
Constitutional Interpretation and Public Reason: Seductive Disanalogies

CHRISTOPHER F. ZURN

There is much that is seductive about John Rawls's striking claims that constitutional courts should and, in fact, do exemplify public reason,¹ not least of which is the prospect of making a connection, through the link of public reason, between the institution of court-based constitutional review and the legitimacy conditions of liberal democracy. Many prominent liberal and deliberative democratic theories have sought to assuage democratic worries about judicial review by extolling judicial discourse as an exemplar of public reason. This chapter critically assesses the analogies and disanalogies between public reason and actual judicial discourse, thereby undercutting the attempt to legitimize judicial review in terms of its allegedly superior ability to speak in the name of, and for, the people's shared political principles.

The first section of the chapter indicates schematically how public reason theorists can be seen as responding to a nexus of theoretical and empirical factors that call into question the legitimacy of court-based constitutional review. The second section spells out how the strategy of appealing to public reason is seductive for Rawls and Christopher Eisgruber and then indicates the remarkable prevalence of the public reason strategy in contemporary political philosophy. The third section makes a key critical assessment by attending to the actual work product of the US Supreme Court. The central claim is that what that court actually does is not, in fact, sufficiently analogous to what public reason theories suggest it does or ought to do. In brief, while the Supreme Court does engage in reason-giving to support its decisions – as the public reason strategy suggests – its reasons are (largely) legalistic and specifically juristic reasons, not the theorists' idealized moral-political reasons on matters of fundamental principle. Section IV

¹ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), pp. 231–240.

considers three types of institutional factors that explain why there is a significant disanalogy between what the court does and what public reason theories require it to do. Section V then suggests the need for further research about the public reason strategy when used beyond the nation-state, that is, in claiming legitimacy for transnational and international courts as public reasoners.

I The Public Reason Strategy and Constitutional Courts

Consider three sets of institutional facts about the set of established and well-functioning constitutional democracies. First, to my knowledge, all of them have constitutional procedures for changing the constitution that require the involvement of citizens, either directly through referenda or constituent assemblies or indirectly through the electoral accountability of officials involved, such as legislators and executives – and frequently through some combination of both direct and indirect citizen participation.² That is to say, all of them institutionally insist that real democratic processes are essential to changing the constitution. Not a single one of them has a procedure for changing the constitution that cuts out citizen involvement entirely, say through the exclusive use of a panel of unaccountable appointed moral experts, fully insulated from democratic political control or influence. All agree that citizen control is ineliminable from constitutional change processes. So, at least formally, established constitutional democracies structure their institutions so that democracy is essential to and ineliminable for processes of constitutional change, or what we might also call “constitutional legislation.”

Now consider, second, that most (but not all) constitutional democracies have constitutional courts, established either formally in the constitution or through historical development. As high courts, the judges themselves, their working processes, and their results are all institutionally insulated from democratic control and accountability, even as their decisions are binding on the entire citizenry and the other branches of government. As constitutional courts, they have the power of judicial review, that is, the power to strike down laws enacted and actions taken by the democratically accountable branches of government when those laws and actions are determined to violate the constitution.

² I have validated these claims for my data set of those 69 consolidated constitutional democracies with a population of more than 500,000 and scoring sufficiently well on three established democracy indices – Polity IV, UDS, and Freedom House – thought the claims are also true for a broader set of nations.

Third, as seems evident to any clear-eyed empiricist, in the process of exercising the power of judicial review, such constitutional courts inevitably end up not only simply enforcing preexisting constitutional standards but also, in fact, positively developing new constitutional law. Said another way, constitutional courts inevitably take on the powers of constitutional legislation.³

So, we have three sets of facts evidently in tension: the institutional aspiration to reserve the powers of constitutional legislation solely to democratically accountable actors, the institutional fact of democratically unaccountable courts as constitutional guardians, and the empirical reality of those (unaccountable) constitutional guardians becoming (unaccountable) constitutional legislators. For political philosophy and political theory, such a tension is a very tempting place to focus attention, and indeed there have been all manner of attempts made to do so.

One conceptual strategy is simply to deny the importance of democracy, affirm the absolute normative priority of individual rights over other values and principles, and celebrate judicial constitutional authorship as the only way to ensure fundamental individual rights.⁴ Of course, the argumentative costs of such a strategy are high, since the theory needs to make several controversial moves along the way. Needless to say, few contemporary political theorists have been willing to boldly take on all these argumentative costs. Some will be worried about strong moral realism about rights, or about realism concerning their absolute priority; some will want to find a place for the ideals of democratic political equality alongside or in concert with ideals supporting individual rights; some will be worried about reliably identifying the moral experts or even the existence of such experts; some will be concerned that the argument places too much faith in the determinacy of practical reason; and so on. Hence, within the broad family of liberal democratic theories, other conceptual strategies for addressing the institutionalized tension have been more prominent.

This chapter addresses one such strategy – the public reason strategy – that is widely endorsed in different variants by theories that are more

³ See Christopher F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (New York: Cambridge University Press, 2007), pp. 256–262, for my own explanation of why constitutional protection by a court inevitably transmutes into the elaboration of new constitutional content.

⁴ In the US context, see, e.g., Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd edn. (New Haven: Yale University Press, 1986), and Jesse H. Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980).

democratically inclined – in particular, deliberative democratic theories – as well as those that are more liberal in character, especially those inspired by Rawlsian political liberalism. The central inferential intuitions of this public reason strategy usually go something like the following: Quality democracy, democracy worth striving for, cannot always be just a matter of numbers or bare majority rule, but must somehow involve making collective decisions on the basis of the best available reasons, at least about fundamental matters. This is because specific political decisions must be acceptable not only to those who are in favor of them but also to those who disagree with them. On fundamental matters, on “constitutional essentials” to use Rawls’s terminology, such acceptability to all can be achieved if the decisions are simultaneously based on abstract principles that all citizens endorse, based on the best available reasons concerning the specific entailments of those principles, and facially seen to be so based. So the political choices on constitutional essentials can be understood as legitimate for both winners and losers, as it were, if those choices are the results of abstract reasons all citizens share, of quality exercise of practical reasoning about the entailments of those reasons, and all this as clearly evident from the processes ensuing in the choices.

But which political institutions actually base their decisions, and are seen as basing them, on principled reasons shared by all and on practical reasoning about the entailments of those shared principles? Courts are the answer. They are uniquely reasoning-based institutions and are seen as such. If courts actually use the shared principles of public reason as the basis of their reasoning, then their decisions can be understood as consistent with the demands of quality democracy. As long as courts positively elaborate and develop the constitutional essentials in line with the content of the shared principles – and are seen as doing so – then their function as constitutional legislators is not fatally in tension with the institutional demand for the constituent power to be held by the people. Constitutional courts, then, because they speak in the language of the people’s public reason and because they are the institutional representatives of the people’s public reason, are in fact eminently democratic actors, even when they are legislating new constitutional content. This public reason approach to answering the democratic worries about judicial review is quite widely endorsed in contemporary scholarship. In the next section I will explain why it is a seductive strategy by elaborating a few versions of it in Rawls, Eisgruber, and others. In Section III, I will argue that the strategy nevertheless fails empirically

when evaluated in the light of the actual work product of the Supreme Court of the United States.

