as legitimate a particular statute or decision enacted in accordance with the constitution.<sup>19</sup>

- Finally, Rawls says that higher law, as outlined in a constitution, can *confer* legitimacy on ordinary statutes and decisions.<sup>20</sup>

When we bring these characterisations together, we see that for Rawls raising questions of political legitimacy is not only to ask whether the outcome of the political process is sufficiently just. A full examination of political legitimacy must also ask whether the agent who made the decision is authorised to make the decision, and whether the decision has been made in accordance with established and recognized procedures that are themselves appropriately authorized and sufficiently just.

If we accept Rawls' characterisations of the general meaning of "political legitimacy", we will think that it makes sense to say that a particular law may be just, but still illegitimate. Or more precisely; we may say that a law is just in the sense that it produces just outcomes, but that it fails to be politically legitimate because it has been created in a process which is not sufficiently just, or because it has not been adopted by an authorized agent through recognized procedures.<sup>21</sup> Similarly, a law may be adopted by authorized lawmakers in a recognized and procedurally just way, but still be illegitimate because it produces grossly unjust results. On the other hand, a law may be substantively unjust but still legitimate, as long as it is adopted by an authorized agent in the recognized way and is not too procedurally unjust, nor too unjust in its outcomes.

Unlike Joseph Raz,<sup>22</sup> and unlike the majority of philosophers concerned with legitimacy, Rawls never speaks of "moral legitimacy". Nor does he see questions

of legitimacy as questions that can be worked out within moral theory.<sup>23</sup> Rawls discusses legitimacy as a distinctly *political* normative quality; as a quality of laws and of political agents, political bodies and their exercise of political power. He presents it as a *composite* quality that is connected not only with moral justifiability or justice, but also with legality, adherence to recognized procedures and right pedigree. Understanding legitimacy in this political and composite way captures is well suited to capture the many dimensions of current concerns about legitimacy deficits and legitimacy crisis. More so than theories of legitimacy that focus primarily or exclusively on one aspect like legality or procedural justice or outcome justice, or on “showing that the alleged subject is likely to better comply with the reasons which apply to him (other than the alleged authoritative directive) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly”.<sup>24</sup>

As argued by Fabienne Peter, there is a tendency in the literature to blur the distinction between legitimacy and justice<sup>25</sup>. There is also a tendency, especially among legal scholars, to blur the distinction between legitimacy and legality. Rawls’ way of characterizing the meaning of “legitimacy” has the advantage of bringing out in a clear way the interconnections, but also the differences, between legitimacy, justice and legality. Rawls’ general characterizations of legitimacy also capture what some theorists call the “content-independence” of legitimacy, or the idea that a legitimate law merits respect, and for some also obedience, from its subjects, even when the subjects disagree with the *content* of the law. However, I see Rawls’ concept as having the additional benefit of making it explicit that legitimacy is not *entirely* content-independent, but only to a certain degree, or

only insofar as the content of a law or decision is not grossly unjust, or too unjust. This seems to correspond better with our considered convictions.

Unlike some Rawls does see legitimacy as creating political authority in the first place. The central notion for Rawls is “legitimate political authority”. For an institution or a political agent to be legitimate means both that its exercise of political power is generally permissible, and that subjects generally have a *genuine or moral obligation*, as opposed to a mere legal obligation, to accept their laws and decisions.<sup>26</sup> However, Rawls’ discussion of civil disobedience in TJ suggests that Rawls sees the obligation to accept legitimate laws as a *pro tanto moral* obligation, which an individual may see as being outweighed by other moral considerations, all things considered. In PL Rawls seems to say that the obligation is a role-specific obligation, i.e. a distinctly *political-moral* obligation tied to our role and standing as citizens in a particular form of regime, and that it can come into conflict with other, non-political, roles and types of moral obligations. In other words, Rawls does not argue that legitimate law necessarily creates an “all things considered” moral duty to obey the law.

## **II. A normative conception of political legitimacy**

Rawls aligns himself with those who see legitimacy as connected with the justifiability of coercion. However, Rawls does not focus primarily on state’s sanctions. His point is rather that the modern state as such is coercive.<sup>27</sup>

There is little need for differentiating between legitimate and illegitimate decisions when cooperation is entirely voluntary and optional, as well as lacking

coercive mechanisms to enforce rules and decisions. Legitimacy questions are also less pressing when all participants see the rules and decisions as correct and just, and willingly obey. Yet this is not the situation in modern nation states. Rawls emphasizes that even in a liberal democracy being a citizen is not voluntary and “should not be compared to membership in a voluntary association”.<sup>28</sup> Moreover, he also says that political power is always coercive because it is collectively binding and can be backed up by the coercive powers of the state.<sup>29</sup> Finally, Rawls stresses that in modern states there is rarely unanimity on the correctness and justice of political decisions.<sup>30</sup> In other words, citizens of modern states are often coerced by laws and decisions they do not agree with, and even see as unjust, while not being able to simply quit or leave the political association. Under these conditions it becomes pressing to have answers to questions like: When is it rightful and justifiable to impose collectively binding laws and decisions on citizens?<sup>31</sup> And when do citizens have a genuine obligation to accept a law, even when they see it as incorrect and even unjust? What makes the constitution sufficiently just?

Rawls’ various characterisations of the meaning of the concept political legitimacy give us some idea of what is required for a decision to be politically legitimate. But these general characterisations tell us neither what exact threshold of justice a process or decision has to satisfy in order to be legitimate, nor what the appropriate pedigree or origin of a legitimate political power holder must be. Such standards are what Rawls attempts to specify by working out a normative conception of political legitimacy. But it is important to see that he does not attempt to specify these standards for all types of cooperation and regimes. In TJ, PL and his later articles Rawls considers solely modern liberal constitutional and



democratic nation states, and attempts to work out a normative conception that can provide a publicly shared understanding of political legitimacy in this particular type of regime.<sup>32</sup>

### **III. Political legitimacy in a regime that is democratic and regulated by law**

Two general features of modern liberal democracies shape what Rawls sees as an appropriate normative conception for this form of regime, especially in his late writings.

Firstly, modern liberal democracy is a *democratic* form of regime. This means that terms of cooperation cannot be laid down by some outside authority distinct from the persons cooperating.<sup>33</sup> This, however, means that democratic citizens have an odd double role. On the one hand they are the ultimate power holders and the collective authors of the laws. On the other hand they are subjects, and laws and decisions they do not agree with are regularly imposed on them.<sup>34</sup> This double role must somehow be captured by a conception of political legitimacy appropriate for a democracy, a point often overlooked by liberal theories of legitimacy. Rawls sees that an appropriate conception of political legitimacy in a democracy must speak not only to the relation between the state and its citizens, but also to how citizens exercise political power and authority over each other. But this makes it much more complex to work out a normative conception for a democracy, than for forms of regime where the ultimate political authority is seen as deriving from God, a particular doctrine, or seen as belonging to a monarch.

