PRIVATE LAW AND PUBLIC REASON

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IN his wide-ranging essay on Public Legal Reason,[1] Professor Lawrence Solum takes on three distinct tasks: to show, first, that social-welfare analysis, as practiced by Louis Kaplow and Steven Shavell, is inconsistent with public reason as that concept is explicated by John Rawls; second, but in a much briefer discussion, that the same is true of Ronald Dworkin's theory of adjudication based exclusively on legal rights; and third, that public reason imposes constraints on the reasoning of judges, but not on the work of legal scholars. The first two of these claims can be derived fairly directly from Rawls's own writings, as can parts of the third, but the claimed exemption of legal scholars from the strictures of public reason cannot, on examination, be sustained.

Professor Solum's claims, despite their foundations in Rawlsian political theory, are nevertheless deceptively ambitious. Taking any ideal political theory, as Rawls's plainly is, and drawing out its implications for legal analysis is fraught with difficulties. Just for starters, most legal analysis does not concern the ideal of what law should be, but the messy reality of what the law actually is. Most of it, too, is heavily influenced by the principles that govern discrete fields and subfields into which the law is divided. The division of the subject into public and private law is only the beginning of much more finely grained categories that, for instance on the private-law side, distinguish torts, contract, property, corporations, trusts and estates, and other familiar subjects in the law school curriculum. The "local priority" of principles within these fields, as Ronald Dworkin has noted, provides a powerful heuristic for analyzing concrete legal problems.[2] Most questions, say, about title to

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[1] Lawrence Solum, Public Legal Reason, 92 Va. L. Rev. 1449 (2006).

[2] Ronald Dworkin, Law's Empire 402–03 (1986).

land, can be resolved by looking to the law of property without searching further afield for analogies.

Political theorists do not usually engage in such fine-grained analysis, either of particular fields or particular cases. As Justice Holmes, in a well-known phrase, put it: "General propositions do not decide concrete cases."[3] Perhaps for this reason, Rawls offers only the most general and sketchy comments on the implications of his theory for law and the legal system.[4] If it is plain that his sympathies, in the end, are with conventionally liberal legal theory, how he derives his legal conclusions from his political theory is not worked out in any detail. This stands in marked contrast to Kaplow and Shavell, most of whose book, *Fairness versus Welfare*,[5] is devoted to a systematic application of social-welfare analysis to subjects such as torts and contracts. This contrast in emphasis forms the background to the first of Professor Solum's claims, involving the incompatibility of Rawlsian public reason with social-welfare analysis as practiced by Kaplow and Shavell.

This Response to Professor Solum will first consider his criticism of Kaplow and Shavell and then his criticism of Dworkin, although it will do so inversely in proportion to the attention he devotes to each. His criticism of Kaplow and Shavell will be treated summarily, not because it is wrong but because it is so obviously right. His criticism of Dworkin will receive greater attention because it comes closer to the core of public reason as an element of liberalism. Unlike Rawls, Kaplow and Shavell are consequentialists, so the differences between them over the role of public reason are not at all surprising. Conversely, both Dworkin and Rawls are liberals, so their differences over public reason—in particular, over just how central it is to liberalism—are more revealing. The last part of this Response will then consider whether Rawlsian public reason is a distinctive constraint on his political theory or whether it resembles the methodological constraints that accompany any such theory.

[3] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). He did add, however, that he thought he had found a proposition in this case which, "if it is accepted, will carry us far toward the end." Id.

[4] See, e.g., John Rawls, A Theory of Justice 197 (rev. ed. 1999) ("We may take for granted that a democratic regime presupposes freedom of speech and assembly, and liberty of thought and conscience.").

[5] Louis Kaplow & Steven Shavell, Fairness versus Welfare (2002).

