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## “We Hold These Truths to Be Self-Evident”: Constitutionalism, Public Reason, and Legitimate Authority

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# “We Hold These Truths to Be Self-Evident”: Constitutionalism, Public Reason, and Legitimate Authority

MATTIAS KUMM

## I Introduction: Setting Up the Question

The following presents a rough sketch of a normative theory of constitutionalism that puts the idea of justifiability in terms of public reason at its center. Surprisingly, notwithstanding the considerable literature on the idea of public reason among political philosophers, legal and constitutional scholars have engaged with the idea relatively little.<sup>1</sup> Yet, the idea of justifiability in terms of public reason as a condition for laws to claim legitimate authority lies at the heart of the liberal democratic constitutional tradition and provides a much more plausible account of the dominant features of global constitutional practice than competing accounts, or so I will argue. John Rawls was right when he described the apex courts in liberal constitutional democracies as “exemplars of public reason.” If, and to the extent they are, there is no worked out constitutional theory that accounts for that fact. The structure of the position to be developed here is reflected in the following six propositions:

- (1) Law makes a claim to legitimate authority.
- (2) Law, simply by virtue of being positively identifiable valid law, does not necessarily have the legitimate authority it claims to have.

<sup>1</sup> Exceptions include Ronald Den Otter, “Constitutional Public Reason” in *Judicial Review in an Age of Moral Pluralism* (Cambridge: Cambridge University Press, 2009), 139–171; Lawrence B. Solum, “Public Legal Reason,” *Virginia Law Review*, 92 (2006), 1449–1501; Wilfrid Waluchow, “On the Neutrality of Charter Reasoning,” in Jordi Ferrer Beltran, Jose Juan Moreso and Diego M. Papayannis (eds.), *Neutrality and Theory of Law* (Netherlands: Springer, 2013), 203–224; and Mattias Kumm, “The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review,” *Law and Ethics of Human Rights*, 4 (2010), 142–175. For critical engagement with the idea of courts as “exemplars of public reason,” see Jeremy Waldron, “Public Reason and ‘Justification’ in the Courtroom,” *The Journal of Law, Philosophy, and Culture*, 1 (2007), 107–134.

- (3) Whether law has the legitimate authority it claims to have depends on its justifiability in terms of public reason.
- (4) A core normative point of constitutions is to establish the conditions that ensure that positive laws meeting constitutional requirements have the authority they claim to have. Constitutions seek to flesh out and operationalize in more concrete, formal, procedural, and substantive terms what justifiability in terms of public reason amounts to.
- (5) The dominant structures of global constitutional practice in liberal constitutional democracies, with regard to foundational doctrines, basic institutional arrangements, and dominant interpretative approaches, are best explained and justified as exemplifying a public reason–based conception of constitutionalism.

The sketch of the argument to be presented below takes propositions one and two for granted. Section II will contrast the idea of public reason–based constitutionalism with positivist – either conventionalist or voluntarist – conceptions of constitutionalism, in which there is only limited space for public reason. In Section III, the heart piece of the chapter, I will introduce a public reason–based conception of constitutionalism and discuss the core issues concerning propositions three, four, and five. Section IV will conclude with an interpretation of a puzzling clause of the second paragraph of the 1776 Declaration of Independence of the United States for the purpose of further clarifying the exact way that public reason–based constitutionalism is not only inclusive but also exclusive.

## **II Constitutional Positivism: Conventionalism and Democratic Voluntarism**

If we assume that a core normative point of constitutions is to establish the conditions that ensure that positive laws meeting constitutional requirements have the authority they claim to have, then what is it about constitutions that are supposed to ensure just that? Or, to ask that question slightly differently: If all law makes a claim to authority, and if constitutions are the supreme law of the land, what grounds their claim to supreme authority? Different conceptions of constitutionalism give different answers to that question. Before turning to a public reason–based account of constitutionalism, I will sketch the limited and circumscribed role of public reason within the two dominant positivist conceptions of constitutionalism: democratic voluntarism and conventionalism. While both conceptions are fundamentally flawed, I will not provide

a critical normative assessment of either. Instead, it must suffice to analyze their structure to gain a better understanding of the conceptual space left for justification in terms of public reason as part of constitutional practice within such paradigms.

### 1 *Democratic Voluntarism*

One prominent answer to what grounds the authority of constitutions is the idea of “We the People.” The will of “We the People,” acting as constituent power, is claimed to be the ground for constitutional authority.<sup>2</sup> Debates about constitutional interpretation within this framework are understood as debates about how to understand the requirement of remaining faithful to the will of the people, which grounds a constitution’s authority.<sup>3</sup> Here there is much space for disagreement. How should we imagine “We the People” in its relationship to constitutional practice?<sup>4</sup> More specifically, did “We the People” act only once, when the Founders created the US Constitution? Or can “We the People” be construed as acting whenever – in the context of a phase of high-level constitutional contestation involving public debates, the political branches and the courts – a new constitutional settlement is eventually reached?<sup>5</sup> Or should we understand and require that the will of “We the People” undergird the ordinary evolution of constitutional doctrine, requiring constitutional interpretation to follow widely and deeply held popular views?<sup>6</sup> And even if we achieve consensus on these questions, how do we identify the content of the people’s will? Should the focus be

<sup>2</sup> See L’Abbé des Sieyes, *Qu’est que ce le Tiers Etat* (Paris 1789).

