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REVIEW ESSAY

RAWLS'S EXCESSIVELY SECULAR POLITICAL CONCEPTION

Gary C. Leedes*

*"Five different epistemologies in an evening. Take your choice. They're all agreeable, and not one is binding or necessary or has true strength or speaks straight to the soul."*¹

I. INTRODUCTION

In *Political Liberalism*,² John Rawls clarifies the differences between general theories of human nature and his model of justice.³ Unlike most philosophers in the Western tradition, Rawls does not place the subject of justice within a comprehensive theory of human behavior.⁴ His conception of justice rests

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1. SAUL BELLOW, *HUMBOLDT'S GIFT* 390 (1976).

2. JOHN RAWLS, *POLITICAL LIBERALISM* (1993). Bernard Williams writes, "There are many questions, about social justice, toleration and the stability of the modern state, that can scarcely be discussed unless one starts from ideas that have been shaped by Rawls." Bernard Williams, *A Fair State*, *LONDON REV. OF BOOKS*, May 13, 1993 at 7.

3. Rawls "takes as his point of departure, not a general theory of human nature, but what he calls 'the public culture of a democratic society.'" John Gray, *Can We Agree to Disagree?*, *N.Y. TIMES*, May 16, 1993, § 7, at 35 (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)).

4. Stuart Hampshire, *Liberalism: The New Twist*, *N.Y. REV. OF BOOKS*, Aug. 12,

solely on a unique "construct"⁵ called the "liberal political conception" (LPC).⁶ Rawls claims that his freestanding LPC, if adopted by citizens of a constitutional democracy, could unite reasonable persons otherwise divided by their ideologies. As a result, citizens—given favorable conditions—enjoy the benefits of a stable, well-ordered society.

In the well-ordered society envisioned by Rawls, citizens honor fair terms of social cooperation because they no longer make fundamentally important political decisions based on polarizing religious, moral, or philosophical doctrines. Instead, they resolve issues of basic justice solely on the basis of shared political values. Rawls claims that social unity can prevail and endure under the LPC for several generations, notwithstanding the prevalence of many incompatible comprehensive ideologies,⁷ because there are enough reasonable people who recognize the benefit of shared liberal *political* principles of justice.⁸

Although Rawls is America's pre-eminent living political philosopher, his LPC will not please everyone; it will be rejected in some respects by persons who find it "disembodied and idealistic."⁹ His constructivism will also be criticized by those who

1993 at 44.

5. Rawls calls his LPC a construct, the product of his method of political constructivism. RAWLS, *supra* note 2, at 89-129. For a critique of Rawls's constructivism, see JÜRGEN HABERMAS, JUSTIFICATION AND APPLICATION 25-30 (1993).

6. The political ideas contained within the LPC are: 1) the belief that rationality is good; 2) the desirability of a fair distribution of the primary goods needed by all free and equal citizens who pursue rational life plans (e.g., basic liberties, income, wealth, social bases of self-respect); 3) the irrelevance of comprehensive conceptions of the good incompatible with principles of justice; 4) the desirability of citizens having morally superior character traits (e.g., the political virtues of civility, tolerance, reasonableness, and a sense of fairness) and 5) the goodness of a stable and cooperative, well-ordered (political) society. RAWLS, *supra* note 2, at 176, 178, 190, 194.

7. *Id.* at xviii.

8. *See id.* at xxv.

9. Bernard Williams, *supra* note 2, at 7. Robert Bork writes, "Rawls approaches his topic not through an examination of American society, its institutions, and its stresses but through a highly abstract and complex contractarian theory that advances a political agenda whose main appeal will be to persons already of the left-liberal persuasion." Robert Bork, *Justice Lite*, FIRST THINGS 31 (Nov. 1993) (reviewing JOHN RAWLS, POLITICAL LIBERALISM (1993)). Bork adds, "POLITICAL LIBERALISM is not merely unworldly and egalitarian beyond reason but contains strong authoritarian elements inappropriate to a constitutional democracy." *Id.* at 32.

believe Rawls underemphasizes the importance of empirical research, and by those who believe that American and Western European intuitions of justice cannot be applied as if they were universally compelling principles. Additionally, the LPC will be rejected by many religious groups who are denied certain privileges and exemptions by Rawls's excessively secular political conception.¹⁰ Rawls disapproves of citizens who explicitly refer to their religious beliefs when they engage in political activity.¹¹ Rawls, however, does not adequately distinguish between a political activist's manipulative use of religion and intellectually honest religious expression that is politically relevant. He does not distinguish between ethical strategies of persuasion and unethical strategies of domination such as blackmail-type threats of damnation. Rawls also largely ignores distinctions between religious rhetoric used as a weapon to diminish freedom and religious rhetoric used to expand religious freedom or other civil rights. Rawls seeks to contain religious rhetoric whether or not it is intemperate and harsh or moderate and conciliatory. With few exceptions, he condemns any mixture of religion of politics, and he urges citizens to adjust their religious *principles* and temper their religious speech.

To justify his LPC, Rawls refers to an imaginary assembly of representatives whose agreements will be honored by the public at-large. The negotiations of these politically unaccountable, politically unresponsive and fictitious "representatives" occur under unrealistic conditions where no citizen has any bargaining advantages and all citizens are represented.¹² Rawls's LPC, however, does not merely describe procedural justice; it is the source for the following two carefully worded substantive principles of justice:

10. Rawls hopes (within the limits allowed by freedoms of speech, conscience, and thought) to contain the spread of unreasonable comprehensive religious, philosophical, and moral doctrines that have the potential to "undermine the unity and justice of society." RAWLS, *supra* note 2, at xvi-xvii. Rawls admits that some persons commenting on his work have warned him that his LPC is excessively secular. *Id.* at 194 n.28.

11. See *id.* at 245 n.32 (criticizing references to theology during political debates over the abortion issue). See also *infra* text accompanying notes 112-13, 145-77.

12. See *infra* text accompanying notes 32-38.

a. Each person has an *equal right to a fully adequate scheme of equal basic liberties* which is compatible with a similar scheme of liberties for all.¹³

b. Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.¹⁴

According to the requirement of equality in the first principle of justice, religious persons are not entitled to any special exemptions when general laws prohibit acts or forbearances mandated by their religious beliefs.¹⁵ Under the "justice as fairness" principles and the LPC, persons whose religion-based acts or omissions are prohibited by generally applicable laws cannot depend on either freedom of thought or liberty of conscience for protection¹⁶ since those basic liberties do not immunize enough religion-based conduct.¹⁷ In Rawls's view, persons who elevate their religion's mandates over secular law do not deserve greater freedom than persons whose secular beliefs dictate non-compliance with the law.¹⁸ In fact, persons who justify their conscientious refusals to obey law on religious grounds are less deserving of special exemptions than persons who refuse, on secular political grounds, to conform to laws that violate "a commonly shared conception of justice."¹⁹

Rawls distinguishes between the ordinary liberties and inalienable basic liberties that cannot be legally restricted in order to advance the general welfare. Rawls's short list²⁰ of in-

13. RAWLS, *supra* note 2, at 291 (emphasis added). According to Rawls, this first principle is "preceded by a lexically prior principle requiring that citizens' basic needs be met, at least insofar as their being met is necessary for citizens to understand and to be able fruitfully to exercise th[eir] rights and liberties." *Id.* at 7.

14. *Id.* at 291.

15. *Id.* Rawls also discussed his refusal to guarantee religious persons special exemptions from general laws in an earlier work. JOHN RAWLS, A THEORY OF JUSTICE 205-11, 368-71, 379, 384-85 (1971) [hereinafter A THEORY OF JUSTICE].

16. See RAWLS, *supra* note 2, at 311 (discussing the basic liberty of conscience).

17. See *infra* text accompanying notes 184-99.

18. See RAWLS, *supra* note 2, at 314.

19. A THEORY OF JUSTICE, *supra* note 15, at 365. See also *id.* at 369, 385.

20. As Rawls writes, an enlargement of his list of guaranteed basic liberties would

alienable basic liberties includes certain political rights including political speech, freedom of thought, the liberty and integrity of the person, liberty of conscience, certain supporting liberties, and certain rights and liberties covered by the rule of law.²¹ Unless a compelling interest is endangered by the exercise of an inalienable liberty, the government's power to abridge the liberty is not recognized as lawful by judges. However, Rawls does not want judges to use any "compelling interest" test, or any other form of strict judicial scrutiny, when generally applicable statutes advancing the general welfare interfere with the practice of religion. In view of Rawls's refusal to recognize religious liberty as a preferred fundamental right, I maintain that his LPC is excessively secular.

In this review essay, I discuss most of the important ideas intertwined in Rawls's theory of justice, including the idea of a "political conception,"²² the idea of society as a "fair system of cooperation,"²³ the political conception of a "person,"²⁴ the idea of a "well-ordered society,"²⁵ the idea of an "overlapping consensus,"²⁶ the "ideal of public reason,"²⁷ and the idea of a family of basic liberties within a coherent system of law based on the two powers of moral identity.²⁸ In order to prepare the reader for a more detailed discussion of these topics, I will briefly introduce five of Rawls's fundamental ideas.

II. FIVE FUNDAMENTAL IDEAS

A. *The Idea of a Liberal Political Conception of Justice*

Rawls's LPC is designed to provide the framework essential for "a fair system of cooperation over time, from one generation

"risk weakening the protection of the most essential ones and recreat[e] . . . indeterminate and unguided balancing problems." RAWLS, *supra* note 2, at 296.

21. For a more complete list of basic liberties recognized by Rawls, and his explanation of the criteria governing their selection, see *infra* section VIII.A.

22. See *infra* part II.A.

23. See *infra* part II.B.

24. See *infra* part II.D.

25. See *infra* part II.E.

26. See *infra* part V.

27. See *infra* part VII.

28. See *infra* part VIII.

to the next."²⁹ His LPC is not a comprehensive view of the world. If it were, it would conflict with the divisive and controversial comprehensive doctrines affirmed by different members of society. The LPC is generated separately from, but is tailored for and compatible with, several different moral codes and epistemologies that have a more encompassing range of application.

