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Introduction

John Rawls’s Proffer to Believers:
A Bargain Called,
“The Idea of Public Reason”

WILLIAM J. WAGNER

The quality of discourse in contemporary American politics is strained by the companion frustrations of not being heard upon appeal—or so it would seem—to what one considers germane points of basic principle, while, at the same time, being required to listen to views—or it would, no less equally, appear—premised on stated or unstated assumptions invasively insistant on their own—not to put too fine a point on it—irrational presuppositions. Religion, like no other topic, strikes a contemporary American nerve of frustration over “not being heard” but “being made to listen.” The current international face-off between secular Western ideologies and the forces of Islamic revival with its extraordinarily deep difference on the place of religion in politics, merely aggravates this sense of mutual miscomprehension arising when religion surfaces as an issue in political debate."1

One serious error would be to imagine that such patterns of dual and reciprocal frustration within the contemporary American mind, whether they are experienced by

1 Stephen Healey in a recent article observes that “since the terrifying acts of September 11, 2001, the relationship of religion and politics—especially purported failures and dangers of Islam—has dominated scholarly and popular discussions.” Stephen Healey, Religion and Terror: A Post-9/11 Analysis, INT’L J. ON WORLD PEACE, Sept. 2005, at 3, 3. In comparing two recent books he observes that “the conclusions the authors draw are diametrically opposed,” for one “reflects ethically on the capacity of religious faith to precipitate acts of madness,” while the other “examines[s] the capacity of world religions to support development of large-scale social systems, especially democratic politics.” Id. at 4.
Americans in the context of the current international situation or elsewhere, represent no more than the ubiquitous human tendency to one-sidedness and unconscious bias for self. American political discourse is, especially in the new global era, pretty clearly in trouble in a variety of ways. The causes of this trouble are complex and multifaceted. The sensitivity of religion’s role in political discourse, although not pointing to any single cause of the troubled nature of discourse today, can, nonetheless, be accounted at least a central symptom of that trouble and, it seems reasonable to hope, may offer a significant clue, as such, to some of its causes and even potentially to some of its remedies.

Among theoretical proposals for placing American political discourse on a truer and more legitimate footing, and, no less, among those such proposals treating, more specifically, religion as a consideration critical to that end, that which John Rawls offers in his book *Political Liberalism* has attained, perhaps, the greatest notoriety. Even though world historical events occurring at the time of Rawls’s death and immediately afterwards have shifted the background of the discussion, the systematic character of Rawls’s thinking and his immense academic standing continue to make his thesis a virtual institution in American discourse on politics. Anyone seriously concerned today with the role of religion in public life, or with the health of American political discourse, has to account still for where they stand in relation to Rawls.

Rawls viewed the settlement of contention over religion’s role in politics to be necessary both to democracy and to the achievement of a just society. As path to this goal, Rawls lays down that certain constraints govern the admissibility of religious argument in democratic politics, at least with respect to pivotal questions he defines as those encompassing “constitutional essentials and matters of basic justice.” Rawls asserts that these constraints, deriving from a decisively important concept he calls the “idea of public reason,” limit participants in a democracy to positions that they can

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5 Rawls states that “political values alone are to settle” questions “involving what we may call ‘constitutional essentials’ and questions of basic justice.” *John Rawls, Political Liberalism* 214 (expanded ed. 2005) [hereinafter POLITICAL LIBERALISM]. He holds that these include “fundamental principles that specify the general structure of government” and “equal basic rights and liberties of citizenship.” *Id.* at 227.

6 He argues that “[the idea of public reason has been often discussed and has a long history,” beginning at least with Kant, “and in some form it is widely accepted.” *Id.* at 213. He states his goal as expressing the idea of public reason “in an acceptable way as part of a political conception of justice that is broadly speaking liberal.” *Id.* at 214.
avow solely by reference to some “political conception of justice” drawn from the fund of common democratic ideals independent of any “comprehensive vision” of the truth. Rawls’s notion of “public reason” must regulate the admissibility of religious argument in public debate, since religion, by its very definition, entails comprehensive doctrine.

Rawls once appeared intent on championing, from among competing liberal conceptions of justice, his own particular view of “justice as fairness,” and, as well, on excluding, from the scope of public validity, all religious conceptions of what is just premised on comprehensive assumptions. However, in a subsequent influential article entitled, *The Idea of Public Reason Revisited,* Rawls was seen to adjust these views to favor greater pluralism. He declared that the ongoing presence in politics of diverse views, informed, among themselves, by mutually incompatible conceptions of justice, was, under his standard of public reason, defensible after all. He now condoned, as legitimate, a state of continuing open and unresolved differences among a range of diverse conceptions of justice, so long as they at least met his criteria for constituting an overlapping liberal consensus. In taking this revised position, Rawls was content to allow his own conception of “justice as fairness” to assume a standing as merely one instance of a political conception qualifying as liberal. Moreover, Rawls now allowed that religious arguments could be expressed in public, consonant with his theory, but with the proviso that those making such arguments must supplement their expressly religious declarations, within a reasonable time, with what could be termed adequate and independent secular grounds for their conclusions. Even more significantly, Rawls showed a new willingness to make room in public discourse for conceptions of justice offered by spokespersons of religion, on condition

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7 Rawls defines a “political conception of justice” as one which is, in addition to other definitional requirements, “freestanding,” i.e., not derived from a conception that tends to cover “all recognized values and virtues within one rather precisely articulated system.” *Id.* at 12-13.

8 In *Political Liberalism,* Rawls presents “justice as fairness” as the basis of a shared commitment he presupposes of the well-ordered democratic society, within which he seeks to develop an “overlapping consensus” among competing comprehensive doctrines. *Id.* at 133-4. In this description, he appears to assume that religious arguments are excluded as based on comprehensive doctrine. Rawls does suggest that Lincoln’s Second Inaugural Address, if offered on “constitutional essentials or matters of basic justice,” would have been out of order, but reassures us that “whatever implications it might have could surely be supported firmly by the values of public reason.” *Id.* at 254.


10 *Id.* at 773 ("Thus, the content of public reason is given by a family of political conceptions of justice, and not by a single one.").

11 *Id.* at 774 (“There are . . . many forms of public reason specified by a family of reasonable political conceptions. Of these, justice as fairness, whatever its merits, is but one.").

12 Rawls turns to “the wide view of public political culture.” *Id.* at 783. He states that according to this view, “reasonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, provided that in due course proper political reasons—and not reasons given solely by comprehensive doctrines—are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support.” *Id.* at 784. Rawls refers to “[t]his injunction . . . as the proviso.” *Id.* His concept can be compared to that of “adequate and independent state grounds” employed by the United States Supreme Court as the measure of when a state supreme court can interject comment on federal law in one of its opinions without undermining the finality of its holding. The state court can make such comment, without losing the finality of its holding, as long as it provides a “plain statement” that it has “adequate and independent” grounds for its opinion in state law. See *Michigan v. Long,* 463 U.S. 1032 (1983). For a discussion of the quasi-legal quality of aspects of Rawls’s reasoning, see Jeremy Waldron, *Public Reason and "Justification" in the Courtroom,* 11 J.L. PHI & CULTURE 107, 123 (2007).
that such conceptions satisfied the criteria of reasonableness on which he rested his liberal notion of "a political conception," his test for admissibility in public debate. Rawls cited, as an example of argument meeting this test, the "common good" approach of some contemporary Roman Catholics, naming, in this regard, with approval, the reasoning offered in public in the more recent past by the late Archbishop Joseph Bernardin of Chicago, and, in a slightly more distant era, by Jesuit theologian John Courtney Murray.

Rawls made his concept of reasonableness the gatepost of admissibility. His schema separated, through an essentially procedural step, those approaches that are eligible to influence public debate and those that are not. As gatekeeper, Rawls accorded and denied entry to various kinds of potential participants. These determinations have an all-or-nothing quality. In approving Bernardin and Murray, Rawls, thus, extended a hand of welcome to some religious views knocking at the door of public discourse. He conditioned his offer on such views taking care to satisfy his criteria, as he perceived Bernardin and Murray to have done. This was the bargain Rawls offered to religious believers. He hoped, of course, by it, to gain sufficient support for his theory to allow it to become, in reality, the basis of an overlapping liberal consensus.

