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Political Liberalism and the Radical Consequences of Justice Pluralism

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Political liberalism's central commitments to recognizing reasonable pluralism and institutionalizing a substantive conception of justice are inconsistent. If reasonable pluralism applies to conceptions of justice as deeply as it applies to conceptions of the good, then some reasonable people will reject even many liberal conceptions of justice as unreasonable. If so, then imposing these conceptions of justice on citizens violates the liberal principle of legitimacy and related public justification requirements (Rawls 2005, xliv).[1] Political liberal justice is thereby pitted against reasonable pluralism about conceptions of justice or *justice pluralism*. I argue that the inconsistency must be resolved in favor of justice pluralism; political liberals must abandon their commitment to institutionalizing a substantive conception of justice.[2] My argument is not that political liberalism is false, but that it must change, and that the change will prove significant.

Many political liberals have attempted to contain the threat of justice pluralism. Most prominently, Jonathan Quong (2011, 193) has defended the "asymmetric" treatment political liberals give to pluralism about the good and justice pluralism.[3] I argue that Quong's reply to the asymmetry objection is unsuccessful because it faces a dilemma: it either depends on the false claim that the liberal principle of legitimacy is not violated when a law that is subject to what Quong calls a "justificatory disagreement" is coercively imposed upon citizens (194) or else not all reasonable disagreements about justice are justificatory in nature.[4] After introducing political liberalism and justice pluralism in Sections I and II, I outline Quong's reply to the asymmetry objection in Section III and answer it in Section IV. While a number of authors have defended justice pluralism, few of them have responded to Quong's replies to their arguments (Brower 1994, 21–22; Sandel 1998, 203; Waldron 1999, 191–93; Sen 2011, 12–15; Taylor 2011, 250–53). So if we are to push the literature forward, we must address his position.

I will then argue that justice pluralism should lead political liberals to resist imposing controversial thick conceptions of justice on citizens who reasonably reject them.[5] So the novel implication of the article is that reasonable pluralism about justice requires significant modification to political liberalism's theoretical structure by the traditional political liberal's own lights. I defend this claim in Section V. In Section VI, I sketch an alternative political liberal approach that restricts public justification to affirming a thin conception of justice that includes fundamental rights and constitutional rules. Additional coercive laws and

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institutions cannot be publicly justified, and so cannot be legitimate. I conclude in Section VII.

I. Political Liberalism and Reasonable Disagreement

Readers will find the basic form of political liberalism familiar. As Quong argues, political liberalism is a theory that tries to identify which "political principles and institutions can be *publicly justified* by reference to *moral ideas* that each person who is bound by them could reasonably endorse" (Quong 2011, 36). The political liberal holds that state coercion is impermissible when reasonable people lack good reason to endorse the coercive law or policy proposed.[6] For state coercion to be permissible, it must be based on principles and ideas that all can reasonably accept. Otherwise, the coercion is incompatible with our understanding of ourselves as free and equal.

Political liberalism has a number of important features, but readers of this article will already recognize as familiar the ideas of a political conception of justice (Rawls 2005, xxx), an overlapping consensus (11) and the idea of public reason (41). Readers will also recognize the importance of the fact of reasonable pluralism, but it bears reviewing due to its central place in my argument.

John Rawls claims that the use of practical reason under free conditions will naturally lead people to reasonably disagree about what is of ultimate value in life. Political liberalism assumes that "a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime" (xvi). Thus, citizens will profoundly and deeply disagree about core questions that arise in philosophy, theology, and other issues. The source of reasonable pluralism is the burdens of judgment. Reasonable and rational people have to make many kinds of decisions, primarily about which ends to select and how to balance them. Reasonable people must also balance their own claims against the claims of others. Making these decisions is difficult due to at least six factors, such as the vagueness in our normative concepts and disagreements about which values are more important (56–57).

We must also consider what is to be publicly justified. Rawls claimed that only constitutional essentials and matters of basic justice had to be publicly justified; public justification does not apply to particular laws (xlvi). However, both Quong (2011, 275–87) and Gerald Gaus (2011, 490–97) argue that public justification should govern coercive laws. Here I follow Quong's argument that the liberal principle of legitimacy should apply to laws in the absence of a compelling reason to adopt a narrower view of public reason's scope. Coercive laws can be every bit as destructive and dangerous to persons as the broader constitutional structure within which the law was ratified, and this is reason to think that laws must be publicly justified as well as the broader constitutional order. So, like Quong and Gaus, I reject Rawls's defense of this narrower scope.

Consequently, I shall assume throughout the article that public justification applies to coercive laws as well as constitutional essentials and matters of basic justice. The assumption is important in vindicating the claim that imposing substantive conceptions of justice on those who reasonably reject them is illegitimate. For if we opt to impose a substantive conception, which implies the imposition of a whole host of laws, then if persons have sufficient reason to reject many of those laws as worse than no law, the substantive conception cannot be justifiably imposed.[7] Readers of Andrew Lister's (2013, 2) work will note here that I am hereby adopting the "coercion" frame of public justification, where the object of public justification is laws and policies, rather than the "reasons for decision" frame where reasons for decisions must be publicly justified and laws and policies can be publicly justified, and so imposed on citizens, whenever the balance of justificatory reasons favors them.[8] This is because I think traditional Rawlsians must adopt the coercion frame once we recall that political conceptions of justice cannot be legitimate if they are reasonably rejectable by citizens who affirm reasonable comprehensive doctrines. If political conceptions include laws and policies, in addition to constitutional essentials and matters of basic justice, then if some reasonable people have sufficient reason to reject the political conception with its specific legal implications in tow, it cannot be publicly justified.[9]

Another implication of the coercion frame is that, since political conceptions of justice must be fully justified by being shown to be compatible with a range of reasonable comprehensive doctrines, then, at some point in public justification, we must appeal to the private reasons of citizens. In public discourse, and when specifying a political conception of justice, we should perhaps proceed either exclusively or primarily in terms of shared reasons, but in the end, private reasons to reject a political conception must be overridden to achieve political justification. This is not to imply that I am adopting a "convergence" conception of justificatory reasons here (Vallier 2014), however, since the *pro tanto* justification of political conceptions of justice might still be restricted to shared reasons, and a duty of civility might assign shared reasons some priority. But private reasons are not excluded from being justificatory reasons downstream from *pro tanto* justification.