B. The Idea of Society as a Fair System of Cooperation Over Time

The idea of society as a fair system of cooperation continuing from one generation to the next presupposes the existence of reasonable persons in power. When a fair system of cooperation is established, reasonable citizens "may reasonably be expected to accept [the governing norms], provided that everyone else likewise accepts them,"³⁰ their ideologies notwithstanding. The element of reasonableness, defined somewhat uniquely by Rawls, makes the goal of social cooperation seem attainable even though some critics having more government experience than Rawls say that "what fragments our society is . . . group animosities and fights for material advantage" rather than comprehensive ideologies.³¹

C. The Problematic Idea of a Hypothetical Original Position: A Teaching Tool for Simulating Fair Bargaining Conditions

Imagine that "parties" representing all members of society assemble to negotiate the terms of a social contract containing fair terms of social cooperation. Rawls uses this thought experiment skillfully to help readers organize ideas about justice and to prove that his carefully worded "justice as fairness" principles would probably be selected by citizens in a real constitutional convention if every citizen were represented fairly.³²

The hypothetical parties are partially blinded by a so-called veil of ignorance preventing them from knowing much about

29. RAWLS, *supra* note 2, at 14.

30. *Id.* at 300.

31. *See, e.g.,* Bork, *supra* note 9, at 31.

32. Rawls describes the presocial parties as "merely artificial creatures inhabiting [a] device of representation." RAWLS, *supra* note 2, at 28.

the citizens they represent. For example, the parties lack information about any particular citizen's social position, religion, race, gender, sex and ethnicity.³³ They also lack information about the aims, interests and aspirations of the persons they represent.³⁴ Moreover, the fictitious parties do not know the skills, talents, abilities, tastes or strengths of those they represent.³⁵ Since all the parties are equally uninformed in this decontextualized situation, they are "symmetrically situated,"³⁶ and if they rely on true premises,³⁷ perform their duties properly and rationally, and reach a unanimous agreement, all represented "citizens . . . are represented fairly."³⁸

D. *The Political Conception of a Person as a Democratic Citizen*

Rawls describes democratic citizens as reasonable persons who can "view themselves apart from certain religious, philosophical and moral convictions."³⁹ His idealized description of persons is quite different from the conceptions of persons used in psychology, the social sciences and the natural sciences.⁴⁰ According to Rawls, the "justice as fairness" principles can be derived from his conception of reasonable persons capable of governing themselves cooperatively and democratically.

In Rawls's opinion, persons endowed with the power to have a conception of good can *inter alia* form, revise and rationally pursue political and non-political aims and commitments.⁴¹ Persons also have the capacity to "affirm the values of political justice and [they] want to see them embodied in political institutions and social policies."⁴² Because persons are both reason-

33. RAWLS, *supra* note 2, at 25.

34. RAWLS, *supra* note 2, at 79.

35. RAWLS, *supra* note 2, at 272. See also *supra* text accompanying note 12; *infra* text accompanying notes 221-27.

36. Rawls, *supra* note 2, at 24, 79. Symmetrically situated bargaining parties do not engage in force, coercion, deception or fraud. *Id.* at 23.

37. *Id.* at 102-03.

38. *Id.* at 79-80.

39. *Id.* at 31.

40. *Id.* at 18 n.20.

41. *Id.* at 30.

42. *Id.* at 30-31.

able and rational, they can "adjust and reconcile"⁴³ their respective aims, interests and commitments in accordance with principles deemed reasonable by every other normal person.⁴⁴

E. *The Notion of a Well-Ordered Society*

A well-ordered society can be established if the following conditions are satisfied: (1) everyone accepts and knows that everyone else accepts the "justice as fairness" principles;⁴⁵ (2) society's coordinated institutions function in accordance with the "justice as fairness" principles; (3) cooperative citizens subordinate their conflicting conceptions of good and willingly comply with the regulations and restrictions imposed by society's institutions because they regard these norms as just,⁴⁶ and (4) public discussions and decisions are guided by peer pressures that oblige all citizens to avoid relying explicitly on controversial axioms of religion, morality and philosophy when they engage in political activity.⁴⁷

These conditions are unrealistic and cannot be satisfied without the kind of reasonable pluralism that exists only when the conflicting comprehensive doctrines affirmed by society's members are not rigid.⁴⁸ The flexibility of their comprehensive doctrines enables reasonable "citizens [to] converge on roughly the same principles of justice from quite different and incompatible moral and philosophical perspectives."⁴⁹ When this convergence occurs, there is what Rawls calls an overlapping consensus.⁵⁰ In sum, the idea of a well ordered society depends on an overlapping doctrinal consensus, which depends on reasonable pluralism, which depends on flexible doctrines adhered to by reasonable persons.

43. *Id.* at 31.

44. *See id.*

45. *Id.* at 35.

46. *Id.*

47. *See infra* part VII.

48. *See* RAWLS, *supra* note 2, at 63-55.

49. Jeremy J. Waldron, N.Y. TIMES LITERARY SUPP., June 18, 1993, at 5.

50. *See* discussion *infra* part V.

III. THE VIRTUE OF REASONABLENESS

In this section, two aspects of reasonableness will be discussed, namely (1) the willingness of reasonable persons to propose and agree to fair terms of cooperation and (2) the recognition by reasonable persons of their fallible judgment. I also discuss the problem of motivation, which is not adequately taken into account in Rawls's explanation of reasonableness.

A. *The First Aspect of Reasonableness*

According to Rawls, reasonable citizens in public discourse propose and accept terms of social cooperation that other reasonable citizens "publicly recognize" as just.⁵¹ Reasonable persons also willingly cooperate with each other according to some shared criteria for evaluating the fairness of behavioral norms. Conversely, an unreasonable person is unwilling to propose and abide by "general principles or standards for specifying fair terms of cooperation."⁵²

Reasonableness is a political virtue that supplements one's capacity to be rational; the latter is a human trait that is concerned both with means-end reasoning and the deliberate ordering of ends according to a list of preferences. A person can be rational but unreasonable if she lacks the will to engage in fair cooperation on terms that others might reasonably be expected to endorse.⁵³ A person is both rational and reasonable only if she is willing to moderate her self-interest, ends and attachments in order to live amiably with others on a basis of mutual trust and respect. Rawls believes that reasonable persons will subordinate their rational desires in order to conform to "justice as fairness" principles.⁵⁴

51. RAWLS, *supra* note 2, at 53.

52. *Id.* at 50.

53. *Id.* at 51.

54. *Id.* at 339-40, 367.

According to Rawls, reasonable persons always honor the claims of democratic civility. As he explains, persons have two distinctive powers of moral identity (sometimes called moral personality) that "work in tandem to specify the idea of fair terms of cooperation."⁵⁵ When conflicts of duty arise, the reasonable person's rational conceptions of good, comprehensive and determinate, are subordinated to shared political conceptions of justice. According to Rawls, relying purportedly on general principles of human psychology, only abnormal persons lack the capacity to be reasonable. Rawls claims his context-transcending, post-metaphysical assumptions regarding reasonableness are somehow superior to dogmatic, metaphysical worldviews; however, this claim is disputed by contextualists for whom there is no single transcendent standard of reasonableness that is epistemologically or morally superior to so-called unreasonable comprehensive doctrines.⁵⁶ Rawls's distinction between reasonable persons who are normal, and unreasonable persons who are abnormal, stigmatizes devoutly religious persons who do not satisfy his secular criterion of reasonableness, and "[i]t suggests that a voluntary exile or emigrant, a hermit or wanderer, a detached aesthete or artist, is a delinquent, short of full humanity."⁵⁷

B. *The Second Aspect of Reasonableness*

A second aspect of the virtue of reasonableness, as expounded by Rawls, pertains to the willingness of persons to be tolerant owing to their recognition of their fallible judgment.⁵⁸ No one can always be expected to make correct judgments⁵⁹ and "[m]any hard decisions may seem to have no clear answer."⁶⁰ As persons begin to doubt whether their positions on various political issues are true, their zealotry and rigidity decline. They become more moderate. Even their comprehensive doctrines become more pliable, more accommodating.⁶¹ Unfortu-

55. *Id.* at 52, 54.

56. See HABERMAS, *supra* note 5, at 95.

57. Hampshire, *supra* note 4, at 44.

58. See RAWLS, *supra* note 2, at 94.

59. *Id.* at 56.

60. *Id.* at 57.

61. According to Rawls, reasonable persons affirm only reasonable comprehensive

nately Rawls does not emphasize the need for an ongoing dialogue between reasonable liberals and religiously devout persons who are viewed by him as rigid and unreasonable.

C. *The Problem of Motivation*

Persons who have firmly held convictions and who do not accept Rawls's conception of reasonableness might ask, "Why should I willingly support and comply with laws restricting my religious liberty when those laws violate my firmly held religion-based convictions?" Rawls understands that persons must be "sufficiently motivated" to endorse an LPC that preempts their comprehensive doctrines.⁶² Rawls, however, believes that all reasonable persons will be sufficiently motivated to endorse "justice as fairness" principles when they recognize that they adequately secure everyone's basic rights and liberties.⁶³ Rawls also promises citizens self respect,⁶⁴ "mutual respect for one another,"⁶⁵ and the absence of civil strife driven by dogmatic ideologies. In his view, reasonable persons would gladly trade the "rigid" aspects of their religion, philosophy, and morals in return for the promissory note of social unity. Rawls, at times, seems to forget that many people have been brutally oppressed throughout history by officials advancing doctrines of social conformity and unity.

Rawls has an enormous burden of proof if he hopes to convince religious persons that they are unreasonable if they do not willingly obey laws that, in their view, result in the damnation of their children.⁶⁶ For example, the Old Order Amish insist on withdrawing their children from schools accredited by the government in accordance with a rational interpretation of the Epistle of Paul to the Romans, "be not conformed to this

doctrines, i.e., intelligible views of the world based on theoretical and practical reason, which normally draw upon slowly evolving traditions of thought. *Id.* at 59.

62. *Id.* at 87.

63. *See id.* at 86.

64. *Id.* at 318.

65. *Id.* at 319.