II The Seductions of the Public Reason Approach: Rawls, Eisgruber, and Others

1 *The Juridical Exemplification of Public Reason: Rawls*

Although Rawls is the well-spring of political theory focusing on public reason, he himself does not claim to justify judicial review in those terms.⁵ Rather, in the course of clarifying the meaning and place of “public reason,” Rawls makes the more modest claim that a supreme constitutional court should be understood as “the exemplar of public reason” in a constitutional democracy.⁶ To understand this, it is necessary to look at the problem he takes the conception of “political liberalism” to be solving. In *A Theory of Justice*⁷ Rawls outlines a powerful set of arguments for a deontological justification of liberal principles of justice – what he calls “justice as fairness.” Over time, he comes to believe that this conception is seriously deficient in its unrealistic assessment of the extent to which all citizens in actually existing constitutional democracies would or could unreservedly endorse the basic principles of justice as fairness. In particular, Rawls becomes much more sensitive to the apparently ineliminable plurality of irreconcilable moral worldviews in healthy democracies: “A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines. No one of these doctrines is affirmed by citizens generally. Nor should one expect that in the foreseeable future one of them, or some other reasonable doctrine, will ever be affirmed by all, or nearly all, citizens.”⁸

The theoretical problem raised by this situation – what Rawls calls the “fact of reasonable pluralism” – is that the legitimacy of a democratic government hangs on the acceptance, by its citizens, of the basic moral soundness of at least the fundamental principles that are to govern their consociation, the principles that a constitution is intended to instantiate and promote. But how can diverse citizens, with their different and

⁵ Sections II–IV of this chapter contain reworked versions of previous work, Zurn, *Deliberative Democracy*, pp. 168–212, with new material.

⁶ Rawls, *Political Liberalism*, p. 231.

⁷ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

⁸ Rawls, *Political Liberalism*, xviii.

incompatible moral worldviews, agree on the same set of moral principles? Rawls's solution is that citizens can agree on a set of specifically political principles – in what he calls an “overlapping consensus” – meaning that the political principles are simultaneously shared by all the various reasonable comprehensive doctrines, are grounded in those more encompassing moral views, and yet are nevertheless employable independently of each of the comprehensive worldviews. As long as citizens mutually agree to resolve their fundamental political disagreements on the neutral ground of these principles that they all already agree to (though each for their own reasons), then a democratic regime can gain the legitimacy and stability it requires. Furthermore, it is crucial that citizens understand that the overlapping consensus apply not to any and every political issue, nor to any and every social issue, but only to the most basic of political arrangements and underlying principles. “Political values alone are to settle such fundamental questions as: who has the right to vote, or what religions are to be tolerated, or who is to be assured fair equality of opportunity, or to hold property.”⁹ The requirements that citizens appeal only to the publicly shared principles – while prescind from any reference to nonshared, nonpolitical contents of their specific comprehensive doctrines – and apply those political principles only to fundamental matters of basic justice and constitutional essentials are then intended to ensure that citizens can treat one another as reasonable and moral consociates when settling their disagreements, even though they hold irreconcilable moral worldviews.

Public reason is, however, not merely a matter of content restrictions; it also has positive content requirements. Rawls understands the content of public reason to be comprised of both those substantive political principles shared in the overlapping consensus and commonly shared standards of evidence, inference, and justification. So, on the one hand, public reason contains substantive political principles: principles such as those guaranteeing individual liberty of conscience, rights to due process of law, equal voting rights, democratic structures of government, representative political processes, etc. On the other hand, public reason also contains generally accepted methods of inquiry and deliberation: “We are to appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial.”¹⁰ The proper use of public

⁹ *Ibid.*, p. 214.

¹⁰ *Ibid.*, p. 224.

reason, then, is the key to the legitimacy of democratic decisions, since it ensures that citizens can accept the moral soundness of the basic structures and principles of their government. We are to apply the substantive principles and methods of public reason, and public reason alone, when we are trying to decide on matters of basic justice and constitutional provisions concerning governmental institutions and individual rights. Citizens, candidates, legislators, officials, and – most significantly – judges have a “duty of civility” toward fellow citizens, who have diverse comprehensive doctrines, to employ only public reason’s freestanding principles and forms of reasoning when addressing matters of fundamental importance.

For my purposes, the most striking claim that Rawls makes with respect to the way decisive power is distributed through political processes is that a constitutional court, one entrusted with the power of judicial review, should not only employ public reason but also be, for a society, “the exemplar of public reason.”¹¹ He explicates this claim in terms of three theses. First, and most importantly, a supreme court is the exemplar of public reason insofar as it “is the only branch of government that is visibly on its face the creature of that [public] reason and of that reason alone.”¹² Unlike other branches of government that may consider ordinary political matters, and so may invoke particular comprehensive doctrines or defer to bare majority preference, a supreme court has “no other reason and no other values than the political” values comprising public reason.¹³ In other words, only a constitutional court consistently speaks and decides issues solely on the basis of the impartial language tailored to consociation across pluralistic diversity. Second, a supreme court is the exemplar of public reason insofar as it plays an educative role with respect to a society’s publicly shared reason. Since such courts should interpret a nation-state’s constitution and traditions in a way that justifies those as a whole, in the light of the publicly shared conception of justice, a court can show citizens the political values all can be expected to share and embrace. Third, a supreme court with the power of judicial review also educates the public by intervening decisively in constitutional controversies on the basis of shared political values, rather than on the basis of partisan struggles “for power and position.”¹⁴

¹¹ *Ibid.*, p. 231.

¹² *Ibid.*, p. 235.

¹³ *Ibid.*

¹⁴ *Ibid.*, p. 239.

What are we to make of these striking claims? To begin, it is important to note that Rawls merely stipulates that public reason is the reason of a supreme court, and that the supreme court can play an exemplary educative role with respect to the duties of civility. The closest he gets to an argument supporting such contentions is an invocation of Bruce Ackerman's dualist theory of US democracy, followed by a supposition that in such a dualist regime, "the political values of public reason provide the Court's basis for interpretation."¹⁵

Second, in Rawls's defense it must also be noted that there is no evidence empirical or otherwise adduced precisely because he is putting forward the exemplarity claim to clarify what he means by the concept of public reason. He is not attempting to make claims about institutional design, or even about the comparative capacities or separate roles of various governmental organs.¹⁶ In fact, he explicitly says that "while the Court is special in this respect, the other branches of government can certainly, if they would but do so, be forums of principle along with it in debating constitutional questions."¹⁷ The point of the discussion of supreme courts in the context of Rawls's overall political theory is simply to demonstrate what he means by public reason by pointing to what he takes to be its clearest example.

A third point is that if Rawls is wrong to point to constitutional court decisions as exemplifying the use of public reason – as I will suggest in Section III – then his subsidiary claims about the educative role of court decisions with respect to public reason will also fall. A supreme court could not educate ordinary citizens either about their duties of civility or about the contents and guidelines of public reason if its decisions are not solely or largely based in – and facially seen to be based in – that special argot of freestanding, public political morality. The fourth point is that if, however, Rawls is right, then we would have some strong *prima facie* reasons to accord courts a preferred place with respect to democratic deliberations, especially with respect to highly contested but fundamental issues of governmental structure, individual rights, and abstract constitutional provisions. We might then prefer a division of labor between expert deliberators trained to use the moral argot of public reason and populist aggregators who respond directly to the amoral imperatives of interest groups and their threats. For Rawls, then, the fact (if it is a fact)

¹⁵ *Ibid.*, p. 234.