II. Rawls and the Binding of Justice

In Rawls's earliest formulations of political liberalism, he primarily applied reasonable pluralism to comprehensive doctrines and conceptions of the good. The resulting challenge is to determine whether a shared political conception of justice, one that we construct together, can become the object of an overlapping consensus of reasonable comprehensive doctrines. The focus on agreement about justice is crucial. Rawls argues that a society cannot be well-ordered if citizens entertain "different views as to the most appropriate political conception," because in a well-ordered society "everyone accepts, and knows everyone accepts, the very same principles of justice" (Rawls 2005, 35).[10]

The challenge for Rawls's earlier formulation of political liberalism, then, is to show that a *single* conception of justice can be the object of an overlapping consensus, even if a society does not begin the convergence process in agreement on it. But Rawls later admitted that reasonable people can disagree about the requirements of justice even under well-ordered conditions: "it is inevitable and often desirable that citizens have different views as to the most appropriate political conception; for the public culture is bound to contain different fundamental ideas that can be developed in different ways" (2005, 227). There are, in this way, "many liberalisms" (223). Rawls thereby partly capitulates to justice pluralism. His defense was to *bind* justice pluralism to only contain a small family of liberal conceptions of justice. Despite there being many liberalisms, every reasonable political conception identifies a set of basic liberties, assigns them a special priority over other considerations, and guarantees all-purpose means for enjoying the worthy of those specially prioritized liberties (6). Disagreements about the good can be deep and fundamental, but *all* reasonable people *must* agree that reasonable political conceptions satisfy three conditions.

Rawls did not provide a detailed argument for limiting the set of reasonable liberal political conceptions ("liberal set" for short), certainly nothing as rich as his arguments for justice as fairness. One worry about Rawls's approach is that it may face a dilemma, specifically that the liberal set either seems too wide or too narrow, depending on whether reasonable people can reject members of the liberal set. Let us assume, first, that reasonable people cannot reject any member of the liberal set as unreasonable. In this case, the liberal set will be too wide. Consider John Tomasi's (2012) "free-market fairness" conception of justice that prizes the same values as justice as fairness and relies on several Rawlsian arguments. But in contrast to Rawls, Tomasi (226–66) includes thick economic liberties among our basic liberties, such as freedom of contract and the right to own productive capital. Free-market fairness appears to be a reasonable liberal political conception, despite its stark contrast with justice as fairness. Tomasi (2012, 68–84) identifies a certain list of liberties as basic, many of Rawls's liberties plus some thick economic liberties, assigns them a special priority, and guarantees all-purpose means to realize the worth of those liberties through his distributional adequacy principle (123–27). Rawls's liberal set must include free-market fairness.

Traditional egalitarian political liberals now have a problem, as the liberal set is wider than they would like. If free-market fairness is a reasonable liberal political conception, then a liberal democratic state that realizes free-market fairness is legitimate. That is, *egalitarian Rawlsians* will have to acknowledge that a conception of justice that institutionalizes freedom of contract and strong rights to capital ownership is reasonably just and legitimate. Further, a publicly justified constitution based on free-market fairness could dramatically limit government, dispensing with the vast majority of state functions. This too is something Rawlsians would like to reject.

To further buttress my point, notice that Tomasi's stress on freedom of contract as a basic right could rather easily legitimize Supreme Court decisions like *Lochner v. New York*, where the Court determined that the constitution prohibited legislative interference with freedom of contract in ways that prevented states from, in Ronald Dworkin's (1996, 125) words, improving "working conditions and otherwise regulat[ing] the economic market." Dworkin and other constitutional lawyers place *Lochner* on a moral par with *Plessy v. Ferguson*, which held that the equal protection clause was not violated by racial segregation. Dworkin (308) states that nearly "all constitutional lawyers now regard the *Lochner* decision, and the decisions that followed in its spirit, as disastrous mistakes." This suggests that many Rawlsians will regard constitutional laws prohibiting the regulation of the economy as on a moral par with segregation, and as a "disastrous" mistake, and so not the basis of legitimate law.[11] Legitimacy is a lower bar than justice, but allowing that free-market fairness is legitimate makes the bar of legitimacy rather low indeed.[12] I contend, therefore, that Rawlsians will prefer my claim that only thin conceptions of justice are legitimate to acknowledging the legitimacy of robust liberty of contract and extensive rights of private property in capital. They will want to say not only that there are decisive arguments against free-market fairness (Friedman 2014, 3–4), but that free-market fairness is *unreasonable*. Resisting justice pluralism by allowing for the legitimacy of any member of the liberal set, therefore, comes with the cost of legitimizing free-market fairness.

But the bigger problem is that the liberal set might be too narrow. This horn of the dilemma is raised if we allow reasonable people to reject members of the liberal set. One reason to allow this is that reasonable comprehensive doctrines often include conceptions of justice, and that these conceptions could lead reasonable people to reject members of the liberal set as unjust and unreasonable. Imagine two social groups who share political institutions—advocates of free-market fairness and advocates of justice as fairness. Both sides will reject one another's conceptions of justice in a deep way, much as they would reject other conceptions of the good as appropriate for structuring public life. Instead, both sides will prefer to opt for a thinner conception of justice, which contains only agreed-upon common principles and institutional structures. Free-market fairness advocates will rank a thin conception of justice above justice as fairness, and justice as fairness advocates will rank a thin conception of justice above free-market fairness. This ranking is clear once we reflect on the stark differences between free-market fairness and justice as fairness. At least under a thin political conception, members of the public can reject *Lochner* as illegitimate, and will at least have the democratic authority to limit private property rights in productive resources, capital goods.