66. "Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence." *Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972).

world. . . ."⁶⁷ These Amish parents urgently need a religious exemption from compulsory education laws since their "religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community."⁶⁸ Without an exemption and an adequate guarantee of religious liberty, many Amish parents and their like-minded teenage children will be oppressed by "justice as fairness" principles.

Rawls rejects the arguments of persons who claim they lack the capacity to be cooperative because of their rigid comprehensive doctrines.⁶⁹ He presumes that normal persons are able to control and revise their wants and desires as circumstances require.⁷⁰ Moreover, Rawls claims that "free persons do not think of themselves as indissolubly tied to any particular final end, or family of such ends, but regard themselves as always capable of appraising and revising their aims in light of reasonable considerations."⁷¹ Rawls's claim that people will be motivated by the benefits produced by social unity lacks substantial evidentiary support. He does not provide the reader with any social science data concerning patterns of social interaction relevant to his argument that persons will be motivated to adhere to his LPC. In order for Rawls's argument to have persuasive force, we need much more evidence, certainly more than Rawls provides, indicating whether "normal" human beings, regardless of their religious training, are biologically predisposed to welcome principles of justice that do not guarantee them adequate religious liberty. His discussion of human psychology is not supported by social science data. The distinguished social scientist James Q. Wilson tells us of empirical findings indicating a core of nearly universal attitudes and beliefs, some of which question the substantive content of Rawls's

67. *Id.* at 216.

68. *Id.*

69. Citizens, whether religious or not, must recognize, according to Rawls, that the significance of their claims is not given by the strength and psychological intensity of their wants and desires, however rational they might be. See RAWLS, *supra* note 2, at 34.

70. *Id.* at 280.

71. *Id.*

"justice as fairness" principles.⁷² It is therefore difficult to support Rawls's LPC, which depends on untested abstractions and does not respond to research in related disciplines that challenge his claims.

Political theorists would be more convincing if they relied more on empirical studies drawn from a wide range of disciplines including, among others, economics, biology, neurobiology, ego psychology, neuropsychology, anthropology, demography, sociology and political science. Amatai Etzioni provides us with substantial evidence showing that the most important basis for decisions, even in market behavior, lies in the affective and normative domain.⁷³ This means that human beings often make decisions on the basis of non-rational or pre-rational considerations chiefly because they draw on normative-affective sources.⁷⁴ In short, Rawls's assertion that his principles of justice benefit everyone falls short of a demonstration that persons will be motivated to adhere to them consistently over their lifetime.⁷⁵

IV. RAWLS'S CONTENTION THAT THE LPC IS SUFFICIENTLY OBJECTIVE LACKS PERSUASIVE FORCE

Philosophers vainly inflate their importance if they attempt to go beyond clarifying the thinking of citizens who support competing principles of justice. Even if a philosopher attempts to make society more democratic, her proposed principles of justice are just another entry in a vast marketplace of ideas unless the persuasive force of his or her arguments actually

72. See A. MacIntyre, Book Review, N.Y. TIMES, Aug. 29, 1993, at 13 (reviewing JAMES Q. WILSON, *THE MORAL SENSE* (1993)).

73. AMITAI ETZIONI, *THE MORAL DIMENSION* 90 (1988). As Hans-Georg Gadamer notes, it is often not so much our judgments but our prejudices and traditions that unconsciously guide us and constitute our being. See generally HANS-GEORG GADAMER, *TRUTH AND METHOD* (1975); JOEL C. WEINSHEIMER, *GADAMER'S HERMENEUTICS: A READING OF TRUTH AND METHOD* 164-84 (1985).

74. ETZIONI, *supra* note 73, at 90.

75. Stuart Hampshire believes that "[t]he narrative of a person's life shows the constantly shifting predominance of one set of contrary dispositions and ambivalent feelings over another." Hampshire, *supra* note 4, at 46. If this is true, Rawls's argument is undercut by this tendency since many normal persons will, at various periods of their lives, feel disinclined to adhere to the LPC.

demonstrates to all that the proposed principles are superior to all alternatives. Yet Rawls presumes he may say: "Here are two objective principles that I have formulated; now, if you are reasonable and want your society to be less unfair, endorse them!" There is something elitist and undemocratic about a philosopher designing, in the isolation of his study,⁷⁶ two principles of justice determining the ideological content of a nation's constitution, which limits the power of some people and burdens the liberties of others.

Rawls's principles of justice advancing ideas of reasonable pluralism, secularism and tolerance, considered historically, embody relatively recent ideas that are not influential in certain areas of the world. In many regions of the world, including several localities in the United States, the idea that the LPC preempts comprehensive doctrines of justice is not endorsed by many ordinary persons whose religions pervade virtually all spheres of their lives. Rawls, however, thinks his LPC can satisfy an objective principle of legitimacy which stipulates that "our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason."⁷⁷

The objectivity of Rawls's LPC is quite different from the criteria of truth and universal validity. Rawls admits as much; he does not claim that his "justice as fairness" principles are true or universally valid and he therefore does not claim they bind each and every individual, always and everywhere without exception.⁷⁸ His criterion of legitimacy is in practice dependent upon the consent of self-governing citizens. In contrast, Immanuel Kant's categorical imperatives are not agreement-seeking. Indeed, for Kant, moral principles lack validity if their moral

76. In a democracy, the wording of principles of justice with the force of law is the people's sole responsibility since they suffer the consequences if their constitution is ill-designed.

77. See RAWLS, *supra* note 2, at 137.

78. In a recent public lecture at Oxford, however, Rawls "extended his defense of [political] liberalism to international politics." Hampshire, *supra* note 4, at 46.

force depends solely on a social consensus or practice.⁷⁹ Similarly, unlike the agreement-seeking persons adhering to Rawls's liberalism, adherents of rational intuitionism believe moral imperatives are derived from an order of values independent of the persons making statements about moral imperatives.⁸⁰ They claim their binding principles of justice are "fixed by a moral order"⁸¹ found in the nature of things. Rawls does not claim his LPC has this kind of objectivity.⁸² However in Rawls's opinion, the LPC is adequately objective for a regime if there is:⁸³

a) an established public framework of thought that is sufficiently complete for partial judgments to be made by citizens;⁸⁴

b) a specified concept of correct political judgment that is shared and accepted, namely the "justice as fairness" principles interpreted according to the canons of practical reason;⁸⁵

c) the expectation that reasonable and rational agents will make political judgments on the basis of reasons specified by the LPC, regardless of their motivation or personal preferences;⁸⁶ and

d) an expectation that a citizen's personal point of view cannot override the political agreements reached by a majority of the other rational and reasonable citizens and lawmakers after discussion and reflection.⁸⁷

For Rawls, if the LPC is actually endorsed and the people maintain social unity "over time, then this considered agree-

79. WILLIAM A. GALSTON, *LIBERAL PURPOSES* 137 (1991).

80. RAWLS, *supra* note 2, at 91. For rational intuitionists, the existence of the moral order is not attributed to the mental activities or reasoning of human beings. *Id.* at 91-92.

81. GALSTON *supra* note 79, at 135.

82. Rawls's theory has been criticized by Libertarians and Communitarians. See CHANDRAN KUKATHAS & PHILIP PETTIT, *RAWLS: A THEORY OF JUSTICE AND ITS CRITICS* (1990).

83. I take the liberty of paraphrasing and condensing Rawls's discussion of the essentials of objectivity.

84. RAWLS, *supra* note 2, at 110.

85. *See id.* at 115.

86. *Id.* at 111.

87. *Id.* at 111-12.

ment in judgment, or narrowing of differences, normally suffices for objectivity."⁸⁸

Concededly, principles of justice congenial to a particular culture can be, from the standpoint of persons within that culture, objective. But Rawls does not insist on a genuine intersubjective agreement; he relies instead on what he calls an overlapping consensus, which excludes many religious persons as well as others whose firm convictions are insufficiently moderated.⁸⁹ The overlapping consensus has not yet been established anywhere in the world, therefore Rawls's claim that the LPC is sufficiently objective is premature if not fanciful.

Like many other social contract theories, Rawls's notion of consent is imputed.⁹⁰ There cannot be any genuine overlapping consensus unless every concerned citizen has an adequate opportunity to give or withhold informed consent.⁹¹ A requirement of equal participation by all citizens concerned with governance shifts the focus from what a philosopher on his own can justify to a dialogic process of will formation. To satisfy this requirement, every person affected by proposed principles of justice should be admitted as an equal participant. This includes many religious persons who are viewed, by Rawls, as unreasonable.

Authentic mutual understanding occurs only when caring persons in mutually comprehensible dialogue put themselves in the place of their political adversary and attempt to reach mutually satisfactory agreements—without any party being subjected to coercion, duress, or manipulation. Many persons engaged in such dialogues will not endorse proposed principles of justice unless they are satisfied that the supporting arguments are more cogent than arguments supporting competing propos-

88. *Id.* at 120.

89. *See infra* part VI.

90. According to the principle of discourse ethics, "[o]nly those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse. JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 93 (Christian Lenhardt et al. trans., M.I.T. 1990) (1983).

91. *Id.* at 71.

als. A genuinely ethical discourse cannot occur if the parties in dialogue are incapable of empathy, the trait that enables secularists to put themselves in the place of religious persons frightened by Rawls's liberal secularism, which opposes any mixture of religion and politics and which generally opposes legal exemptions for the religiously devout. Dialogues leading to a social contract acceptable both to religious persons and Rawlsian secularists cannot be realistically simulated by a philosopher's thought experiment or introspective monologues, which rob the social world of its legitimately ordered agreement-seeking, interpersonal modes of communication.⁹²

Rawls has not indicated that he empathizes with the Amish parents who, in his opinion, must send their children to schools inculcating the basic values of Western democratic societies. The Amish would tell Rawls, if they could, why his conception of compulsory liberal education is analogous to the despotic demands for conformity that required their great-great-grandfathers to leave Europe for the United States.