<sup>3</sup> There is also the preliminary question of how the exercise of constituent power should be structured in practice to best fulfill its function; see Andrew Arato, *The Adventures of Constituent Power* (Cambridge: Cambridge University Press, 2017). For a wide-ranging analysis of the conceptual and practical problems of constituent power as it relates to constitutionalism, see the contribution in Martin Loughlin, Neil Walker (eds.), *The Paradoxes of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007).

<sup>4</sup> In classical Christian theology, the problem of God’s relationship to the world has a similar structure. Did he create the world in the beginning and then abandon it to function according to its own laws (the watchmaker model)? Or does God continue to intervene on certain extraordinary occasions by way of a miracle? Or is it the case that God is perpetually intervening and that the empirical laws of nature are merely the result of God’s perpetual will to uphold them (occasionalism)?

<sup>5</sup> See Bruce Ackerman, *We the People, Vol. 1: Foundations* (Cambridge: Harvard University Press, 1991).

<sup>6</sup> Such a position comes close to conventionalism; see Section II.2.

on the original intentions of those drafting the document or the understanding of those who ratified it? Whatever the most plausible answer may be to these questions, they have in common that any answer will ultimately tie the right constitutional interpretation to the identification of a historically articulated will. However one conceives of such a quest in more specific terms, it is likely to be a largely factual inquiry, leaving little space for an independent role for public reason.

There is one interpretation that exposes voluntarist accounts of constitutionalism to public reason to a considerable extent, at least *prima facie*: the argument that those enacting abstract rights provisions know they are enacting abstract principles. What ratifiers most plausibly wanted, it has been argued,<sup>7</sup> is that these principles, in their original semantic meaning, should be authoritative, not the many concrete intentions and implications ratifiers might have, perhaps misguidedly, associated with it. Instead of tying contemporary constitutional interpreters of abstract principle to the historically parochial horizon of late eighteenth-century ratifiers, it would be more appropriate to see that those ratifiers willed other constitutional interpreters over time to reason about and improve on that understanding. In this way, moral reasoning about principle would be an important part of constitutional interpretation.

Yet this argument is unlikely to persuade anyone committed to a voluntarist account of constitutionalism. If the grounds for constitutional authority are the will of the people, then the will of the people must be of paramount importance more generally. But if it is, how can one make sense of the idea that a relatively undemocratic institution such as a court should be in charge of concretizing and giving authoritative meaning to the majestic and wide-ranging generalities of a constitution, trumping even the determinations made by democratically legitimated legislatures? If courts are to play any such role at all, it must be a further restricted and specified role to be compatible with an overall commitment to a conception of democracy, in which the will of the people remains central. Perhaps the judicial function is to ensure the representation of certain minorities and keep open the channel of political change.<sup>8</sup> Perhaps the constitutionalized rights reflect a particular commitment of the self-

<sup>7</sup> See, for example, Ronald Dworkin, "Originalism and Fidelity," in *Justice in Robes* (Cambridge: Harvard University Press, 2006), 117–139 (distinguishing between semantic intentions, which fidelity requires be taken seriously, and political intentions, which are irrelevant. See also Jack Balkin, *Living Originalism* (Cambridge: Harvard University Press, 2011).

<sup>8</sup> See John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1981).

governing community.<sup>9</sup> But whatever the position might be, it must ultimately be made to fit the idea that the will of the people grounds all authority. Within such a conception of constitutional authority, there may be space for public reason with regard to specific clauses or within the context of specific doctrinal tests. But that space is likely to be marginal and unstable, always subject to be challenged in the name of democracy and the will of the people.

## 2 Conventionalism and “Living Tree” Constitutionalism

According to a conventionalist position, what grounds the authority of constitutions is that they are recognized as having authority as a matter of fact by those over whom such authority is claimed, including relevant officials.<sup>10</sup> If conventions are the grounds of constitutional authority, then in constitutional interpretation, too, any role for public reason will be limited and narrowly circumscribed by conventionalist concerns.<sup>11</sup> Even when constitutional norms are too indeterminate to generate shared determinate meaning in a concrete case, as is typically the case with regard to the abstract clauses that guarantee basic rights, the existence of conventional understandings and practices would provide authoritative guidance and constraints on judicial interpretation. To illustrate the point: Assume we want to know whether it is a violation of the constitutionally guaranteed right to equality that, according to state laws, marriage is restricted to heterosexual couples only, thus excluding gays and lesbians. The text of a constitutional provision, say in the form of a general right to equality, is unlikely to provide much guidance. Instead, a great deal of justificatory work is necessary to assess whether equality, as it relates to marriage, is in fact compatible with the exclusion of gay couples. The problem is, of course, that issues of

<sup>9</sup> See Jed Rubenfeld, *Freedom and Time* (New Haven: Yale University Press, 2001) and Lawrence Lessig, “Fidelity in Translation,” *Texas Law Review*, 71 (1993), 1165–1268.

<sup>10</sup> Note how in the most influential modern positivist theory the fact that relevant officials recognize a constitution as the supreme law of the land merely establishes its status as the highest-ranking legally valid norm, not its actual moral authority; see H. L. A. Hart, *The Concept of Law* (2nd ed.), (Oxford: Clarendon Press, 1994). Only if positivist jurisprudential theories are recast as theories relating to the moral grounds of law is it possible to connect some core features of positivism with conventionalism as a moral theory. For a discussion of legal conventionalism, see Andrei Marmor, *Interpretation and Legal Theory* (Oxford: Hart, 2005).