I. PUBLIC REASON AND SOCIAL-WELFARE ANALYSIS

Unfortunately, the incompatibility between these two approaches is all too easy to prove. Social-welfare analysis, as Kaplow and Shavell use the term, requires the analysis of social policy by aggregating its effects on individual well-being. They offer a frankly consequentialist political theory that recommends policies that maximize individual well-being, defined in terms of "what the individuals under consideration really care about."[6] As they elaborate later in their book, well-being is wholly a function of the revealed preferences of individuals, which extend beyond preferences that satisfy immediate individual desires or interests, and extend, in particular, to preferences for fairness.[7] This would commonly be called a utilitarian theory based on satisfaction of preferences, but they remain skeptical about whether "utility" is always defined so broadly[8] and about the distributive commitments of utilitarian theories.[9] Nevertheless, even if they are reluctant to characterize their theory as utilitarian, its ideas are certainly very similar.

These similarities turn out to be significant because Rawls identifies utilitarianism as among the comprehensive doctrines that must be qualified and restricted in order to conform to the requirements of public reason.[10] It is, of course, no news that Rawls rejects utilitarianism, as he makes plain in *A Theory of Justice*. In that book he rejects utilitarianism on the merits, as it would be considered by parties deciding upon a political theory for their society in the original position, whereas he later excludes it, in its comprehensive form, from consideration altogether as inconsistent with public reason.[11] So, too, he would have rejected the social-welfare analysis of Kaplow and Shavell. Like utilitarianism, it does not give priority to any basic rights or liberties; it depends upon complex and speculative predictions about the effect of public poli-

[6] Id. at 19 n.8.
[7] Id. at 409–36.
[8] Id. at 18 n.7.
[9] Id. at 5 n.8. For Professor Solum's comparison of social-welfare analysis and utilitarianism, see Solum, supra note 1, at 1453–54.
[10] John Rawls, Political Liberalism 170 (expanded ed. 2005).
[11] Rawls, supra note 4, at 144–53.

cies; and it does not encourage compromise with other comprehensive views.[12]

This summary assessment of Kaplow and Shavell might appear to be overly harsh, but it is, in fact, entirely characteristic of their theory. Other comprehensive views figure in their assessment of social policy only insofar as they are embodied in the actual preferences of individuals.[13] Their entire argument against fairness rests on this feature of their theory: that fairness counts in assessing overall social welfare only to the extent that individuals actually prefer fair outcomes. As an independent value, it counts for nothing because otherwise it would be inconsistent with the dominant and exclusive role of social welfare. This uncompromising stance against fairness would, by the logic of their argument, extend to any competing comprehensive doctrine. It would be demoted into only one component in the overall calculation of social welfare, one that might well be overridden by others. Kaplow and Shavell explicitly rule out the compromises required by public reason.

Professor Solum is surely correct to point out the inconsistency between social-welfare analysis and public reason, but it follows too directly from the essential features of these methodologies to be informative. Social-welfare analysis depends upon a comprehensive version of consequentialism and is therefore inconsistent with public reason. This fundamental inconsistency also pretermits the otherwise interesting question of how the views of Kaplow and Shavell could be modified to yield a version of social-welfare analysis that is consistent with public reason. They would have to give up the feature of their theory that is most distinctive: the subordination of other principles, like fairness, to the maximized satisfaction of individual preferences. They would be forced into a precipitous retreat from their insistence on social-welfare analysis as the exclusive measure of social policy, taking them a long step back towards some theory of constrained maximization like the one Rawls himself advocates. Professor Solum suggests that they might have to retreat even further, to the anodyne claim that satisfaction of preferences plays some role in any plausible political theory and therefore in any theory consistent with public reason.

[12] Rawls, supra note 10, at 161–63.
[13] Kaplow & Shavell, supra note 5, at 28–31, 39–45.