In a face-to-face dialogue, assuming the Amish keep an open mind and put themselves in the position of liberals, will Rawls's arguments convince Amish parents that they deserve imprisonment if they do not allow accredited school teachers the opportunity to convince their children that their religious convictions are anachronistic and unreasonable? If Rawls's arguments are unconvincing, his failure to persuade does not necessarily indicate the Amish parents are unreasonable any more than Rawls is unreasonable if the Amish cannot convince him, after he puts himself in their position,⁹³ that they must be guaranteed religious exemptions.

92. Rawls invites his readers to reach reflective equilibrium by asking themselves "[h]ow well [his] conception of political justice viewed as a whole 'articulates [their] more firm considered convictions of political justice, at all levels of generality, after due examination, once all adjustments and revisions that seem compelling [are] made.'" RAWLS, *supra* note 2, at 28. This individualized introspective process by each reader is again a monologic procedure rather than a dialogue among persons whose belief systems cannot easily be brought into harmony with Rawls's LPC.

93. "To understand religiously conservative [persons] one needs to appreciate their devotion to their children." Ralph Reed Jr., *The Religious Right Reaches Out*, N.Y. TIMES, Aug. 22, 1993, § 4, at 15.

In short, Rawls's idea of reasonableness is excessively secular exclusionary, and insensitive to persons whose world views are incompatible with the LPC's meld of egalitarian liberalism, Western cultural norms, and modernity.

V. THE POSSIBILITY AND DESIRABILITY OF AN OVERLAPPING DOCTRINAL CONSENSUS

A. *The Features of an Overlapping Consensus*

Whether or not the "justice as fairness" principles are acceptable to the religiously devout, Rawls believes they can support an overlapping consensus legitimately under the following conditions:

(a) There is "reasonable pluralism," a notion referring to the presence of a great many persons affirming reasonable comprehensive doctrines (and conversely the absence of a significant number of unreasonable people affirming unreasonable comprehensive doctrines).

(b) The governing principles of justice are congruent with (nearly) every citizen's reasonable doctrines. Under such circumstances, "the doctrines making up the consensus" and the requirements of the "justice as fairness" principle are no longer "in conflict with citizens' essential interests."⁹⁴

(c) All, or nearly all, citizens comply with the terms of cooperation specified by and derived from "justice as fairness" principles because they believe the value of social unity clearly outweighs conflicting values.⁹⁵

To illustrate the nature of an overlapping consensus, Rawls supplies his readers with a make-believe country where only a few doctrines are competing for adherents. A Kantian or Millian doctrine of morality is affirmed by one-third of the population. Another one-third of the population is religious but they believe that religious faith must be freely chosen. All other citizens adhere to an ad hoc mixture of humanistic beliefs, and they usually balance competing values in order to decide whether, all things considered, the liberal values that guarantee basic

94. RAWLS, *supra* note 2, at 134.

95. *Id.* at 144-50.

liberties and economic justice are more attractive and compelling than competing values.

Given the narrow spectrum of views in this model case, the reasonable persons in Rawls's make-believe country can simultaneously affirm both the LPC and their own diverging comprehensive, or partly comprehensive, doctrines.⁹⁶ The religious groups can support an LPC that guarantees freedoms of thought, conscience, speech and association since these basic liberties are consistent with their religious doctrines.⁹⁷ Millian utilitarians can support the LPC and its basic liberties as the best workable solution among proposed alternatives advancing general well-being; reasonable Kantians, without compromising their "particular categorical imperatives,"⁹⁸ can also reconstruct Kant's system of thought and apply it, as adjusted, to conditions of reasonable pluralism. Finally, the humanists can support the LPC because as a whole in their considered judgment, its worth outweighs conflicting values.⁹⁹ In sum, the model case outlined by Rawls demonstrates that reasonable persons affirming the LPC need not compromise¹⁰⁰ any important principles derived from their systems of thought.

As Rawls admits, there are at least four objections to the kind of social unity he describes in his model case:¹⁰¹ (1) an overlapping consensus is a mere *modus vivendi*, a temporary convergence of interests;¹⁰² (2) Rawls's overlapping consensus of reasonable doctrines, rather than "true" doctrines, implies indifference and skepticism concerning the truth of a political conception of justice;¹⁰³ (3) the LPC is inadequately compre-

96. *Id.* at 145-46. Rawls's model case is a phoney set-up that does not resemble any real pluralistic democracy.

97. Rawls does not seem to understand that most Americans have a more libertarian conception of the Constitution's guarantee of the free exercise of religion.

98. RAWLS, *supra* note 2, at 169-72.

99. *Id.*

100. *Id.* at 169. There is a bit of a cheat here by Rawls. So-called reasonable citizens in an overlapping consensus do not compromise their principles because they already have trimmed them down to the point where further compromise is unnecessary.

101. *Id.* at 145.

102. *Id.* at 146-47.

103. *Id.* at 150.

hensive and therefore unworkable;¹⁰⁴ and (4) an overlapping doctrinal consensus productive of social unity, now or in the near future, is utopian in the pejorative sense of that word.¹⁰⁵

B. *The Objection that the Overlapping Consensus is a Mere Modus Vivendi*

According to Rawls, the objection that the overlapping consensus supporting the LPC is a mere *modus vivendi* misfires because it overlooks significant differences between a temporary marriage of convenience and a community united by enduring, stronger and wider ties. The parties whose agreement is a *modus vivendi* remain ready to pursue most of their goals and interests at the expense of their cohorts. The recent Persian Gulf joint venture to free Kuwait is an example of a politically expedient *modus vivendi*; each joint venturer reserved the right to pursue its own national goals not involving the liberation of Kuwait. In contrast, the overlapping consensus unifying the three groups (religious, Millian-Kantian, and ad hoc humanistic) in Rawls's model case¹⁰⁶ is more stable allegedly because the LPC uniting everyone has a moral object—enduring justice for everyone—and criteria for political judgments that are not based merely on self-interest.¹⁰⁷

As Rawls argues, an overlapping consensus requires more conformity than a *modus vivendi*; for that very reason, many religious groups in the United States strongly prefer a *modus vivendi* to the regime Rawls has in mind. To become part of the overlapping consensus, religious sects would have to modify the aspects of their convictions that liberals consider unreasonable. In return, the religious sects are included in a consensus endorsing principles that deprive them of constitutionally guaranteed religious exemptions. Therefore, a *modus vivendi* is obviously preferable for many members of religious groups adversely affected by the demands and side effects of an overlapping doctrinal consensus.

104. *Id.* at 154.

105. *Id.* at 158.

106. *See supra* text accompanying notes 96-100.

107. RAWLS, *supra* note 2, at 148.

C. Rawls's Alleged Indifference and Skepticism

In Rawls's view, the stability of an overlapping consensus depends on the exclusion of many doctrines from the public discourse.¹⁰⁸ Rawls would not approve of politically active citizens asserting the truth of any precepts identified with their particular comprehensive religious, philosophical or moral doctrines.¹⁰⁹ Rawls's critics allege that his position "implies indifference or skepticism as to whether a political conception of justice can be true."¹¹⁰ Rawls denies the allegation that he is guilty of skepticism, a denial in some tension with his skeptical claim that no one's judgment is infallible.¹¹¹

Rawls is guilty of an offense more serious than healthy skepticism when he takes the "truths of religion off the political agenda"¹¹² in order "to have some hope of uncovering a basis of a stable overlapping consensus."¹¹³ This manipulative strategy is rank censorship. Rawls acts as a censor when he attempts to suppress what he perceives as needlessly divisive religious arguments. Rawls has the reputation of being an open-minded pluralist, but he actually opposes a robust, broadly participatory public discourse of competent speakers who, within the rules of relevance, may question all assertions, introduce any assertion, and fully express their beliefs, attitudes, and needs.¹¹⁴

Americans conforming to the LPC must keep their religious beliefs in the closet when they enter the field of politics; this type of conformity is not in accordance with American traditions, customs and practices. This restriction violates the princi-

108. *Id.* at 14.

109. *Id.* at 150.

110. *Id.*

111. See *supra* text accompanying notes 58-60. Skepticism is a word that can be used honorably to describe a person with an inquiring mind, who, like Rawls, opposes claims of infallibility.

112. RAWLS, *supra* note 2, at 151.

113. *Id.* at 152.

114. See HABERMAS, *supra* note 90, at 89 (quoting R. Alexy, *Eine Theorie des Praktischen Diskurses*, NORMENBEGRÜNDUNG, NORMENDURCHSETZUNG, 40 (1978)).

ple of discourse ethics¹¹⁵ that assures adversely affected religious persons full and equal participation in political debates. Some might defend Rawls's position by arguing that divisive, faith-based presuppositions of religious persons are not reasoned judgments based on shared premises. This haughty defense, however, is unlikely to increase a religious person's confidence in Rawls who promises freedom of speech, mutual respect, and tolerance, but who censors religious speech during political discussions.

D. *The Objection that the LPC is Insufficiently Comprehensive*

According to some critics, the LPC is too confined in scope to adjudicate "many conflicts of justice that arise in public life."¹¹⁶ Rawls denies the need for a more comprehensive conception. Indeed, Rawls deliberately formulates a political conception of justice different in kind from all other comprehensive doctrines in order to narrow the disagreements¹¹⁷ caused by religious speech. Rawls treats religious speech as an aggressive and divisive mode of communication that must be confined to the private sphere.¹¹⁸ This kind of discriminatory treatment is unlikely to end the culture wars¹¹⁹ between many Americans and their adversaries including Christian fundamentalists, Islamic fundamentalists, conservative Catholics, and Orthodox Jews. Rawls is in cloud-cuckoo land if he thinks that religious disagreements will be reduced in number by a political theory that stigmatizes devout persons whose political opinions are consistently aligned with their religious orientation.¹²⁰

115. See *infra* text accompanying notes 228-29.

116. RAWLS, *supra* note 2, at 154.

117. *Id.* at 156.

118. This posture is opposed by many accommodationists who do not value social conformity. See Michael M. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 120 (1992).

119. For a description of culture wars, see JAMES D. HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

120. In the United States, the spectrum of thought is much wider than the narrow range described in Rawls's model case. See *infra* text accompanying notes 96-100. Moreover, without exemptions for religious groups, some religious sects that ordinarily pose no threat to the rule of law would probably engage in destabilizing lawless activity. See Frederick Mark Gedickes, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 690 (1992).