The comparison of these two conceptions of economic justice suggests a strong analogy between institutionalizing thick conceptions of justice and institutionalizing a reasonable conception of the good other than one's own. Acknowledging the opposing conception of the good as reasonable does not mean

that we think the opposing conception of the good is an appropriate conception for governing shared public life. Instead, parties opt to secure primary goods, goods that everyone can agree are necessary for a rational plan of life. Similarly, I would argue that those with opposing substantive conceptions of justice will opt for a scheme of rights that everyone can agree are necessary for pursuing conceptions of the good and justice on reciprocal terms, which I have elsewhere (Vallier 2019, 156–72) called *primary rights*, following Rawls's familiar idea of primary goods.

If so, then a reasonable overlapping consensus *cannot form* even around many members of the liberal set. Consequently, there may no one substantive conception of justice that can become the object of an overlapping consensus under conditions of justice pluralism. If we impose a thick conception of justice anyway, we coerce those who reasonably disagree with us, which is disrespectful, inegalitarian, illegitimate, and authoritarian.[13] Thus, even justice as fairness cannot serve as a public conception of justice, as some will reasonably reject it. The problem generalizes: *any* attempt to institutionalize a thick, unshared conception of justice becomes sectarian and authoritarian. Note that this is quite different from Rawls's position. Rawls thought a political order could be legitimate if it converged on a single member of the liberal set; my argument is that a political order can only be legitimate if it settles on a thin conception of justice that includes only the limits on the liberal set, and not any substantive conception of justice in the set.

Consider two Rawlsian replies. First, a tiny or empty liberal set might make political liberalism too hostile to coercion. After all, if the state cannot promote a substantive conception of justice, then it seems the state can do very little. Quong (2011, 202) calls this outcome *political libertarianism*. If political liberals cannot coercively impose principles of justice, then the limits on legitimate coercion will be of libertarian-grade strength. Of course, reasonable people will reject libertarian conceptions of justice, so coercively enforcing libertarianism will arguably be defeated. But we may end up with libertarian-leaning conclusions anyway, given that so few laws and policies can be publicly justified.[14] However, we will see below (V) that each person's interest in social cooperation will make a number of rights and laws, including non-libertarian rights and laws, eligible for public justification. Even the libertarian will be prepared to ascribe legitimacy to some non-libertarian laws and policies.

Second, a traditional Rawlsian could stress that any reasonable political conceptions of justice that satisfy a criterion of reciprocity (2005, xliv) are reasonable by definition and so *cannot be reasonably rejected* by persons with reasonable, but incompatible conceptions of justice. But Rawls did not provide an argument that reasonable people couldn't reject members of the liberal set. In lieu of such an argument, we can, at best, stipulate that reasonable people cannot reject members of a small liberal set, which is not very compelling.

III. Quong's Reply to the Asymmetry Objection

The most prominent and detailed attempt to avoid the threat of justice pluralism is Quong's response to the "asymmetry objection" to political liberalism, an objection which holds, as I do, that reasonable pluralism about justice should be treated *symmetrically* with reasonable pluralism about the good.[15]

Quong's reply begins with a distinction between two types of reasonable disagreement: *foundational* disagreements and *justificatory* disagreements. Foundational disagreements "are characterized by the fact that the participants do not share any premises which can serve as a mutually acceptable standard of justification" (Quong 2011, 193). Those engaged in foundational disagreements "disagree at the level of ultimate convictions or principles" (205). In contrast, justificatory disagreements occur "when participants … share premises that serve as a mutually acceptable standard of justification, but they nevertheless disagree about certain substantive conclusions" (193). In such cases, parties to a justificatory disagreement agree about a great deal. For instance, they may "both accept the idea that society should be a fair system of social cooperation between free and equal citizens, and they also each accept the existence of the burdens of judgment and the consequent fact of reasonable disagreements" (205). Because of this, those who disagree in the justificatory way also "accept the further ideal that principles of justice should be free standing and abstain from relying on sectarian doctrines."

With the distinction in hand, Quong formulates his argument as follows:

1. Reasonable disagreements about the good life are not necessarily justificatory and will almost certainly be foundational.
2. Reasonable disagreements about justice are necessarily justificatory and not foundational.
3. The liberal principle of legitimacy is not violated when the state imposes a view that arises out of a justificatory disagreement.
4. Therefore, claims of justice over which there is reasonable disagreement, if imposed by the state, do not violate the liberal principle of legitimacy in the way that perfectionist claims are likely to do. (204)

Quong defends the first premise by arguing that reasonable disagreement about the good is so deep that it is unclear how such a disagreement could be resolved in a rational fashion given their divergent factual beliefs and preferred moral standards. Parties share so little that they cannot even *hope* to come to an agreement, as the two parties must inevitably appeal to unshared considerations to vindicate their views. And it is plausible to think that somewhere along the way a foundational disagreement will ground out in fundamental differences. So Quong's first premise seems true.

Quong defends the second premise by arguing that "[r]easonable disagreements about justice, however, presuppose a common standard" (2011, 207). That

is, disagreements about justice are necessarily justificatory: "Reasonable disagreements about justice are thus justificatory by definition" (214). Furthermore, "By stipulating that arguments about justice must meet this standard, we ensure that all political proposals appeal to some values or principles that all reasonable persons can at least be expected to endorse" (209). Stipulating that justice pluralism is justificatory may seem *ad hoc*, but Quong denies this; reasonable disagreements about justice are justificatory because they presuppose accepting certain shared ideas that enable us to construct a mutual standard of justification.