¹⁶ For a political theorist, Rawls has surprisingly little to say about the design of governmental institutions.

¹⁷ *Ibid.*, p. 240.

that constitutional courts exemplify how to speak in the special language of democratic political consociation renders them exemplars of democratic discussion, rather than an antidemocratic anomaly.

2 *The Juridical Representation of the People's Moral Reason: Eisgruber*

Although Rawls does not attempt to use this apparent deliberative advantage of courts to justify judicial review as legitimate and recommended, Christopher Eisgruber does.¹⁸ However, unlike Rawls who focuses on the restricted and denuded language of public reason that supreme courts are supposed to specialize in, Eisgruber focuses on the institutional incentives that make courts preferred forums for deliberations concerning matters of fundamental political morality, especially in comparison with the branches of government that are more sensitive to popular and electoral pressures. Thus, both idealize courts as unique sites of principled deliberation, even though Rawls takes the language of judicial decisions to be crucial, while Eisgruber focuses on the unique institutional location of courts vis-à-vis electoral pressures.

Like others who follow the lines of Alexander Bickel's distinction between kinds of public forums,¹⁹ Eisgruber conceives of electorally insulated courts as the paradigmatic location for principled moral argument about public issues, since, on his account, governmental institutions sensitive to popular input are capable only of bargains and compromises on matters of mere policy. The first major premise in his justification of judicial review is the distinction between matters of principle and policy. Principles reflect our fundamental values, and they should trump our interests. As citizens, we are happy to let ordinary laws and governmental actions be the result of partisan processes that aggregate across our divergent interests and decide such issues of mere policy in a more or less majoritarian manner. We are happy, in Eisgruber's words, to let such decisions result from "an effort to pander to voters, campaign for higher office, engineer an interest-group deal, or honor a party platform."²⁰ However, we take some matters to reflect

¹⁸ Christopher L. Eisgruber, *Constitutional Self-Government* (Cambridge: Harvard University Press, 2001).

¹⁹ Bickel, *The Least Dangerous Branch*; Choper, *Judicial Review and the National Political Process*; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996).

²⁰ Eisgruber, *Constitutional Self-Government*, p. 4.

fundamental and nonnegotiable values, and we expect the decisions of a democratic government to respect this difference. As moral citizens, we should not allow such matters to be decided by crass partisan mechanisms. We want the decision, rather, to reflect our convictions about what is right, no matter what we as private subjects desire. As Bickel puts the point, such decisions should be the result of “a principle-defining process that stands aside from the marketplace of expediency.”²¹ On matters of principle, then, we insist on deliberative processes that can present, sift, and evaluate moral reasons, rather than mere aggregative processes that reflect the preponderance of private interests across the electorate.

If we then ask what governmental institutions could perform such sensitive moral deliberations while remaining true to the demands of principle even in the face of countervailing interests and pressures, a body disciplined by the use of reason and separated from the vicissitudes of majoritarian excitement recommends itself: a court at the apex of appellate jurisdiction, with members having life tenure and so insulated from electoral accountability, and finally entrusted with the power to decide the most fundamental issues of political principle for the nation-state. In other words, the Supreme Court of the United States. Eisgruber supports his second main premise – that such a supreme court is better suited than any other governmental organs to make principled decisions – through a comparative analysis of institutional incentives in the US constitutional scheme. In brief, since courts are insulated from electoral pressures, they are less sensitive to the base and transient desires of the populace and so more suited to rule on fundamental matters of principle.

The final major premise in Eisgruber’s brief for judicial review is the claim that, although the practice may be countermajoritarian, it is not antidemocratic. Unlike traditional defenses of judicial review, which celebrate it (especially as practiced in the United States) as a rights-protecting counterweight to majoritarian democracy,²² Eisgruber aims to show that judicial review is not only democratically legitimate, but also democracy-promoting. His most important argument here claims that democracy should not be understood in terms of majority rule or the general satisfaction of interests, as aggregative models suggest. He suggests, rather, that “sustained public argument about the meaning of

²¹ Bickel, *The Least Dangerous Branch*, p. 69.

²² Bickel, *The Least Dangerous Branch*; Choper, *Judicial Review and the National Political Process*.

equality and other ideals might plausibly be regarded as the essence of democracy.”²³ This deliberative model of democracy, then, shows how the Supreme Court is not antidemocratic. It is rather “a kind of *representative* institution well-shaped to *speak on behalf of the people* about questions of moral and political principle.”²⁴ Judicial review is one legitimate institution among others for democratic self-government, provided that we understand democracy along the lines of the legitimacy criterion stressed by political liberals and deliberative democrats alike: Fundamental decisions, at least, ought to be based on the best publicly articulated and publicly acceptable reasons available after debate and discussion. Supreme Court judges are uniquely positioned to be disinterested arbiters and representatives of “the people’s convictions about what is right.”²⁵ On these matters at least, according to Eisgruber, judges speak better for the people than any other governmental actors.

3 *The Public Reason Strategy Is Widely Shared*

The seductive idealizations of courts as uniquely public reasoners and of American-style constitutional courts as the preferred site in government for reasoned deliberation are widely shared across a number of otherwise quite divergent contemporary theories. Rawls’s thesis that constitutional juridical discourse exemplifies public moral-political discourse, rather than a mere fight for power and position, is of course quite similar to the views of Bickel and Ronald Dworkin that courts are uniquely suited to be the governmental “forum of principle” in contrast to other governmental organs, which are structured around reason-independent contests over policy fought out in the media of majoritarian preferences, power, and position.²⁶ Bickel and Dworkin in fact explicitly endorse the educative thesis, also shared by Rawls and Eisgruber: Namely, a supreme constitutional court’s moral-political discourse can educate the citizens in how to reason with one another on contested issues and so improve their deliberations.²⁷ Frank Michelman argues that the US Supreme Court

²³ Eisgruber, *Constitutional Self-Government*, p. 35.

²⁴ *Ibid.* (emphasis added).

²⁵ *Ibid.*, p. 5.

²⁶ Bickel, *The Least Dangerous Branch*, pp. 22–31; Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), pp. 71–79.