E. *The Objection that the Stable Overlapping Consensus is Utopian*

Rawls's LPC is too shallow for many Americans desiring more deeply rooted underpinnings that support a more comprehensive set of cherished values. Nevertheless, Rawls outlines in two stages how the political, social and psychological forces leading to an overlapping consensus can be strengthened.¹²¹

The first stage is a transition from a *dissensus* to a *modus vivendi* of persons loosely allied by some principles that justify duly enacted valid laws. The United States is still in this stage of development since its constitutional consensus is more or less of a *modus vivendi*.¹²² To reach the second more advanced stage of development, which is the desired overlapping consensus, the range of conceptions supporting different social and economic interests must be narrowed substantially; otherwise, "deeply conflicting political and economic interests"¹²³ will continue to prevent an evolution towards an overlapping doctrinal consensus.

Evolution towards a wider, deeper and firmer consensus requires a major shift in the thinking of countless people.¹²⁴ If an overlapping doctrinal consensus is ever established, there will be a concordant fit between everyone's reasonably flexible comprehensive views and the LPC.¹²⁵ Rawls has "a reasonable faith" that such an overlapping consensus will be established.¹²⁶ Faith is needed when evidence is lacking.

Rawls does not dwell on the difficulties obstructing progress towards an overlapping consensus. Many ongoing conflicts in

121. RAWLS, *supra* note 2, at 158.

122. *See id.* at 163.

123. *Id.* at 168.

124. If more people cooperate with one another and appreciate the value of continued cooperation, then they eventually might realize that the values of social unity greatly outweigh the values of their principles which obstruct the establishment of an overlapping consensus. *Id.* at 163-68.

125. RAWLS, *supra* note 2, at 171.

126. *Id.* at 172.

the United States are not likely to be settled soon. For example, citizens disagree whether and to what extent economic rights "merit legal if not constitutional protection."¹²⁷ Political gridlock prevents the government from taking innovative and significant legislative steps to ameliorate the suffering and distrust of an alienated and embittered underclass. Angry disputes exist concerning abortion, affirmative action, the rights of gays and lesbians, and a host of other social justice issues. A consensus in the United States does not support Rawls's weak conception of religious freedom which does not go beyond liberty of conscience and equal protection of the laws.¹²⁸

Rawls does not give much weight to the interests of religious persons who believe, as Abraham Lincoln did, that "important principles may and must be inflexible."¹²⁹ If an increasing number of lawmakers adopt Rawls's secularism, the gaps between liberals and religious persons will widen, as extremism in the defense of religion-centered family values will become a more acceptable option for alienated religious conservatives condemning what they see as the callous and imperialistic secularism of many American liberals.¹³⁰ Clearly, Rawls's LPC in its present form is not likely to narrow the gaps between religious persons and relentless secularists. Therefore, Rawls's desire for a stable overlapping consensus is wishful thinking for the foreseeable future.

VI. THE EXCESSIVE SECULARISM OF RAWLSIAN LIBERALISM

Rawls can justify certain kinds of civil disobedience (e.g., refusal to engage in wartime combat) if a citizen's refusal to obey the law sends a message that "addresses the sense of

127. *Id.* at 159.

128. *Id.* at 335. See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

129. Abraham Lincoln, Last Public Address, in ABRAHAM LINCOLN: SELECTED SPEECHES, MESSAGES, AND LETTERS 285, 290 (T. Harry Williams ed., 1964).

130. One writer, a pastor yet, wrote "This religious right confronts us with a threat far greater than the old threat of Communism." Robert H. Meneilly, *Government is Not God's Work*, N.Y. TIMES, Aug. 29, 1993, § 4, at 15. For many other examples of the anti-religious fervor that often characterizes the liberal point of view, see STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

justice of a majority of the community,"¹³¹ but his LPC does not guarantee Quakers a religion based exemption from combat duty. Consequently, a disturbing question is whether Rawls's excessively secular LPC¹³² callously ignores the dilemma religious persons confront when their civil and religious duties conflict.

Rawls recognizes that all citizens must be left sufficient space to pursue their conceptions of good since the primary function of principles of justice is to sustain "ways of life fully worthy of citizens' devoted allegiance."¹³³ Nevertheless, religious liberty can be unduly burdened by Rawls's emphasis on the virtues of reasonable pluralism. This kind of exclusionary pluralism denigrates some religious persons as unacceptable because their conceptions of goodness and justice are not those most citizens "as equals might reasonably be expected to endorse."¹³⁴ As a result, if those persons unwilling to accommodate religious persons are numerous and powerful enough, they often threaten the less well-represented, the forgotten, or ignored.¹³⁵

Among the many religious persons who would be threatened if Rawl's ideas prevail would be the Amish-American parents who may be jailed if they do not send their offspring to accredited schools that teach teenagers "to be fully cooperating members of society."¹³⁶ In Rawls's ideal society, each Amish child, without exception, must learn "the [liberal] political virtues so that they [all] want to honor the fair terms of social cooperation in their relations with the rest of society."¹³⁷ The sectarian aims of Amish parents conflict with Rawls's secular political liberalism, which has a "different aim."¹³⁸

131. A THEORY OF JUSTICE, *supra* note 15, at 364.

132. See RAWLS, *supra* note 2, at 194 n.28 (admission by Rawls that excessive secularism is a concern of several persons commenting on his work).

133. *Id.* at 174.

134. *Id.* at 51.

135. Rawls's reliance on an overlapping consensus actually leaves too little space for anyone with convictions who wants to engage actively in politics. See Williams, *supra* note 2, at 17.

136. RAWLS, *supra* note 2, at 199.

137. *Id.*

138. *Id.* (emphasis added).

The only remedy for the Amish is to petition the elected representatives of the supermajority, euphemistically called the overlapping consensus. In such cases, public reason determines whether a regime's "institutions allow sufficient space for ways of life worthy of citizens' devoted allegiance."¹³⁹ Although Rawls insists that the LPC leaves enough space for the rational pursuit of conceptions of the good permitted by the LPC,¹⁴⁰ the Amish and other religious sects actually have inadequate space or freedom.¹⁴¹ Instead of worrying about excessive secularism, ideological conformity, and democratic despotism, Rawls coldly responds to the complaining Amish whose needs are ignored by lawmakers by "say[ing]: if a political conception of justice is mutually recognized by reasonable and rational citizens who affirm the reasonable comprehensive doctrines in an overlapping consensus, . . . this fact itself confirms that its free basic institutions allow sufficient space for ways of life worthy of citizens' devoted allegiance."¹⁴²

This kind of confirmation, Rawls insists, is the "most reasonable assurance political liberalism allows—and the most we can reasonably have that our political institutions contain sufficient space for worthy ways of life, and that in this sense our political society is just and good."¹⁴³

The challenge for liberal theorists, as Rawls obviously recognizes, is to formulate principles and priorities whereby adherents of radically divergent conceptions of good can coexist peacefully and amiably. Rawls's theory in its current version falls short of this desideratum because it is excessively secular and because its guarantee of basic liberties dilutes the protection provided by the Supreme Court in *Wisconsin v. Yoder*,¹⁴⁴ which upheld religious exemption claims by Amish parents. The excessive secularism of Rawls's LPC is exhibited most clearly by his discussion of the ideal of public reason.

139. *Id.* at 210.

140. *Id.* at 208.

141. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

142. RAWLS, *supra* note 2, at 210.

143. *Id.*

144. *Yoder*, 406 U.S. at 234-35.

VII. THE EXCLUSIONARY AND RESTRICTIVE IDEALS OF PUBLIC REASON

Public reason is a Rawlsian conception concerned with constitutional essentials, the common good and fundamental justice.¹⁴⁵ In non-public discourse, people may freely express their metaphysical, moral, and religious opinions; however, citizens adhering to the LPC are less free when voting in national elections or discussing constitutional law and basic justice. For example, ideal citizens endorsing the LPC and adhering to its ideal of public reason may not cite or rely upon religious precepts as such in public discourse.

In this section, I emphasize those aspects of Rawls's ideal of public reason that pertain to my concern that his overall approach is excessively secular. A telling example of Rawls's secularism is his view that Lincoln's two Proclamations of Thanksgiving in 1863 and 1864, if repeated by a contemporary American President, would violate limits set by public reason.¹⁴⁶ These limits require government officials to delete allusions to a deity in proclamations since any public address by an official can be communicated adequately without religious references. Of course, American presidents traditionally refer to God on Thanksgiving day. This custom comforts, perhaps, millions of citizens. Nevertheless, any publicly acknowledged reverence for the sacred violates moral duties imposed by public reason.¹⁴⁷ Needless to say, Rawls's secular ideal is aspirational; it is not descriptive of American politics and traditions.¹⁴⁸

145. RAWLS, *supra* note 2, at 213-14.

146. *Id.* at 254.

147. The ideal of public reason imposes moral, not legal, duties. *Id.* at 217.

148. *See id.* Rawls concedes that not all liberals accept his version of public reason. *Id.* Indeed, many liberal theorists have even stricter views. *See* Rawls's discussion of the so-called "exclusive view" of public reason. *Id.* at 247-52. In the Dewey Lecture at the University of Chicago Law School that was delivered on November 4, 1993, Rawls admitted that his view of public reason needs to be clarified and liberalized because the version of public reason described in POLITICAL LIBERALISM moves liberalism—and here I paraphrase—"in a way that destroys itself and our political tradition." Apparently, one's duty to abide by the canons of public reason obtains now only when a citizen acts as a judge, as a public official or as a person who takes part in political campaigns, especially as an orator or in party platform deliberations. In other situations, citizens may introduce non-public reasons if and only if the values expressed,

Consistent with Rawls's aspirations, let us imagine the existence of a liberal republic called "Academe" where the citizens do not support their public positions with "reasons given explicitly in terms of comprehensive doctrines;"¹⁴⁹ when they vote, they are not motivated by distinctively religious conceptions of right and good. Instead, the politically virtuous citizens of Academe rely only on political values conforming to the ideal of public reason¹⁵⁰ and its guidelines. Academe's citizens adhering to these guidelines do not deviate from the "presently accepted general beliefs and forms of reasoning found in common sense, and the [uncontroversial] methods and conclusions of science."¹⁵¹ Social policy and laws in Academe must "rest on the plain truths now widely accepted, or available, to citizens generally. Otherwise, [Academe's] political conception would not provide a public basis of justification."¹⁵² Again, God-fearing persons deviating shamelessly from these guidelines are considered unreasonable. Indeed, any supernatural religious belief is outside the framework of political "values that others can reasonably be expected to endorse and . . . in good faith . . . defend."¹⁵³

Rawls does not say much about the enforcement mechanisms of his ideal of public reason; how much does it rely on peer pressure and how much does it rely on social pressures traceable to government officials? How much does it rely on judges whose views on freedom of speech are shaped by the conventions holding together the overlapping consensus? Answers to

which support the political measures that they propose, are compatible with public reason and the LPC. Rawls also now concedes that public reason is pluralistic and changing. Personal Communication from Greg Sergienko, December 1, 1993.