A second, equally important, aspect of the form of regime Rawls focuses on is that it is regulated through the medium of *law*. We have seen that Rawls characterizes legitimacy as institutional and connected to law, but unfortunately he says next to nothing about the interconnections between law and legitimacy. However, his exchange with Habermas,<sup>35</sup> and some of his comments in PL<sup>36</sup>, gives us some indications. First of all, Rawls seems to share Habermas' understanding of the medium of law as a functional necessity for cooperation in large-scale, differentiated and pluralistic societies where we cannot expect unanimity on decisions.<sup>37</sup> Public law is, or should be, publicly known, uniform and apply to all persons in the society.<sup>38</sup> This means that law can enable convergence of expectations and effective coordination. Law enables cooperation also because it has impartial mechanisms for dispute settlement that can provide a final arbiter in cases of conflict. This, combined with coercive mechanisms for ensuring compliance, reduces the costs for agents in trusting each other.

But Rawls stresses another feature of legal systems in modern democratic regimes, namely their use of *constitutional* law, meaning that they distinguish between higher law and ordinary law and decisions, where the higher law confers validity on ordinary laws.<sup>39</sup> The importance of this is that the constitutional law defines substantive norms, values and basic rights which ordinary laws cannot conflict with. The constitution also outlines the appropriate procedures for making ordinary laws, and the procedures for filling central political and legal positions.<sup>40</sup> In other words, the constitution guarantees that ordinary laws made in accordance with it lies within an *acceptable range* of political values and political justice.

Agreement on constitutional law can thus relieve participants from having to come to agreement on every single law. As Rawls puts it, constitutional law can

*confer* legitimacy on ordinary laws and decisions, and make us accept them as legitimate even when we disagree with them and think that they are less than just on their own merits.<sup>41</sup> However, since constitutional law comprises part of the basic structure that coerces citizens it must itself be legitimate. When political societies use constitutional law to regulate cooperation, it is thus of the utmost importance that the constitution itself is sufficiently just, and also that the constitution has the right pedigree. But what is the appropriate standard of procedural and outcome justice for the constitution itself? And what is its right pedigree or origin?

It is time to look at how Rawls works out normative conceptions of legitimacy attempting to answer these questions. I start by briefly outlining the conceptions Rawls relies on in TJ and in PL respectively, before I go into more depth when looking at Rawls' later texts on political liberalism.

#### **IV. Political legitimacy in TJ: Connected to Justice as Fairness**

It is sometimes said that the difference between TJ and PL is that the former is about justice, whereas the latter is about legitimacy. This is not entirely correct. Rawls uses the concept “legitimacy” and “legitimate” in several passages in TJ, and he also presupposes a certain normative conception.<sup>42</sup>

Already in TJ, Rawls assumes that laws can be legitimate and genuinely binding on citizens without being fully just, as long as they have been enacted in accordance with a sufficiently just constitution.<sup>43</sup> But when conceptualizing a

more specific standard of what counts as a sufficiently just constitution, Rawls relies on the conception of justice he calls *Justice as Fairness*.

Justice as Fairness defines principles of justice as those principles which secure persons' "reciprocal advantage"<sup>44</sup>, or as "those principles which persons would choose in an initial situation that is fair."<sup>45</sup> This conception includes a heuristic device – the *original position* – which outlines and gathers the conditions which Rawls sees as necessary for making a fair initial choice of principles of cooperation.<sup>46</sup> The main condition here is that power asymmetries between the parties must be annulled. Rawls relies on this conception of justice when he says that a just constitution is one that would have been adopted by a hypothetical constitutional convention informed by principles of justice chosen in the original position:

A just constitution is defined as a constitution that would be agreed upon by rational delegates in a constitutional convention who are guided by the two principles of justice [i.e. principles chosen in the original position]. When we justify a constitution, we present considerations to show that it would be adopted under these conditions. Similarly, just laws and policies are those that would be enacted by rational legislators at the legislative stage who are constrained by a just constitution and who are conscientiously trying to follow the principles of justice as their standard.<sup>47</sup>

In TJ being legitimate amounts to being sufficiently close to this ideal, although Rawls does not provide an account of how that threshold is to be determined. The

normative standard of political legitimacy in TJ is thus inextricably tied to Justice as Fairness, whose principles of justice set the standard for what counts as a sufficiently just constitution. The resulting constitution then sets the standard both for saying what is a sufficiently just political process, and sufficiently just outcomes to create a (*pro tanto*) political-moral obligation to comply with a particular law or decision.

## **V. Political legitimacy in PL: The liberal principle of legitimacy**

Rawls gradually came to think that the political sociology in TJ was not sufficiently realistic, because it did not take sufficiently into account *the fact of reasonable pluralism*<sup>48</sup>. This is the assumption that in a free and democratic regime both unreasonable and reasonable disagreements will persist over the good life and religion, but also over moral and philosophical comprehensive doctrines. In PL Rawls tries to take this assumption into account, and this has a series of consequences for his political philosophy. He now sees the conception of justice that he defended in TJ as a fairly comprehensive doctrine of justice.<sup>49</sup> And he argues that it is neither realistic nor politically reasonable, to expect citizens in modern liberal regimes to agree on any particular comprehensive moral, religious or philosophical doctrine – including Justice as Fairness – as the most appropriate, or even as an acceptable, standard of justice for their constitution and basic structure.

Rawls therefore recasts Justice as Fairness as a “*political* conception of *political* justice”<sup>50</sup> in PL. The scope of Justice as Fairness is now limited to the

political domain while its ideas of reciprocity are presented in a political way, i.e. with ideas and terms familiar from political life, and not concepts drawn from or dependent on specific doctrines. The argument is now that we as free and equal citizens can accept the principles of Justice as Fairness as the *most appropriate political conception of political justice for a constitutional liberal democracy*, or as the most reasonable standard of justice for their constitution and basic structure. Rawls does not argue that citizens will accept Justice as Fairness as a correct general doctrine, or theory, of justice. The thought is that the limited scope and depth of Justice as Fairness allows citizens to agree on it in an *overlapping consensus*; meaning that they can agree on this as the most reasonable conception of political justice, while continuing to disagree about its deeper foundations, and about comprehensive doctrines generally.