This conclusion holds despite the restricted range of social-welfare analysis as developed by Kaplow and Shavell. They sharply distinguish their theory from one concerned with personal morality.[14] This limitation is not at all surprising, since their version of consequentialism takes personal preferences, including those derived from personal morality, as given and then proceeds to maximize the degree to which they are satisfied. Kaplow and Shavell, in fact, attribute many of the defects in relying on fairness as a guide to public policy to a mistaken extrapolation from individual to social issues. Perhaps for these reasons, their theory cannot be labeled a "comprehensive doctrine" as Rawls uses this term,[15] but the exclusivity of their reliance on satisfaction of preferences still renders it inconsistent with public reason. To be sure, a peculiar feature of their theory is that, if individuals exhibited a sufficiently strong preference for public reason, then this preference would have to be satisfied, causing public reason to be endorsed by their theory. Presumably, they would deny that any such preference is widely held throughout society. Rawls himself also impugns any such strong assumptions that reconcile utilitarianism with public reason as inherently unstable, since they do not provide any assurance that such preferences either currently exist or could be maintained.[16]

It nevertheless remains true that, despite the obvious inconsistencies in their theories, Kaplow and Shavell share this restriction in range with Rawls. The main point of Rawls's later work is to develop a political theory that avoids any commitments to a comprehensive morality, including individual morality, just like he seeks to avoid any commitments to religion or metaphysics.[17] Another common feature of their respective theories is the exclusion of broad categories of arguments from debates over public policy. This principle of exclusion, as Professor Solum calls it,[18] appears in both theories. For Rawls, it precludes appeal to comprehensive doctrine that has not been mediated by public reason to appeal to adherents of rival comprehensive views. For Kaplow and Shavell, it

[14] Id. at 79 & n.121.
[15] Rawls, supra note 10, at 13–14.
[16] Id. at 161–62.
[17] Id. at 11–15.
[18] Solum, supra note 1, at 1466.

is the exclusion of any appeal to principles such as fairness, or indeed any other consideration, that is not reflected in the actual preferences of individuals. Only satisfaction of individual preferences counts under their theory, just as only arguments of public reason count for Rawls. Both theories reject alternative arguments as simply irrelevant, not just as inadequate or unpersuasive after being considered on the merits. This methodological exclusion of competing arguments represents a striking similarity between political theories that are otherwise dramatically incompatible. It raises questions, to be discussed in Part III, about the distinctiveness, significance, and force of the limitations on public debate imposed by the concept of public reason.

II. COMPREHENSIVE LIBERALISM

Professor Solum correctly points out that Dworkin's theory of adjudication is inconsistent with public reason.[19] The abstract right to equal concern and respect that lies at the foundation of Dworkin's theory of adjudication also lies at the foundation of his comprehensive version of liberalism.[20] In adjudication, judges must turn to fundamental moral principles to resolve hard cases,[21] and in liberalism, Dworkin turns to similar principles to defend an individual's autonomy in choosing what constitutes the good[22] or, in a later formulation, what is valuable in human life.[23] Unlike Rawls, Dworkin does not sever his liberalism from comprehensive doctrine. For him, the truth of the claims of political morality is essential,[24] though precisely what Rawls asks any comprehensive doctrine to give up.[25] If Rawls cannot accept Dworkin's liberalism on

[19] Id. at 1474–75.

[20] Ronald Dworkin, Liberalism, *in* Public & Private Morality 113, 125–26 (Stuart Hampshire ed., 1978) [hereinafter Dworkin, Liberalism]; Ronald Dworkin, What Rights Do We Have?, *in* Taking Rights Seriously 266, 273–74 (1977).

[21] Ronald Dworkin, Hard Cases, *in* Taking Rights Seriously, supra note 20, at 81, 126–30 [hereinafter Dworkin, Hard Cases]; Dworkin, Law's Empire, supra note 2, at 254–58.

[22] Dworkin, Liberalism, supra note 20, at 127–28.

[23] Ronald Dworkin, Life's Dominion 28–29, 100–01, 239 (1993).

[24] Ronald Dworkin, Objectivity and Truth: You'd Better Believe It, 25 Phil. & Pub. Aff. 87, 131–39 (1996).

[25] John Rawls, The Idea of Public Reason Revisited, *in* John Rawls: Collected Papers 573, 579 (Samuel Freeman ed., 1999).

its own terms, he at least awards it the consolation prize of being assimilated to the comprehensive secular doctrines of Kant and Mill.[26]

Professor Solum goes further in questioning the compatibility of Dworkin's views with public reason, contending that Dworkin's "rights thesis," allowing judges to rely only on arguments of principle in support of the rights of the parties in cases that come before them, represents a rejection of the pluralism that public reason requires.[27] Although Professor Solum only mentions this issue in passing, it does provide the necessary balance in his conclusion that public reason allows "[b]oth fairness and consequences, but neither welfarism nor deontology."[28] Because he does not give nearly as much attention to this side of the balance as to his critique of welfarism, he does not address the many similarities between comprehensive and political liberalism. If the views of Dworkin and Rawls are at all representative, these similarities are quite striking.