It is not yet known to what extent Rawls plans to revise his conception of public reason, but Rawls's revision of his thesis, when published in final form will probably moot some of my major objections to the version published in *POLITICAL LIBERALISM*. This revision by Rawls supports my thesis that academic philosophers cannot create "fair" rules of substantive justice in the privacy of their study but must engage in an ongoing dialogue with the persons affected by the proposed fair restrictions on their individual rights and liberties.

149. RAWLS, *supra* note 2 at 247.

150. *Id.* at 241.

151. *Id.* at 224.

152. *Id.* at 225.

153. *Id.* at 226.

these questions are unclear. However, an ominous hint of duress is suggested when we read that a question to be settled by public reason is: "what religions are to be tolerated?"¹⁵⁴ Such a question demonstrates the extent to which the Rawlsian ideal represents "the politically marginal standpoint of American academic liberalism"¹⁵⁵ so often insensitive to the value of input from persons motivated primarily by their religious perspectives. The potentially mischievous question "what religions are to be tolerated" encourages ideological cleansing and invidious discrimination adversely affecting the "intolerable" religions.

Clearly, the republic of Academe does not welcome adherents of "militant Hinduism or Islam, for instance, or the most fanatical variants of Orthodox Judaism."¹⁵⁶ Even non-militant religions are unwelcome; in Academe, any religion that does not give its adherents sufficient leeway to conform to the ideal of public reason is beyond the pale of religious toleration. In Academe, religious persons cannot adequately interact politically with others in a robust and thought-provoking mode of communication because public reason guidelines prohibit nearly all references in public to religious texts and religious prophets.

In a well-ordered society like Academe's, there are very few situations where religious persons are allowed to refer explicitly to their religious beliefs when they cast their votes and engage in political advocacy. In one situation opponents of direct government aid to church-related schools may explain to co-religionists favoring nondiscriminatory financial aid to all schools why their shared religious beliefs prohibit government aid to church-affiliated schools.¹⁵⁷ "This knowledge," Rawls says, "surely strengthens mutual trust and public confidence" among the citizenry.¹⁵⁸ Obviously, Rawls's ideal of public reason contains a content-based double standard: religious speech strengthening secularism and the liberal coalition in a well-ordered society is permissible; otherwise it is not.

154. *Id.* at 214.

155. Gray, *supra* note 3, at 35.

156. Williams, *supra* note 2, at 17.

157. RAWLS, *supra* note 2, at 249.

158. *Id.* at 249.

Rawls also allows persons to rely explicitly on religious reasons to support their political arguments when the constitutional consensus is disintegrating, but only if they intend to strengthen the endangered liberal political conception.¹⁵⁹ Accordingly, Rawls condones much of the anti-slavery rhetoric occurring in the decades prior to the American Civil War but only because many abolitionists sincerely believed that, in their day, religious rhetoric was "the best way to bring about a well-ordered and just society."¹⁶⁰ Again, Rawls employs a double standard: his ideal of public reason never allows citizens engaged in political activity to refer to religious beliefs that undermine the LPC.

Rawls does not argue that citizens must "pluck out their religious convictions" and think about matters of basic justice and constitutional essentials as if "they started from scratch."¹⁶¹ He claims instead that the political judgments of religious persons will be basically the same even if they disregard their superfluous beliefs in the supernatural. Rawls states that persons need not speak the whole truth when a partial truth conforms to the ideal of public reason and disguises the roots of their political judgment. Rawls's thesis makes sense only if all the persons voting or engaged in political advocacy are already liberal, reasonable, and domesticated citizens of Academe who choose to be constrained by the limits of public reason.¹⁶²

Even Immanuel Kant conceded that religious persons who fail to be sincere are in their own opinions "object[s] of the deepest contempt."¹⁶³ Rawls, however, in this situation is unsympathetic and unforgiving, even though compliance with his ideal of public reason is an extremely difficult task for persons

159. *Id.* at 251.

160. *Id.* at 250.

161. *Id.* at 244 n.33 (quoting KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 155 (1988)).

162. See Williams, *supra* note 2, at 17.

163. IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE 178 (Harper Torchbook ed., Harper & Brothers 1960) (Theodore M. Greene & John R. Silber trans., 1934).

whose religious precepts are internalized. When internalized religious values dominate a person's mental decisionmaking, they are virtually an integral and inseparable facet of that person's identity.¹⁶⁴ If such persons were asked to separate their non-political values from their political values, each would say: "What you want me to do just isn't *me*."¹⁶⁵

Rawls claims that religious persons can honor both their religion and public reason "when three conditions are satisfied:"¹⁶⁶

(a) [when they] give very great and normally overriding weight to the ideal [public reason] prescribes; (b) [when they] believe public reason is suitably complete, that is, for at least the great majority of fundamental questions, possibly for all, some combination and balance of political values alone reasonably show the answer; and finally (c) [when they] believe that the particular view [they] propose, and the law or policy based thereon, expresses a reasonable combination and balance of those values.¹⁶⁷

Under these conditions, according to Rawls, the fact that a person does not refer to the religious beliefs that support her political judgments does not mean that she is insincere.¹⁶⁸

The foregoing three conditions of authentic behavior often cannot be satisfied when religious persons have firmly rooted convictions in conflict with public reason. For example, the LPC and public reason, according to Rawls, provide women with a right to choose an abortion in the first trimester.¹⁶⁹ If a religious person's belief in the sanctity of human life extends to the first trimester, that religious person might not be able to lay aside her firmly rooted convictions and still feel she is

164. Habermas writes: "[I]deas of the good life are not notions that simply occur to individuals as abstract imperatives; they shape the identity of groups and individuals in such a way that they form an integral part of culture and personality." HABERMAS, *supra* note 90, at 177.

165. Habermas writes: "A person who questions the forms of life in which his identity has been shaped questions his very existence." *Id.* at 177-78.

166. RAWLS, *supra* note 2, at 241.

167. *Id.*

168. *Id.* at 242.

169. *Id.* at 243 n.32.

acting authentically when she condones, either by silence, word, deed or vote, laws permitting abortion. Indeed, many religious persons are not similarly situated with the adaptive persons Rawls "recognize[s] as liberal;"¹⁷⁰ however, public reason does not make exceptions for persons who cannot adapt.

In Rawls's view, if a person's religious doctrines cannot support a woman's right to choose abortion then her "comprehensive doctrines . . . run afoul of public reason."¹⁷¹ Moreover, religiously devout voters who adhere to their unreasonable comprehensive doctrines are perceived as "unjust, politically speaking" since they are willing to use political power coercively for the wrong reasons.¹⁷² Under these circumstances, believers in unreasonable religious doctrines can be contained "in self-defense."¹⁷³ How they can be contained is not explained. Will they be monitored by government agencies, or excluded from political party platform committees? Will their religious organizations be denied tax exemptions if their members speak out in public and use religious metaphors and rhetoric?

Whatever the form of public reason's enforcement mechanism, Rawls's support of public reason is naive partly because suppression of religious rhetoric forces politically active religious leaders to conceal their goals. For example, certain religious organizations advancing fundamentalist objectives could pretend to adhere to "reasonable" doctrines when they sponsor so-called "stealth candidates."¹⁷⁴ Allegedly some right wing religious organizations already conceal their true agendas until after their stealth candidates are elected.¹⁷⁵ Other groups allegedly engage in terrorism to punish the United States for its aggression against their religious traditions.¹⁷⁶ Surely, a candid public airing of a religious person's dogmatic worldview is preferable

170. *Id.* at 290.

171. *Id.* at 243.

172. *Id.* at 247.

173. *Id.*

174. See Eric T. Schneiderman, *Let's Keep Political Coercion out of Religion; Reed's Stealth Agenda*, N.Y. TIMES, Aug. 29, 1993, § 4, at 14 (referring to the Christian Coalition, a right wing religious organization).

175. See Meneilly *supra* note 130, at 15.

176. See Richard Bernstein, *American Law Tackles Terrorism*, N.Y. TIMES, Aug. 29, 1993, § 4, at 1.

to stealth or terrorism. In Brandeis's hopeful immortal words, "repression breeds hate," "discussion affords ordinarily adequate protection against the dissemination of noxious doctrine," and the "freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth."¹⁷⁷ The extent to which Rawls believes in freedom of speech and the free exercise of religion is discussed in the next section.

VIII. THE BASIC LIBERTIES

A. *The Abbreviated List of Basic Liberties*

Basic liberties are indispensable elements of Rawls's conception of "fair terms of social cooperation"¹⁷⁸ since they enable individuals to develop and exercise their two powers of moral personality.¹⁷⁹ The distinction between ordinary and basic liberties is fundamentally important in constitutional law. Unlike ordinary liberties,¹⁸⁰ basic liberties may not be constitutionally restricted by lawmakers trying to advance religion, perfectionist values, utilitarian conceptions of good or other comprehensive doctrines.¹⁸¹ A basic liberty may be limited on-

177. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

178. RAWLS, *supra* note 2, at 304.

179. Recall that the first power of moral personality pertains to each person's sense of justice, the capacity to be reasonable, enabling everyone to be moved by a just and stable scheme of social cooperation conforming to "justice as fairness" principles. The second moral power pertains to each person's determinate conceptions of good and each's capacity to evaluate, after due deliberation, his or her conception of "what is valuable in human life," the capacity to be rational. *Id.* at 19. The regulative nature of the second power "enable[s] us to think of ourselves as affirming our way of life in accordance with the full, deliberate, and reasoned exercise of our intellectual powers." *Id.* at 313.