The purpose of the present essay is ultimately to introduce a series of articles that follow exploring the common theme of "Rawls's 'Idea of Public Reason: Achievement or Failure?'" These articles ask what sense is made by Rawls's idea of public reason and by the offer of a bargain to religious believers that it represents. Their authors include political commentators, moral philosophers, and scholars of First Amendment jurisprudence: E.J. Dionne, Kent Greenawalt, John Haldane, Paul Weithman, Nicholas Wolterstorff, Jeremy Waldron, Michael McConnell, and William Galston. Surely, these writers represent as formidable a gathering of commentators on contemporary political theory, and on the topic of religion in law and politics in particular, as any recently taking place on the American and Anglo-American scene. Reading—and re-reading—what these collected essays have to say equips the reader, whether motivated by religious conviction or by a commitment to political theory or by both, to comprehend more fully and to assess more critically

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13 Rawls distinguishes public reason from secular reason or values. Religious viewpoints may put themselves forward in the terms of public reason, but they "must proceed[ ] entirely within a political conception of justice." *The Idea of Public Reason Revisited*, supra note 4, at 776.

14 *Id.* at 775, 798 n.82, 799 n.83. He notes that "political liberalism also admits . . . Catholic views of the common good and solidarity when they are expressed in terms of political values." *Id.* at 775. He specifically cites Cardinal Bernardin's "consistent ethic" argument against abortion as an "argument in public reason," noting that it asserts three political values: "public peace, essential protections of human rights, and the commonly accepted standards of moral behavior in a community of law." *Id.* at 798 n.82. In the following footnote, he implies that John Courtney Murray, S.J., and also Mario Cuomo, reason in a manner compatible with public reason. *Id.* at 799 n.83. In *The Idea of Public Reason Revisited*, Rawls gives evidence of a dialogue with Catholic political and moral theorists, also citing, for example, in addition to Thomas Aquinas and Jacques Maritain, *id.* at 775 n.29, John Finnis, *id.* at 775 n.29, 796 n.75, David Hollenbach, S.J., *id.* at 768 n.15, 785 n.52, Paul Weithman *id.* at 785 n.52, 799 n.83, Michael Perry, *id.* at 780 n.41, and Leslie Griffin, *id.* at 799 n.83.
what Rawls, with his idea of public reason, actually has to add to contemporary conversation on religion, politics, and democracy.

As a prelude to its more specific comment on the content of these essays, this introduction first seeks preliminary insight into the exchange of Rawls pursues with Catholicism which Rawls himself acknowledges, after all, as occasioning his recognition of the possibility of at least some religious viewpoints joining an overlapping liberal consensus. This preliminary look seeks to place this inter-relation between Rawls and contemporary Catholicism in its concrete historical context. It also aims at an exposition of the broader implications of the option that Rawls ultimately offers to all religious believers, considered from the particular historic perspective of Catholicism. In both respects, it seeks a baseline from which the reader may better consider the substantive essays that follow.

The authors of those essays, in evaluating Rawls's idea of public reason from the perspectives of political and legal theory, have occasion to investigate several inter-related topics. These include: the significance of Rawls’s American context; Rawls’s formulation of the problem to be resolved, and his formulation of its answer; an evaluation of Rawls in light of the proper significance of religion to politics; his evaluation in light of reason’s role both in politics and in justifying political theory; and practical doubts about the effects of adopting Rawlsian constraints. Once this introduction has sketched the baseline represented by Rawls’s exchange with Catholicism, it draws, for the reader, a map of the discussion occurring among the essayists on these several key issues. By assisting the reader to follow with greater ease, the thread of the conversation underway among the authors, this map, it is hoped, will be of intrinsic interest, but, as well, also useful preparation for the reader’s own ultimate response to a significant question yet at the center of American academic discourse on law and politics: John Rawls’s idea of public reason—achievement or failure?

1. Rawls’s Exchange with Catholicism: Context and Implications

The rapprochement Rawls seeks with, at least some, Catholics is intriguing on its face, for Roman Catholicism in the totality of its doctrinal claims would appear to be as comprehensive a doctrine as almost any. The tradition of social contract reasoning, to which Rawls belongs, historically has viewed Catholicism as ineligible to participate in public debate. John Locke, for instance, barred Catholics from

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participating in the polity. Rawls himself appears categorically to reject Catholic approaches as these were formulated in the past. Twentieth-century American Jesuit scholar, John Courtney Murray, who is cited by Rawls with admiration, returns the compliment, by singling out social-contract thinker John Locke for singularly disparaging treatment in *We Hold These Truths*.

The Catholic natural law tradition of reasoning about politics has always stressed universal norms of reason rather than warrants from religious revelation. But Rawls does not find common ground with present-day Catholic attempts at public argument of a traditional Catholic kind, against practices like abortion, any more than he does with pre-modern Catholicism. The common ground that Rawls finds with Catholicism, and which he appears prepared to accept as a model of liberal accommodation of religion more generally, is conditioned on the adherents of religion, to whom he reaches out, approaching select contemporary public policy issues in a certain way. The proposed "conversion" among religious viewpoints, upon which Rawls conditions the offer of inclusion in politics, is not one he envisions as strictly prospective. It has, apparently, in his view, at least in some cases, already been undergone.

From the present character of certain Catholic public policy proposals, it would seem, then, arguably to Rawls, that, in spite of past Catholic opposition to social contract reasoning, some Catholics need no persuasion to join him, but are, rather, already working, to at least some extent, within his stipulated confines and constraints. In those cases, then, Rawls himself is not calling for any change, but rather is willing already to bless these Catholics who have come on their own to meet

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16 See John Locke, *A Letter Concerning Toleration* (1689), in *Political Writings of John Locke* 390, 425-26 (David Wooton ed., 1993) [hereinafter *A Letter Concerning Toleration*] ("[T]hat Church can have no right to be tolerated by the magistrate which is constituted upon such a bottom that all those who enter into it do thereby, ipso facto, deliver themselves up to the protection and service of another prince. For by this means the magistrate would give way to the settling of a foreign jurisdiction in his own country, and suffer his own people to be listed, as it were, for soldiers against his own government."). Jeremy Waldron observes that in the *Second Treatise on Government*, Locke implies that the "failures of the later Stuarts to prosecute and enforce the laws against Catholicism amounted to subversion of the Constitution." *Locke: Toleration and the Rationality of Persecution*, in *John Locke: A Letter Concerning Toleration in Focus* 99-124, 109 (John Horton & Susan Mendus eds., 1991).

17 Rawls purports comprehensively to define medieval Christianity by five characteristics. He sees it as authoritarian, soteriological, creedal, sacerdotal, and militant-expansionist. *Political Liberalism*, supra note 5, at xxiii. By "Christianity," he makes no effort to indicate whether he is speaking of the polities of Christendom, or of the Catholic Church, or of both. He makes no mention of fundamental principles of the tradition that undergird medieval Catholic notions of politics, including the fundamental distinction between temporal and spiritual authority, or consent as the basis for inclusion in the Church.

18 John Courtney Murray, S.J., *We Hold These Truths: Catholic Reflections on the American Proposition* 274-79 (1960) [hereinafter *We Hold These Truths*]. The tone of Murray's discussion of Locke is clear enough in the following sentence: "With the optimism characteristic of his age and the inconsistency characteristic of himself, Locke prattles a bit about the 'innocent delights' attendant on the 'liberty' of the state of nature." *Id.* at 274.

19 He states in *Political Liberalism*, "any comprehensive doctrine that leads to a balance of political values excluding that duly qualified right in the first trimester is to that extent unreasonable; and depending on details of its formulation, it may also be cruel and oppressive." *Political Liberalism*, supra note 5, at 243 n.32.

20 As David Hollenbach, S.J., whom Rawls cites, notes "liberalism has been transforming Catholicism once again through the last half of our own century." *The Idea of Public Reason Revisited*, supra note 4, at 785 n.52 (citing David Hollenbach, S.J, *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 *San Diego L. Rev.* 877, 891 (1993)).
his standards of citizenship. A convergence in patterns of reasoning has occurred before either Rawls or the Catholics he cites have consciously sought reconciliation with one another. This convergence is explicable through reference to an essentially common situation in which both Rawls and contemporary Catholicism found themselves precisely as they developed their respective contemporary approaches to politics. Once this common context is understood, the implications of the bargain Rawls offers believers, both from the side of the Church and of politics, can be investigated.

A. The Common Situation

At the commencement of his career as an academic philosopher, Rawls found himself in a situation defined by the predominance of various kinds of utilitarianism and counsels of accommodation to political expediency. Political philosophy, in general, was in disarray, and had even been declared dead. A chasm, in short, divided Rawls from the social contract theorists to whom he was drawn. The tradition of social contract towards which he was inclined, by contrast to the thought of his own period, while excluding the integration of politics within the single comprehensive framework of general moral reasoning characterizing medieval political theory, had still had, as its decisive objective, the securing of a normative foundation precisely for guaranteeing a sphere of individual liberty, while also legitimating state power. Participation in politics was premised on an at least implied consent to this normative foundation. Locke’s foundations which were deistic or theistic, for instance, excluded declared atheists from political participation.