What are the implications of this political liberal turn for Rawls' understanding of political legitimacy? In PL Rawls formulates a normative conception of legitimacy which he refers to as the "liberal principle of legitimacy". It says that

[o]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.<sup>51</sup>

In itself this liberal principle of legitimacy does not tell us much, except that the exercise of political power must be in accordance with a sufficiently just constitution, and that a constitution is sufficiently just only if it is reasonably

acceptable to citizens “in the light of principles and ideals acceptable to their common human reason”.<sup>52</sup> Or as Rawls also puts it, a constitution is sufficiently just only insofar the constitution’s essentials are such that “all citizens may reasonably be expected to endorse [them] in the light of ideals and principles acceptable to them as reasonable and rational”<sup>53</sup>, or “in light of reasons all might reasonably be expected to endorse.”<sup>54</sup> A broader reading of PL, however, reveals that what Rawls means is that the constitution must be such that it is acceptable to citizens “in light of what they regard as their reciprocal advantage”<sup>55</sup>, and that this condition is best secured insofar as citizens can see the essentials of their constitution as reflecting the principles of justice they would choose in the original position.<sup>56</sup> In PL Rawls also suggests that we can understand the liberal principle of legitimacy itself as something citizens would choose in the original position.<sup>57</sup>

This means that both TJ and the first edition of PL rely on Justice as Fairness to provide a standard for when a constitution is sufficiently just to confer legitimacy on ordinary laws and decisions. What changes in PL is that Rawls shifts from Justice as Fairness as a fairly comprehensive Kantian doctrine of justice to Justice as Fairness as a political conception of political justice. Rawls also goes from assuming the possibility of full consensus to only assuming the possibility of an overlapping consensus on Justice as Fairness as the most appropriate basis for the constitution and basic structure more generally. Rawls also works out the idea and ideal of “public reason”, and explains how Justice as Fairness (as a political conception) can be publicly known and shared among citizens, and how exercise of political power informed by Justice as Fairness helps secure the sufficient justice of their constitution and laws enacted in accordance

with it. These are indeed important developments from TJ, but I will submit that Rawls' general understanding of the meaning of the concept political legitimacy, and the role that political legitimacy plays within Rawls' political philosophy, do not change fundamentally from TJ to the first edition of PL. At least not if we understand Rawls' early version of political liberalism in the way I have done here. I will argue that a more radical legitimacy turn becomes visible in Rawls' two latest texts on political liberalism, and then as a consequence of Rawls adjusting his political sociology once more and drawing a further set of implications from the "fact of reasonable pluralism".

## **VI. Political legitimacy in Rawls' late texts: Political legitimacy based on the criterion of reciprocity**

In "Introduction" and "Revisited"<sup>58</sup> Rawls formulates his normative conception of legitimacy in a new way, and in the latter text he no longer speaks of "the liberal principle of legitimacy", but refers to his conception as "the idea of political legitimacy based on the criterion of reciprocity".<sup>59</sup> It says that

Our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions – were we to state them as government officials – are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons. This criterion applies on two levels: one is to the



constitutional structure itself, the other is to particular statutes and laws enacted in accordance with that structure.<sup>60</sup>

This late conception of political legitimacy stresses the nature of the *reasons* one should offer other citizens when *exercising political power to shape constitutional essentials and the basic structure*. These reasons, Rawls says, must be reasons which satisfy the “criterion of reciprocity”, and in order to do so one must a) sincerely believe that the reasons one offers for one’s political action are appropriate reasons to offer for this action as a government official, b) sincerely believe that other citizens too can accept the reasons offered as appropriate.<sup>61</sup> But what does it mean “to reason as government officials”? And how can reasoning in this way yield political legitimacy? In the following three sections I discuss Rawls’ rationale for conceptualizing political legitimacy in this rather convoluted way.

#### *A. Drawing full implications of the fact of reasonable pluralism*

Rawls’ new way of conceptualizing legitimacy must be understood in light of the political liberalism which he relies on in “Introduction” and “Revisited”; a political liberalism that differs significantly from what we find in the first edition of PL. The changes from PL to these later texts, however, are not as easy to discern as the changes from TJ to PL, because Rawls largely continues to use the same political liberal terms and concepts. But what happens in “Introduction” and “Revisited” is that Rawls draws a fuller set of implications from some of the political liberal ideas and concepts developed in PL. He also shifts the emphasis

among these ideas, thereby giving ideas like “public reason” and “overlapping consensus” a somewhat different content and function.

The most important change is that Rawls draws a fuller set of implications from “the fact of reasonable pluralism”. Thus, Rawls now emphasizes more strongly than previously that there can not only be a reasonable pluralism of comprehensive doctrines, but also a reasonable pluralism of *political conceptions of justice*.<sup>62</sup> In other words, he gives up the idea that all reasonable and rational citizens will come to see Justice as Fairness – even as a political conception – as the *most* appropriate standard of justice for their constitution and basic structure. Or rather, Rawls says that a sufficiently realistic political philosophy for a constitutional liberal democracy cannot take for granted that such a consensus will form. This change has radical consequences. It means that Rawls can no longer specify political legitimacy as acting in accordance with a constitution that conforms sufficiently to the principles of Justice as Fairness. Indeed, it means that he can no longer define the “sufficiently just” element of political legitimacy in terms of sufficient convergence with any particular doctrine of justice, and not even as convergence with any particular political liberal conception of justice.

#### *B. Addressing tensions in the normative basis of constitutional liberal democracies*

To understand why Rawls formulates his late conception of political legitimacy in the way he does, it is also useful to look back at why Rawls thought that defending the possibility of a well-ordered constitutional liberal democracy required him to work out a conception of political legitimacy in the first place. Does not the very name of this form of regime reveal its basis of legitimacy? I.e.

that it is a regime that claims authority to produce binding decisions on the basis of satisfying two normative benchmarks; i.e. *democracy* or *popular sovereignty*, and *liberal constitutionalism*?

The problem, according to Rawls, is that constitutional liberal democracies do not have a publicly accepted way of conceptualizing the relation between these two basic sources of legitimacy.<sup>63</sup> There is a long-standing impasse in this type of regime, he argues, between different groups' views on what constitutes the appropriate basis for the constitution and basic structure, and also disagreement about whether the current constitution and laws reflect that acceptable basis to a sufficient degree.<sup>64</sup> As a stylized example of such disagreements he mentions the opposing views of the *liberal tradition*, which sees the ability to secure a set of rights and liberties for all citizens as the main criterion of legitimacy, and the *civic republican* tradition, which sees popular sovereignty, or democratic procedures and the active participation of citizens as the primary hallmark of political legitimacy.<sup>65</sup> Another deep tension in the normative self-understanding of this type of regime relates to how citizens should reconcile their religious identities with their political identities and the obligation to accept legitimate law.<sup>66</sup>

Rawls sees the lack of a shared and publicly recognised standard of political legitimacy as problematic. Not only because it can create stability problems, but also because constitutional liberal democracy is a *democratic* form of regime which claims that the collective of citizens is the ultimate and collective sovereign.<sup>67</sup> The lack of a shared public legitimacy standard suggests that constitutional liberal democracies do not, and cannot, live up to their own basic idea of popular sovereignty and liberal constitutionalism because many citizens find that their constitution is not sufficiently just and that they are being coerced

on a basis they cannot accept. In Rawls' view, the lack of a shared public conception of legitimacy suggests that a constitutional liberal democracy cannot be *well-ordered* according to its own basic normative ideas, or that its basic ideas cannot be combined in a way that is public and accepted by all its citizens, and also effective in shaping laws and institutions.