Quong thinks disagreements about justice are justificatory by definition because of his unique interpretation of political liberalism.[16] Quong's "internal" conception of political liberalism explains "what kind of question political liberalism is meant to answer, what social facts it should respond to, how the constituency of reasonable people should be defined, and what it means to justify something to reasonable people" (137). Reasonable citizens, for Quong, are not actual citizens but idealized liberals. Thus, principles and laws are justified if and only if this restricted, idealized group of liberals endorses them. Quong puts the point sharply: "the internal conception declares that the justification of liberal principles at no point depends on the beliefs of real people" (144). If you reject the internal conception, then you may have good reason to reject his second premise, but it is important to be clear that the second premise has a nonarbitrary justification: the internal conception. I have criticized the internal conception elsewhere (Vallier 2017), so I will set it aside here.

The third premise of Quong's argument (2011, 204) holds that, if the state coerces Reba into complying with a position she rejects based on a justificatory disagreement, then it does not violate her freedom and equality. The case for the third premise involves Quong's claim that even if Tony offers Sara an *argument* that she can reasonably reject as false, but the state acts on Tony's argument anyway, then the state still offers Sara "an argument for the decision that she could reasonably be expected to endorse" since Tony's argument is at least "a plausible justification, based on a clearly identifiable political value to which Sara is firmly committed" (209). Sara can still "understand and accept" Tony's argument "in her capacity as a free and equal citizen, even if she does not believe it is the best argument, or even if she believes it to be incorrect" (209). All the state must do to treat Sara as free and equal is to act on an argument that is based on political values that Sara affirms, even if Sara rejects the argument as false or wrong-headed. This means that coercive laws can be respectfully imposed on Sara even if she thinks there is no good argument for the coercive law.

IV. Resisting Quong's Argument

I believe that Quong's argument is mistaken. We can identify the mistake by first identifying an ambiguity in Quong's claim that the state is permitted to coerce in the case of a justificatory disagreement.

Recall that in Quong's defense of premise 3, he is focused on whether *arguments* are reasonably rejectable, not whether coercive laws and policies—*proposals*—are reasonably rejectable. There is an important difference between a proposed act of state coercion and the arguments that are used to justify the act.[17] But this raises the question of when Quong thinks coercive proposals are publicly justified, which is where the ambiguity lies. Gaus's work on public justification focuses more on the justification of proposals, and he develops the useful idea of an "inconclusive" justification for proposals (1996, 179–94). For Gaus, a proposal is inconclusively publicly justified when it and at least one other coercive proposal are undefeated for all members of the public.[18] A proposal is defeated when at least one member of the public has sufficient reason to reject the proposal as *worse than nothing*. Rejecting a proposal as worse than nothing is to hold that it is better if no law governs the issue under consideration. A proposal is thereby inconclusively justified even if members of the public think that the proposal is *worse than all the other coercive proposals* but maintain that it is still *better than no proposal*. Another way to think about inconclusiveness is that each person regards all inconclusively justified proposals as favored by the balance of their justificatory reasons over no proposal.[19] Different reasonable people can rank two undefeated or inconclusively justified proposals differently, such that neither option Pareto dominates the other, but each person's balance of reasons still endorses multiple proposals as "eligible" for justification.

A critical question for Quong is whether justificatory disagreements are always disagreements over inconclusively justified proposals in Gaus's sense. Quong faces a dilemma in answering the question. If justificatory disagreements are all and only disagreements between inconclusively justified proposals, then Quong's premise 2 is false, because, as I will argue, some reasonable disagreements about justice cover defeated proposals, and so are not justificatory disagreements. But if justificatory disagreements include disagreements over defeated proposals, then premise 3 is false because imposing defeated proposals on citizens is unacceptable moral dogmatism, and so the liberal principle of legitimacy does not always allow the state to impose a view that arises out of a justificatory disagreement.

Focusing on the first horn of the dilemma, even people who are reasonable in Quong's sense, and that reasonably disagree about justice, will regard at least some of the proposals grounded in other reasonable conceptions of justice as worse than no proposal. Quong (2011, 214) insists that reasonable disagreements are justificatory by definition because reasonable people "share a commitment to public or political values that are the subject of the overlapping consensus" and reasonable people must agree both that society is a fair system of cooperation and that people are free and equal. But none of these commitments prohibit reasonable people from acknowledging that others have reasonable views about justice *and also* holding that, from their own perspective about justice, some proposals based on the other person's conception of justice are worse than nothing.

To demonstrate, consider the case of a justificatory disagreement between people with incompatible, but reasonable conceptions of economic justice, such as a disagreement between John, a libertarian citizen who affirms Tomasi's free-market fairness, and Reba, an egalitarian citizen who affirms Rawls's justice as fairness. Both John and Reba affirm reasonable political conceptions of justice because both free-market fairness and justice as fairness meet the three conditions restricting the set of reasonable liberal political conceptions of justice that Rawls (2005, xlvi) affirms. John maintains that laws that impose heavily redistributive taxation violate a person's self-authorship (Tomasi 2012, 40), and so are worse than no laws imposing heavily redistributive taxation; he thinks the heavily redistributive tax is worse than less redistributive tax laws and even worse than no tax at all. But egalitarian Reba will regard laws that protect wealthy property owners from the expropriation of their wealth as worse than no laws protecting their property rights.

One could respond that John and Reba will be prepared to accept one another's property regimes as legitimate because neither will regard the other's proposal as worse than nothing given the need for property rights in general. This reply is mistaken because what the two regard as worse than nothing is adopting rights and policies that settle the *extensiveness* of property rights as a matter of justice, in either an egalitarian or libertarian direction. They will of course agree on some property rights protections, so the alternative to public justification is not a general anarchy regarding property rights. The true alternative is a combination of limited publicly justified property rights and no authoritative coercion on questions where egalitarians and libertarians reasonably disagree. If democratic decision making is publicly justified for both groups, then democratic decision making can be used to temporarily settle the extensiveness of private property rights when it is necessary to avoid destructive social conflict. Libertarians and egalitarians will prefer such an open legal arrangement because they cannot accept one another's property regimes as authoritative for them given how bad and unjust those property regimes are likely to be.[20]

John and Reba are both reasonable in Quong's sense. They recognize society as a fair system of cooperation and that persons are free and equal, and their disagreements are also based on shared substantive values. John and Reba both affirm reasonable political conceptions of justice as well. And yet both John and Reba can reasonably reject at least one proposal essential to institutionalize one another's conception of justice as worse than no proposal. And so John and Reba can reasonably reject being governed by the other person's reasonable conception of justice. Quong could double down and insist that, if John and Reba are truly reasonable, then they lack defeaters for the relevant economic proposals governing the tax rate by definition. But as I noted in section II, this is a cost for egalitarian Rawlsians like Quong, since they have to acknowledge a very large range of inegalitarian laws as potentially legitimate.