Concurrently, as Rawls began his work, the reinforcement in principle of respect for moral values that a Protestant citizen class had once conferred on American society no longer existed, as the Protestant establishment, in its old form, had vanished. Where the social contract theorists Rawls admired had once theorized for moral philosophy the predominant systematic theory has been some form of utilitarianism.... Most likely we finally settle upon a variant of the utility principle circumscribed and restricted in certain ad hoc ways by intuitionistic constraints. Such a view is not irrational; and there is no assurance that we can do better. But this is no reason not to try.

See John Haldane, Public Reason, Truth, and Human Fellowship: Going Beyond Rawls, I J.L. PHIL. & CULTURE 175, 178 (citing the opinion expressed in Peter Laslett, Introduction to Philosophy, Politics and Society, First Series, at 1, 1 (Peter Laslett ed., 1956)).

The Whig ideology to which Locke subscribed viewed loyalists to the papacy precisely as raising a challenge to the legitimacy of government. The scope Locke gives to individual freedom is subordinated (in the case of papists) precisely at the intersection of concern for legitimization of government. Richard Ashcraft, Revolutionary Politics and Locke’s Two Treatises of Government 98-99, 191-94 (1986).

George Marsden, in a book with the subtitle From Protestant Establishment to Established Nonbelief, explores “commitments ... already ... set” in 1880 that ensured that the American academic establishment would be separated from its Protestant basis. He also studies trends “throughout the first sixty years of the twentieth century making
the Protestant middle class, Rawls found himself addressing a different class of people, one for whom Christian concepts of moral obligation had become no more second nature than had Sabbath observance, a class for whom, as Wallace Stevens describes in the opening line of his poem “Sunday Morning,” “Complacencies of the peignoir, and late / Coffee and oranges in a sunny chair, / And the green freedom of a cockatoo / Upon a rug mingle to dissipate / The holy hush of ancient sacrifice.”

Once societally prevalent, Protestant theological belief and practice previously ensured general assent to a popular variant of the normative foundations of the social contract theorists. The Protestant doctrines of justification by faith alone and the depravity of human reason had, indeed, undercut medieval confidence in comprehensive natural law foundations of politics, but the Protestant concept of the emergency power of God’s left hand, as authorizing civil rule, had, nonetheless, still bolstered belief in the fittingness of some general ethic of government rule, just as the Protestant doctrine of the authority of the individual believer had once acted as support for a sphere of individual political liberty. But as Rawls began his work, such theological assumptions no longer described general political consciousness.

Rawls’s generation witnessed unparalleled possibilities of destruction, but, no less, for substantial social progress, both by way of enacted governmental policy. Rawls reached maturity as atomic weapons were used against civilian populations on purely pragmatic grounds, and he began his academic career at about the time the hydrogen bomb, with its more massive destructive potential against civilian population centers, was unveiled as the cornerstone of American cold war foreign policy based on deterrence. He saw the success of the New Deal in widening participation in economic opportunity and wealth. He also witnessed the Civil Rights Movement’s prevailing intellectual ideals become less friendly to religious concerns” and ensuring that “the dominance of the mainline Protestant ethos receded.” GEORGE M. MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY 26, 430 (1994). The displacement of the Protestant establishment in the United States continues to be reflected in accelerating demographic trends. See Tom W. Smith & Seokho Kim, The Vanishing Protestant Majority, 44 J. Sci. STUDY RELIGION 211, 220-21 (2005).


27 According to Luther, in his restraining function, the secular ruler operates “from untrammeled reason, above the law in the books,” and his “decision” is one “no pope, nor jurist, and no law-book could have given him.” MARTIN LUTHER, Secular Authority: To What Extent It Should Be Obeyed (1523), in MARTIN LUTHER: SELECTIONS FROM HIS WORKS 363, 401 (John Dillenberger ed., 1951).

28 Id. at 370 (“God has ordained the two governments; the spiritual, which by the Holy Spirit under Christ makes Christians and pious people, and the secular, which restrains the unchristian and wicked so that they must needs keep the peace outwardly, even against their will.”). Another example of a Protestant work offering a theology that bolsters individual political liberty is the Calvinist Theodore Beza’s The Right of Magistrates (1572), which is seen as anticipating social contractarian support for revolt against a tyrant. 2 QUINTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT 338-39 (1978).

29 Rawls served as an infantryman in the pacific in World War II and witnessed the destruction in Hiroshima shortly after it was hit with the atomic bomb. POGGE, supra note 3, at 11-12.

30 Rawls completed his Princeton Ph.D. in 1950, id. at 15-16, the same year Harry Truman announced the development of the hydrogen bomb, Barton J. Bernstein, Crossing the Rubicon: A Missed Opportunity to Stop the H Bomb?, INT’L SECURITY, Fall 1989, at 132, 137.

unprecedented and rapid progress in overcoming widespread, deeply ingrained injustice in American society. Rawls's inclination was to seek a return to a principled defense of democratic and human values that he saw implicated in both negative and positive trends. He sought a renewal of theory offering a justificatory anchor for the premise of equal regard for all, and therewith the goods of social and democratic stability. The metaphysical and normative postulates of his social contract precursors, however, stood as little chance of convincing a general educated audience, as did those of Aquinas or Aristotle.

The Catholic Church, for its part in roughly the same period, having abandoned the ghetto within which it had felt free to assert the self-sufficiency of its neo-scholastic moral methodology, consciously sought to influence public policy. The Church's impulse in this direction coincided, in part, with Rawls's practical commitments. Moreover, as the Church pursued its goals, it found itself in a situation not by all unlike the one confronting Rawls, with one significant difference. Unlike Rawls, the Church had, as a historic actor, contributed to the creation of its situation by acting to remove itself from its modern ghetto. The single most decisive step, by which it did so, was its promulgation, at the Second Vatican Council, of its Declaration on Religious Liberty, Dignitatis Humanae. In Dignitatis Humanae, the Catholic Church renounced its claim on religious establishment, and shifted its trust from reliance on the authority of the state to an affirmation of the integrity of individual conscience. The declaration proclaimed the right to the free exercise of religion.

On its face, the Church's endorsement, in this document, of individual liberty does not go nearly so far as Sir Isaiah Berlin's concept of negative freedom or John...

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33 See A THEORY OF JUSTICE, supra note 21, at viii ("What I have attempted to do is to generalize and carry to a higher order of abstraction the traditional theory of the social contract as represented by Locke, Rousseau, and Kant. In this way I hope that the theory can be developed so that it is no longer open to the more obvious objections often thought fatal to it.").
35 The metaphor of the ghetto to describe pre-Vatican II Catholicism appears to go back to an allusion by Monsignor John Tracy Ellis in his AMERICAN CATHOLICS AND THE INTELLECTUAL LIFE 57 (1955). The significance of Dignitatis Humanae "in the history of the Church" is mentioned by John Courtney Murray, S.J., in his introduction to the document in the standard published version. John Courtney Murray, S.J., Introduction to DIGNITATIS HUMANAE, in THE DOCUMENTS OF VATICAN II 672, 673 (Walter M. Abbott, S.J., ed., 1966). Murray says that the document was "the most controversial document of the whole Council" because of its implications for the "development of doctrine." Id.
36 SECOND VATICAN COUNCIL, DIGNITATIS HUMANAE [Declaration on Religious Freedom] ¶ 2, 6 (1965) [hereinafter DIGNITATIS HUMANAE] ("It is in accordance with their dignity as persons... that all men should be... impelled... and also bound by moral obligation to seek the truth, especially religious truth... Therefore, the right to religious freedom has its foundation, not in the subjective disposition of the person, but in his very nature... If, in view of peculiar circumstances obtaining among peoples, special civil recognition is given to one religious community in the constitutional order of society, it is at the same time imperative that the right of all citizens and religious communities to religious freedom should be recognized and made effective in practice.").
37 ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958), in LIBERTY 166, 174, 216 (Henry Hardy ed., 2002) ("The defense of liberty consists in the 'negative' goal of warding off interference... Pluralism, with the measure of 'negative' liberty that it entails, seems to me a truer and more humane ideal than the goals of those who seek... the ideal of 'positive' self-mastery by classes, or peoples, or the whole of mankind.").
Stuart Mill’s freedom of the free unfolding of personality. On its face, it appears to be at odds with Rawls’s notion of public reason. It premises the respect it now accords human freedom on an anthropology of objective human dignity. It grounds the respect that is owed this freedom in the capacity of the mind for the truth. It stipulates the respect owed the free exercise of religion reaches its objective limit in society’s regard for order, justice, and public morality, and it assumes that these limiting principles can be given objective content.