To begin with Dworkin's theory of adjudication, the rights thesis could easily be reconciled with public reason, contrary to what Professor Solum claims. Nothing in Rawls's highly abstract formulation of public reason excludes a division of labor or a separation of powers among the branches of government along the lines contemplated by Dworkin: requiring judges only to consider arguments about rights, but leaving the legislature free also to consider issues of policy.[29] Moreover, Professor Solum is surely wrong to criticize Dworkin for not admitting some degree of consequentialism into his theory of adjudication. First of all, a theory cannot, so to speak, be just a little consequentialist. Either a theory is consequentialist, excluding consideration of any other reasons, or it is not. To the extent that consequentialism, through consideration of public welfare, enters into Dworkin's theory, it is through rights created by the legislature to further overall social goals of this kind.[30] Nor, of course, does Dworkin exclude consideration of consequences in analyzing conflicts among rights, as he made clear

[26] John Rawls, The Idea of an Overlapping Consensus, *in* John Rawls: Collected Papers, supra note 25, at 421, 427, 428 n.12.
[27] Solum, supra note 1, at 1474.
[28] Id. at 1452 (emphasis omitted).
[29] Dworkin, Hard Cases, supra note 21, at 82–88.
[30] Id.

some time ago.[31] Allowing arguments about consequences, of course, is quite different from allowing consideration only of consequences. It is the latter, not the former, that is the defining feature of consequentialism.

On the more general question, Rawls seldom descends to that level of detail in his remarks on constitutional law. Yet it would be entirely consistent with *A Theory of Justice* to reserve one branch of government to enforce legal rights that implement the principles of equal basic liberties and liberal equality of opportunity.[32] As a matter of public reason, the toleration of rival comprehensive doctrines, so long as they are reasonable, easily lends itself to enforcement through legal rights analogous to those of religious freedom. On the inclusionary side of public reason, nothing requires courts to consider matters of overall social welfare if they can be considered by the legislature. The only deviation from the rights thesis required by public reason is in the nature of the rights that judges could consider: for Dworkin, these include rights supported by comprehensive moral doctrine; for Rawls, the rights must be limited to those derived from reasonable comprehensive views. The rights considered by judges under these two theories might well be different, but the rights thesis could still be maintained consistently with public reason.

In fact, the rights derived from both theories might well coincide. The parallels between Dworkin's comprehensive liberalism and Rawls's political liberalism are striking.[33] Dworkin would give individuals the freedom to decide on their own conceptions of the good, subject to the constraints of justice, where Rawls would give effect to any comprehensive doctrine to the extent that it met the requirements of public reason. Dworkin accords priority to the abstract right to equal concern and respect in adjudication and elsewhere throughout the law, whereas Rawls imposes the requirement of public reason to assure that political discourse is between free and equal citizens.[34] No doubt, these similarities are in part attrib-

[31] Ronald Dworkin, Appendix: A Reply to Critics, *in* Taking Rights Seriously 291, 311 (rev. ed. 1978).

[32] For Dworkin's own arguments to this effect, see Ronald Dworkin, Justice in Robes 252–59 (2006).

[33] Dworkin himself has recently made this point. Id. at 261.

[34] Rawls, supra note 25, at 581.

utable to the fact that both Dworkin and Rawls are liberals, so that their differences result mainly from the arguments that they deploy rather than the conclusions that they reach. Liberalism, at least as they conceive of it, is committed to the largest possible degree of toleration for fundamentally different religious and secular views. Yet if this is so, it necessarily reduces the modifications that must be made in a comprehensive liberal doctrine in order to make it conform to public reason. Compared to Kaplow and Shavell, Dworkin would not have to modify much of his legal or political theory to limit the range of political discourse to what Rawls recognizes as reasonable.