So, Rawls attempts to move beyond the long-standing impasses in the public political culture, and to find a way of conceptualising political legitimacy in a way that can be recognised as appropriate for this form of regime by all its reasonable citizens.<sup>68</sup> In PL Rawls relied on Justice as Fairness and the original position to provide a standard for a sufficiently just constitution that could be acceptable to all reasonable citizens. But Rawls now assumes a more radical version of the fact of reasonable pluralism which says that we cannot expect all citizens to agree on a particular political conception of justice. In his late texts Rawls also draws fuller implications from inquiring into a form of regime which purports to be democratic. He now stresses the importance of citizens themselves participating in a process of working out what they can see as a sufficiently just constitution. But given that Rawls now assumes a more radical version of the fact of reasonable pluralism, it is hard to see how citizens can find any rules of cooperation that are reciprocally acceptable, or how they can come to an agreement on what counts as a sufficiently just constitution. What, then, does he propose?

### *C. Rawls' proposal*

His proposal is the "idea of political legitimacy based on the criterion of reciprocity", a conception that focuses on the kinds of reasons public officials and citizens should be guided by when exercising political power to shape the

constitution and the basic structure. It says that exercising political power over these fundamental issues requires public officials and citizens to use their *public reason*, and not their sectarian or private forms of reason. Using public reason here means that one should ensure that one's political decision does not conflict with what one sincerely sees as a reasonable and sufficiently complete interpretation of the basic political-moral ideas of the public political culture of constitutional liberal democracies, and be willing to give a public justification of one's decision in these terms. When public officials and citizens exercise their political power in this way they publicly show each other that they attempt to interpret, specify and give institutional effect to the basic political-moral ideas of the regime.

The idea is that a democratic practice informed by this deliberative ideal makes it possible for a losing minority to see a majoritarian decision as at least politically reasonable, and as politically legitimate and binding, even when they disagree with the decision. Moreover, the idea is that a democratic deliberative practice where participants use public reason can over time shape the constitution and the basic structure, making it possible for all politically reasonable citizens to recognize the constitution as having the right pedigree and as being sufficiently just to confer political legitimacy on ordinary laws and decisions.

Rawls' proposed conception of political legitimacy builds on a number of assumptions which must be spelled out. First, Rawls assumes that politically reasonable citizens in a constitutional liberal democracy implicitly accept certain political-moral ideas familiar from their public political culture.<sup>69</sup> These are, he says, ideas which they will be familiar with from their constitution and its tradition of interpretation, leading historical documents and widely known

political writings;<sup>70</sup> namely the very idea of popular sovereignty or democracy, and the idea of liberal constitutionalism – or the idea of having a constitution that protects a set of liberties for each. In addition, Rawls includes the political concept of citizens as free and equal and the concept of political society as a fair system of cooperation.<sup>71</sup> Rawls thinks these are ideas all politically reasonable citizens implicitly accept and see as an appropriate basis for the regime. What creates political divisions and deep impasses in constitutional liberal democracies is not disagreement about the validity of ideas and conceptions as such, but rather disagreements about how to provide these political-moral ideas with a *deeper normative grounding*, and disagreements about *how best to combine and translate them into specific legal and institutional arrangements*.<sup>72</sup> Because the basic political-moral ideas are vague and general, can be interpreted differently, and may be grounded in different comprehensive doctrines.<sup>73</sup>

Rawls' latest conception suggests that the way to move beyond the current impasse in the public political culture is to satisfy "the criterion of reciprocity", or to ensure oneself and others that when we exercise political power to change the basic terms of cooperation we do it in a way that does not conflict with these shared political-moral ideas. But since these political ideas are open to so many conflicting interpretations, we have to proceed in a particular way. First, to respect these ideas sufficiently it is not enough to convince ourselves and others that our political action can be supported by *one* of these basic ideas. We have to ensure that it is compatible with all of them. Secondly, if we present the political-moral ideas as an integral part of our preferred religious, moral or philosophical doctrine we cannot reasonably expect other citizens with different doctrines to accept them as an appropriate basis for exercising political power in the fundamental cases.

Rawls argues that in order to respect the criterion of reciprocity and the ideal of public reason, each must check their decision against what they sincerely see as the most reasonable “political conception of political justice”,<sup>74</sup> i.e. each must sincerely try to give an interpretation of how all these basic political-moral ideas fit together in a complete and coherent conception, and rank the political values and principles one sees as following from them in a way one sees as appropriate for a constitutional liberal democracy.<sup>75</sup> The aim of the inquiry should be *wide and general reflective equilibrium*.<sup>76</sup> This means that each must try to make their political conception of political justice compatible with their most considered convictions of justice, and with their comprehensive doctrine if they have one.<sup>77</sup> Each must also be sensitive to whether other citizens can accept their conception as politically reasonable. This may require each to make adjustments to one’s political conception, to one’s considered convictions and also to one’s comprehensive doctrine.<sup>78</sup> Many will want to provide their political conception of political justice with a deeper grounding. But citizens must see that under conditions of reasonable pluralism this deeper grounding cannot be part of a political conception itself. Citizens can refer to their comprehensive doctrines, also in political debates, but the criterion of reciprocity requires that they refrain from exercising political power in the fundamental issues in a way that conflicts with their political conception of political justice.<sup>79</sup>

Rawls’ conception does not presuppose that all citizens come to see one and the same political conception of political justice as the *most* reasonable conception. What it does assume, however, is that a democratic process informed by public reason will over time help constitutional liberal democracies move from an implicit agreement on the vague and general basic political–moral ideas of the

public political culture, to a situation where citizens can recognize a range of political conceptions of political justice, or a range of interpretations of the basic ideas, as providing acceptable justifications for exercising political power in the fundamental cases. When citizens recognize each other's interpretations as reasonable this is reassuring. If other citizens find that your justification is based on an unreasonable interpretation of the basic ideas, one that they cannot reasonably accept, they can contest your interpretation and correct your misperceptions of what is actually reasonably acceptable to them. Only an orderly contest over time can show which political conceptions of political justice citizens can in fact accept as politically reasonable. After such a process one can say that "[...] the legal enactment expressing the opinion of the majority is legitimate law. It may not be thought to be the most reasonable, or the most appropriate, by each, but it is politically (morally) binding on him or her as a citizen and is to be accepted as such. Each thinks that all have spoken and voted at least reasonably."<sup>80</sup>