The example generalizes. If we prohibit the imposition of coercive laws on reasonable citizens who have sufficient reason to regard the laws as worse than nothing, then many citizens will regard laws that institutionalize a competing conception of justice as worse than no law, such that the competing conception of justice is defeated *by proxy*. If conception of justice J_1 requires laws L, M, and N to be institutionalized, and a member of the public P accepts conception of justice J_2 and rejects L, M, and N as *worse than nothing* based on J_2, then P has sufficient reason to prevent J_1 from being institutionalized, which is to reject it as an appropriate basis for organizing a society's basic structure.

Premise 2, the claim that all reasonable disagreements about justice are justificatory, appears false because some reasonable disagreements about justice imply that proposals required to institutionalize other reasonable conceptions of justice are defeated for some reasonable people. That means that some reasonable disagreements about justice concern proposals that are not inconclusively justified. But since we stipulated in this horn of the dilemma that all reasonable disagreements about justice are justificatory, then premise 2 must be false.

We can now turn to the second horn of the dilemma, where we relax the stipulation that all justificatory disagreements are restricted to disagreements over inconclusively justified proposals. Justificatory disagreements, therefore, include disagreements over defeated proposals as well. In this case, premise 2 may be true, but premise 3 looks false.

Gaus argues that inconclusively justified legal proposals can be permissibly imposed only if the inconclusiveness is resolved in a publicly justified fashion, primarily via publicly justified decision procedures. If we use a publicly justified voting rule to choose an inconclusively justified proposal from an "eligible" set of such proposals, then the proposal selected is *conclusively* justified through a second-order voting process. Gaus's view, then, is that the state may only coercively enforce legal proposals if a publicly justified process selects them. Otherwise, state action involves "moral dogmatism" (Gaus 1996, 182). Gaus argues that "to impose an undefeated but unvictorious public justification on another fails to meet the demands of public justification. To have satisfied yourself that your demands are justified is far short of showing others that your demands are justified." The person who imposes an inadequately justified principle on another engages in "an act of *subjugation:* one is supplanting the other's own judgment about what the other should do, and replacing it with one's (merely personal) judgment about what the other should do" (183).[21] If Gaus is right, then the state cannot respectfully force reasonable citizens to comply with laws that they reasonably reject. The fact that the justification for the law draws on a political conception of justice is insufficient to justify such coercion because one person is still insisting that his judgment carry the day in the face of a disagreement and coercing others accordingly. To be sure, it is better to force someone to comply with a proposal that she has *some* reason to endorse than a proposal she has sufficient reason to *reject*, but the two acts resemble one another in their moral badness.

Gaus's criticism seems to me correct, but Quong holds the majority position.[22] Rawls (2005, x), for one, seems fine with permitting coercion based on a reasonable liberal political conception that some believe is not most reasonable for them. Consequently, mainstream political liberals will likely dismiss concerns about moral dogmatism as rooted in a conception of public justification they should reject.[23]

However, even if the imposition of inconclusively justified proposals isn't moral dogmatism, imposing *defeated* proposals is. This is because defeated proposals cannot be vindicated by arguments that Reba can reasonably be expected to accept. Reba's deliberations, even after taking the arguments of others into account, tell her that the arguments for the proposal are so problematic or weak that the proposal is worse than no proposal on the issue. If Reba's balance of justificatory reasons implies that a proposal is worse than having no law governing an issue, then she should be understood as having sufficient reason to reasonably reject a law and that she cannot reasonably be expected to accept it. How much worse would the proposal have to be before it becomes a proposal that no one can reasonably expect Reba to accept? We could tie reasonable rejection to laws that are *much* worse than nothing, but that draws the line of reasonable rejection too widely; we might as well hold that a person can only reasonably reject a law when it is the worst conceivable proposal, and surely that is too strong. But then how else are we to understand the idea of reasonable rejection in Quong's conception of public justification? If the standard of reasonable rejection is not understood to exclude from public justification even proposals that are much worse than nothing, then it is not clear what reasonable rejection would exclude. Quong's account of reasonable rejection does not suggest any obvious response. Imposing a proposal on Reba, who has defeater reasons for the proposal, is thus an illicit act of subjugation.

I conclude, then, that it is morally unacceptable to force someone to comply with a proposal that the balance of her justificatory reasons defeats. This is to say that the liberal principle of legitimacy, understood as a principle of public justification, does not always permit imposing a proposal on persons that is the subject of a justificatory disagreement, such that premise 3 of Quong's argument is false.