²⁷ Bickel, *The Least Dangerous Branch*, p. 26; Dworkin, *Freedom’s Law*, pp. 345–346. Jeremy Waldron expresses strong empirical reservations about this educative thesis in *Law and Disagreement* (New York: Oxford University Press, 1999), pp. 289–291.

has a special responsibility for communicating with citizens in a moral-political discourse – for being open to the full blast of sundry reasons, interests, and opinions of the citizenry – when it settles matters of fundamental constitutional interpretation.²⁸

By far the greatest resonance is found, however, in Eisgruber's thesis of juridical discourse as serving a representative function. The basic idea here, endorsed under many variations, is that when the Supreme Court exercises its power of constitutional review by using public reason, it is representing the highest and truest principles of the American people against whatever other unsavory and partial interests may have been responsible for the discredited statute or regulation. In this story, juridical discourse represents – speaks for – the true people and their deepest interests, and speaks against those who, despite their apparent heightened accountability to the people, would falsely claim to speak in the people's name. Such theories have a provenance at least as far back as Alexander Hamilton's claim in *Federalist Paper*, No. 78 that judicial review of legislation merely represents the higher will of the people, the will enshrined in the constitution, against the necessarily subordinate will of the legislature.²⁹

In contemporary jurisprudence there is a veritable efflorescence of such theories, all aiming to reduce the manifest tensions between the normative ideal of democratic constitutional legislation and the institutions and practices of American-style judicial review. What is remarkable in this literature is how prevalent the general strategy clearly articulated by Eisgruber is: namely, to conceive of constitutional juridical discourse, in some way and with respect to some types of issues, as more representative of the deep, true, or important will and interests of the people than the discourses employed in other branches that are directly accountable to citizens. By such a conception, then, the Supreme Court of the United States, or its close relatives in other nations, is transformed from an antidemocratic anomaly into a, if not the, democratic paragon. Thus Bruce Ackerman, distinguishing between ordinary times when citizens are apathetic, ignorant, and selfish and extraordinary times when the We the People collectively take up our democratic constitution-making powers, argues that the Supreme Court represents and protects the authentic will of the people by using their special reasoning powers of

²⁸ Frank I. Michelman, *Brennan and Democracy* (Princeton: Princeton University Press, 1999).

²⁹ Alexander Hamilton, James Madison, and John Jay, *The Federalist with Letters of "Brutus"* (New York: Cambridge University Press, 2003), p. 380.

interpretation during those times when *We the People* is asleep.³⁰ Dworkin argues that the court speaks for the people considered as a collective self-governing association by attending to the principled democratic conditions necessary for legitimate political association.³¹ Samuel Freeman makes the public reason analogy clear, arguing that since the court issues decisions backed by reasoned opinions, it exemplifies the public use of reason. Hence, judicial review represents the people's sovereign precommitment to maintaining the equal value of rights that they would have expressed in a foundational, legitimacy-conferring social contract.³²

This list could easily be extended.³³ In each case, one central premise of these representational arguments is that, in some manner, an institution like the Supreme Court of the United States is uniquely qualified to represent the people's principles because of its specially heightened capacities for reasoned deliberation about fundamental moral-political matters. And, whether implicit or explicit, it appears that a central motivation for such a belief in the judiciary's heightened capacities is judicial work product: Judicial decisions are usually accompanied by reasoned opinions explicitly put forward as supporting the decisions. But, as I will now argue, equating the reasons used by judges with the disanalogous moral-political reasoning required by democratic deliberation is to be taken in by a seductive disanalogy.

III The Disanalogy: The Supreme Court of the United States Is Not a Public Reasoner

Whether we are talking of Rawls's claim that a constitutional court exemplifies the use of public reason, or Eisgruber's claim that it speaks for the people's public reason, or the manifold of other similar exemplificative, educative, representative, and communicative claims – all rest on an analogy between the reasons that judges use and public reason. Said another way, all presuppose that judicial discourse is a language well suited to the task of democratic deliberation on fundamental matters.

³⁰ Bruce Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991), pp. 165–265.

³¹ Dworkin, *Freedom's Law*, pp. 1–38.

³² Samuel Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review", *Law and Philosophy*, 9 (1990–1991), 327–370.

³³ Space prohibits a discussion of further examples in the work of Alon Harel, Christina Lafont, Michael Perry, Jeb Rubinfeld, and Lawrence Sager.

However, what is most striking when one actually reads the constitution-interpreting opinions of the US Supreme Court is that, in the main, they are neither couched in the special argot of public reason nor concentrated around the principled moral-political reasoning these theories idealize. The court's actual constitutional reasoning is, rather, dominated by the *technicalia* of legal argument: jurisdiction, precedent, consistency, authorization, distinguishability, separation of doctrine from dicta, justiciability, canons of construction, and so on. Even if they obey the content restrictions of public reason by prescinding from reference to comprehensive doctrines, they do not obey public reason's content requirements of employing the substantive moral-political principles of the overlapping consensus. Elsewhere I have considered at length a series of US constitutional cases in four different areas – religious liberty, criminal punishment, individual liberty, and electoral districting – in order to show how the actual judicial reasons adduced in support of the decisions are dominated neither by the substantive content of America's public reason nor even more generally by sustained arguments of moral-political principle, but rather by strictly juristic considerations.³⁴ Here I simply review those key findings in summary form, with brief reference to a few more recent examples.

Consider first a question the Supreme Court of the United States agreed to decide during its 2004 term: Is a law directing the daily recitation in elementary school of the Pledge of Allegiance, which contains the words “one Nation under God” a problematic violation of the separation of church and state? Although of course the case was argued in terms of the anchoring legal text – here the clause of the First Amendment to the US Constitution barring “an establishment of religion” – it is easy to translate the presenting question into Rawlsian terms; here the question of whether the recitation of the Pledge impermissibly oversteps the requirements of state neutrality vis-à-vis specific comprehensive doctrines. Did the court exemplify public reason in its decision and opinion; did it represent the fundamental principles of the people? I think the actual work product of the court is sure to disappoint adherents of the public reason strategy: “We conclude that, having been deprived under California law of the right to sue as next friend, Newdow [the respondent father who brought the original suit] lacks prudential standing to bring this suit in federal court.”³⁵ Thus rather than deciding broad

³⁴ Zurn, *Deliberative Democracy*, pp. 187–206.

³⁵ *Elk Grove Unified School District et al. v. Newdow et al.*, 542 U.S. 1 (2004), pp. 17–18.

questions about the meaning and import of the principle of separation of church and state as effected through the US Constitution's First Amendment, or even deciding narrower questions of whether this specific California law establishing the daily school recitation of the Pledge violates the clauses, the court invoked a specifically legal principle to simply avoid such questions. Said in public reason terms, after agreeing to carry out its democratic tasks of exemplifying and representing the people's moral-political reason, the court switched to its preferred legalistic language and found a way of shirking its exemplary duties of civility. A decision that turns on accidents of the standing of one of the parties simply cannot be said to employ, and crucially result from, reasoning based in fundamental moral-political principles in the way envisioned by the public reason strategy.

Consider next a question of criminal law that the 2003 case of *Lockyer v. Andrade* raises: Is a prison sentence of two consecutive twenty-five years-to-life terms an appropriate punishment for the petty theft of approximately \$150 worth of videotapes, where that theft resulted in a third lifetime felony conviction?³⁶ The case raises fundamental moral-political questions about the purpose and limits of just punishment. Put in the terms of the US Constitution, and as rendered to the court by the defendant, the question is whether Andrade's punishment violated the Eighth Amendment's prohibition against inflicting "cruel and unusual punishments." To the best of my nonlawyerly abilities to figure it out, here is how the Supreme Court addressed the question. According to Justice Sandra Day O'Connor, the Ninth Circuit Court erred in ruling that the sentence violated the Eighth Amendment, because (1) the Ninth Circuit did not have jurisdiction to grant habeas corpus relief to Andrade, since (2) it did so on the theory that a Supreme Court doctrine of "gross disproportionality" announced in *Solem v. Helm* (1983)³⁷ was "clearly established law" under the terms of an unrelated federal statute (the Antiterrorism and Effective Death Penalty Act of 1996) and (3) had thus been objectively misapplied by the California Court of Appeals. However, (4) since thickets of precedential "cases exhibit a lack of clarity

³⁶ *Lockyer v. Andrade*, 538 U.S. 63 (2003). Defendant Andrade's effective punishment of lifetime imprisonment resulted from California's mandatory sentencing law, passed by popular referendum and intended to reduce the sentencing discretion of judges. After a so-called third strike felony conviction, there is a mandatory sentence of at least twenty-five years and up to life imprisonment. Similar mandatory sentencing laws were passed in many US jurisdictions during the 1990s.