180. Ordinary liberties are not protected as much as basic liberties but they may not be denied or limited without sufficient cause. *See id.* at 292.

181. *Id.* at 295. The "basic liberties constitute a family, and . . . it is this family that has [lexical] priority and not any single liberty by itself." *Id.* at 357.

ly in so-called self-limiting situations¹⁸² or when two or more basic liberties conflict.¹⁸³

The basic liberties protected by Rawls are few in number.¹⁸⁴ They include some liberties significant for the development and informed exercise of everyone's sense of justice such as freedom of thought¹⁸⁵ and the political liberties (e.g., right to vote or run for office) that guarantee everyone roughly equal access to public facilities and the political process.¹⁸⁶ "These basic liberties require some form of representative democratic regime and the requisite protections for the freedom of political speech and press, freedom of assembly, and the like."¹⁸⁷ These basic liberties of conscience¹⁸⁸ and association¹⁸⁹ are connected to everyone's capacity rationally to advance their permissible conceptions of good. The remaining supportive basic liberties recognized by Rawls include "the liberty and integrity of the person violated, for example, by slavery and serfdom . . . and the

182. *Id.* at 341. A liberty is self-limiting when regulations are necessary for its continued adequate exercise; for example, limits on political campaign contributions may be necessary to insure everyone the fair value of their political liberties. *See id.* at 356-57. Moreover, content-neutral rules of parliamentary procedure during a debate, may be necessary for effective freedom of speech.

183. *Id.* at 295. The ambit of the basic liberties must be adjusted so that each one is tailored to fit appropriately into a scheme of constitutional law secured equally for all citizens. *Id.* Each basic liberty has a "central range of application." *Id.* at 178.

184. Rawls concedes that lawmakers in the future may modify the original list of basic liberties, so long as the list is improved. *Id.* at 293. To determine whether a modification is an improvement, the lawmakers should ask whether the change will guarantee "essential social conditions for the adequate development and full exercise" of every citizen's "two powers of moral personality over a complete life." *Id.*

185. *Id.* at 332. Rawls's conception of freedom of thought does not include any affirmative duty on the part of the government not to burden the free exercise of religion.

186. *Id.* at 327-30. "Formal equality is not enough" to guarantee all persons, rich and poor, an equally effective voice in public affairs. *Id.* at 361.

187. *Id.* at 335.

188. Liberty of conscience "includes the freedom and integrity of the internal life of religious associations and the liberty of persons to determine their religious affiliations in social conditions that are free." *Id.* at 341. This liberty is not co-extensive with a right created by a limit on the government's power to interfere with the free exercise of religion.

189. The basic liberty of association supports liberty of conscience by enabling persons "to associate with other like-minded citizens." *Id.* at 313.

rights and liberties covered by the rule of law."¹⁹⁰ This list is too short.

The abbreviated list of basic liberties guaranteed by the LPC "specifies the common and guaranteed status of equal citizens in a well-ordered democratic society."¹⁹¹ The free exercise of religion is not included as a basic liberty on Rawls's list because it provides religious persons with special privileges which violates Rawls's notion of fair terms of social cooperation because conscientious refusals to obey laws may not be justified by "an unworldly view bound to remain a sectarian doctrine."¹⁹² In short, according to Rawls, granting exemptions to "unreasonable" persons adhering to religious belief systems is unfair to persons adhering to non-religious belief systems.

The LPC does not protect the religiously grounded conduct of the Old Order Amish whose religion pervades and determines the entire mode of life of its adherents.¹⁹³ The values and programs of modern schools "are in sharp conflict with the fundamental mode of life mandated by the Amish religion . . . substantially interfering with the religious development of the Amish child, and his integration into the way of life of the Amish faith community."¹⁹⁴ Of course, special exemptions for the Amish treat religious persons differently from other citizens, and such differential treatment violates the Rawlsian ideal of a *common* and guaranteed status of *equal* citizens:

Justice Souter is more accommodating than Rawls, and more attuned to the history of religious freedom in the United States. He writes: "A law that is religion neutral on its face or in its

190. *Id.* at 335. The rule of law guarantees the regular and impartial administration of public rules. This is a guarantee of formal justice: the idea that like cases should be treated alike. See A THEORY OF JUSTICE, *supra* note 15, at 235-43. "The right to hold and have the exclusive use of personal property" is apparently another basic liberty. RAWLS, *supra* note 2, at 298. "The role of this liberty is to allow a sufficient material basis for a sense of personal independence and self respect, both of which are essential for the development and exercise of the moral powers." *Id.* Rawls also wants lawmakers to protect freedom of movement and occupation because this protection is necessary if the basic liberties are to be properly guaranteed. *Id.* at 335.

191. RAWLS, *supra* note 2, at 335.

192. See A THEORY OF JUSTICE, *supra* note 15, at 382.

193. *Wisconsin v. Yoder*, 406 U.S. 205, 208-09 (1972).

194. *Id.* at 216.

purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids."¹⁹⁵ Souter recognizes that religious persons may be dissimilarly treated because they are dissimilarly situated with reference to the effects of a law. Rawls does not use this test of equality, which goes beyond formal equality, because he does not recognize "the value of religious freedom as an affirmative individual liberty."¹⁹⁶

Religious liberties, of course, cannot be protected absolutely; the most protective test developed by the United States Supreme Court involves strict scrutiny, a balancing test.¹⁹⁷ This is another reason why the free exercise guarantee is omitted from Rawls's lists of basic liberties: he generally opposes the balancing of competing interests.¹⁹⁸ Although Rawls claims he opposes delicate balancing tests when it comes to legal questions about the identity and scope of basic liberties, ironically he himself attempts to strike "[a] reasonable balance" among competing political values, and he would protect a woman's duly qualified right of abortion.¹⁹⁹ This inconsistency is not adequately explained by Rawls. In other respects, Rawls's theory of constitutional law is incoherent, incomplete and confusing. For example, Rawls recognizes that the right to vote is a basic political liberty; yet, his ideal of public reason condemns as unreasonable religious persons whose vote against a law is based consciously on theological grounds. In the next section, we see that Rawls protects political speech absolutely in contrast to religious speech, which is condemned as morally obnox-

195. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2241 (1993) (Souter, J., concurring). As an example, Justice Souter writes, "A secular law, applicable to all, that prohibits consumption of alcohol . . . will affect members of religions that require the use of wine differently from members of other religions and nonbelievers, disproportionately burdening the practice of, say, Catholicism or Judaism." *Id.*

196. *Id.* at 2250 (Blackmun, J., concurring).

197. See *Yoder*, 406 U.S. at 237 (White, J., concurring).

198. See generally RAWLS, *supra* note 2, at 353. Rawls explains that the basic liberties "do not depend on conjectural calculations concerning the greatest net balance of social interests (or of social values). In justice as fairness such calculations have no place." *Id.* at 317.

199. *Id.* at 243-44 n.32.

ious if a religious person's political advocacy refers explicitly to religious precepts.²⁰⁰

B. *The Basic Liberty of Political Speech*

When lawmakers specify or adjust the range of basic liberties, Rawls wants them to use the criterion of significance instead of ad hoc balancing tests.²⁰¹ He believes that "a liberty is more or less significant depending on whether it is more or less essentially involved in, or is a more or less necessary institutional means to protect, the full, informed and effective exercise of the moral powers."²⁰² For example, freedom of thought is essentially involved with the development of a person's sense of justice and capacity to be moved by political principles relevant to a shared sense of justice.²⁰³ Accordingly, freedom of thought also protects speech, "an essential part of which is the necessity of revolution, or the use of unlawful force and the incitement thereto as a means of political change."²⁰⁴

According to Rawls, subversive advocacy significantly enhances the development of everyone's sense of justice since revolutionaries go beyond simply shouting "Revolt! Revolt!" They give reasons.²⁰⁵ Rawls maintains that:

[t]o repress subversive advocacy is to suppress the discussion of these reasons, and to do this is to restrict the free and informed public use of our reason in judging the justice of the [political order] . . . and its social policies. And thus the basic liberty of freedom of thought is violated.²⁰⁶

In other words, the political dissident must be given free rein since his calls for revolution enable others to consider whether

200. See *supra* text part VII.

201. See generally RAWLS, *supra* note 2, at 317, 353.

202. *Id.* at 335.

203. *Id.* at 334-35.

204. *Id.* at 343.

205. *Id.* at 346 (citing HARRY KALVEN, JR., *A WORTHY TRADITION* (Jamie Kalven ed., 1987)).

206. RAWLS, *supra* note 2, at 346.

the political order is conforming, as it should, to "justice as fairness" principles and the LPC.

In extraordinary emergency situations where the procedures of democratic institutions can no longer operate,²⁰⁷ the suppression of subversive advocacy could be justified, but only to prevent a greater or more significant loss to a basic liberty.²⁰⁸ Absent this type of emergency, however, there is never any justification for punishing speakers who intend to convince others that revolution is necessary. Therefore, the United States Supreme Court's focus on the imminent and likely dangers of inciting speech "is beside the point."²⁰⁹ Summarizing Rawls's position, all subversive political speech, no matter how dangerous, is absolutely protected so long as the nation's free political institutions still operate and adequately protect freedom of thought, a free press and other basic liberties.²¹⁰

Religious persons, among others, may wonder why subversives who call for violent revolts are fully protected, while non-violent Quakers are not constitutionally guaranteed exemptions from the duty to kill others in wartime combat. Rawls points out the crucial difference: Quakers rely explicitly on religion to justify their refusal to kill; revolutionaries urging "death to capitalists" rely on political ideas relevant to the development and informed exercise of everyone's sense of justice.²¹¹ In short, religious persons are never constitutionally entitled to exemptions from general laws whereas revolutionary speech inciting violence for political purposes is always fully protected while institutions of government still operate.²¹²

Rawls employs a criterion of significance to determine the range of basic liberties²¹³ connected with the two powers of moral personality,²¹⁴ but Rawls's explanation leaves many questions unanswered. For example, do the two powers of moral

207. *Id.* at 354.