<sup>11</sup> On the connection between grounds of law and legal interpretation, see Ronald Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1986).

principle such as these are often highly disputed. If there is real disagreement over an issue, even one framed as an issue of abstract constitutional principle, and the law provides no authoritative guidance as to how to resolve this disagreement, to what extent and why should courts rather than legislatures have the authority to settle them? This is an issue central to modern constitutional practice that includes highly abstract rights provisions and establishes courts with the jurisdiction to enforce them. All constitutional theories worth their mettle need to have a plausible answer to it.

For a conventionalist the problem of disagreement as it relates to the judicial role in interpreting constitutional principle is largely mitigated if not resolved by reference to conventions. How exactly conventions matter, which conventions matter, and whether and to what extent they exclude reference to general moral argument may be subject to controversy.<sup>12</sup> But notwithstanding differences between different positions, conventionalists agree that courts should recognize only those rights, which are solidly grounded in or can be seen to fit with prevailing practices or at least endorsed by existing tendencies and trends. On the one hand, conventions can be established in the form of judicial precedent or other forms of explicit constitutional recognition. If an issue can be shown to be sufficiently closely linked to legally settled positions and justifications, then that provides the preconditions for also accepting a new norm as constitutionally required, if there are otherwise good reasons for doing so. On the other hand, existing social and ordinary legal conventions and practices may also support and help authorize a court to recognize something as a matter of constitutional right. Within a conventionalist framework it makes sense, for example, that the European Court of Human Rights is likely to recognize as rights only propositions that already reflect a widespread European consensus reflected in national legal practice across jurisdictions, although in some cases it suffices for the court to establish a dynamic tendency in

<sup>12</sup> Dworkin's early and middle periods – which includes *Law's Empire* and his account of “law as integrity” – remain, contrary to Dworkin's own characterization, conventionalist in the relevant sense. Interpretation may be a matter of morality, but it is law's morality, constituted and constrained by the criteria of “fit,” that is connected to what has been historically accepted and what can be made sense of as part of a chain novel. Only the late Dworkin sheds his foundationally historicist, conventionalist assumptions; see Ronald Dworkin, “Law” in *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011), 400–415. The late Dworkin may plausibly be reconstructed as embracing a public reason-based understanding of constitutionalism, which is discussed further in Section III.

the evolution in the direction of such a consensus.<sup>13</sup> And when the US Supreme Court faced the issue of gay marriage<sup>14</sup> and ended up recognizing such a right, it did so not without mentioning that such a right had been accepted in the majority of states, either by courts, legislatures, or referenda.<sup>15</sup> In that sense courts as interpreters of rights within a conventionalist mindset are authorized to formally ratify existing majoritarian conventions or endorse general evolutionary tendencies as constitutional requirements. But whatever role might be left for public reason as part of constitutional interpretation, it is grounded in and limited by recognized conventions.

### III A Public Reason–Based Conception of Constitutionalism

If a core normative point of constitutions is to establish the conditions that ensure that positive laws meeting constitutional requirements actually have the authority they claim to have, and if law actually has the legitimate authority it claims to have only if it is justifiable in terms of public reason, what follows? How can we make sense of constitutions in this context, and what kind of constitutional practice would that give rise to? In the following I will first clarify some core features connected to the idea of justifiability in terms of public reason as it becomes relevant for the construction of a public reason–based constitutional theory (1), before then spelling out the basic contours of such a theory (2).

#### 1 *The Idea of Justifiability in Terms of Public Reason: Three Core Ideas*

For the purpose of constructing a constitutional theory, there are three core features central to the idea of justifiability in terms of public reason, without which it would not be possible to understand what is distinctive

<sup>13</sup> More specifically, the idea of a “European consensus” operates as a criterion for the degree to which the court will recognize a “margin of appreciation” for state institutions when they interfere within the scope of a right. The more a consensus there is, the harder the court will scrutinize a state’s deviance from that consensus. The less of a consensus there is, the lower the level of judicial scrutiny of state decisions. For an overview of the issues raised by such an approach, see Panos Kapotas and Vassilis P. Tzevelekos (eds.), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge: Cambridge University Press, 2019).

<sup>14</sup> *Obergefell v. Hodges* 135 S. Ct. 2534 (2015).

<sup>15</sup> Only thirteen of the fifty US states prohibited gay marriage at the time the case was decided.



about the idea. All these ideas are familiar, but I will on occasion give them a distinctive interpretation and take a position in debates relating to public reason.