³⁷ *Solem v. Helm*, 463 U.S. 277 (1983).

regarding what factors may indicate gross disproportionality,”³⁸ the principle is fuzzy and so “applicable only in the ‘exceedingly rare’ and ‘extreme’ case”³⁹ (5) the California Court of Appeals could not have made a clear error with respect to Supreme Court precedent as clearly established law for, (6) on the one hand, there was no precedential clarity and, (7) on the other, in citing precedent, the California Court of Appeals did not violate the rule of law by “confron[ting] a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arriv[ing] at a result different from [Supreme Court] precedent.”⁴⁰ Finally, (8) the Ninth Circuit erred by incorrectly defining the controlling habeas relief standard of “objectively unreasonable” to mean “clear error.”⁴¹

One way of interpreting this kind of a decision is as an impressive employment of common law jurisprudential techniques in order to precisely avoid the substantive merits of the basic moral issue: Is California’s three-strikes law unjust? A different interpretation points out that, as the apex of the federal appellate judiciary, and as the supreme constitutional court in the land, as well as being responsible for the elaboration of judicial doctrine relevant to the application of federal legal provisions (including those of the US Constitution), the Supreme Court must ensure that reasons relevant to the specific character of the American legal system – most particularly, those reasons relevant to a common law system of constitutional interpretation carried out by courts – are the decisive reasons in its decisions. But on neither interpretation is the opinion in *Lockyer* anything remotely akin to what our public reason theories would lead us to expect. It is distinctly not an exemplar of public reason; nor is it a representative of the people’s fundamental moral-political principles; nor can ordinary people understand it, let alone understand it as an exemplar or representative of the public reason they share in common with fellow citizens. It is, I would nevertheless submit, representative of the majority of the work product of the Supreme Court, and even more so that of appellate courts underneath it.

Consider a long series of cases over forty years concerning how to secure the electoral equality of all citizens, from the redistricting revolution inaugurated in 1962 by *Baker v. Carr*⁴² to the 2004 term’s *Vieth*

³⁸ *Lockyer*, p. 72.

³⁹ *Lockyer*, p. 73.

⁴⁰ *Lockyer*, p. 73.

⁴¹ *Lockyer*, p. 75.

⁴² *Baker v. Carr*, 369 U.S. 186 (1962).

v. *Jubelirer*.⁴³ Here we witness again the general predominance of legal principles over moral-political principles – even though voting equality must surely be considered as a central matter of our public reason applied to constitutional essentials. Rather than manifest discussions about how the principle of political equality applies to questions about the relative voting power of citizens across electoral districts with significantly different sizes, the court has focused on insulated and institutionally specific concerns with standing, jurisdiction, and, above all, justiciability, hence the overwhelming emphasis on apparently strictly juridical concerns: whether various proposed voting districts and questions about gerrymandering send the court into a “political thicket,” as Justice Felix Frankfurter asserted in 1946 in *Colegrove v. Green*,⁴⁴ if redistricting in general raises unfortunately “nonjusticiable political questions,” if court decisions would require judicially indiscernible and unmanageable standards, and so on. In fact, Justice William Brennan’s opinion in *Baker*, the case inaugurating the redistricting revolution, did not even go to the merits of the claim concerning the vast disproportionality of the Tennessee electoral districts, content rather to dwell on legalistic questions of jurisdiction, standing, and justiciability. There is no surprise here, since in order to intervene the court had to overcome two obstacles given its common law methods. First, the extant doctrine of “nonjusticiable political questions” announced and followed since the 1849 Supreme Court case of *Luther v. Borden*⁴⁵ had to be clarified and brought up to date to see whether it applied to state legislative districting. Second, any intervention had to overcome the directly contrary 1946 precedent in *Colegrove*, holding that courts should not wade into such a “political thicket.” This was achieved in *Baker* by claiming that what had been previously taken to be *Colegrove*’s doctrine was actually mere *obiter dicta*. Justice Potter Stewart’s concurring opinion in *Baker* simply underlines the claim that the court’s holding concerned only issues of jurisdiction, standing, and justiciability. The long line of redistricting cases cannot fairly be read, I submit, as exemplifying the use of public reason and fundamental political principles, but rather as grounded in well-developed juridical principles appropriate to the Supreme Court’s role in an appellate court hierarchy.

⁴³ *Vieth et al. v. Jubelirer*, 541 U.S. 267 (2004).

⁴⁴ *Colegrove v. Green*, 328 U.S. 549 (1946).

⁴⁵ *Luther v. Borden*, 48 U.S. 1 (1849).

It is important to stress here that the claim is not categorical. I am not arguing here that the Supreme Court, in exercising its power of judicial review, always avoids speaking directly to the substance of significant moral controversies. Indeed, on the same day that it announced the decision in *Lockyer*, the court also published a decision in another California three-strikes punishment case, *Ewing v. California*⁴⁶ that did indeed grapple directly with basic moral-political principles governing the justice of criminal punishment. Yet, even with *Ewing* defenders of public reason cannot take much comfort, since the decision was not supported even by a majority opinion, but rather by three different opinions that each expressed different and incompatible moral-political principles – hardly a shining example for the ideal of an overlapping consensus on constitutional fundamentals. No more do I wish to claim that such court interventions never have the beneficial educative and deliberative effects on wide public debates claimed. The opposite is indeed sometimes the case. Consider the 1997 cases *Washington v. Glucksberg*⁴⁷ and *Vacco v. Quill*,⁴⁸ where the court refused to ban state laws outlawing physician-assisted suicide. Chief Justice William Rehnquist’s opinions in the cases, especially in *Vacco*, directly engaged in serious and difficult considerations of the substantive merits of the briefs presented by those both opposed to and in support of such state laws. And the other justices in their various concurrences in the unanimous decision, further considered the twists and turns of diverse considerations, most of which are focused largely on the difficult moral issues involved, rather than strictly legal considerations. They were supported in this by a remarkable paragon of public use of public reason in Rawls’s sense: an amicus brief filed by seven of the most famous English-language moral philosophers – including Rawls himself – that was subsequently also published as “Assisted Suicide: The Philosophers’ Brief.”⁴⁹ Thus the judicial decisions, in concert with “The Philosophers’ Brief,” were in this case clearly resting on principled moral arguments couched in a public reason standing free of comprehensive doctrines, and hence accessible and acceptable to many US citizens. Without exhaustive analysis of a full data set, I cannot say exactly how representative such lines of cases are.

⁴⁶ *Ewing v. California*, 583 U.S. 11 (2003).