In sum, then, either premise 2 or premise 3 of Quong's argument is false and so Quong's reply to the asymmetry objection fails. Given the *prima facie* plausibility of treating reasonable pluralism about the good and justice pluralism symmetrically, we should default to symmetric treatment. I think this means we must allow for foundational justice pluralism, where persons regard some reasonable conceptions of justice as so objectionable that the conception of justice cannot morally form the basis of shared social order, just as persons regard some reasonable conceptions of the good as so objectionable that no substantive conception of the good can form the basis of shared social order. When citizens regard the laws required to institutionalize a thick, controversial conception of justice as worse than no law, imposing that conception of justice is illegitimate and unjustified. If

some reasonable citizens can reasonably reject these laws as defeated, we cannot save the traditional Rawlsian commitment to institutionalizing a coherent, thick conception of justice.[24]

V. Separating Political Liberalism from Sectarian Conceptions of Justice

I contend that, to preserve political liberalism, we must abandon institutionalizing thick conceptions of justice. Justice pluralism renders such attempts sectarian and disrespectful. Substantive political conceptions of justice, even small sets of such conceptions, can no longer form the core of an overlapping consensus. One might worry that my conclusion requires rejecting political liberalism. I disagree. We can remain political liberals by endorsing a version of the liberal principle of legitimacy and the idea of public reason, along with liberal constraints on the norms of justice that can be justified. But we must admit that political liberalism requires considerable revision. [25]

Some political liberals may worry that my proposal leads to anarchism. After all, if justice pluralism is as deep and enduring as pluralism about the good, then the state will be barred from coercively requiring citizens to comply with *any* principles of justice. But this is too quick. Reasonable people agree on a great many goods, so Rawlsian primary goods can be distributed and protected by the liberal state.[26] Members of the public may likewise be able to converge on rules of justice that can be justified to all reasonable members of the public. Reasonable people, no matter how much they disagree about what justice requires, think it is unjust to kill the innocent, to steal, rape, and extort. They believe the strong should be prevented from exploiting the weak and that there are moral restrictions on which harms we can impose on others. At the least, we could institutionalize these justice norms, which we can understand as primary rights, discussed further below. Primary rights can forestall anarchy.[27]

Further, we may be able to publicly justify decision procedures that can settle, at least temporarily, our disputes about what our public norms of justice should be. Even if we disagree about which norms of justice are the best, we all agree that it is better to institutionalize some norms of justice rather than none. If we can publicly justify decision procedures, then we can publicly justify selecting a member of an eligible set of rules of justice or primary rights to be institutionalized.[28] I grant that reasonable people will also disagree about which decision procedures can be publicly justified, but surely there is some agreement here as well. Reasonable people arguably believe that majority voting rules are better than minority voting rules (less than 50%) and that votes should not be apportioned based on class, race, gender, expertise, or moral virtue. Some will prefer supermajority rules to simple majority rules, and a few might prefer unanimity rules, but nearly everyone recognizes a common interest in having rules to resolve disputes about which inconclusively justified proposals to ratify.[29] I understand this process as a form of constitutional choice.

Of course, members of the public will disagree a great deal about which issues we can vote over. Classical liberals will tend to restrict the reach of democratic procedures more than egalitarian liberals. For instance, egalitarian liberals allow legislatures to restrict most economic liberties however they like, so long as doing so doesn't violate other publicly justified liberties or restrict rights to personal property and freedom of occupation (Rawls 1971, 239). In contrast, classical liberals hold that many more economic liberties should be subject to constitutional protection and so taken out of the realm of collective choice. But both can agree that a great many matters should not be the subject of democratic choice, generating a set of publicly justified liberal rights. This means that there is widespread agreement that legislative voting should be restricted. So once again, we do not have to worry about anarchy.

Unfortunately for Rawlsians, however, it is a virtual certainty that some reasonable people will reject justice as fairness, most of all the difference principle, as inferior to a thin liberal conception of justice. Rawls (2005, xlvii) admits that some reasonable members of a well-ordered society will reject the difference principle as part of the most reasonable political conception of justice. In fact, he says that he would be "unreasonable" to deny it. A reasonable person might replace the difference principle with "a principle requiring the improvement of social well-being subject to a constraint guaranteeing for everyone a sufficient level of adequate all-purpose means." This means that laws that can only be justified on the basis of the difference principle alone cannot be publicly justified, which probably means a range of radical redistributive policies will be reasonably rejected.[30] That is because the some radically redistributive policies can only be justified on strongly egalitarian grounds.

Reasonable people can surely disagree with other parts of Rawls's conception of justice. Many will endorse fair equality of opportunity, but they may not give it lexical priority. And even if they endorse fair equality of opportunity, they may apply it differently than Rawlsians do. There will also be a great deal of disagreement about how to understand the liberties in the liberty principle, including both economic and political liberty. Rawlsians give political liberties enormous weight, so much so that only political liberties must be guaranteed their fair value. But many classical liberal members of the public will be less impressed with political liberties and place more weight on economic liberties, perhaps even insisting that economic liberties alone be guaranteed their fair value (Tomasi 2012). It is reasonable to refuse to single political liberties out for such extraordinary special treatment.

Importantly, my arguments do not imply that Rawlsians will be forced to endorse classical liberalism (Gaus 2011, 526) or political libertarianism. But the egalitarian economic regimes that Rawlsians endorse cannot be publicly justified because some reasonable people reject them as worse than a thin liberal conception of justice. Classical liberal members of the public who regard the associated forms of state intervention as worse than no state intervention have defeaters for economic egalitarianism.[31] Even many reasonable social democratic members

of the public may regard liberal socialism and property-owning democracy as ineligible. They too might worry that Rawls's preferred regime types will be inefficient and subject to abuses of power.

My suspicion is that given justice pluralism, the most extensive state that can be publicly justified in modern liberal democracies is a generous social democratic welfare state, though I cannot show that here. The basic idea is that property laws that prohibit the modest redistribution of wealth required to fund social welfare programs cannot be publicly justified, but property laws that prohibit more extensive state interventions can be, since members of the public who favor these more extensive interventions will have modest property rights protections in their eligible set. But it is safe to say that a publicly justified state with deep, reasonable political disagreement, will not embrace an egalitarian conception of justice or pursue the egalitarian policies characteristic of liberal socialism and property-owning democracy.

Again, the same reasoning applies *mutatis mutandis* to alternative conceptions of justice like libertarianism and Rawlsian classical liberal conceptions of justice such as free-market fairness (Tomasi 2012). Insofar as reasonable members of the public can reject thick egalitarian conceptions of justice, they can also reject thick libertarian conceptions of justice. The problem cuts in as many other ways as there are thick, reasonably rejectable conceptions of justice.