Moreover, when, the constitution and basic structure has been shaped by citizens and public officials who reason in public reason over time, it will be possible for citizens to see the constitution and basic structure itself as reasonably just and political-morally binding on them even when they do not fully agree with all of its specifics, and even when they think that it falls short of the *most* reasonable political conception of political justice. Why? Because each person can at least recognise that the rights and procedures which are entrenched in the constitution are based on basic political-moral ideas which they accept and share in some form. Each can also see the constitution and the basic institutions as shaped by the right agents, and as having been shaped in the right way, i.e. in a



process of deliberation and decision-making where participants have been oriented towards the basic political-moral ideas of the regime. Each can see that they have had the chance to participate, to present their favoured interpretation of the basic political-moral ideas to others, and to contest others' public justification of their political acts. This enables each to see oneself as a free and equal citizen, or as a co-sovereign and not merely as a subject of the constitution and laws.

Some may see the resulting constitution as expressing the *most* reasonable conception of political justice, others will only accept it as politically reasonable, even if barely so.<sup>81</sup> But according to Rawls this is enough to say that the constitution is sufficiently just to confer legitimacy on ordinary laws and decisions. And it suffices to show that a constitutional liberal democracy can be well-ordered by its own normative standards, and have a publicly shared conception of political legitimacy: one which says that the process of democratic decision-making where participants are informed by their public reason, creates laws and decisions which are at least *pro tanto* binding on all citizens.

Finally, why does the "idea of political legitimacy based on the criterion of reciprocity" require citizens to reason as government officials? It seems rather obvious that if state leaders, Supreme Court justices and other public officials ignore the basic political-moral ideas, making their decisions on the basis of personal preferences and particular doctrines, then the constitution and the basic structure will evolve in a different direction and eventually into a different form of regime.<sup>82</sup> Thus one can say that it is part of the practical political reason for a government official to have the basic political-moral ideas of liberal constitutionalism and democracy in mind, and to make sure that their political actions do not undermine these goals and values in the fundamental cases. Rawls,

however, reminds us that in democracies citizens too exercise political power, and that they ultimately have the power to revise their constitution.<sup>83</sup> This means, Rawls argues, that citizens cannot exercise their political power merely as *private persons*.<sup>84</sup> Citizens must acknowledge that when they exercise political power they too must use a political practical reason that is appropriate for their role as co-sovereigns. In other words, citizens' reasoning in these types of cases cannot be fundamentally different from the practical reason expected of elected representatives and government officials. This explains why Rawls speaks of reasoning as "*as free and equal citizens*", to reason "*as government officials*", to reason "as if they [citizens] were lawmakers" and "to use public reason" interchangeably. Rawls' ideal only says that citizens should reason as government officials when they exercise political power in matters that touch on the constitution and basic justice, and hence not in all political matters. I interpret this restriction as Rawls a trade off between keeping the basic structure sufficiently just, on the one hand, and securing epistemic virtues of democracy as well as citizens' free expression on the other hand.

To sum up; Rawls' latest formulation of political legitimacy says that public officials' and citizens' exercise of political power is politically legitimate insofar as they exercise their power in accordance with a sufficiently just constitution. The constitution itself is sufficiently just insofar as it expresses a coherent interpretation of the basic political-moral ideas of the regime, an interpretation that citizens can recognize and accept as a reasonable political conception for this type of regime. Finally, it says that a sufficiently just constitution can only be secured over time insofar as public officials and citizens use public reason, and thus ensure that their decisions do not conflict with what they sincerely see as the

most reasonable interpretation of the basic ideas, when they exercise political power in ways that shape the constitution and the basic structure.

## **VII. A more radical turn to legitimacy**

Rawls' latest conception of political legitimacy differs from his earlier "liberal principle of legitimacy" in important ways. Instead of defining legitimacy with reference to a sufficiently just constitution, the "idea of political legitimacy based on the criterion of reciprocity" shows how the constitution too is an ongoing project. Instead of defining reciprocally acceptable terms of cooperation in terms of ideas and principles acceptable to citizens' "common human reason", Rawls now stresses the distinctiveness and autonomy of a *political* practical reason, and speaks of what is reciprocally acceptable to persons *as* citizens in a constitutional liberal democracy. This means that instead of understanding "reciprocal acceptability", or that which "cannot reasonably be rejected"<sup>85</sup>, as the outcome of the original position, Rawls now defines this as the outcome of a deliberative process where citizens take the basic political-moral ideas of their public political culture into account. Or put differently, Rawls' latest conception of political legitimacy focuses primarily on the kinds of reasons that are seen as reciprocally acceptable when we think of ourselves as political sovereigns in a constitutional liberal democracy, whereas the early formulations focused more directly on finding terms of cooperation that were to citizens' reciprocal advantage, as outlined in the original position. Thus, one can say that the ideal and practice of a public reason replaces the role which the original position used to have as the core

and engine of Rawls' conception of political legitimacy, and more generally, of his political philosophy.

In the above account I have tried to show that the shift from “the liberal principle of legitimacy” to “the idea of political legitimacy based on the criterion of reciprocity” comes as a result of two changes. Firstly, it is a result of Rawls drawing a further set of implications from the fact of reasonable pluralism. However, I also see it as a result of Rawls' philosophy becoming more reflexive, acknowledging the need for the methodology to catch up with its subject matter. When he writes that “our exercise of political power is proper only when we *sincerely believe* that the reasons we would offer for our political actions – were we to state them as government officials – are sufficient”<sup>86</sup>, Rawls signals a shift in the perspective of his political philosophy. His earlier philosophy encouraged us to think from the perspective of the original position, or from what is reasonably acceptable to all as seen from a third person perspective as defined by a philosopher. But now he appeals to the first person, or participant perspective, of citizens *as* citizens or political sovereigns; He appeals to what *each sincerely believes* to be most politically appropriate or reasonable in this regime, i.e. when thinking of themselves *as* citizens and engaging with others in this capacity. He starts from this perspective and then moves on to the intersubjective exchange of these reasons and interpretations in public justification of political action.

The most striking feature of Rawls' latest texts on political liberalism, however, is the importance which political legitimacy gains vis-à-vis justice. One can say that until “Introduction” and “Revisited”, legitimacy played second fiddle to justice. When this changes Rawls starts drawing the full implications from the fact of reasonable pluralism. In these late texts the process of public reason

becomes the focal point of Rawls' conception of political legitimacy, and this conception in turn becomes the focal point and engine of Rawls' political philosophy.