⁴⁷ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁴⁸ *Vacco v. Quill*, 521 U.S. 793 (1997).

⁴⁹ Ronald Dworkin, et al., “Assisted Suicide: The Philosophers’ Brief,” *New York Review of Books*, 44 5 (1997), 41–47.

My sense is, however, that they are quite a bit more the exception rather than the rule.

The same patterns have continued over the last decade. For every counterexample case to my thesis where public reason appears to play a leading role – for example, 2015’s *Obergefell v. Hodges*⁵⁰ concerning gay marriage – there are many more prominent cases of constitutional review decided on the basis of juristic reasons – for example, 2013’s *Shelby County v. Holder*⁵¹ concerning electoral procedures. On a fair reading, it is hard to dispute that the reasoning in *Obergefell* – the case holding that the right of marriage may not be denied to same-sex couples – was based in the content of American public reason and could be understood by fellow citizens with fundamental disagreements as such. Not only were matters of fundamental liberty and equality facially involved and relatively clearly discussed as such in majority opinion, but there was also a substantive colloquy between the controlling and dissenting opinions over the democratic credentials of and correct limitations of judicial review itself.

But this is not, I would suggest, characteristic of the main work product of the court, even in the 10–15 percent of constitutional review cases it decides each term. The great majority of landmark constitutional cases are rather decided on the basis of juristic concerns and are presented in a legalistic language. Thus the hotly disputed 2010 decision of *Citizens United v. Federal Elections Commission*⁵² – the case that overturned legislation limiting contributions from corporations and unions to political candidates’ campaigns – was not based on moral-political reasons concerning the entailments of notions of fundamental political fairness, acceptable wealth inequalities, and basic liberties of free expression. The work of the majority opinion – and of the concurring and dissenting opinions – was almost entirely focused on battling over the correct holding of past precedents, the putative rationales of those precedents, whether they should have *stare decisis* effects, the proper application of the judicial doctrine of “strict scrutiny,” meta-judicial doctrines of “judicial restraint” and deference to the legislature, whether the court manipulated its rules of presentation to reach a broader holding than warranted by the incident case, and so on. Remarkably, the decision was falsely but widely understood by the actual public as turning on an

⁵⁰ *Obergefell v. Hodges*, 576 U.S. ____ (2015).

⁵¹ *Shelby County v. Holder*, 570 U.S. 529 (2013).

⁵² *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010).

entirely novel judicial doctrine that corporations could be understood as legal persons. For legal elites, of course, a broad concept of legal personhood is distinctly venerable, not novel. So much for the claims that the reasoning of the court is an exemplar of public reason and that it should be seen as an exemplar of public reason.

One might object that I have presented a one-sided picture of the US Supreme Court's work product and, further, have cherry-picked cases in support of that picture. Indeed I have not presented a dispositive, complete analysis here of the entire constitution-interpreting work product of that body, nor do I have a database of all the relevant cases coded for statistical analysis. But I have indicated the disanalogies between juridical and public reason in a large and diverse set of high-profile cases. Even if we can find analogies in a few cases, it seems a few exceptions prove the rule. At the end of the day, my appeal is to the reader, and especially to a fair and unblinkered reading of the actual opinions and the specific character of the controlling reasons therein – I think one will fairly find there the dominance of juridical over philosophical reasons.

IV Institutional Determinants of Legalism in US Juridical Discourse

The upshot is that we should be wary of the seductions of the public reason strategy for ameliorating the tension between democracy and judicial review. Indeed, the strategy is correct to point to the Supreme Court as an exemplar of the use of (particular kinds of) reasons in making its decisions. Further, it is correct to point out that the court is rather scrupulous about obeying the content restrictions of public reason concerning comprehensive doctrines: It does not refer in its justifications to our God-given rights, nor to expectations about salvation, nor to the superiority of specific forms of the good life over others, nor to the greatest happiness principle, etc. Furthermore, it often obeys public reason's content restrictions to only matters of constitutional essentials, not devolving into policy development (though *Shelby County* shows that this restriction is not always scrupulously obeyed by the court). But, I believe, a balanced assessment of the court's actual work product shows that the decisive reasons employed do not conform to the content requirements of public reason. In the main, they do not refer to, nor decisively rely upon, the substantive content of those fundamental moral-political principles in our overlapping consensus that define and shape just terms of consociation. Almost all the case examples show that the

language of reasons employed by judges is rather a specifically juristic language. Supreme Court judges are rightly engrossed with the *technicalia* of the rule of law, not with arguments about fundamental moral and political principles. By the same token, juristic discourse is not well tailored to the kind of widely dispersed democratic deliberation and debate about the proper terms of mutual consociation that self-governing citizens can and ought to engage in as mutual citizens.

It is no accident of history or practice that there is this disanalogy between the reasons Supreme Court judges employ and the reasons public reason theorists suppose as underwriting the democratic legitimacy of judicial review. For juristic discourse, at least in the United States, is a language of reasons tailored to maintaining the rule of law within a complex court system with constitutional review performed throughout the regular appellate court hierarchy. It is worth considering briefly the specific legal and institutional determinants of the predominance of legalistic reasoning in US constitutional adjudication. I have in mind here three features that constrain juridical reasoning and prevent it from exemplifying, representing, or communicating in the language of public reason: (1) judicial review in the United States is only effected through particular cases, (2) by a court that is simultaneously a constitutional court, at the apex of the national appellate system, and with significant authority within a complicated federalist division of political and judicial authority, and (3) it is carried out through common law methods of adjudication.

First, the “cases and controversies” requirement not only has deleterious consequences for moral epistemology: no ability to initiate principled interventions, limited information about all affected, and solution sets constrained by the need to resolve the incident case. The restriction to concrete review also explains the court’s predominant focus on legal principles concerning issues such as standing, jurisdiction, ripeness, mootness, legal remediability, etc. Second, because the Supreme Court must wear many institutional hats at once, it needs juristic principles governing its authority and jurisdiction in order to rationally manage the employment of such diverse powers. The development and employment of complex doctrinal law about the use of judicial power – concerning, for instance, the scope and limits of “state sovereignty” vis-à-vis the federal government, managing disagreements between federal appellate courts, and regulating judicial oversight of the other branches of the federal government – unsurprisingly often assume more importance in case decisions than substantive moral-political considerations, even

when those cases facially raise such issues of fundamental justice. Third, the Supreme Court's preoccupation with specifically juridical issues – such as the weight and content of precedents, the incidence of the principle of *stare decisis* in different kinds of cases (e.g., in statutory vs. constitutional interpretation), distinguishability, the standing and content of judicial doctrines, methods for distinguishing between mere dicta and holdings that add to precedent and shape doctrine, interpretive canons of construction, and so on – are basic features of common law methods of adjudication. While such specifically juridical concerns may be considered as essentially supportive of the core values of the rule of law, it must be acknowledged that common law methods significantly impede the abilities of the justices to act either as exemplars of public reasoning about fundamental principle or as impartial representatives employing the people's principles.

There may well be other legal and institutional determinants of the predominance of the use of legalistic over moral-political reasoning in the Supreme Court's judicial review cases. All I have sought to do here is point out three general features of the court's actual institutional location and adjudicative practices that, I think, go a fair way toward explaining why we should generally expect to find significant disanalogies between actual Supreme Court discourse and public reason.