On the other hand, it very much remains to note that Dignitatis Humanae, while leaving religious truth to conscience, fails to explain why the no less immaterial aspects of order, morality, or justice remain amenable to public validation, especially when it goes on to add that “for the rest, the usages of society are to be the usages of freedom in their full range.” It bears noting, as well, that the document does not really specify the mode of reasoning according to which such validation is to proceed, although it is safe to assume that, whatever it is stipulated to be, this mode of thought would run afool of Rawls’s proscription of reasons based on “comprehensive” doctrine. But, then again, when one examines the writings of John Courtney Murray, who is usually credited with being the principal architect of the Vatican II document, one finds a spirited defense of the compatibility of Catholic notions of moral truth with religious freedom and much politically sound judgment, but little theoretical demonstration. Murray, and with him, the Church, in confronting the separation of church and state already firmly in place in the practice of Western countries, encountered a fait accompli. The Church was following suit after the fact. The immediate usefulness of the change to the Church is at least as clear as the Church’s independent conviction of theoretical truth.

38 JOHN STUART MILL, ON LIBERTY 57, 78 (Albury Castell ed., Meredith Corp. 1947) (“But it is the privilege and proper condition of a human being, arrived at the maturity of his faculties, to use and interpret experience in his own way. It is for him to find out what part of recorded experience is properly applicable to his own circumstances and character... What I contend for is, that the inconveniences which are strictly inseparable from the unfavorable judgment of others, are the only ones to which a person should ever be subjected for that portion of his conduct and character which concerns his own good, but which does not affect the interests of others in their relations with him.”).

39 DIGNITATIS HUMANAE, supra note 36, ¶ 7 (“These norms arise out of the need for the effective safeguard of the rights of all citizens and for the peaceful settlement of conflicts of rights, also out of the need for an adequate care of genuine public peace, which comes about when men live together in good order and in true justice, and finally out of the need for a proper guardianship of public morality. These matters constitute the basic component of the common welfare: they are what is meant by public order.”).

40 Id.

41 Midway through the development of his position, Murray reassures the reader with the disclaimer that “[i]n a later chapter I shall present a historical and theoretical discussion of what is meant by natural law.” WE HOLD THESE TRUTHS, supra note 18, at 111. He offers that “[f]or the moment” he considers it “sufficient to sketch the general structure and style” of natural law reasoning. Id. At long last, in a last chapter, just seven still fairly breezy pages before the end of the book, we find a section devoted to “The Premises of Natural Law.” Id. at 293. At this point, Murray confesses that “[t]he whole metaphysic involved in the idea of natural law may seem alarmingly complicated; in a sense it is.” Id. Kent Greenawalt, thus, quite accurately conveys in his essay below what it is like, with all benefit of the doubt, to get a handle on Murray on natural law. See Kent Greenawalt, What are Public Reasons?, 1 J.L. PHIL. & CULTURE 79, 95 (2007) (discussing Murray’s natural law reasoning with such elliptical comments as “[i]n his most developed remarks,” “[t]hat is the best I can do” in giving an account of a theory that does “not purport to be fully systematic”).
In the nineteenth century, Pope Leo XIII initiated a revival of scholastic Thomism with the goal of ensuring a philosophical foundation for the policies of the Catholic Church by issuing his encyclical, *Aeterni Patris*. The Catholic intellectual revival that followed, although fairly inscrutable to the world at large, continued to sustain the Catholic ghetto until it was dissolved by the promulgation of *Dignitatis Humanae*. When the Second Vatican Council convened in 1963, the council fathers received draft documents prepared for conciliar approval by curial officers that reflected the neo-scholastic philosophy of the preceding eighty-four years. They immediately rejected them. As a matter of pure public relations, the council fathers saw that the terminology proposed would not communicate well. They then drafted and produced their own documents which did not rely on neo-scholastic terminology. These documents, while pastorally attuned, were thin both on the substantive depth of their formulation of doctrine and on theory.

In the period since, papal social encyclicals, while often balanced and courageous in their concrete judgments, have, more often than not, also been quite circumspect in their reliance on theory. At the time of Rawls's apparent quest for rapprochement with Catholics, these documents seemed to exhibit, for example, an increasing paucity of reference to natural law. Philosophical reasoning justifying and clarifying the meaning of references to God occurring in the course of the documents' articulation of moral injunctions have been not infrequently absent. Over all, these documents are addressed to all men of good will, i.e., the general polity. They expound their conclusions to this audience as requirements of reason, but they do not specify that concept of reasoning too closely. As one sorts through them, one can, with some clarity, line up the public policy recommendations they enumerate, but one does not always know what to make of the religious references they contain. It could appear that, in the reception of these documents, many readers find the references to God inoffensive because they are, in fact, superfluous. Such readers could thus feel authorized to bracket these references as extraneous "noise" under what is, in effect, none other than the Rawlsian proviso. They might, in fact, feel themselves invited to discount their meaning in the fashion which Justice Sandra Day O'Connor suggests applies to the public interpretation of a crèche included as part of holiday decorations at a public site, in her concurring opinion in *Lynch v. Donnelly*.

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43 In George Lindbeck's terms, "they didn't like the tone; it wasn't tactful." George Weigel, Re-Viewing Vatican II: An Interview with George A. Lindbeck, *First Things*, Dec. 1994, at 44, 46.


45 John Paul II's *Veritatis Splendor* (1993) compensates for this trend.

46 See *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) ("Pawtucket's display of its crèche . . . does not communicate a message that the government intends to endorse the Christian beliefs represented by the crèche. Although the religious and indeed sectarian significance of the crèche, as the District Court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display . . . . The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion. . . . The crèche is a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols, as it was in Pawtucket.").
Like John Rawls, the Catholic Church—for its part now out of its ghetto—was committed to purveying its moral teaching within a larger world, in a period that had already in fact suffered the loss of a generally accepted framework of moral justification. Where Rawls set out to articulate an intellectual construct that answered to what he saw as the theoretical needs of the moment, some Church leaders—precisely those mentioned above who attracted Rawls's attention—took care, in a kind of parallel with Rawls, to formulate their concrete proposals issue by issue in terms that their instincts, perhaps, told them reflected a prevailing unstated etiquette of civil discourse. Such leaders may have known that, openly, to have referenced the fullness of Thomas Aquinas's notion of *recta ratio* would have veered into what Rawls's readers would recognize as the Rawlsian faux pas of public reliance on comprehensive doctrine and, thereby, have defeated their hope to have influence. Instead, they may have found their way, by instinct, into the range of expression satisfying John Rawls's definition of the "reasonableness," in his view and theirs, holding contemporary democracy together. Whether, as a matter of practical judgment, these spokespersons actually contributed to genuine public discourse, or ultimately only to its evasion, is a question that can be asked in parallel to asking whether Rawls's ideas, as a matter of theory, hold water.

It should not be surprising, at any rate, that Rawls saw Cardinal Bernardin as being a kindred soul, for Cardinal Bernardin sought to advance moral teaching in a direction overlapping, in fact, with that of Rawls under similar conditions of public exchange. Rawls, in *The Idea of Public Reason Revisited*, reveals, by inference, that he did not think the same of New York's Cardinal John J. O'Connor. He fails, for example, to drop a footnote to O'Connor's interpretation of the Catholic conception of reason as calling for the legal prohibition of abortion. Rawls extended no open hand to Catholic perspectives like O'Connor's, nor would those who held them have been inclined, without further cause, to accept Rawlsian constraints.

From the perspectives both of concern for the cogency of Rawls's proposal and for the integrity of religious belief, it becomes essential to know whether there exists, within Catholicism, some internal principled basis for the formulations of the Bernardsins and Murrays, that allows us to consider them as more than at best "pastoral" or pragmatic. From the perspective of these same two concerns, it is likewise essential to know whether that basis, if it exists, is sufficient even to justify the Church's considering whether it should make its own the theoretical construct

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47 The focal case is the ambiguity of Cardinal Bernardin's concept of "a consistent ethic of life" as a "seamless garment" tactically linking diverse issues in law and morality. For a sociological analysis, see J. Stephen Cleghorn, *Respect for Life: Research Notes on Cardinal Bernardin's "Seamless Garment,"* 28 REV. OF RELIGIOUS RES. 129 (1986).

48 As noted by Thomas Hibbs, "Aquinas borrows from Aristotle the definition of prudence as an intellectual virtue that reasons rightly about things to be done (*recta ratio agibilium*) and that arises from experience and memory." THOMAS S. HIBBS, *VIRTUE'S SPLENDOR* 98 (2001).