a The Fundamental Status of Free and Equal Persons

Those to whom justification is owed because they are subject to the jurisdiction of a law claiming authority over them are imagined as having the *fundamental status of free and equal persons*. For purposes of law and politics, this is how we fundamentally should regard each other: As fellow free and equal persons, who, in virtue of the fact that we live under the jurisdiction of the same laws, are members of a justificatory community. What defines our status, then, is not our faith, ethnicity, race, cultural heritage, gender, or sexual orientation, even if, as free and equals, we recognize being members of communities in which there are many, including perhaps you and me, for whom markers such as these define identities and structure lives. But as justificatory agents and as persons making demands for justification, interacting with others in the political and legal realm, we act and make demands as free and equals who happen to be Catholic, Muslim, Jewish, atheist, black, white, Hispanic, straight, gay, queer, or anything else. We have no right to demand positive affirmation for the substance of the choices and identities that make us who we are by public officials or fellow citizens in public life. Nor is it a requirement that pluralism and multiculturalism be celebrated as a wonderful mutually enriching thing in public life. It may indeed be something enriching for some, perhaps for many. But for others it may also just be hard work requiring adjustment to a brave new world in which old familiarities are lost due to cultural, technological, and demographic change. Debates about multiculturalism and its desirability may have their place, because, at the margins, they are policy relevant. But these debates should not cloud the core point: Irrespective of what someone might think about multiculturalism, whether they think it is a good thing or a bad thing: Every person is required to *recognize* others as being persons with the right to make the choices that are theirs to make and as having the identities they are free to have. Like the results or not, a person's status as free and equal, and the choices that such a person is free to make, demands recognition, regardless of the assessment of the decision you – or I – would believe to have good reasons to make.

## b The Fact of Reasonable Disagreement

Among free and equals we recognize that it is not a symptom of decadence or bad faith, but simply part of the condition of politics that we, as reasonable persons, should not expect to agree either on what gives meaning to our lives or how we should live it (questions relating to “the good”), nor should we expect to agree on exactly what justice requires and what we owe to each other.<sup>16</sup> The fact of reasonable disagreement across these two domains leads to different, but in each case constitutionally fundamental, conclusions.

First, questions relating to the good are deemed to be justificatorily off-limits. They are excluded as legitimate reasons justifying the imposition of burdens on anyone. What exactly that implies cannot be fleshed out here, but it is closely connected to the traditional idea of the ethical neutrality of the state. Note how this ethical neutrality is primarily *justificatory neutrality*, not neutrality of effect (that would be impossible to achieve). It means that justifications offered by public authorities must abstain from judgments about the merits of ethical decisions, decisions relating to the good. It may not be an easy question whether or not Italy was violating the rights of non-Christians when requiring that crucifixes be hung in all public school classrooms.<sup>17</sup> But it was uncontroversial that had official public justification insisted on the truth of the Christian faith and the positive effects of having children being socialized in that true faith, it would not have been a plausible justification for these policies. Of course, this was not the argument put forward by the Italian government; and not surprisingly, such a justification was so beyond the pale that it was not even discussed. Equally beyond the pale would be a counter assertion by an atheist rights-claimer that crosses be taken off the wall of

<sup>16</sup> While John Rawls famously focuses on reasonable disagreement with regard to the good and the existence of competing and incompatible but equally reasonable conceptions of justice, he establishes no constructive symmetry between these domains, even though he acknowledges the various conceptions of justice in his later works. For a discussion of the problem of disagreement about justice, see Chapter 4 in this volume, and Silje A. Langvatn, *Legitimate but Unjust, Unjust but Legitimate*, *Philosophy and Social Criticism*, 42 (2015), 132–153.

<sup>17</sup> In *Lautsi v. Italy*, the European Court of Human Rights upheld the Italian regulation on the grounds that such a measure is a justifiable restriction of the negative right of non-Christians that they not be subjected to being taught in a classroom with Christian symbols. Such a measure can be conceived as the majority making use of their positive right to exercise freedom of religion within the context of a general culture of pluralism and tolerance that makes such an imposition proportionate in light of its legitimate purpose.

public schools, because religion is merely a form of pernicious superstition, the “opium for the masses,” that enlightened citizens should be emancipated from. Under conditions of reasonable disagreement among free and equals, questions such as the nature of the true faith, are questions that individuals work out for themselves.<sup>18</sup> Public authorities do not have the jurisdiction to make authoritative judgments on this and build those judgments into the justification of coercive laws. Doing so violates a requirement of public reason.

Second, questions of justice among free and equals are also subject to reasonable disagreement. How do we circumscribe the liberty of one to ensure that it is compatible with the equal liberty of others? What does that mean with regard to the exact legal norms governing, say, contracts or torts, family law or real estate law? What does it mean in the context of regulating restaurants, hospitals, or banks? And when we raise money through taxation to pay for public services, what does a commitment to equality mean with regard to the structure of progressive income tax, or the relationship between taxes on income, taxes on capital, or taxes on inheritance? Clearly these are questions that cannot be off-limits for public authorities to decide. These are exactly the kind of questions that are required to be decided authoritatively by public institutions. The point of justice is to determine what it is that we owe to each other, what we can claim from each other. It is an issue that requires institutional settlement. Only once we settle our reasonable disagreement by way of legislation do we know what is to count as just among us. Indeed, this is the core point of positive rulemaking by public authorities: to reasonably settle contentious questions of what we owe to each other and what rights, as free and equals, we have, when all has been considered and weighed.