V Beyond America: Could International Courts Be Public Reasoners?

This then raises the question of whether the public reason analogy strategy might be more convincing in alternative systems of judicial review. Could a Kelsen-style constitutional court,⁵³ widely adopted in European constitutional democracies – namely, a court tasked with direct “abstract review” of ordinary law independent of a concrete case, one specialized only in constitutional review and without other significant appellate duties, and perhaps even adjudicating without the legalistic requirements of common law jurisprudence – better exemplify public reason and become the vaunted representatives of the people's fundamental principles of public reason? Or might we be better off with a system of constitutional legislation and elaboration that more directly involves democratic citizens themselves and their accountable agents in

⁵³ Hans Kelsen, “Judicial Review of Legislation. A Comparative Study of the Austrian and the American Constitution,” *Journal of Politics*, 4 2 (1942), 183–200.

public reasoning processes specially designed for updating constitutional codes?⁵⁴

However, rather than pursuing further the problems of institutional design within established nation-states, I would like to turn briefly to the question of whether the considerations of this chapter have any bearing on international courts. Notably, the public reason strategy has picked up some scholarly momentum recently in the context of understanding courts above the level of the nation-state.⁵⁵ In a sense, this is not surprising, since such courts are under perhaps even more stringent legitimation demands than national constitutional courts. While they are not clearly the institutional creations of democratically legitimated constitutions – it is difficult to even speak of such constitutions above the level of the nation-state, where the closest we have are intergovernmental treaties between nations – they have nevertheless assumed perhaps even greater powers for constitutional authorship than national constitutional courts, perhaps even authoring the very “constitutional orders” they are supposed to derive their authority from.⁵⁶ With no clear democratic constitutional legislators at the transnational and international levels, but with insistent pressures for legal structures within which to carry out conflict resolution and regulation, courts above the nation-state have simultaneously become active developers of law and foci of concern about their very authority to take on such development.⁵⁷ While at the nation-state level of liberal democracies, constitutions have traditionally specified both democratic political institutions and individual liberty rights, at the international level there is comparatively little treaty language structuring democracy but a plethora of treaties spelling out human rights. Hence the liberal elements of liberal democracy have

⁵⁴ Zurn, *Deliberative Democracy and the Institutions of Judicial Review*, pp. 253–341.

⁵⁵ E.g., Ernst-Ulrich Petersmann, “From State-Centered towards Constitutional ‘Public Reason’ in Modern International Economic Law,” in Giorgio Bongiovanni, Giovanni Sartor, and Chiara Valentini (eds.), *Reasonableness and Law* (New York: Springer Publishing Co., 2009), pp. 421–458; Wojciech Sadurski, “Supranational Public Reason: On Legitimacy of Supranational Norm-Producing Authorities,” *Global Constitutionalism*, 4 3 (2015), 396–427.

⁵⁶ See, e.g., some of the striking formulations concerning the self-legitimation of courts in the context of transnational constitutionalism in Chris Thornhill, “Contemporary Constitutionalism and the Dialectic of Constituent Power,” *Global Constitutionalism*, 1 3 (2012), 369–404.

⁵⁷ Armin von Bogdandy, Matthias Goldmann, and Ingo Venzke, “From Public International to International Public Law: Translating World Public Opinion into International Public Authority,” *The European Journal of International Law*, 28 1 (2017) pp. 115–145.

become much more prominent than the democratic elements above the level of the nation-state: Compare the successes of the human rights movement to the failures of transnational democracy.

Perhaps, then, it is no accident that intriguing recent scholarship applying the public reason strategy to international courts has basically given up on the attempt to understand public reason as a specifically democratic legitimating device for such courts. Consider, for example, Wojciech Sadurski's 2015 claims: "In the world of plural sites of constitutionalism we need to be careful not to insist on democratic conditions of legitimacy everywhere."⁵⁸ And, "the legitimacy of supranational authorities is often grounded on the *type of arguments* provided by supranational entities, and in particular, their appeal to public reason – a legitimacy-conferring device well suited to supranational authorities."⁵⁹ Here the public reason strategy is centrally identified with courts as protectors of individual rights and positive legislators of human rights law: Courts give reasons for their decisions, and if these reasons are based in public reason, rather than power politics or sectarian ideologies, then courts give reasons that all ought to be able to accept. The public reason strategy need take no detour through the ostensibly democratic notions of exemplifying or representing the people's reason. Public reason legitimates supranational courts on its own, because the reasons such courts provide are "reasonably acceptable to all."⁶⁰

By way of ending this chapter on a note for future research, let me suggest a comparative strategy for research that may shed light on judicial discourse and its institutional determinants.⁶¹ Specifically, the idea would be to use the institutional differences between three ideal-typical high court systems – US Supreme Court-style systems, Kelsenian constitutional courts, and international courts – to probe the degree to which we can detect, in the actual work product of the different courts, those disanalogies between public reason and judicial reason that this paper has argued exist. Furthermore, does that content analysis of court discourse vindicate or vitiate the three hypothesized institutional determinants?

On the first register, all three systems are courts, and courts decide cases rather than initiate constitutional legislation. Does that mean that the language employed in all three systems will exhibit some of the same

⁵⁸ Sadurski, "Supranational Public Reason," 403.

⁵⁹ *Ibid.*, 425 (emphasis in original).

⁶⁰ *Ibid.*, 406.

⁶¹ I thank to an anonymous reviewer for very helpful suggestions toward reworking this section.

disadvantages as the US system with its case and controversy restrictions and its attendant juridical focus on issues of standing, presentment, and court authority? Or might powers for abstract review of ordinary law on the part of both Kelsenian courts and some international tribunals mitigate some of the predominance of juristic reason over public reason? Or further, might the newly felt freedom of some international courts to issue advisory opinions push them to act more like constitutional legislators responding to controversies arising in the broader public spheres and employing *de novo* moral-political reasoning about constitutional essentials, rather than maintaining the traditionally reserved, reactive, and specialized language of jurists? And are there significant differences between the epistemic capacities of the three ideal court systems, especially concerning the limitations detected in the US system: waiting for suitable case vehicles and legal entrepreneurs to act,⁶² limited and distorted information with respect to all affected parties, or solution sets limited by settling the incident disputes?

Second, in what ways analogous to the US Supreme Court might Kelsenian and supranational courts need to positively develop and scrupulously attend to specifically juridical doctrine concerned with managing their own authority relations to other national and international authorities, agencies, and courts? While Kelsenian courts are not, and supranational courts need not be, at the apex of a diffuse system of judicial review, they will nevertheless be quite intertwined with other courts and authorities. To what extent do we see the development of complex and technical doctrines about the relative scope and limits of judicial power, and about the relevant competences of the other involved agencies? Do considerations about, say, the so-called competence competence, direct and indirect effects, and the margin of appreciation predominate over first-order substantive moral-political reasoning in the argot required by public reason?