Rawls proposes, in a kind of parallel to its having, in *Dignitatis Humanae*, once retroactively made its own the principle of the free exercise of religion. If such a principled point of departure were found to be lacking within Catholicism, and were the Church to accept Rawlsian constraints for the purely pragmatic purpose of ensuring itself entré it would otherwise be denied, to contemporary political influence, the case for the cogency of Rawls’s proposal and the cause of the integrity of religious belief would, at one and the same time, be greatly undermined. But, what if the discourse of our polity is already somehow irrevocably subject *de facto* to subterranean Rawlsian-styled constraints, whether acknowledged or not, so that anyone who seeks to express his views in the terms of a Cardinal O’Connor is now doomed to having those views weeded out as background noise? The hard question would arise of where precisely concern for integrity of religious belief and the requirements of genuine political engagement would place a check on the Church’s freedom voluntarily to accommodate its mode of political engagement to such a state of affairs.

**B. Catholic Reasons for Agreement with Rawls?**

If some tenet internal to Catholicism is to serve as a principled basis for endorsing Rawlsian constraints, an element within Rawls’s frame of reasoning must possess a corresponding affinity sufficient to complete the bridge from the other end. A common historical pedigree, in fact, links Rawls’s social contract theory precursors and sources of medieval political thought that still inform Catholicism at some level. While Rawls makes do without adopting the justificatory apparatus of the social contract thinkers, his reasoning, nonetheless, stands in significant continuity with the elements in social contract tradition reflecting this pedigree. This still discernible genetic relationship between Catholicism and Rawls might provide a basis, intrinsic to Catholicism, for bridging the gap, appearing to some, to separate Catholicism and the Rawlsian concept of political discourse.

Social contract thought sought to give a principled justification to an orientation to politics that had emerged in the early seventeenth century from the settlement of the Wars of Religion. According to that settlement, as reflected in the Peace of Westphalia, speculative truth about ultimate questions had to be viewed as accidental to political organization. Social contract theory premises eligibility to participate in and enjoy the benefits of legitimacy, under its imprimatur—as does Rawls in his own subsequent context—upon categorically relinquishing previous foundations, now defined as outmoded—perhaps something like the demand made on English recusants

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50 Samuel Pufendorf coined the term “Thirty Years’ War.” Seventeenth-century Protestant historians interpreted the “wars fought in Europe during the decades following 1618 . . . [as] linked together in a single struggle in defence of religious and constitutional liberty.” Geoffrey Parker, *The Thirty Years’ War* xiii (2d ed. 1997).

51 The peace of Westphalia ending the Thirty Years’ War was settled in 1648. *Id.* at 167.
under the Oath of Supremacy.\textsuperscript{52} For the social contract theorists, the test was a willingness to abjure medieval metaphysics and reasoning by reference to religious authority.\textsuperscript{53}

In the theory that emerged, law and politics inhabited one realm in a bifurcated universe. They were concerned with the “temporal” cultivation of prosperity and material means, as calculated through the wealth of the nation and of ascertainable individuals and emergent classes of people, whether the theoretical emphasis falls on libertarian support for individual initiative\textsuperscript{54} or utilitarian preference for legislative majorities.\textsuperscript{55} The terms that governed legal and political reasoning regarded the refereeing of material interests. The other “spiritual” sphere in the bifurcated social-contract universe belonged to individual right and interior personal autonomy—outside the reach of law and politics.\textsuperscript{56} Reasoning proper to one sphere was not transferable to the other, and those who ignored this limit were ruled unintelligible.\textsuperscript{57}

Admittedly, the social contract thinkers, based on the experience of the Wars of Religion, answered, in the negative, the question Saint Augustine, in \textit{The City of God}, posed a millennium and more beforehand. They concluded that it was not, in fact, feasible, as Augustine had insisted it was, to govern society based on the integration of a comprehensive vision of the truth about the reality of politics and morality in a single framework of interlocking temporal and spiritual rule.\textsuperscript{58} They rejected the

\textsuperscript{52} In England in the post-reformation centuries, legal succession to landed property “had to be sealed by a livery, and the livery was only granted if the heir took the anti-Catholic Oath of Supremacy.” \textsc{John Cedric H. Aveling}, \textit{The Handle and the Axe: The Catholic Recusants in England from Reformation to Emancipation} 143 (1976).

\textsuperscript{53} In contrast to Socrates who adopts the starting point of testing opinion for whether it is reasonable, social contract thinkers generally take as their starting point an event that preempts modes of reasoning as though they were procedurally defective legal pleadings. Hobbes, for example, lists his invalidated claims in the penultimate chapter of the Leviathan, “Of Darkness from Vain Philosophy, and Fabulous Traditions.” \textsc{Thomas Hobbes}, \textit{Leviathan} 478-93 (Michael Oakeshott ed., Macmillan Publishing Co., Inc. 1962) [hereinafter \textit{Leviathan}].

\textsuperscript{54} \textit{Immanuel Kant}, \textit{On the Common Saying: "This May be True in Theory but it does not Apply in Practice"} (1793), in \textsc{Kant: Political Writings} 73, 83 (H. S. Reiss ed., H. B. Nisbet trans., 2d. ed. 1991) (“It is obvious from this that the principle of happiness (which is not in fact a definite principle at all) has ill effects in political right just as in morality, however good the intentions of those who teach it. The sovereign wants to make the people happy as he thinks best, and thus becomes a despot, while the people are unwilling to give up their universal human desire to seek happiness in their own way, and thus become rebels.”).

\textsuperscript{55} \textit{John Locke}, \textit{Second Treatise of Government} 75 (C. B. Macpherson ed., Hackett Publ’g Co., Inc. 1980) (1690) (“The legislative power is that, which has a right to direct how the force of the common-wealth shall be employed for preserving the community and the members of it.”). On the meaning of preservation, “[o]f course where Locke speaks of preservation he is assuming his usual doctrine that it is preservation for the public good or public happiness, not miserable preservation.” \textsc{A. P. Brogan}, \textit{John Locke and Utilitarianism}, 69 \textsc{Ethics} 79, 91 (1959).

\textsuperscript{56} Locke, as just one example of diverse contractarian justifications for this stance, holds that it appears not that God has ever given any such authority to one man over another as to compel anyone to his religion. Nor can any such power be vested in the magistrate by the consent of the people, because no man can so far abandon the care of his own salvation as blindly to leave it to the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace. . . . In the second place, the care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God.


\textsuperscript{57} See supra text accompanying note 53.

\textsuperscript{58} \textsc{The City of God}, supra note 2, at Bk. XIX, Ch. 17 (“This heavenly city, then, while it sojourns on earth, calls citizens out of all nations, and gathers together a society of pilgrims of all languages, not scrupling about diversities in the manners, laws, and institutions whereby earthly peace is secured and maintained, but recognizing that, however various
vision of Europe Augustine had unfurled at its inception—Augustine postulated that the universality of the love of God could ground a concept of the state as a community of reason for those who cared about universal human happiness, and, with a proportionate infusion of coercion, a community of convenience for those who did not. From the social contract thinkers’ vantage, far from making possible a community of reason based on a foundation of charity, the Augustinian vision devolved, as the Wars of Religion had established, into a coercive regime, and, finally, into a war of all against all, battling for the upper hand, and into lives that were "solitary, poor, nasty, brutish, and short."

Rejecting universally accessible knowledge of any hierarchy of substantive human goods, and any public basis for supranational ecclesiastical jurisdiction over spiritual matters, the social contract thinkers equated truth claims with an implied willingness to coerce and sought categorically to exclude them from political life. Originally derived from the Protestant notions of justification by faith alone, the depravity of human reason, and the decentralized character of true religious authority, their insight into what counted as an excludable claim finally made religion itself a prime suspect, and gave particular weight to the importance of shielding a class or classes of people from the wound to their self-esteem, of being seen as heretics or shirkers, or even as just less than fully enlightened, when the only fault of such class or classes in this view—which they themselves were presumably anxious to have held to be no fault at all—was to want to tend their own gardens and, arguably, to think well of themselves.

these are, they all tend to one and the same end of earthly peace... Even the heavenly city, therefore, while in its state of pilgrimage... desires and maintains a common agreement among men regarding the acquisition of the necessaries of life..."

Concretely, Augustine gave his synthesis form when he justified the Roman state employing coercive force on behalf of the Catholic Church in its enforcement of orthodoxy in the Donatist controversy. See generally P. R. L. Brown, St. Augustine’s Attitude to Religious Coercion, J. ROMAN STUD., 107 (1964).

The City of God, supra note 2, at Bk. XIX, Ch. 17 (“The earthly city, which does not live by faith, seeks an earthly peace, and the end it proposes, in the well-ordered concord of civic obedience and rule, is the combination of men’s wills to attain the things which are helpful to this life. The heavenly city, or rather the part of it which sojourns on earth and lives by faith, makes use of this peace only because it must, until this mortal condition which necessitates it shall pass away... [T]hus, as this life is common to both cities, so there is a harmony between them in regard to what belongs to it.”).

Leviathan, supra note 53, at 100.