208. *Id.* at 356.

209. *Id.* at 355.

210. *Id.*

211. See A THEORY OF JUSTICE, *supra* note 15, at 379, 382, 385.

212. *Id.* at 382.

213. RAWLS, *supra* note 2, at 525.

214. *Id.* See also *supra* note 179.

personality include a moral sense²¹⁵ that includes the capacity to compromise with persons who reject the LPC because it is excessively secular. Are liberals always content with the status quo so long as it is supported by a stable overlapping doctrinal consensus adhered to by reasonable and rational persons? How much room does Rawls's LPC leave for a critical theory of liberalism?²¹⁶ Is there any way to amend the Constitution to guarantee freedom of religion, or does a special exemption for religious persons always violate the provision guaranteeing each person "an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all?"²¹⁷ What happens when the political dissident inciting revolution uses religious terms; does this embellishment subject her to punitive sanctions?

Rawls's book *Political Liberalism*, relies on a narrow view of public reason to answer these questions. Rawls, however, consistently overestimates the ascertainability and reliability, of public reason which, in practice, is really public opinion, an impure meld of reason, passion and prudence which is precisely the difficulty Rawls is trying to ameliorate.²¹⁸ To the extent that Rawls is trying singlehandedly dictate the permissible content of evolving public reason, his effort is unrealistic and unsuccessful idealism. In short, the LPC is currently an inadequate and incomplete source for a coherent and workable scheme of constitutional law,²¹⁹ and Rawls's excessive secularism creates tensions that defeat his attempt to achieve social unity.

215. See generally JAMES Q. WILSON, *THE MORAL SENSE* (1993).

216. Even communitarianism is rejected by Rawls. See RAWLS, *supra* note 2, at 282.

217. RAWLS, *supra* note 2, at 291. Although anyone may legally engage in political speech and advocate revolution, because political speech and freedom of thought are basic liberties, the Rawlsian ideal of public reason represses expression of reasons derived from comprehensive doctrines, especially those that are incompatible with liberalism and the prospects for an overlapping consensus.

218. See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 186 (1989).

219. As Rawls recognizes, the task of a well-ordered society is to design a practicable scheme for making the basic liberties compatible with each other in some workable and coherent constitutional arrangement. RAWLS, *supra* note 2, at 297-98.

IX. CONCLUSION

This article is an analysis of John Rawls's abstruse answer to the following question: in a republic of self-governing people divided by different conceptions of goodness and justice, which conception is best for regulating conduct and protecting liberties? Not suprisingly, Rawls selects his own LPC, because, when compared to competing conceptions, it is allegedly more likely to produce stable social unity. In Rawls's view, the LPC is more likely to produce social unity because it is the least deficient proposal for motivating persons to cooperate with each other on a basis of mutual respect.

Rawls's highly theoretical book does not adequately explain how societies actually alter their paradigms of justice, and he does not adequately deal with real problems of power politics or the subtle and shifting relationships between morality, law and politics. His approach creates the mystifying illusion that a system of justice can be built up from a few abstractions about society, persons, and their so-called moral powers. In reality, competing conceptions of the common good and justice, and their connections, if any, cannot be authoritatively prejudged as fair or unfair by a political philosopher expounding theory.²²⁰ The task of judging the validity of proposed principles of law and justice belongs to the participants in the political process. Before their task is completed, none of the competing proposed principles have self-evident validity.

Given the dynamics of pluralism,²²¹ the "justice as fairness" principles selected by the parties in the original hypothetical position would probably not survive totally intact if they were debated in the United States. Some basic liberties might be deleted by realistic politicians and citizens (probably the guaranteed minimum level of welfare proposed by Rawls) and others added (probably the free exercise of religion).²²² Historically,

220. See HABERMAS, *supra* note 5, at 248.

221. Pluralism as used here posits both diversity and potential unity. Pluralism enfeebles the notion of a common good, but this is the price of having a non-tyrannical regime and minority rights.

222. The Supreme Court diluted the free exercise clause in *Employment Division v. Smith*, 494 U.S. 872 (1990); *But see* Religious Freedom Restoration Act, *infra* note

Americans have vacillated between models of liberalism that privilege the common good and those competing models that posit separate individuals equally pursuing their self-interest. During this ongoing debate, a political philosopher like Rawls is a helpful participant; his influence during the process of will formation, however, depends on the soundness of his arguments—a judgment ultimately made by all the participants rather than made by an academic philosopher. Not even Rawls predicts the imminent arrival of an overlapping doctrinal consensus in the United States.

Rawls's thought experiment, imaginatively creating parties in the original position,²²³ reminds us that "you may get a fair division of a cake by asking someone to cut it who does not know which [slice] he will get."²²⁴ However, the cake cutter ought to know whether the other people at the table like cake and are hungry, or have diabetes. Rawls essentially specifies, without consulting those adversely affected, the size of everyone's slice of religious freedom. Rawls should admit that philosophers cannot put themselves in the place of participants in the political process. Obviously, "the theoretician's mind [is] no substitute for real discourse."²²⁵

Rawls's controversial move from a procedural model of justice, called the original position, to substantive "justice as fairness" principles has been criticized often, even by admirers of his attempt to make liberalism more coherent.²²⁶ Although in Rawls's thought experiment²²⁷ the veil of ignorance artificially eliminates the bias of self-interest and simulates fair bargaining conditions, one philosopher's monologue obviously is not a substitute for an ongoing political debate.

237.

223. See *supra* text accompanying notes 12, 32-38.

224. See Williams, *supra* note 2, at 17.

225. THOMAS MCCARTHY, INTRODUCTION TO MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION ix (1990).

226. See AUTONOMY & SOLIDARITY: INTERVIEWS WITH JÜRGEN HABERMAS 199-201 (Peter Dews ed., 1992) [hereinafter INTERVIEWS]; see also HABERMAS, *supra* note 90, at 175-76.

227. See *supra* text accompanying notes 12, 32-38.

According to an alternative model of discourse ethics, citizens participating in ongoing political dialogues demonstrate their moral maturity by putting themselves in the positions of their political opponents.²²⁸ This attitude of empathy does not prevent participants in public advocacy from considering the politically relevant ideas of religious persons uncomfortable with the extent of social permissiveness in modernity. Indeed, in order to evaluate carefully and sensitively whether a religious person's conception of justice is sound and workable, liberal secularists must suspend their prejudices and empathize, at least temporarily, with religious participants engaged in an effort to reach a genuine mutual understanding or a basis for a *modus vivendi*.²²⁹ Unfortunately, Rawls presumes to decide, *qua* philosopher king, that social unity is more compelling than a person's religion even though the social unity he has in mind alienates many religious persons from their traditions and gods.²³⁰

The more empathetic procedures of political will formation, suggested by Jürgen Habermas, are not more attainable in practice than Rawls's ideal conception of justice. The Habermasian model of discourse ethics, however, does not provide us with a ready made set of substantive principles and a scheme of ordered priorities. In other words, the outcome of a truly open-ended debate over principles of justice according to discourse ethics is not pre-ordained or prejudged. The outcome depends on flesh and blood persons with freedom of choice who must justify their proposals, claims and constructs. Because the outcome of the debate in the discourse ethics model is not necessarily the same as a political theorist's preferences, it is less

228. In this respect, the construction of the original position by Rawls has similar aims. INTERVIEWS, *supra* note 226, at 259. However, when Rawls moves from the construction of the original position to a statement of the carefully worded "justice as fairness" principles, he becomes an advocate rather than a philosopher describing the conditions for a fair decisionmaking process.

229. As Habermas writes, there should be "a shared, reciprocal taking over of perspectives" so that all persons affected can test whether a proposed principle "is acceptable from the perspective of everyone else's understanding of the world and of themselves." INTERVIEWS, *supra* note 219, at 251.

230. See *Wisconsin v. Yoder*, 406 U.S. 205, 206 (1972). "In the Amish belief higher learning tends to develop values they reject as influences that alienate man from God." *Id.* at 210.

substantive, less presumptuous, and more adaptable to context than Rawls's excessively secular ideal of public reason.

In all societies in every era "where ideals are at issue, the particular passions and memories of the particular individuals involved will largely determine their beliefs."²³¹ Underestimating this feature of human nature, Rawls, like many philosophers preceding him, overestimates the relationship between reason and "a decent social order."²³² In the United States, non-conformists are *not* expected to surrender their beliefs when they vote. Moreover, in the United States, extremists advocating the enactment of religion-based laws are not purged or systematically contained despite the dangers they pose. They often proliferate, flourish and eventually cancel each other out, as James Madison hoped. Indeed, America has a remarkable "big tent" capacity to cope with doctrines deemed unreasonable by Rawls. Justice Roberts, writing for the Supreme Court in *Cantwell v. Connecticut*²³³ understood the significance of pluralism and religious speech better than Rawls. Roberts wrote:

In the realm of religious faith, and that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to his exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of citizens of a democracy.²³⁴

231. Hampshire, *supra* note 4, at 46.

232. *Id.*

233. 310 U.S. 296 (1940).

234. *Id.* at 309.

Similarly, in *Thomas v. Collins*,²³⁵ Justice Jackson wrote:

[I]t cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. Nor would I.²³⁶

Clearly, for religious persons, the American political system is preferable to a Rawlsian regime where relentless secularists "have created a political and legal culture that presses the religiously faithful to be other than themselves . . . as though their faith does not matter to them."²³⁷

235. 326 U.S. 526 (1945).

236. *Id.* at 545 (Jackson, J., concurring).

237. CARTER, *supra* note 130, at 3. See generally Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics* 60 GEO. WASH. L. REV. 685 (1992). The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, reinstates strict judicial scrutiny as the proper test for laws of general applicability which substantially burden free exercise. In effect, the Act creates a statutory right which returns free exercise jurisprudence to standards developed in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner* 374 U.S. 398 (1963).