VI. Primary Rights and Constitutional Choice

Justice pluralism leaves political liberals with two areas of justificatory inquiry: primary rights and constitutional procedures. These are, in my view, two stages of political justification after justice pluralism. In the first stage of justification, we determine which scheme of rights can be justified to persons who disagree about the good and justice. In the second stage, we determine which constitutional essentials and procedures can be publicly justified, both to protect primary rights and to resolve other controversies.[32] I believe, though I cannot argue here, that there are rights and procedures that people who disagree about the good and justice can agree are superior to having no justified rights or procedures. The case is rather simple: it is better to have a moral and political order than none, and having such an order requires legal practices to institutionalize rights and settle disputes.

A critic could reply by arguing that even primary rights and constitutional procedures will not survive reasonable rejection. But primary rights and constitutional procedures are critical for having a functional moral order *at all*. If persons have sufficient reason to value cooperating on free and equal terms with others, they will be committed to recognizing at least some political institutions as eligible, that is, as better than a state of anarchy on issues that would otherwise be governed by primary rights and constitutional essentials. Since persons not only value getting what they want—the realization of their doctrines of the good and

justice—but also value living on reciprocal terms with others, they are bound to allow that some political institutions are reasonably acceptable.[33] The less committal we are about the shape of those institutions, the more likely the institutions are to be publicly justified, so there is reason to favor political institutions that create a basic framework for a diverse public life over more monistic and centralized political regimes.

We therefore begin our reconstruction of political liberalism with what remains of Rawls's first stage of justification.[34] The first stage no longer seeks a unified conception of justice but rather a scheme of primary rights that can be justified to reasonable people with divergent views about justice and the good. These arguably include all rights that persons will want for themselves to pursue their conception of the good *and their conception of justice* and are willing to extend to everyone (and not just the reasonable) on the same terms.[35] Importantly, Rawls includes among primary goods a scheme of rights and liberties, so rights are already part of his story.

But while Rawlsian rights are rooted in guaranteeing persons the goods required to exercise their sense of justice, the new scheme of primary rights is more expansive in providing persons with the means to structure part of their social world according to their own conception of justice. This probably implies a somewhat different scheme of primary rights than the rights endorsed by Rawlsians, such as a strengthened right to freedom of association, since robust freedom of association allows people to enact their conceptions of justice within local organizations.

The main worry about primary rights after justice pluralism is that too few rights will be justified because many rights are reasonably rejectable. For instance, we can imagine some religious persons who would refuse to extend rights to hold great wealth and would accept the same imposition because they believe that a simple life is better for the soul. Or perhaps an atheist would happily dispense with her freedom of religion in order to deprive religious citizens of that same right. Rawls solved this problem with a thick veil of ignorance: since people would not know their conception of the good, they would seek rights as insurance against interference (Rawls 1971, 118–23). Political liberalism after justice pluralism can retain the veil of ignorance, which will help to ensure that primary rights are equal and that people will want to ensure that they have more rights rather than fewer. Of course, we must eventually lift the veil and determine whether the resulting scheme of primary rights is compatible with distinct conceptions of the good and conceptions of justice, but so long as the scheme of rights is judged better than nothing from each perspective, it can be justified to them.

Once primary rights are chosen, we select constitutional essentials, again following the practice of political liberalism. Constitutional essentials are to be understood as *constitutional decision rules*, the rules that make laws. Constitutional choice is constrained in two ways. First, primary rights limit eligible constitutional rules to those that support or at least do not undermine the institutionalization of

primary rights. Second, we have considered judgments about, say, fairness in decision making that can somewhat constrain constitutional choice. We will reject constitutional rules that generate laws at random, for instance. The surviving rules can be ranked, insofar as is possible, in accord with the degree to which they facilitate the passage of publicly justified law and resist the passage, repeal, or reform of defeated law. Rights-respecting constitutional rules are publicly justified in part because they normally generate publicly justified law.

Constitutional rules must next survive two tests. First, they must survive the scrutiny of diverse conceptions of justice and the good. In Rawlsian terms, they must be fully justified (Rawls 2005, 70). This means that each reasonable person must be able to see the constitutional rules as justified based on their set of justificatory reasons, not merely the shared reasons used within a political conception to settle on an assignment of rights. Second, constitutional rules must be self-stabilizing. That is, they must be stable for the right reasons.

Notice, critically, that this position is distinct from the notion of a "constitutional consensus" found in the work of Kurt Baier, where there is only a consensus "on the principles and rules of a workable political constitution" (Rawls 2005, 149). Baier (1989, 775) claims that a constitutional consensus only involves "an agreement on the process of adjudication when interests conflict." On a similar view advanced by Bryan McGraw (2010, 164), a constitutional consensus involves accepting liberal principles but not because they are based on a shared political conception. In contrast, I think constitutional justice after justice pluralism includes agreement on a political conception comprised of primary rights and constitutional rules. It is just a *thinner* conception than Rawls's position, as it takes no stand on the parts of Rawls's conception of justice about which there is reasonable disagreement.

VII. The Cost of Justice Pluralism

The binding of justice has failed. Political liberal commitments to recognizing reasonable pluralism and institutionalizing thick conceptions of justice are inconsistent. But all is not lost, for justice pluralism pushes political liberalism in important new directions. The theory of justice must play a more limited role in articulating the structure of a publicly justified polity, much as the theory of the good plays a more limited role in *Political Liberalism* than in *A Theory of Justice* (Rawls 2005, 439). However, we must still determine the list of primary rights and deal with the complex formal and empirical questions surrounding constitutional choice. To my mind, these problems are rich enough to sustain political liberalism as a fertile research program.

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Notes

[1]The liberal principle of legitimacy is Rawls's version of a public justification requirement: "our exercise of political power is proper only when we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions."

[2]I will understand a "thick" or "substantive" conception of justice as one that contains a specific, detailed content and that is the subject of reasonable disagreement. Justice as fairness is a thick or substantive conception of justice. A commitment to respecting free speech is not.

