ABSTRACT. This essay addresses Rawls’ claim in *Political Liberalism* that the U.S. Supreme Court would have power to overturn an amendment repealing the First Amendment. I argue that the argument succeeds if one conceives of public reason as a theory of constitutional lawmaking. This theory is founded on Rawls’ unique contributions to the concept of public reason: the criterion of reciprocity, and the content, given by a family of reasonable conceptions of political justice. This conception of public reason imports substantive moral commitments into democratic theory, and thereby limits what may count as law. This essay reconstructs Rawls’ reasoning by developing a theory of public reason as law higher even than constitutional law, and then to use this theory to analyze and critique other theories, such as Ackerman’s constitutional moment.

The Court could say, then, that an amendment to repeal the First Amendment and replace it with its opposite fundamentally contradicts the constitutional tradition of the oldest democratic regime in the world. It is therefore invalid. Does this mean that the Bill of Rights and the other amendments are entrenched? Well, they are entrenched in the sense of being validated by long historical practice. They may be amended in the ways mentioned above [brought more closely into line with a public conception of political justice] but not simply repealed and reversed. Should that happen...that would be constitutional breakdown, or revolution in the proper sense, and not a valid amendment of the constitution. The successful practice of its ideas and principles over two centuries place[s] restrictions on what can now count as an amendment, whatever was true at the beginning.¹

In *Political Liberalism*, and echoed later by Samuel Freeman,² Rawls claims a paradox: an amendment to repeal the American First Amendment would be unconstitutional, and that the Supreme Court would have power and duty to reject it. Can a constitutional amendment be unconstitutional? In this paper, I analyze and reconstruct Rawls’ reasoning to create a new substantive basis for

the argument that may insulate it from criticism. I provide a theory of higher lawmaking that lies implicit in Rawls’ theory, and use it to provide a stronger basis for the claim of the First Amendment’s de facto entrenchment. This conception employs the criterion of reciprocity, one of the novel features of Rawls’ public reason, as the limiting condition on what can qualify as constitutional law, making a highest law, regulating the higher law, as the higher law regulates ordinary legislation.

I. RECONSTRUCTING RAWLS

Rawls’ claim implies two arguments. First, a valid amendment brings the Constitution closer in line with its original promise; second, the First Amendment’s historical pedigree and success give it and ‘other amendments’ special status. But Rawls does not explain what makes some (nor does he say exactly which) amendments specially ratified, and he does not explain why history lends legitimacy.

As to the first argument, Rawls claims a difference between a valid amendment and a constitutional revolution, yet it is unclear when an amendment amounts to a revolution: Reconstruction and the New Deal were also radical changes in constitutional structure, but their legitimacy is not subject to serious debate. The implicit litmus test seems not to be the degree of change but the kind: to repeal the First Amendment would be to abandon the fundamentals of constitutional democracy, whereas Reconstruction and the New Deal brought the United States closer to a well-ordered society. Not a massive shift, but an abandonment of some aspect of justice appears to constitute a revolution.

As to the second, Rawls claims that ‘[t]he successful practice of [the First Amendment’s] ideas and principles over two centuries places restrictions on what can now count as an amendment, whatever was true at the beginning’. But the weight of history alone is not sufficient for legitimacy. Some normative theory is required to make this case, and to distinguish between unjust and time-honored legitimate laws. Slave-owners could have made the same claim about that institution: entrenched by the mere preponderance of history.

---

3 Ibid., at 239.
4 Ibid.