The one similarity that Dworkin shares with Kaplow and Shavell is that he would also limit political discourse, at least insofar as judges engage in it. His rights thesis has the same exclusionary force as Kaplow and Shavell's social-welfare analysis and, as noted earlier, Rawls's own concept of public reason. This puzzling commonality among all three theories calls attention again to the issues discussed in the next Part of this Response.

III. PUBLIC REASON AS CONSTRAINT

Professor Solum himself calls attention to the antecedents of public reason in the work of Hobbes, Rousseau, and Kant.[35] The preceding Parts of this Response call attention to the formal similarity between public reason and the methodological restrictions imposed by contemporary political theorists other than Rawls. Both comparisons raise the question of what exactly is distinctive about Rawls's concept of public reason. Any political theory will have implications for the permissible forms of political argument, rejecting some considerations as entirely irrelevant. Kaplow and Shavell reject arguments of fairness, insofar as they are given any independent force apart from satisfaction of preferences. Dworkin rejects arguments over the general public interest in his theory of adjudication, and, at the opposite end of the political spectrum, Robert Nozick rejects arguments about redistribution, as distinct from arguments about corrective justice to redress previous violations of individual rights.[36] Even political theories that are more

[35] Solum, supra note 1, at 1467.

[36] Robert Nozick, Anarchy, State, and Utopia 167–74 (1974).

ecumenical, admitting any seemingly relevant argument to debates over public policy, eventually have to set standards for choosing among these arguments. Failing to do so would leave a political theory without any normative implications at all.

Rawls is not distinctive in ruling some arguments in and others out through his concept of public reason. He is, however, distinctive in the grounds that he offers for these principles of exclusion and inclusion, seeking to sever them from comprehensive doctrine in the form of religious, metaphysical, and moral views. Having taken this step in restricting debate in the original position, he naturally enforces the same restrictions at more concrete levels of analysis, in framing the constitution, passing legislation, and engaging in interpretation and adjudication. Otherwise, arguments from comprehensive doctrines that were inadmissible at any earlier stage could be smuggled back in at a later stage to decide what public policy actually was. In this respect, too, he is not likely to differ from other political theorists, who also would not want their basic principles to be attenuated and evaded in disputes over concrete issues of law and policy. Yet Rawls is nevertheless cautious about the extent to which a "political conception" of liberalism can actually dictate the outcome of such disputes.[37] The thought behind this qualification appears to be that specific legal rules, rights, and policies cannot be derived solely from any abstract political theory; they instead depend upon contingent features of a society and its history.

These qualifications affect the force of public reason at different levels of analysis and lead to questions, like those addressed by Professor Solum, over its role in the work of political and legal theorists. To start at the most abstract level, Rawls does not claim that public reason limits debate over the concept itself.[38] Rawls's defense of the concept, to be sure, must conform to the strictures of public reason. He could not, for instance, derive it from some form of comprehensive liberalism without contradicting the very principles of political discourse that he seeks to establish. Yet his

[37] Rawls, supra note 10, at 162 n.27, 214–15, 247–54; Rawls, supra note 25, at 578–79.

[38] See Rawls, supra note 10, at 215 (noting that limits of public reason "do not apply to our personal deliberations and reflections about political questions, or to the reasoning about them by members of associations such as churches and universities, all of which is a vital part of the background culture").

theory allows, and indeed requires, that adherents of different comprehensive views can, within the resources of those views themselves, endorse public reason. This is just what distinguishes the overlapping consensus from a *modus vivendi*, and in related fashion, reasonable from unreasonable comprehensive doctrines.[39] Wholly apart from these considerations, internal to Rawls's own theory, it would be an exceedingly peculiar political theory that ruled out any criticism of its claims from the beginning. This would amount to the kind of "totalitarian ambitions" that Professor Solum attributes, with some hyperbole, both to Kaplow and Shavell and to Dworkin.[40]