The third research area would consider whether we find differences in the incidence of actual public reason reasoning between courts employing common law and civil law techniques. For across all three ideal types of courts, we should expect jurists to devote quite a bit of their actual reasoning to matters concerned with correctly identifying and applying binding law. To be sure, there are significant disanalogies between the

⁶² See Karen Alter's interesting work on the politics of international litigation, especially her focus on human rights activists and norm entrepreneurs, in Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press, 2014).

common law methods used in the United States and the various judicial methods adopted by Kelsenian courts and various supranational tribunals. I would hypothesize that, since the problems they all face are sufficiently similar at a general level, we would find a heavy preponderance of precedential reasoning over that based in the normative substance of fundamental principles. Turning only to international courts, it is true that there is no official doctrine of *stare decisis* in international law. Yet courts still take precedents into consideration in a serious way and have been developing a series of juristic techniques to regularize this.⁶³ And supranational tribunals face straightforwardly the same central problems of identifying and interpreting binding legal texts – from treaties to regulations – that domestic courts do. The problems of managing fidelity to binding legal texts are perhaps even more complicated concerning international and transnational law, and so courts will need to develop legalistic methods of addressing those. For instance, the general problem of adjudicating conflicts between apparently relevant and binding but nevertheless conflicting legal standards has given rise to the increasing use and standardization of techniques like proportionality analysis across jurisdictions and courts. Further, the absence of a clear global constitutional text, combined with the desire to give *erga omnes* effect to various human rights norms, has in turn given rise to the legal complexities of identifying, specifying, and delimiting *jus cogens* norms. This last problem looks sufficiently analogous to the domestic problem of identifying the overlapping consensus that theory tells us forms the basis of public reason. But it is not clear that juristic techniques for such identification are really the kind of first-order substantive normative reasoning that deliberative democrats and public reason liberals idealize as the core of the public use of reason. Research would need to attend, as in the domestic context, to the actual work product of the three types of courts to confirm or refute such hypotheses.

These three areas – case-based reasoning, managing authority relations, and common law versus civil law techniques – are worth further research across the differential data set provided by the three different types of courts to determine whether they do or do not serve as institutional determinants of the disanalogies between judicial and public reason. This is particularly so for those concerned with employing the public reason strategy to legitimize supranational courts. For that

⁶³ Gilbert Guillaume, “The Use of Precedent by International Judges and Arbitrators,” *Journal of International Dispute Settlement*, 2 1 (2011), 5–23.

strategy invites us to analogize judicial reasoning with reasoning about constitutional essentials based in the substantive principles of public reason, and to thereby accept the legitimacy of constitutional court legislation as based in considerations that are either the reasons of the demos or that all could not reasonably reject. I have claimed that, no matter how seductive such a strategy may be in principle – focusing on the need to rule through reasons, on the evident use of reasons in the exercise of judicial power, and with the desire to save the legitimacy of courts from charges of usurpation or paternalistic guardianship – the strategy needs to be held to account empirically, in the light of the actual work product of judges. My argument in this chapter has been that when we do so investigate the work product of the Supreme Court of the United States, we can see that the analogy to public reason is, however seductive, largely (but not always) false. The research strategy proposed in this closing section is devoted to discovering whether we find, when investigating the work product of Kelsenian and international courts, that the public reason strategy applied there is also based on similarly seductive but false analogies.

PUBLIC REASON AND
COURTS

Edited by

SILJE A. LANGVATN

University of Oslo and University of Bergen

MATTIAS KUMM

New York University and WZB Berlin Social Science Center

WOJCIECH SADURSKI

University of Sydney and University of Warsaw



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press

978-1-108-48735-1 — Public Reason and Courts

Edited by Silje Langvatn, Mattias Kumm, Wojciech Sadurski

[More Information](#)CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.orgInformation on this title: www.cambridge.org/9781108487351

DOI: 10.1017/9781108766579

© Cambridge University Press 2020

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2020

*A catalogue record for this publication is available from the British Library.**Library of Congress Cataloging-in-Publication Data*

Names: Langvatn, Silje Aambø, 1976– editor. | Kumm, Mattias, editor. | Sadurski, Wojciech, 1950– editor.

Title: Public reason and courts / edited by Silje Langvatn, University of Oslo; Mattias Kumm, New York University; Wojciech Sadurski, University of Sydney.

Description: Cambridge, United Kingdom ; New York, NY, USA : Cambridge University Press, 2020. | Series: Studies on international courts and tribunals | "This book has been made possible with the generous contribution from PluriCourts-Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order, at the University of Oslo, who financed the international workshop Courts and Public Reason in Global Public Law July 2016, and the WZB Berlin Social Science Center who provided the facilities and administrative assistance. Several of the chapters in this volume were presented in early versions at this workshop, while others have been commissioned later." – ECIP Acknowledgements. | Includes bibliographical references and index.

Identifiers: LCCN 2019051929 (print) | LCCN 2019051930 (ebook) | ISBN 9781108487351 (hardback) | ISBN 9781108766579 (ebook)

Subjects: LCSH: Political questions and judicial power. | Judicial process. | Public policy (Law) | Rawls, John, 1921–2002 – Influence.

Classification: LCC K3367 .P83 2020 (print) | LCC K3367 (ebook) | DDC 340/.11–dc23
LC record available at <https://lcn.loc.gov/2019051929>LC ebook record available at <https://lcn.loc.gov/2019051930>

ISBN 978-1-108-48735-1 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Silje A. Langvatn, University of Oslo and University of Bergen

CONTENTS

- List of Contributors* page vii
Preface xi
Acknowledgments xxvii
- 1 Taking Public Reason to Court: Understanding
References to Public Reason in Discussions about Courts
and Adjudication** 1
- SILJE A. LANGVATN
- PART I PUBLIC REASON IN CONSTITUTIONAL
COURTS 43
- 2 Must Laws Be Motivated by Public Reason?** 45
- MICAH SCHWARTZMAN
- 3 The Importance of Constitutional Public Reason** 66
- RONALD C. DEN OTTER
- 4 The Question of Constitutional Fidelity: Rawls on the
Reason of Constitutional Courts** 90
- FRANK I. MICHELMAN
- 5 The Challenges of Islamic Law Adjudication in Public
Reason** 115
- MOHAMMAD H. FADEL
- 6 “We Hold These Truths to Be Self-Evident”:
Constitutionalism, Public Reason, and Legitimate
Authority** 143
- MATTIAS KUMM

- 7 A Kantian System of Constitutional Justice: Rights, Trusteeship, Balancing 164**
ALEC STONE SWEET AND ERIC PALMER
- 8 Laws, Norms, and Public Justification: The Limits of Law as an Instrument of Reform 201**
JACOB BARRETT AND GERALD F. GAUS
- PART II PUBLIC REASON IN INTERNATIONAL COURTS AND TRIBUNALS 229
- 9 European Court of Human Rights in Pursuit of Public Reason? A Study of Lost Opportunities 231**
WOJCIECH SADURSKI
- 10 The Right to Justification in the Context of Proportionality: A Plea for Determinacy and Stability 256**
ALAIN ZYSSET
- 11 “Going Public”: Reasoning and Justification at the World Trade Court 281**
SIVAN SHLOMO AGON
- PART III CRITICAL PERSPECTIVE ON PUBLIC REASON IN COURTS 321
- 12 Constitutional Interpretation and Public Reason: Seductive Disanalogies 323**
CHRISTOPHER F. ZURN
- Index* 350