See, for example, the final chapter of Leviathan, “Of the Benefit that Proceedeth from such Darkness: And to whom it Accrueth.” Id at 494-502.

This, for example, is John Calvin on the possibility of metaphysics or the like: “I pass over the rude and untutored crowd. But among the philosophers who have tried with reason and learning to penetrate into heaven, how shameful is the diversity. As each was furnished with higher wit, graced with art and knowledge, so did he seem to camouflage his utterances; yet if you look more closely upon all these, you will find them all to be fleeting unrealities.” INSTITUTES OF THE CHRISTIAN RELIGION, Bk. I, Ch. 5.12 (Ford Lewis Battles trans., John T. McNeill ed. 1960).

The Marxist interpretation of the social contract is one of bourgeois conceit. Marx and Engels write:

The selfish misconception that induces you to transform into eternal laws of nature and of reason, the social forms springing from your present mode of production and form of property—historical relations that rise and disappear in the progress of production—this misconception you share with every ruling class that has preceded you. What you see clearly in the case of ancient property, what you admit in the case of feudal property, you are of course forbidden to admit in the case of your own bourgeois form of property.

Paradoxically, at the same time, this vision of things inspiring Rawls's seventeenth and eighteenth-century precursors, while rejecting Augustine's overall synthesis, preserved elements of Augustine's fundamental orientation to law and politics that the precursors had absorbed through their genetic descent through the Protestant reformers. The social contract thinkers merely shifted these Augustinian elements into a different key. They followed Saint Augustine where he formulated the realm of law and the dynamics of politics in terms of "temporal" material interests. They followed him in stipulating that, due to the fall, or, in their terms, in view of the state of nature, common agreement in the temporal realm on elements of metaphysical truth was impossible. And, they followed him no less where he placed concern for "spiritual" matters in another "heavenly" dimension very much oriented to individual choice and decision. They were able to preserve the unity of their framework, notwithstanding this dualism, by according justificatory force to the integrity of individual consent, through which politics and law are said to emerge from the state of nature. On this point too, they emulated Augustine, although again in their own distinctive key, for Augustine maintained the unity of his universe—notwithstanding its dualism—by the justificatory import he accorded the Christian ruler's conversion to the love of God.

Rawls, for his part, like Locke, Grotius and Hobbes, in an earlier era, coming after the large-scale disappearance of sustainable references to more "comprehensive" views of the truth from public life that had already occurred, sought to ground a discourse and praxis of liberty, equality, and justice, but in a manner arguably offering a basis for the status quo of the welfare state rather than challenging it. Like his precursors, but at least one step further removed, Rawls continues to depend on

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64 See supra note 59 and accompanying text.
65 The CITY OF GOD, supra note 2, at Bk. XIX, Ch. 25 ("For what kind of mistress of the body and the vices can that mind be which is ignorant of the true God, and which, instead of being subject to His authority, is prostituted to the corrupting influences of the most vicious demons?")). Augustine sees the "greater number" being caught in sin, and so presumably thus of darkened intellect. Id. at Bk. XXI, Ch. 16.
66 For Augustine, individual conversion places the person in a state of peace that tends to remove them from the anxiety and greed that are the general lot in living with common arrangements under law. Id.
67 In Hobbes, for example, the unity of the terms describing the moral psychology and situation of the individual as such and those that describe the order of the state hinges on the act of agreeing to submit in return for protection. LEVIATHAN, supra note 53, at 133.
68 Augustine sees the household, who is the model for the ruler of the city, as ideally he who walks by faith, not by sight; and... refers all peace, bodily or spiritual or both, to that peace which mortal man has with the immortal God, so that he exhibits the well-ordered obedience of faith to eternal law. But as this divine Master inculcates... love of neighbour... and that he who loves God loves himself thereby, it follows that he must endeavour to get his neighbour to love God, since he is ordered to love his neighbour as himself... And this is the order of this concord, that a man, in the first place, injure no one, and, in the second, do good to every one he can reach. Primarily, therefore, his own household are his care, for the law of nature and of society gives him readier access to them and greater opportunity of serving them... This is the origin of domestic peace, or the well-ordered concord of those in the family who rule and those who obey. For they who care for the rest... But in the family of the just man who lives by faith and is as yet a pilgrim journeying on to the celestial city, even those who rule serve those whom they seem to command; for they rule not from a love of power, but from a sense of the duty they owe to others—not because they are proud of authority, but because they love mercy.

THE CITY OF GOD, supra note 2, at Bk. XIX, Ch. 14.
the pattern borrowed from Augustine, for, in Rawls too, law and politics concern the refereeing of material interests within a public space bifurcated from the realm of interior or individual privacy. He, like the social contract thinkers and Augustine before them, sustains the unity of his bifurcated universe by the justificatory import he places on the integrity of individual choice.\(^6\)

Notwithstanding sharp discontinuities in epistemological assumptions, a common basic pattern of orientation, however increasingly faint, still visibly links Rawls, the social contract thinkers of the seventeenth and eighteenth centuries, and the pre-modern Christian thinkers. The Christian pattern inaugurated by Augustine and essential to the Catholic canon of political thought, therefore, provides a potential bridge, internal to Catholicism, by which Catholics might conceivably find a principled connection with Rawls. This bifurcatory pattern—played down somewhat in Aquinas and many subsequent Catholic thinkers, in contrast to the emphasis it receives in some Protestant thought—continues throughout virtually all Christian and Catholic political thought.\(^7\)

As traditionally formulated, the bifurcation that is admitted into Christian reasoning about politics with its skepticism about the role of ultimate truths in the political realm is more or less extreme, depending on the particular theorist’s pessimism or optimism in assessing sin’s impact on the human capacity to know and do the good.\(^7\) However, even for the most pessimistic exponent of the Catholic tradition, a willingness to endorse partial, rather than whole, truths and to accept coercion and pragmatism as the basis of political action, presupposes overarching insight into natural justice and confidence in the ability of some or all to discern the minimum requirements of the natural law. And, even for such an exponent, where larger truths are reserved for a forum other than the political one, this occurs based not on such truths being nonverifiable, but instead on their possessing a scope exceeding the purpose of politics, as a matter of principle, or on their lack of utility in advancing a community’s practical well being in the face of the relative obtuseness of its members.

\(^6\) Rawls unifies the spheres, on the one hand, of individual choice of comprehensive doctrine and other options with that, on the other, of the field of social cooperation, by treating the latter as reflecting the value of individual autonomy “[s]ince citizens’ full autonomy is expressed by acting from the public principles of justice understood as specifying the fair terms of cooperation they would give to themselves when they are fairly situated.” 4 POLITICAL LIBERALISM, supra note 5, at 78 (emphasis added).

\(^7\) For example, in Thomas Aquinas, it is manifest in the distinction between commandment and counsel of perfection. THOMAS AQUINAS, SUMMA THEOLOGICA I-II, Q. 108, Art. 4 (Fathers of the English Dominican Province trans., Benziger Brothers 1948) [hereinafter SUMMA THEOLOGICA]. It is also arguably manifest, in its own way, in Aquinas’s distinction, including social virtue, but excluding private virtue from the scope of civil law’s scope of concern. Id. at I-II, Q. 96, Art. 3.

"Christian anthropology and social faith swing back and forth between optimism and pessimism about man, and between utopianism and defeatism about man’s collective possibilities." Joseph Fletcher, Human Nature and Social Action, J. BIBLE & RELIGION, Apr. 1948, at 85, 87.
C. The Consequences for Catholicism of Accommodating Rawls's Constraints

The general philosophical discussion in the series of essays which follows aims at a conceptual framework for assessing the consequences for a coherent political philosophy of accommodating Rawls's constraints. As a prelude to embarking on that general discussion, it makes sense to ask, first, however, what the consequences of such an accommodation would be for the Catholic tradition which Rawls has engaged in dialogue. To name that impact, one would first have to know first, with greater certainty, whether Rawls's proviso would go the extra step of requiring Catholics to disavow public reliance on both of these, now culturally divergent, underlying Christian assumptions just mentioned. Would the Catholic conception of justice, then, still count as liberal and thus compatible with Rawlsian constraints, if the Catholic asserted either loudly or sotto voce that, although dichotomate as Rawls requires, the Catholic position justifies its stance towards politics, not under procedures of Rawls's “justice as fairness,” i.e., assent to the thought experiment of a hypothetical “original position,” or by any other parallel liberal process, but by reference to some perhaps less than comprehensive but still intrinsic purpose constitutive of the human condition in the nature—or fallen nature—of things?