At the level of actual political debate and legal argument, the ideal of public reason also has limited force. Rawls is careful to recognize that it does not operate as a kind of prior restraint on the content of political speech, a restriction that no plausible understanding of the First Amendment could support.[41] He also does not mean it to restrict all discussion by individuals of political issues, presumably since that would impair any attempt to reconcile comprehensive doctrines with public reason.[42] It applies directly to government officials and to individuals acting in their capacity as citizens, but as he carefully notes, it "imposes a moral, not a legal, duty."[43] Thus, in actual political discourse, public reason does not operate like the exclusionary rule, literally preventing arguments from being heard at all. It just provides a set of reasons for refusing to give those arguments any weight. Adopting the ideal of public reason would not work an immediate change in the "uninhibited, robust, and wide-open" political debate required by democracy as we know it.[44] Its effects would be realized only through changing the attitudes of participants and the arguments that they were willing to consider and accept. To be sure, this would be a significant change, but one hard to distinguish in its effects from the waxing and waning influence of arguments over the merits of any law or

[39] Id. at 144–49; Rawls, supra note 26, at 431–34.
[40] Solum, supra note 1, at 1453.
[41] Rawls, supra note 25, at 577.
[42] Rawls, supra note 10, at 215.
[43] Id. at 217.
[44] N.Y. Times Co. v. Sullivan, 376 U.S. 259, 270 (1964).

public policy. Public reason acts as an ideal, rather than a practical constraint, on political discourse.

Even so, Professor Solum would exempt political theorists from even these weak constraints. As he says, "The ideal of public legal reason that applies to legal practice should not apply directly to legal scholars when they debate and discuss legal policies or normative legal theories."[45] Of course, as noted earlier, he is correct to immunize them insofar as they challenge the requirements of public reason itself,[46] and he is also correct to immunize descriptive political theory because descriptions of how the political or legal system operates are simply outside the scope of public reason.[47] Yet, when political theorists offer recommendations about public or legal policy, public reason applies to them only "indirectly."[48] It is hard to see why this qualification is necessary, since citizens are enjoined by Rawls to assume the role of hypothetical legislators only when they exercise their democratic rights to influence government.[49] To put this point another way, the constraints of public reason always operate indirectly, only when individuals act as, or seek to influence, government officials. In the absence of any prospect of government action, the occasion for invoking the constraints of public reason does not exist at all.

Despite its undeniable novelty as a matter of political theory, public reason acts as a remarkably weak restraint on actual political discourse. Perhaps this is Professor Solum's basic point: a political theory that cannot meet the minimal requirements of public reason does not deserve to be widely accepted. Certainly as a predictive matter, a political theory is not likely to be widely accepted if it makes no concessions to other comprehensive doctrines. So long as those doctrines are reasonable, they constitute a commitment by their adherents to political life in a modern democratic society. Without a reciprocal recognition of the merits of such views, a political theory dooms itself to insularity. Thus, Kaplow and Shavell drastically narrow the appeal of their version of social welfare by insisting that all rival conceptions of value be demoted to

[45] Solum, supra note 1, at 1479.
[46] Id.
[47] Id. at 1480.
[48] Id. (emphasis omitted).
[49] Rawls, supra note 25, at 577.

the status of satisfied or unsatisfied preferences. They may not be wrong to do so in some ultimate sense, but it is precisely such ultimate judgments that public reason seeks to avoid. They are wrong to do so only if they share with Rawls the goal of achieving a degree of acceptance and cooperation among citizens with fundamentally different comprehensive views.

Casting the requirements of public reason in descriptive terms reveals how little it does to limit the scope of public debate. In Professor Solum's terms, its effects are more likely to be inclusive than exclusive. It is more likely to add to, rather than subtract from, the range of arguments available in law and legal theory. Nothing in public reason prevents Kaplow and Shavell from engaging in their protracted polemic in favor of social welfare and against fairness. But in doing so, they subject their arguments to the full range of criticism from public reason and elsewhere. Even if it cannot silence Kaplow and Shavell, public reason provides additional grounds for questioning the relevance of their theory to the conditions of modern democratic society. For this we should be grateful, as much to Professor Solum as to Rawls.