Only once it is understood that we can reasonably disagree about questions of justice does the distinctive point of justification in terms of public reason become apparent. When we assess whether a legal norm is justifiable in terms of public reason, we do not seek to establish whether it is just. True, all just norms are norms that are justifiable in terms of public reason. But not all norms that are justifiable in terms of public reason are just. Justifiability in terms of public reason defines the boundaries of the

<sup>18</sup> They work this out not as “atomistic individuals” as communitarian critics of liberalism like to assert, but as individuals situated and engaged with and in their respective social and cultural contexts.

reasonable in contexts of disagreements about what justice requires. It defines a standard of legitimacy, not of justice.

c Clarifying the Formula: Justifiability in Terms  
of Public Reason

(1) Substance and Procedure

If a core task of public institutions is to settle reasonable disagreement as to what counts as just among us, then any such settlement needs to meet two requirements to be justified. First, the result of the settlement itself must be justifiable to everyone over whom the settlement claims authority. In that sense the decision must meet a *substantive* reasonableness test. But it is not clear why anyone subjected to a norm should accept its authority just because it is reasonable. If you happen to rightly believe that it is wrong, even if reasonable, why should you accept a settlement that, in your eyes, falls short? This is the point where, second, the procedural requirement comes in: Reasonable (although not necessarily just or correct) settlements of justice claims are justified if the procedure used to settle them meets standards of justifiability. Only if the procedure used is a reasonable interpretation about what procedural justice requires with regard to decisions of that kind among and free and equals, is it a procedure that can result in authoritative settlements? For different kinds of decisions, different kinds of procedures will be required. For certain issues, for example those relating to war and peace, or other aspects of basic justice (tax legislation, criminal law, etc.), it would generally be unreasonable not to demand a decision by a properly constituted democratic legislature. For other, more technocratic decisions, a reasonably structured, adequately participatory administrative process may be sufficient. And for other, individualized decisions an adequately structured judicial process, involving being heard by an impartial and independent judge, will be required. Note that it is not required that procedurally perfect justice be done because, just as with regard to substantive decisions, there is going to be reasonable disagreement about what perfect procedural justice requires. Instead, the procedure used must reflect a reasonable settlement of contested questions of what procedural justice among free and equals requires.

(2) The Scope of the Justification Requirement:  
The Micro-Macro Problem

Rawls limits the requirements of public reason to questions of basic justice and constitutional essentials. The core idea is that if basic justice and constitutional essentials are in place, then legitimacy of everything

that is justified under a constitution would be legitimate. But of course, it is not at all obvious why that should be the case. Why would the existence of legitimate macrostructures provide legitimate cover for clear and obvious violations of justice on a micro level, even when they do not concern whatever qualifies as “basic justice”?

Say a police officer stops you because one of the brake lights of your vehicle is not working. Assume further that because you are in a hurry and generally in a bad mood, you do not respond kindly to the police officer stopping you. Although generally cooperative, you clearly hint that you have better things to do. Imagine that the police officer, himself not having a good day, is annoyed with you and, to put you in your place, asks you to get out of the vehicle to pat you down; as you protest, he takes out a taser and threatens you with it. You unwisely decide to lecture him on potential criminal sanctions implicated by certain forms of abuse of authority, at which point he uses the taser on you. Now assume that, *deus ex machina*, you would somehow be able to extract yourself from that situation by pushing the police officer away from you and speeding off, never to be found. In real life this is neither advisable nor realistic, but as a matter of principle, would you have committed a wrong by not complying with the instructions of the abusive police officer claiming to act under the authority of the law? Assume that realistically you would not have had any effective legal remedies available to you against the abusive officer, notwithstanding basic justice and constitutional essentials in place. It is not clear on what grounds the orders of such an obviously abusive police officer could plausibly claim legitimate authority. What this example suggests is that legitimate macrostructures are insufficient to assure the legitimate authority of micro actions. The micro actions themselves have to be susceptible to a reasonable justification to make plausible claims of authority. Your strategy of extricating yourself from the situation may be audacious and dangerous, but it does not constitute a failure to recognize legitimate claims of authority over you. Abusive orders of a police officer in this kind of context cannot plausibly claim authority over anyone.

Note how the inverse appears to be also true. Reasonably justifiable microstructures do not overcome the corrupting effect of illegitimate macrostructures. Imagine a micro practice that is perfectly reasonable, say the general structure of the tax system as it applies to you, a good Aryan living in Nazi Germany in the early 1940s. It turns out that the whole system is geared toward financing a totalitarian dictatorship engaging in a global war of domination, furthering Aryan racial supremacy, and

committing genocidal annihilation. Is it plausible to say that you are obligated to pay taxes to the regime if you lived in Germany at the time, even if you yourself are treated decently? The answer to this question is a clear “no.” There is no obligation to fulfill what Nazi authorities will claim are your legal duties under the circumstances. The reasonableness of the tax code is corrupted by the larger political structure of which it is a part.<sup>19</sup>

What both examples appear to suggest, at least *prima facie*, is that the micro and macro level must always be complementary. There are no plausible grounds for focusing on the reasonableness of the micro situation without taking into account the larger context, just as it is implausible to believe that successful justification of macrostructures trickles down to legitimate unreasonable transgressions on the micro level. Justifiability in terms of public reason is a requirement that encapsulates both levels. The substantive reasonableness of a micro regime is not sufficient to justify its legitimate authority. Nor can the reasonableness of a macro regime justify all the laws and acts of authorities under it.