Even if Rawls would approve of such a Catholic proviso to his proviso, which appears doubtful, one is still left with an awareness of the one-sidedness of the intersection between Rawls and Catholicism that has been adduced here as allowing Catholic participation in the Rawlsian polity on terms arguably meaningful within the Catholic tradition. The Catholic tradition is far richer than the one set of Augustinian themes selected to be most compatible with Rawls. The elements in the tradition, which the Rawlsian reading leaves out of view, tend to stand in tension with and offset those elements that it includes. If their contributions to political discourse were channeled through such a constricted view of the Catholic tradition, would Catholics not, in some essential way, be thwarted in their advocacy of what they actually consider to be the social good? The problem can be brought into better focus by considering Dignitatis Humanae’s stipulation of “good order,” “true justice,” and “public morality” as the limits of individual liberty. Would the content and interpretation that these limits might receive, as formulated under a regime of Rawlsian constraints, leave intact the observance of anything remotely resembling the Christian vision of the social good, whether conceived in Augustinian terms or according to a broader, more optimistic Christian anthropology? Would that content actually, under civil law, through the modes of coercion Rawls's constraints, in fact, authorize redound against Catholicism, ultimately bringing about a restriction, under law, of the free exercise of moral praxis within the Catholic community?

72 For an explanation of Rawls's idea of "the original position," see POLITICAL LIBERALISM, supra note 5, at 304-310.
73 See supra note 39 and accompanying text.
74 It can be left to the imagination to find some fair parallel to the experience of the Mormon Church under federal law.
Before, however, one rules out some accommodation of Rawlsian constraints by Catholics, whether for reasons pragmatic or principled, one will wish to reflect on the present pontiff, Pope Benedict XVI’s advocacy, in his recent encyclical, *Deus Caritas Est*, of a highly flexible response of accommodation by Christians to diverse political regimes, including, no less than others, contemporary “democracy.” Pope Benedict’s recommendation would apply, then, within a Rawlsian democracy no less than any other form of government. Benedict teaches that the Church can flourish where consensus is lacking on, or opposing interpretations prevail over what the Church itself would consider the actual political requirements of practical reason. The Church can, in the pope’s view, remain engaged in its social mission under such circumstances because it is guided by the eyes of transcendent love: “This heart sees where love is needed and acts accordingly.” In the Pope’s vision, Catholics can continue to be effective even where they are unable publicly to announce their principles:

Charity, furthermore, cannot be used as a means of engaging in what is nowadays considered proselytism. Love is free; it is not practised as a way of achieving other ends. But this does not mean that charitable activity must somehow leave God and Christ aside. For it is always concerned with the whole man. Often the deepest cause of suffering is the very absence of God. Those who practice charity in the Church’s name will never seek to impose the Church’s faith upon others. They realize that a pure and generous love is the best witness to the God in whom we believe and by whom we are driven to love. A Christian knows when it is time to speak of God and when it is better to say nothing and to let love alone speak.

D. Consequences for Politics of a Catholic Accommodation of Rawls’s Constraints

Again the essays that follow offers a more general philosophical and conceptual framework for assessing the meaning of the consequences for Rawls’s constraints for politics. A second preliminary question that can be raised here, by way of introduction, however, concerns, more narrowly, the implications for politics of accommodation of those constraints concretely by Catholicism. Assuming, of course, that a polity under Rawls’s constraints would tolerate, if not endorse, the formation,

in its practice at the time of polygamy, see Reynolds v. United States, 98 U.S. 145 (1879), or of Bob Jones University under federal law in its anti-miscegenistic campus dating policies, see Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

75 POPE BENEDICT XVI, *DEUS CARITAS EST* [On Christian Love] ¶ 29 (2005) (“The Church’s charitable organizations . . . constitute an *opus propium*, a task agreeable to her, in which she does not cooperate collaterally, but acts as a subject with direct responsibility, doing what corresponds to her nature. The Church can never be exempted from practising charity as an organized activity of believers, and on the other hand, there will never be a situation where the charity of each individual Christian is unnecessary, because in addition to justice man needs, and will always need, love.”).

76 Id. ¶ 31(b).

77 Id. ¶ 31(c) (emphasis added).
within itself of "nonpublic" communities of discourse, and that Catholics, as a matter of the integrity of their belief system, even after agreeing or acquiescing to Rawlsian constraints, would continue to wish to constitute their own community/communities in accord with "comprehensive" Catholic doctrine and would—even leaving full room for the loving attitude prescribed by Pope Benedict—decline to dilute Catholic doctrine in a Josephist manner for the sake of conforming to the "implicit culture of a democratic society," since to do so would at some point become incompatible with the requirements for integrity of religious belief, then it would appear that a considerable degree of tension would come to exist between the scope of arguments Catholics would be free to make in democratic exchange with others and the fullness of their opinions on politics as they would formulate these within their community of faith.

One can readily name the elements within their tradition that Catholics would be required to self-censor as the price of admission to public discourse in a Rawlsian polity. Even within a far-Augustinian interpretation, Catholicism holds central a concept of the dignity of the person as imago dei that would appear to become essentially inadmissible. This barrier would be particularly poignant where democratic majorities attempt to deny rights and respect to vulnerable classes of human beings based on a loss of insight into their worth. If Catholic resistance to permissive abortion policy does not pose an example that agrees with all readers, one can cite current Catholic opposition to the practice of torture or the vigorous arguments of the Spanish scholastics of the seventeenth century for the moral dignity and political autonomy of the indigenous populations of the New World.

Catholics would appear to lose the freedom, moreover, to insist, in harmony both with St. Augustine and the social contract thinkers, that even as questions of spiritual transcendence are dichotomously removed from direct involvement in politics, they are preserved and made available as of indirect public significance.

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78 Rawls observes that "[i]t is a mistake to say that political liberalism is an individualist political conception, since its aim is the protection of the various interests in liberty, both associational and individual." The Idea of Public Reason Revisited, supra note 4, at 795. He continues, "I emphasize that this idea of public reason is fully compatible with the many forms of nonpublic reason. These belong to the internal life of the many associations in civil society and they are not of course all the same." Id. at 800 (citation omitted).

79 A state policy originating in Austria in the 1760s under Hapsburg Emperor Joseph II interfering with local Church ties with the papacy and making of it "an instrument of progressive government. Josephinism, ENCYCLOPEDIc DICTIONARY OF RELIGION (Paul Kevin Meagher et al. eds., 1979).

80 "Man therefore, whom Thou hast made after Thine own image, received... dominion... over... all the earth... For He judgeth and approveth what He findeth right, and He disalloweth what He findeth amiss... by interpreting, expounding, discoursing disputing, consecrating, or praying unto Thee, so that the people may answer, Amen." ST. AUGUSTINE, CONFESSIONS, Bk. XIII, Ch. 23 (John K. Ryan trans. 1960).

81 Torture which uses physical or moral violence to extract confessions, punish the guilty, frighten opponents, or satisfy hatred is contrary to respect for the person and for human dignity. In times past, cruel practices were commonly used by legitimate governments to maintain law and order, often without protest from the Pastors of the Church. It is necessary to work for their abolition. THE CATECHISM OF THE CATHOLIC CHURCH ¶ 2297-98 (1997).


83 While reliable knowledge about the requirements of right worship of God is outside of the scope of the authority of the state in Augustine, CITY OF GOD, supra note 2, at Bk. XIX, Ch. 17, and knowledge of speculative theological doctrines
experience may be beyond the scope of public recognition but the dignity of the person that flows from the capacity for experiencing these dimensions is not. This continuing indirect relevance of the transcendent within dichotomous thinking on politics, extends from Augustine, through Aquinas, and on to Locke and Kant, even as it is arguably absent from Plato and Aristotle. Harold Berman finds this indirect relation, of the spiritual to the political, at the historic origins of our modern rights guarantees.

Catholics adhering to a more optimistic anthropology in the tradition of Aquinas, who arguably are closer than, but certainly are no less so, to the core of the tradition than neo-Augustinians, would find themselves excluded from seeking political consensus on what is to be adjudged by reference to comprehensive horizons of truth really or ultimately reasonable. They would be barred from advancing a concept of reason that respects free choice and consent as essential, but, no less, as regulated by the requirements of an adequate understanding of what is objectively given in the real circumstances of the concrete community and the human beings comprising it. They would see this bar as diminishing society’s capacity for genuine human flourishing, and as blunting its capacity to recognize and secure protection for the defense of the human rights of vulnerable groups and individuals by eliminating reasoning, in the “thick sense,” from universally knowable duties to avoid harm to the recognition of rights to participate in the good things of creation according to one’s real needs. Their insights based on these capabilities would remain forever marginalized as outlying views not already part of the “implicit culture of democratic society.” Finally, they would perceive a loss in society’s being deprived, through this bar, of the capacity to envision, in common, the central case of law as reciprocity in honoring the requirements of social cooperation, with the result that all law would be outside that scope in Locke, An Essay Concerning Toleration, supra note 16, at 186-210, the dignity the individual brings to citizenship indirectly derives therefrom.