### **VIII. A purely procedural conception of legitimacy?**

It is sometimes said that Rawls has a *purely procedural* conception of legitimacy,<sup>87</sup> or that he defines legitimacy in terms of the outcome of a procedure without setting up an independent and prior criterion against which this outcome can be checked.<sup>88</sup> But in "Reply to Habermas" Rawls explicitly denies that this is the case.<sup>89</sup> Indeed, Rawls goes on to say that all allegedly pure procedural conceptions of legitimacy have an illusory character, and that the same is the case for all allegedly pure procedural conceptions of justice.<sup>90</sup> His argument is that every procedure instantiates certain substantive values, and that our understanding of what counts as a "fair procedure" in the end always relies on substantive value judgements.<sup>91</sup>

What Rawls does say, however, is that "[c]onstitutional political procedures may indeed be – under normal and decent circumstances – purely procedural with respect to legitimacy."<sup>92</sup> I.e. if we enact a law by correctly following the procedures of a sufficiently just constitution, then the resulting law is legitimate. But this is a special case, because a sufficiently just constitution will – under normal and decent circumstances – guarantee that laws correctly enacted in accordance with it are not grossly unjust laws; If a law directly conflicts with the substantive values and ideas entrenched in the constitution it will be invalidated. Moreover, legislation is not a mechanical procedure, but involves interpretation

and actualization of the constitutions' ideas. Hence, to secure sufficiently just legislation *over time* it is not sufficient that legislators follow the constitution's formal voting procedures. Over time legislators must also be motivated by public reason, or motivated to legislate in a way that gives a reasonable and coherent interpretation of the basic ideas of the constitution, and not primarily be moved by their own self-interest or particular comprehensive doctrine.

What about Rawls' "idea of political legitimacy based on the criterion of reciprocity", is this a pure procedural conception? Rawls' normative conception of what it takes for a constitution to be legitimate relies on a deliberative democratic procedure where the participants use public reason. Through this procedure citizens and public officials can move from an implicit agreement on a set of vague and general political ideas, to recognizing each other as politically reasonable and the outcomes of their majoritarian politics as sufficiently reasonable to be seen as genuinely binding on them. So, Rawls thinks this deliberative procedure itself confers legitimacy on outcomes. However, the very structure of this deliberative procedure – who should participate, its restrictions on what are considered appropriate reasons etc. – reflect substantive value choices. Specifically, it is a deliberative procedure designed to operationalize the basic political-moral ideas of the public political culture of a constitutional liberal democracy, and to encourage citizens and public officials to have an orientation towards these ideas as well. Because, as we have seen, Rawls thinks that these are ideas and concepts that can be reciprocally and freely agreed to by all reasonable citizens in a constitutional liberal democracy as an appropriate basis for their shared laws and institutions. The point is that these political ideas are *substantive* ideas, and they provide the substantive, albeit vague and general, guidelines for

evaluating the fairness of the procedure itself, for evaluating its outcomes, and for what should be considered appropriate reasons for political action in the fundamental cases. Again, this orientation, and restriction, is required to make the constitution and constitutional liberal democracies sufficiently just and legitimate in the *long run*.<sup>93</sup>

## **IX. Conclusion**

In his late texts on political liberalism Rawls addresses a pressing question, one that gains importance with more pluralist citizenries and supranational cooperation: What rules can regulate cooperation if reasonable people continue to be divided over what the good life is, what the correct religious or moral comprehensive doctrines are, and *also* disagree on what constitutes the most reasonable political conception of justice? For Rawls, drawing the full implications of the fact of reasonable pluralism requires us to rethink ideals of democratic decision-making and political justification, and also rethink the way we do normative political philosophy. It means that we cannot start from religious, moral or philosophical doctrines, nor give them the last word in our political thinking. Nor can we assume that all reasonable citizens will accept one and the same political conception of justice as the most reasonable basis for the constitution. Ignoring the fact of reasonable pluralism, Rawls argues, will inevitably lead us into ideological impasses and political stalemates, and fail to respect other citizens as free and equal co-sovereigns.

Rawls' response to this challenge is to focus on the political domain as an autonomous domain of practical reasoning. Politics is not simply a domain for applying principles taken from comprehensive doctrines. Some of our most deep-seated convictions, Rawls argues, are distinctly *political*-moral convictions, such as "slavery is wrong" or "democracy is the most legitimate form of regime". We often have an allegiance to such ideas.<sup>94</sup> Not because we have deduced them from our religious or moral doctrines, but because we have been socialized into a public political culture and have formed beliefs based on experiences from political practices. A political philosophy for a constitutional liberal democracy should start from the central political-moral ideas and concepts we implicitly share in our political culture, and try to work them out, searching for wide and general reflective equilibrium.<sup>95</sup> Rawls proposes that these basic political-moral ideas should be a focal point of our political decision-making and public justification, and the on-going shaping of our constitutional structure. This is the main tenet of Rawls' third and latest conception of political legitimacy, "the idea of political legitimacy based on the criterion of reciprocity".

According to this conception one cannot expect each law, or even the constitutional principles, to be fully just according to what one sees as the full doctrinal truth. Nor can one expect them to be fully just according to what one sees as the *most* reasonable conception of political liberal justice. What each citizen in a constitutional liberal democracy should reasonably demand, however, is to be able to recognize the constitutional essentials as expressing a reasonable and coherent interpretation of political-moral ideas which they share with other citizens; and that this is an interpretation which has been tried out in a deliberative democratic process of decision-making and public justification among public



officials and citizens. This, Rawls argues, shows that a constitutional liberal democracy can have a constitution which is sufficiently just and democratic to confer legitimacy to ordinary laws and decisions, in spite of the fact of reasonable pluralism. This late Rawlsian approach to political legitimacy withstands criticisms often raised against Rawls' conceptualisation of political legitimacy; e.g. the criticism that Rawls starts from a pre-political normative standard taken from moral philosophy<sup>96</sup>, or that his conception of legitimacy relies on the use of hypothetical consent in an idealized original position and not on intersubjective processes of deliberation.<sup>97</sup> Its main strength, however, is that it acknowledges the depth of pluralism in modern constitutional democracies, and provides a way of conceptualizing political legitimacy in a constitutional democracy given that there is such a deep and irreducible pluralism.