### (3) What Is the Correct Standard? What Everyone Might Reasonably Accept vs. What Everyone Cannot Reasonably Reject

Is it necessary that those over whom a norm claims authority might reasonably accept such a norm as free and equals? Or must it be the case that the norm cannot be reasonably rejected by them? It is a widely held view that there is an asymmetry between these formulations. We might reasonably accept more than we could not reasonably reject.<sup>20</sup> I propose to resolve the issue by distinguishing between two different standards of justification. Once we connect each of these formulations to the correct standard, they

<sup>19</sup> Here is a further complexity: Imagine, still in Nazi Germany in the early 1940s, you hire a craftsman to paint and refurbish your home. Assume further that the private law governing these kinds of contractual relationships is generally reasonable, notwithstanding extremely unjust exceptions with regard to “enemies of the state,” which include Jews, gays and lesbians, communists, and socialists, who are unable to enforce contractual obligations against Aryans. Is the deeply corrupted macro context sufficient grounds not to honor your contractual obligations to the craftsman? Probably not. Here, the reason why the macro context does not corrupt the micro context is the relative independence of the micro context from the macro context, both personally and economically. But assume you pay the craftsman off the books, so that you get a better price and they save money on taxes. This would probably not constitute a violation of any moral obligations with regard to the law, given the illegitimate macrostructures.

<sup>20</sup> Tom Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991), 36; T. M. Scanlon, *What We Owe to Each Other* (Cambridge: Harvard University Press, 2000), 137–138.

are in fact complementary. If a legal norm claiming authority over a person is such that it might reasonably be accepted as just by everyone, even those most burdened by it, then such a norm cannot be reasonably rejected by an addressee as illegitimate. If the process of settling reasonable disagreement has led to a norm that we can understand as a good faith attempt to treat even those most burdened by it as free and equal partners in a common justice-oriented project, rather than as a person dominated by factual power relations, then that fact is sufficient to establish that a person cannot reasonably reject such a settlement as illegitimate.<sup>21</sup>

## 2 *The Double Function of Constitutions*

Under a public reason-based understanding of constitutionalism, the constituent power of “We the People” is not the power to create the positive legal world out of nothing. Instead, the constituent power is the normatively circumscribed power of free and equals to establish a charter of individual and collective self-government among them, the point of which is to ensure that positive laws meeting constitutional requirements actually have the authority they claim to have. Since this is only the case if positive laws, both in terms of the procedures used to generate them and their substance, are justifiable in terms of public reason, such a constitution needs to serve a double function.

First, a reasonable macro framework of institutions and procedures needs to be created. The institutions established by the constitution, the legislature, the executive, and the judiciary and the delimitation of competences between them reflecting a plausible version of the separation of powers must be justifiable as a reasonable specification of ideas of procedural justice as it applies to free and equals. In that sense, constitutions setting up institutional arrangements and procedures settle reasonable disagreements about what is to count as procedurally just among us. What this means in greater detail cannot be described here, but the establishment of a democratic legislature, the make-up of which is the result of free and open elections based on an equal right to vote, is among the necessary features.

Second, the constitution must also establish the relevant substantive standards for justifiability in terms of public reason. But note this: With regard to this function, constitutions should not be thought of as settling

<sup>21</sup> This is a clarification of the position first articulated in Mattias Kumm, “The Idea of Socratic Contestation,” 141.

issues of justice over which there is reasonable disagreement. Reasonable disagreement about what justice requires is generally to be settled by democratic processes, not by the constitution. The point of constitutional substantive standards is to define the boundaries of the reasonable: If a legislature has produced a specific result that is then struck down on constitutional rights grounds, the claim is that the legislature failed in its task to settle reasonable disagreements about what justice requires. The failure lies not in failing to pick out the just solution. That would be too much to ask and is not for judges to authoritatively pronounce themselves on. The failure lies in picking a solution that is not reasonably susceptible to a justification in terms of public reason. Only when the solution enacted falls outside the boundaries of the reasonable should it not count as a legitimate settlement claiming authority of law.

Recall that Rawls claims that constitutions, to ensure legitimacy, have to guarantee basic justice. There are two ways in which this formulation points in the wrong direction. First, as the discussion of the micro-macro problem has shown, basic justice is not enough to ensure legitimacy. The scope of constitutional requirements has to extend to those domains not plausibly described as basic. Second, the relevant standard is not justice but reasonableness. Constitutions seek to ferret out unreasonable results. Of course, unreasonable attempts to settle competing claims of justice are themselves unjust, but saying that the settlement is unreasonable qualifies that injustice in a way that is decisive for legitimate claims to authority. In a world where reasonable disagreement about what justice requires is part of the circumstances of politics; the fact that one can reasonably claim that an act of public authority is unjust does not yet delegitimize that act. Only when we can show it to be unreasonable does it undermine its claim to authority. The point of judicially enforceable constitutional rights is to define boundaries of the reasonable, not of justice.

### 3 *Implications for Constitutional Practice*

#### a General Features of Constitutional Reasoning

If the point of constitutions is to establish relevant standards ensuring the justifiability of acts of public authorities in terms of public reason, and the original constituent power of “We the People” is the power to do just that, then a constitutional text should be interpreted to reflect that purpose. With regard to the structural provisions of the constitution, this means that they should be interpreted so that they can be understood as



a reasonable attempt to settle and define in concrete terms what procedural justice amounts to here and now for us. And with regard to the substantive requirements, constitutionalized as rights guarantees, these should be interpreted in light of their function to ferret out acts of public authorities that are not susceptible to a reasonable justification. But what would that mean more concretely?