[3]Andrew Lister's (2013) approach to justice pluralism allows for paternalist coercion (2, 51) and so does not rule out all perfectionist coercion. Since political liberals generally want to resist these implications, as do I, I will not address his approach.

[4]I set aside the complication raised by the claim (Rawls 2005, 225) that the liberal principle of legitimacy *is part of* a conception of justice. It is better to understand the liberal principle of legitimacy as a necessary feature of any reasonable liberal political conception of justice.

[5]Including laws required to impose those conceptions of justice, as we will see below.

[6]Public reason liberals like Chad Van Schoelandt (2015) increasingly hold that what is to be justified is some form of *moral authority*, and that the requirement of publicly justifying coercion must be derived from the public justification of moral authority. This has the implication that some forms of coercion do not require public justification.

[7]Thus, a conception of justice is "imposed" when its advocates ensure that the use of state power and legal coercion is consistent with that conception; so in a very real sense, a conception of justice is imposed on persons by force.

[8]The two frames also differ with respect to what occurs if public justification fails, as the coercion frame defaults to no law, and the reasons-for-decisions frame defaults to the exclusion of reasons from consideration.

[9]I reject Quong's (2011, 161–91) revision of the overlapping consensus, as I believe it effectively rejects the overlapping consensus, but I cannot defend that point here. Quong's approach to the overlapping consensus is a major departure from the Rawlsian mainline, and arguably remains a minority position, so I set it aside.

[10]For a discussion of ambiguities in Rawls's conceptions of political liberalism, see Gaus and Van Schoelandt (2017).

[11]Rawlsians will have to accept the legitimacy of *Lochner* even if it fails to secure for employees the all-purpose means of protection from exploitative labor contracts because other policies can probably secure those all-purpose means, such as a basic social minimum income.

[12]I thank an anonymous referee for helping me to see this point.

[13]This is true even for comprehensive liberalisms, like Millian liberalism, since it will permit coercively promoting ethical autonomy against reasonable religious communities that reject that ideal.

[14]One might wonder whether we should just accept political libertarianism if that is what the liberal principle of legitimacy implies. But many political liberals will want to fiercely resist this implication, so it is worth exploring whether they can avoid it.

[15]For a distinct reply to Quong on the asymmetry objection, see Fowler and Stemplowska (2014).

[16]The internal conception motivates the justificatory–foundational distinction, but does not require it.

[17]As noted, Lister (2013, 2) brings out this ambiguity by arguing that some public reason liberals focus on publicly justifying *state coercion*, whereas others focus on publicly justifying the *reasons for decisions* that the state acts upon when coercing citizens in addition to publicly justifying state coercion.

[18]Quong appeals to a conception of inconclusive justification, but he only uses the term to indicate an inability to vindicate a law based on shared liberal political values, which is quite different than Gaus's conception.

[19]This is true however justificatory reasons are understood, say as being restricted to shared reasons, or allowing unshared reasons to be justificatory.

[20]Here I assume, following Gaus (2011, 275), that we can distinguish the public justification of a generic right from the public justification of its particular contours, since we can justify abstract rights early in the order of public justification, and then publicly justify its contours further downstream. Thus, the question of whether there is a right of private property can be distinguished from whether we can publicly justify a particular conception of private property rights. Notice that we can appreciate this point even if we refuse to individuate coercion finely, something Lister (2013, 96) warns us against. I thank an anonymous referee for raising this point.

[21]Emphasis in original.

[22]A referee notes that Quong could also allow inconclusively justified proposals to be justifiably imposed only by a democratic decision procedure. But Quong does not address this possibility, and his remarks about reasonably rejectable arguments suggest he would reject this view, so I will not ascribe it to him.

[23]Quong could argue that Gaus no longer holds a conclusivity requirement because Gaus exempts the public justification of social moral rules from a conclusivity requirement. See Gaus (2011, 392). However, Gaus still affirms the need to publicly justify *legal* decision procedures that choose among inconclusively justified laws. I follow Gaus here.

[24]Recall that Quong cannot respond, as Rawls might, by arguing that ordinary laws do not have to be publicly justified (see Quong 2011, ch. 9).

[25]The content of public reason will now be given by the remaining shared elements of a political conception, namely primary rights and constitutional decision procedures, or perhaps by embracing a more permissive notion of public reason that sometimes allow private reasons into discussion about fundamental matters, as Rawls (2005, 462–66) does in permitting reasoning by conjecture. Private reasons may narrow or expand what can be publicly justified for all reasonable persons, depending on their content.

[26]Though they will disagree about which principles govern distribution, beyond guaranteeing a basic minimum of primary goods for all. I thank an anonymous referee for this point.

[27]This means that philosophical anarchists may turn out to be unreasonable, since they reject a reciprocal, authoritative moral order that includes political power.

[28]This claim assumes that the eligible set of reasonable liberal political conceptions is empty, but that the eligible set of primary rights and/or legal procedures is not.

[29]Though disagreements about decision procedures could go all the way down. See Gaus (2011, 391–409).

[30]Members of the public will arguably reject redistributive policies based on principles of distributive justice that are more egalitarian than the difference principle.

[31]A "classical liberal" supports using robust market mechanisms to produce and distribute goods, but they are not hardline libertarians.

[32]The third stage determines whether constitutional procedures and primary rights can be stable for the right reasons. I have explored this model in Vallier (2019, 173–98).

[33]My stress on reciprocal and equal rights protected by constitutional essentials means that social orders that deny equal rights to persons, or that fail to protect them, are not true moral orders, but instead rule by violence and fail to be stable for the right reasons.

[34]Which we can understand, if the reader likes, as including Rawls's political conception of the person and her interests, or with a related but distinct view of both matters. For my solution to work, however, I do not need to commit to a particular conception of the person and her interests.

[35]Here I follow the mainline political liberal tradition in holding that unreasonable people have the same rights as reasonable people within political liberalism, though their unreasonable demands and objections are ignored.

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