However, this article has also attempted to show that even those who dismiss Rawls' latest conception of political legitimacy with its reliance on public reason, may find Rawls' general characterisations of the meaning of the concept legitimacy useful. Rawls argues that political legitimacy is connected to, but also distinct from, both legal or institutional validity, on the one hand, and justice, on the other hand. Political legitimacy in this rendering is not an either-or. It is a quality which political authorities, institutional and legal systems and their specific laws and decisions can have to different degrees. One can say that Rawls conceptualizes political legitimacy as a composite quality that normally requires a *threshold* level of several other qualities: The agent making a decision must normally have an origin or pedigree which is recognized as sufficiently appropriate for taking on that role, the process of decision-making must proceed in a sufficiently recognized and procedurally just way, and the decisions

themselves cannot yield outcomes that are grossly unjust, although they need not be fully just. This explains how a decision can be just in terms of outcomes, but still fail to be legitimate. It explains how a political authority, say a government, can be politically legitimate, while a particular decision issued by this government is illegitimate, and why we can talk about pure procedural legitimacy when discussing a single law, but not at the level of the constitution. It also provides a framework for understanding changes in legitimacy: How a legitimate government that keeps making unjust decisions, or even one outrageously unjust or unauthorized decision, may undermine its legitimacy. A constitution with a solid democratic pedigree can similarly lose political legitimacy, e.g. if laws enacted in accordance with it turns out to be grossly unjust over time. On the other hand, political bodies with weak pedigree may strengthen their legitimacy over time. It also captures how an international court set up in an irregular process and with weak democratic credentials, can over time bootstrap itself into (more) legitimacy, e.g. by adopting fair proceedings, correct application of law, and by producing outcomes which are widely seen as being just. In this way Rawls sketches a multifaceted and multileveled definition of political legitimacy – one that avoids common simplifying dichotomies, and provides a framework for assessing and discussing complex political legitimacy crises, and strategies for enhancing legitimacy, in a more structured and reflective way.

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<sup>1</sup> C.f. Arthur I. Applebaum, "Legitimacy without the Duty to Obey," *Philosophy & Public Affairs* 38, no. 3 (2010), at p. 216.

<sup>2</sup> Paul Weithman, "Legitimacy and the Project of Rawls's Political Liberalism", (2012). Available online.

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<sup>3</sup> Previous contributions include Samuel Freeman, *Rawls* (London: Routledge, 2007), pp. 371-81; Weithman 2012 (supra note 2); Fabienne Peter, *Democratic Legitimacy* (New York, NY.: Routledge, 2009); Gerald Gaus, "The Turn to Political Liberalism," in *A Companion to Rawls*, ed. J. Mandle and D.A. Reidy (Hoboken, NJ: John Wiley & Sons, Inc., 2014).

<sup>4</sup> References to Rawls' works use the following abbreviations "Introduction": John Rawls, "Introduction to the Paperback Edition," in *Political Liberalism, Paperback Edition* (New York, NY.: Columbia University Press, 1996); "Revisited": "The Idea of Public Reason Revisited," *The University of Chicago Law Review* 64, no. 3 (1997); "Reply to Habermas": "Political Liberalism: Reply to Habermas," in *Political Liberalism, Paperback Edition* (New York, NY: Columbia University Press, 1996); PL: *Political Liberalism* (New York: Columbia University Press, 1993.); TJ: *A Theory of Justice* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1971).

<sup>5</sup> Gaus, "The Turn to Political Liberalism.", p. 24.3

<sup>6</sup> Max Weber, *The Theory of Social and Economic Organization*, trans. A. M. Henderson and T. Parsons (New York, NY: Oxford University Press, 1947).

<sup>7</sup> "Reply to Habermas", p. 429, fn. 77.

<sup>8</sup> Ibid, p. 427.

<sup>9</sup> E.g. "there is of course an essential connection with justice." Ibid, p.428.

<sup>10</sup> Ibid.

<sup>11</sup> E.g. "legitimacy allows an undetermined range of injustice that justice might not permit", ibid. "A significant aspect of the idea of legitimacy is that it allows a certain leeway in how well sovereigns may rule and how far they may be tolerated." ibid, p. 427.

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<sup>12</sup> E.g. “Before this point is reached [the point where injustice corrupts the legitimacy of a political procedure], the outcomes of a legitimate procedure are legitimate whatever they are.” *ibid*, p. 428.

<sup>13</sup> “[N]either the procedures nor the laws need to be just by a strict standard of justice, even if, what is also true, they cannot be too gravely unjust. At some point, the injustice of the outcomes of a legitimate democratic procedure corrupts its legitimacy, and so will the injustice of the political constitution itself.” *ibid*.

<sup>14</sup> Cf. Perry Anderson, "On John Rawls," *Dissent* Winter (1994).

<sup>15</sup> E.g. “It [legitimacy] is also institutional”. ”Reply to Habermas”, p. 428.

<sup>16</sup> E.g. “Their [a king or queen] being legitimate says something about their pedigree: how they came to their office. It refers to whether they were the legitimate heir to the throne in accordance with the established rules and traditions of, for example, the English or the French crown.” *Ibid*, p. 427.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid*.

<sup>19</sup> E.g. “Thus citizens recognize the familiar distinction between accepting as (sufficiently) just and legitimate a constitution with its procedures for fair elections and legislative majorities, and accepting as legitimate (even when not just) a particular statute or a decision in a particular matter of policy.” *Ibid*, p. 393.

<sup>20</sup> *Ibid*. Cf. PL, p. 221; “The second distinction is between higher and ordinary law [...] Higher law binds and guides ordinary power.”

<sup>21</sup> Rawls provides an example of this in “Reply to Habermas”, p. 411.

<sup>22</sup> Joseph Raz, *Morality of Freedom* (Oxford; Clarendon Press, 1986).

<sup>23</sup> *Ibid*, p. 53.

<sup>24</sup> This is the essence of Raz’ service conception of legitimacy. *Ibid*, p. 53, 56.

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- <sup>25</sup> Fabienne Peter, "Political Legitimacy", *The Stanford Encyclopedia of Philosophy* (Winter 2014 Edition), Edward N. Zalta (ed.).
- <sup>26</sup> "Reply to Habermas", p. 460; PL, p. 109. Cf. John Rawls, "Legal Obligation and the Duty of Fair Play," in *Law and Philosophy* ed. S. Hook (New York: New York University Press, 1964).
- <sup>27</sup> Cf. Arthur Ripstein, «Authority and Coercion» *Philosophy & Public Affairs* 32, winter (2004).
- <sup>28</sup> PL, p. 301. Rawls emphasizes that a state's basic structure fundamentally shapes citizens' character and aims (PL, p. 69), and that "the right of emigration does not make the acceptance of political authority voluntary", not in the same way as one can accept e.g. ecclesiastical authority when guaranteed freedom of thought and liberty of conscience (PL, 136, fn. 4).
- <sup>29</sup> PL, p. 136.
- <sup>30</sup> "Reply to Habermas", p. 393.
- <sup>31</sup> Ibid, p.390. Cf. PL, p. 137.
- <sup>32</sup> Cf. TJ, p. 308.
- <sup>33</sup> PL, p. 22. 73.
- <sup>34</sup> Ibid, p. 136.
- <sup>35</sup> "Reply to Habermas"; Habermas, "Reconciliation through the Public Use of Reason"
- <sup>36</sup> PL, p. 109, fn.15. Cf. PL, p. 69f, 109; TJ, pp. 293-343, especially p.308, and Rawls, "Legal Obligation and the Duty of Fair Play."
- <sup>37</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge Mass.: MIT Press, 1996).
- <sup>38</sup> PL, p. 264.