### b On the Scope and Structure of Rights Adjudication

If constitutional rights are to fulfill the function of ascertaining acts of public authority that would not be susceptible to justifications in terms of public reason, what would the scope and structure of human rights practice look like?<sup>22</sup> On the one hand, rights might take the form of rule-like red lines that constitutionally define what is unreasonable and could therefore not claim legitimate authority. Rights might explicitly prohibit torture or the death penalty, for example, or require someone not to be put in jail without seeing a judge for more than twenty-four hours. But more often than not, rights provisions in modern constitutional texts are more abstract, merely stating principles on a relatively high level of abstraction. What principles would need to be included? What is the scope of rights? How would courts determine whether a principle has been violated? How would such an inquiry be structured?

Concerning its scope, it would be necessary for rights to be invocable whenever someone is burdened by acts of public authorities in a nontrivial way. Once someone is burdened by an act of public authority, they would then have the possibility to go to an impartial and independent tribunal to have it assess whether imposing such a burden on the rights claimant is in fact justifiable to her given her status as a rights-bearing free and equal. To make that possible, a constitution would do well to recognize a general right to liberty as well as a general right to equality.<sup>23</sup> Even if there is no such right explicitly recognized in the text of the constitution, a court would be right to interpret very broadly whatever more specific provisions there may be.

Having an act of public authority infringe on the scope of the right does not, of course, end the rights inquiry; it merely triggers the question of whether the infringing act is justified. For the legal justification to mirror the

<sup>22</sup> For a more extensive discussion, see Mattias Kumm, "The Turn to Justification: On the Structure and Domain of Human Rights Practice," in Adam Etinson (ed.), *Human Rights: Political or Moral* (Oxford: Oxford University Press, 2018).

<sup>23</sup> For a such a claim, see Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002).

requirement of justifiability in terms of public reason, it would be important that the justification not be undermined by legal technicalities,<sup>24</sup> while nonetheless providing judges with a workable structure for framing the inquiry. The proportionality test is just such a structure.<sup>25</sup> It provides a set of four questions, which, taken together, provide the individually necessary and collectively sufficient conditions for an act to be substantively justifiable in terms of public reason. The first question asks whether the legal act in question furthers a legitimate purpose, and the second asks whether taking such an act is necessary, in that there was no other equally effective but less rights-restrictive measure available to further that legitimate purpose. The third and final question concerns whether, on balance, the degree to which the measure furthers the legitimate purpose justifies the degree to which the right is infringed, or whether it burdens the rights bearer disproportionately. The proportionality test as a core structural feature of rights adjudication allows courts to effectively assess whether acts of public authorities can be justified to those burdened by them in terms of public reason.

If the scope of rights is as expansive as this and the structure of rights permits courts to assess the justifiability of an act in terms of public reason, then this would clearly validate Rawls's claim that we should think of apex courts as exemplars of public reason. But it does appear, at least on first sight, to raise the concern of juristocracy. Why is it not presumptuous and undemocratic for courts to serve as final arbiters on questions that are subject to reasonable disagreement? A careful reader of this text will know the answer to that question. Courts are not in the business of settling reasonable disagreement. That is left for other, more democratically legitimated political institutions. But courts are in the business of ensuring that the political branches succeed in their task of settling such disagreements within the bounds of reasonableness. Courts never ask whether political institutions have found the best, the most just, fairest, or most efficient solution to a problem. But if the results of the political process produce legislation that is not demonstratively justifiable in terms of public reason, then the issue is not the undemocratic

<sup>24</sup> On this issue, see Jeremy Waldron, “Judges as Moral Reasoners,” *Journal of International Constitutional Law*, 7 (2009), 2–24.

<sup>25</sup> Classics include Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002), Aharon Barak, *Proportionality* (Cambridge: Cambridge University Press, 2012), Alec Stone Sweet and Jud Mathews. “Proportionality Balancing and Global Constitutionalism” *Columbia Journal of Transnational Law*, 47 (2008), 68–149. For a recent discussion, see Mark Tushnet and Vicki Jackson (eds.), *Proportionality: New Frontiers, New Challenges* (Cambridge: Cambridge University Press, 2017).

intervention of judges. The question becomes why such an act could conceivably claim authority over free and equals in the first place.

### c Unconstitutional Constitutional Norms

Finally, it may be useful to point to another feature of a public reason-based conception of constitutionalism. If even the original constituent power of “We the People” is not unlimited but understood as the power to establish a charter of self-government of free and equals that defines the conditions under which acts of public authorities may rightly claim legitimate authority, then there is nothing puzzling about the idea of unconstitutional constitutional norms. Two features widespread in contemporary constitutional practice come into normative focus and are rendered plausible. First, it is perfectly plausible to explicitly write into constitutions some basic principles connected to the core of the constitutionalist project and to insist that they are unamendable. These are often commitments to human rights, democracy, and the rule of law, or to liberal constitutional democracy and the like. But even if there are no such explicitly textually fixed norms, constitutional norms incompatible with the basic point of constitutionalism cannot claim legal validity. In that sense, the constitutional entrenchment of unamendable norms is often of declaratory significance only.<sup>26</sup> Unconstitutional constitutional norms are norms formally enacted as constitutional norms that cannot reasonably be understood as making a contribution or may even be inimical to the constitutionalist project properly conceived. If, for example, a constitution is amended in a way that effectively abolishes multiparty democracy in favor of entrenching the power of a dominant party, then there are no good normative grounds for accepting such an amendment as valid law, even if enacted following reasonable procedures for constitutional amendments laid down in the constitution. Furthermore, it is not only unconstitutional constitutional amendments that may be invalid. If an original act of constituent power includes a constitutional norm that cannot be understood as a reasonable attempt to specify the condition for legitimate authority to be recognized among free and equals, then it may turn out to be *ultra vires* and as such partially invalid.<sup>27</sup> Within the normative framework of a public reason-based conception of constitutionalism, legal doctrines

<sup>26</sup> When constitutional unamendability norms include commitments to more parochial features of the constitution (e.g., its federal structure or distinctive institutions like the US Senate), then those provisions are not declaratory but constitutive.

<sup>27</sup> David Landau, “From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras,” *Global Constitutionalism*, 8 (2019), 40–70.

along these lines, characteristically present in some form or another in contemporary liberal constitutional democracies,<sup>28</sup> make perfect sense.

#### IV Conclusion: “We Hold These Truths to Be Self-Evident”

Perhaps the best rough and ready historical expression of the principles that ground constitutional authority within a public reason-based conception of constitutionalism is contained in the second paragraph of the 1776 US Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. –That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, – That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it.

Much of the substance of the declaration can relatively easily be interpreted to fit the conception of constitutionalism proposed here. I will not comment on the declaration or interpret each of its parts to relate them to the position presented here. I just want to point out, without going either into the history of the drafting process, the at-first-sight mysterious formulation of “We hold these truths to be self-evident.” How is that formulation related to the idea of public reason as the reason appropriate among free and equals participating in the project of self-government and seeking to establish norms that claim authority over them?

To begin with, “these truths” are clearly not self-evident to all. If they were, it would not be necessary to declare that they are to be held as such by all. The truly self-evident goes without saying and requires no declaration. But if these truths are not self-evident, what is the significance of declaring that these truths are to be held as self-evident? Here is the most significant feature of such a declaration: When “we” hold these truths to be self-evident in such a public declaration, we agree that in our dealing with one another, in the justificatory processes that we will be engaged in as political members of the community, we will accept the things we claim to be self-evident truths. We will take that for granted for the purposes of engaging one another in public life. We will not ask for further justifications or question that the person we are dealing with does

<sup>28</sup> For an overview, see Yanif Roznai, *Unconstitutional Constitutional Amendments* (Oxford: Oxford University Press, 2017).

in fact share the status of an equally free person. Questioning the status of every member of the community as free and equal is not part of our public reason but a premise from which it proceeds.

In our private capacities we may well ask what reasons we or others might have to accept the proposition that all of us share the status of free and equals for the purpose of regulating and justifying law and government institutions to each other. As Christians, Jews, or Muslims we might believe, for example, that there is a solid theological base for this, even though that has been very controversial historically in each faith and in part remains so to this day. Or we may actually believe this to be self-evident for ourselves. More generally we may believe, as Rawls does, that under certain favorable conditions an overlapping consensus between reasonable comprehensive worldviews might emerge in this regard.

But what about those who do not share in this overlapping consensus? As normatively inclusive the idea of a shared status as free and equal might be, it is an idea that also has considerable exclusionary force: For those who refuse to see either themselves or others as genuinely having such a status, the justification that public reason, as the reason of and for free and equals, provides may not be convincing. Even if the measures taken by public authorities do as a matter of fact meet public reason requirements and thus make legitimate claims to authority, they may well be rejected by someone not accepting these premises, such as a white nationalist, an Islamic or Christian fundamentalist, or a justice warrior who takes as basic and status-defining race, gender, or sexual orientation and the humiliation suffered as a bearer of these characteristics. In practice this raises problems, of course, and the question arises how best to deal with those within a political community. But in normative terms, here is the hard side of this approach: The fact that someone does not agree with the premises and is not willing “to hold these truths to be self-evident” for public purposes does not undermine the justificatory force of public reasons. Such a person merely outs himself as unreasonable. Those who refuse to accept the premises of the constitutional project merely undermine the possibility to play a constructive role in it, but not the justificatory force of public reason.

Of course, much more would need to be said about “these self-evident truths.” The hypocrisy of making such claims, when slavery and severe racial discrimination were such a significant part of social and political life, does not exactly inspire confidence in the constitutional project. But instead of cynically dismissing all of it as ideology in the worst sense, it may be more adequate to reflect on how claims relating to our status as free and equals have informed historical struggles in productive ways, leading

to progress, sometimes in fits and starts, sometimes with sustained backlashes, and sometimes far too slowly. But as lawyers and citizens we would do well to rediscover and reflect upon the ambitious nature of legal and political life, once we begin to take seriously our status as free and equals, and the demands that having such a status makes not just on public authorities but also on us as citizens. It takes courage to take ourselves seriously in this way. Instead, the temptation is to settle with conventions and perhaps a complacent, normatively unambitious idea of democracy focused on electoral majorities masquerading as “the will of the people,” all within the context of an utterly corrupted electoral system and a similarly corrupted public sphere. Among free and equals, there can be no legitimate authority, except for one that meets procedural and substantive justificatory standards of public reason. Lawyers, as constitutional interpreters, and judges, as guardians of the constitution, would do well to insist upon that.