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- <sup>39</sup> Ibid, p. 231; “Reply to Habermas ”, p. 406.
- <sup>40</sup> Cf. PL, p. 393.
- <sup>41</sup> Cf. TJ, p. 308.
- <sup>42</sup> Cf. TJ, §48 on distributive shares and citizens’ “legitimate expectations”, “legitimate interest” and “legitimate claims”. Rawls also mention “legitimacy of the constitution”, “legitimate conscientious refusal”, and “legitimate dissent”,  
ibid, p. 323-330.
- <sup>43</sup> Cf. TJ, p. 311; “In a state of near justice, then, we normally have a duty to comply with unjust laws in virtue of our duty to support a just constitution.”
- <sup>44</sup> Ibid, p. 33.
- <sup>45</sup> Ibid.
- <sup>46</sup> Ibid, p.357.
- <sup>47</sup> Ibid, p.357.
- <sup>48</sup> Cf. Gaus, "The Turn to Political Liberalism."; Weithman, "Legitimacy and the Project of Rawls’s Political Liberalism."
- <sup>49</sup> Cf. PL, p. 175.
- <sup>50</sup> Rawls uses the terms “political conception of political justice”, “political conception of justice” and “conception of political justice” interchangeably.
- <sup>51</sup> Ibid, p.137.
- <sup>52</sup> Ibid.
- <sup>53</sup> Ibid, p. 216.
- <sup>54</sup> Ibid. p. 243.
- <sup>55</sup> Ibid, p.22, 97.
- <sup>56</sup> E.g. PL, p. 336f. Cf. Rawls’ “four-stage sequence”, Ibid, p. 398.
- <sup>57</sup> Ibid, p. 136-7, fn.5.

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<sup>58</sup> I read «Reply to Habermas» as an intermediate text between the first edition of PL and his late philosophy.

<sup>59</sup> “Revisited”, p. 771. Rawls introduced the criterion of reciprocity in “Introduction”, but referred to it as “the liberal principle of legitimacy”.

<sup>60</sup> “Revisited”, p. 445-6.

<sup>61</sup> Cf. a similar formulation in “Introduction”, p. xliv.

<sup>62</sup> “Introduction”, p. xxxvi. In certain passages of PL Rawls speaks of Justice as Fairness as one of several possible reasonable political conceptions of political justice. E.g. in PL, p.167f. But he does not draw the full implications of this, and in other passages he continues to speak of Justice as Fairness as the *most reasonable* political conception, or as specifying “the center of the focal class” of reasonable political conceptions”, Ibid, p.168.

<sup>63</sup> Ibid, p. 205, 299.

<sup>64</sup> Ibid, p. 300, 330, 368; “Reply to Habermas”, p.433.

<sup>65</sup> PL, p.204f ; «Reply to Habermas», p. 396, 409-416.

<sup>66</sup> “Revisited”, p. 486f.

<sup>67</sup> Rawls emphasizes the citizenry as a collective sovereign in “Reply to Habermas”, but also in PL, p. 68, 232.

<sup>68</sup> When Rawls speaks of “reasonable citizens” here, he means *politically* reasonable citizens as seen from within a constitutional liberal democracy, i.e. citizens who accept the basic political-moral ideas of this type of regime and also “the burdens of judgment”, or that there can be a reasonable pluralism of comprehensive doctrines.

<sup>69</sup> «Reply», p. 376; «Revisited», p. 776. C.f. PL, p.8, 14, 186.

<sup>70</sup> PL, p. 376.

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- <sup>71</sup> “Reply ”, p. 384; “Revisited”, p. 776.
- <sup>72</sup> PL, p. 368f.
- <sup>73</sup> C.f. the conflict between the liberal and the republican tradition of interpretation.
- <sup>74</sup> “Revisited”, p.453.
- <sup>75</sup> «Reply to Habermas», p. 384, 386, 389; «Revisited», p. 777f.
- <sup>76</sup> «Introduction», xlviii; «Reply », p. 384, fn.16.
- <sup>77</sup> «Reply to Habermas »; p. 386ff, «Introduction», p. xxff, xviii, xxxviii, xxxix.
- <sup>78</sup> “Reply to Habermas”, p. 386; PL, p. 45, 145ff, 160.
- <sup>79</sup> Cf. Rawls’ Proviso in «Revisited», §4.
- <sup>80</sup> Ibid, p. 770.
- <sup>81</sup> Ibid.
- <sup>82</sup> “Reply to Habermas”, p. 423.
- <sup>83</sup> PL, p. 231.
- <sup>84</sup> “Revisited”, p. 462.
- <sup>85</sup> PL, p. 49, fn.2, 124.
- <sup>86</sup> “Revisited”, p. 445-6.
- <sup>87</sup> Cf. Peter, *Democratic Legitimacy*.
- <sup>88</sup> Cf. Rawls’ definition of pure procedural *justice* in PL, p. 72.
- <sup>89</sup> “Reply to Habermas ”, p. 429.
- <sup>90</sup> Ibid, p. 431. Cf. TJ, p. 210.
- <sup>91</sup> “Reply”, p. 429ff, 423.
- <sup>92</sup> Ibid, p. 426.
- <sup>93</sup> Or as Rawls also puts it: “The point is that no institutional procedure without such substantive guidelines for admissible reasons can cancel the maxim ‘garbage



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in, garbage out'. [...] the mix of views and reasons in a vote in which citizens lack awareness of such guidelines may easily lead to injustice, even though the outcome of the procedure is legitimate." «Reply to Habermas», p. 431.

<sup>94</sup> "Revisited", p. 781, 784ff; PL, p.168.

<sup>95</sup> «Introduction», p. xlviii; «Reply to Habermas», p. 386, fn.16.

<sup>96</sup> Cf. Alan Buchanan, "Justice, Legitimacy and Human Rights," in *The Idea of Political Liberalism: Essays on Rawls*, ed. V. Davion and C. Wolf (Rowan & Littlefield, 2000).

<sup>97</sup> Jürgen Habermas, "Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism," *Journal of Philosophy* 92, no. 3 (1995); Enzo Rossi, "Legitimacy, Democracy and Public Justification: Rawls' Political Liberalism Versus Gaus' Justificatory Liberalism," *Res Publica*, no. 1 (2013).