For Aristotle, anything that is not part of the social relationship is no longer human and is, at its most relevant, a crime (“But he who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god: he is no part of the state.”). See ARISTOTLE, POLITICS BOOK I, 2. For Plato, the path ascending to the idea of the good proceeds exclusively through the polity (“[t]hat rule we set down at the beginning as to what must be done in everything when we were founding the city — this is, in my opinion, justice.”. See PLATO, REPUBLIC Book IV 433.a

Berman traces the rise of constitutionalism to the papal revolution in which the church contested the unrestricted power of the state, inspired by faith in the transcendent dignity of the human person. HAROLD J. BERMAN, LAW AND REVOLUTION 165-98 (1983).

Aquinas sees legitimate government as deriving from consent and participation balanced with respect for the requirements of natural justice:

[I]n every law, some precepts derive their binding force from the dictate of reason itself, because natural reason dictates that something ought to be done or to be avoided. . . . At the same time there are other precepts which derive their binding force, not from the very dictate of reason . . . but from some institution . . . . When therefore the moral precepts . . . refer to man’s relations to other men, they are called judicial precepts. Hence there are two conditions attached to the judicial precepts: viz. first, that they refer to man’s relations to other men; secondly, that they derive their binding force not from reason alone, but in virtue of their institution.

SUMMA THEOLOGICA, supra note 70, at I-II, Q. 104, Art. 1.

See, for example, John Finnis’s specification of rights. NATURAL LAW AND NATURAL RIGHTS 218-21 (1980).

Kent Greenawalt, in his essay What are Public Reasons?, develops this problem, as it could beset at least some versions of public reason theory, in more general terms. See Greenawalt, supra note 41, at 86-102.
tend instead to appear as a form of coercion that, at best, can be "imputed" with noncoerciveness for one reason or another, in Rawls, for example, because, it is deemed, to have been ratified, constructively at least, by the person who is subject to it.89

In practice, Catholics would, moreover, as they formulate public proposals, in each case, have to differentiate and separate the specifics of their publicly allowable position from such more complete internal understandings. Even assuming that Catholics had the intellectual tools to accomplish this screening process—which appears more than a stretch—they would still be left with the fuller array of inadmissible Catholic considerations in mind. It is hard to see how Catholics could prevent these unstated considerations from influencing the priority and urgency with which they advocate positions ostensibly advanced on other grounds. To the degree that Catholics acted under such unseen influence, they would risk turning Rawls's constraints into a duplicitous mask. To the extent that they observed an interior bar to such cross-communication of priorities and relative weights—akin to the corporate requirement known within securities law by the quaint, and according to some, questionable name the "Chinese Wall"90—they would risk betraying their integrity as believers and as human subjects.91

Such internal dissonance would also appear to risk exposing the Church to the danger of itself becoming a tepid association accommodating Christ to Culture.92 The more the Church concludes that its own traditions of political thought do not leave it with a sufficient principled reason for endorsing the Rawlsian constraints and the more it were to endorse them for purely pragmatic reasons, the more likely this

89 For Aquinas:

[T]he law belongs to that which is a principle of human acts, because it is their rule and measure. Now as reason is a principle of human acts, so in reason itself there is something which is the principle in respect of all the rest: wherefore to this principle chiefly and mainly law must needs be referred. . . . [T]he last end of human life . . . happiness. Consequently the law must needs regard principally the relationship to happiness. Moreover, since every part is ordained to the whole, as imperfect to perfect; and since one man is a part of the perfect community, the law must needs regard properly the relationship to universal happiness.

SUMMA THEOLOGICA, supra note 70, at I-II Q. 90, Art. 2. This principle is unrelated to coercion. Similarly, Lon Fuller, in his own parallel, sees law as an order of reciprocity, which again has a basis outside of coercion. THE MORALITY OF LAW 209 (rev. ed. 1969).

90 U.S. securities law prohibitions against insider-trading generate conflicting duties for broker-dealers, who maintain their freedom to trade in stock while processing confidential information for corporate clients through internal policies and procedures compartmentalizing material nonpublic information within the department in which it arises so that it cannot be known by the firm as it trades client's shares. 1 EDWARD F. GREENE, EDWARD J. ROSEN, LESLIE N. SILVERMAN, DANIEL A. BRAVERMAN, SEBASTIAN R. SPERBER, U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS § 10.07[1] (8th ed. 2006).

91 Rawls concludes that "Moreover, that the Catholic Church's nonpublic reason requires its members to follow its doctrine is perfectly consistent with their also honoring public reason," The Idea of Public Reason Revisited, supra note 4, at 799. He concludes that his view "is similar to Father John Courtney Murray's position." Id. at 799 n.83.

92 Niebuhr points out that a tension exists between what a culture endorses and what is known through faith in Christ, and some Christian thinkers have resolved this tension by rejecting anything from faith that is at variance with contemporary cultural norms. H. RICHARD NIEBUHR, CHRIST AND CULTURE 83-84, 91-92 (expanded ed., 2001). Yet, despite this tension, the church, while retaining its separate identity, "has become the guardian of culture, the fosterer of learning, the judge of the nations, the protector of the family, the governor of social religion." Id. at 129.
outcome would appear to be. The Church would foreseeably defend itself against an imposition of Rawlsian constraints by relativizing the significance of politics and subordinating the duties of Rawlsian citizenship within a larger hierarchy of moral and human duties. In adopting such a strategy, the Church would appear—in opposition to its traditional self-understanding—to be re-fashioning itself as a sect conscious of its constant duty and readiness for civil disobedience when laws enacted without the influence of Catholic reasons in fact conflict in practice with Catholicism's fuller understanding of the requirements of "comprehensive" truth. At that point, Rawls's appeal to Catholics to contribute towards a stabilizing liberal consensus would appear to falter definitively.

II. The Essays that Follow: Assessing Rawls from the Perspectives of Political and Legal Theory

The background, thus far, sketched regarding the inter-relationship of Rawls and contemporary Catholicism is historical, particular, and theological in character. It remains to assess Rawls's "idea of public reason" from the general theoretical perspectives of political and legal philosophy. For such an assessment, one may turn now to the series of articles that follow. These articles, by E.J. Dionne, Kent Greenawalt, John Haldane, Paul Weithman, Nicholas Wolterstorff, Jeremy Waldron, and Michael McConnell, each merit study on their own terms as original contributions to the field of Rawls studies. A survey of the collection, as a whole, and of the interplay of viewpoints it contains, is, at the same time, invaluable, in its own right, for the light in sheds on fundamental questions regarding law, politics, and religion. William Galston, in his concluding essay, offers his apt and thoughtful observations on the significance of the discussion that the essays, as a group, comprise.

The articles organize their assessment of Rawls around a set of five intersecting themes: (1) Rawls's American context; (2) Rawls's formulation of the problem to be resolved and of its answer; (3) an evaluation of Rawls in light of religion's significance of religion to politics; (4) his evaluation in light of reason's role both in politics and in justifying political theory; and (5) practical doubts. The portion of this introduction that remains is devoted to providing the reader with a brief descriptive map, organized around these themes as they appear in the articles that follow. The ultimate objective of the map is to orient readers to a more reliable basis as they seek to answer to the question: "John Rawls's 'Idea of Public Reason: Achievement or

93 Letter of the Holy Father Pope Benedict XVI to the Bishops, Priests, Consecrated Persons and Lay Faithful of the Catholic Church in the People's Republic of China 8 (May 27, 2007) ("The clandestine condition is not a normal feature of the Church's life, and history shows that Pastors and faithful have recourse to it only amid suffering, in the desire to maintain the integrity of their faith and to resist interference from State agencies in matters pertaining intimately to the Church's life. For this reason the Holy See hopes that these legitimate Pastors may be recognized as such by governmental authorities for civil effects too—insofar as these are necessary—and that all the faithful may be able to express their faith freely in the social context in which they live.")
Failure?” Its additional purpose is to assist readers to access the wealth of insight in these essays, not just on Rawls, but on a range of theoretical issues concerning reason, religion, law and politics.

A. Rawls’s American Context

John Rawls is acclaimed for reviving political theory, writ large. Yet, his “idea of public reason” possesses an indisputably particular, late-twentieth-century-American flavor. A theme at the threshold of several of the essays that follow is the significance of Rawls’s American context. Authors E.J. Dionne and Michael McConnell, for example, cite the American context to complete, in one case, a positive construal, and in the other, a negative critique of Rawls. For his part, John Haldane, questions whether Rawls’s American preoccupations allow him to rise to the level of general theory.

E.J. Dionne interprets Rawls as responding religion as a problem in the American political arena, deftly sketching a national history in which Protestantism gave rise to a culture of tolerance and respect for religious liberty but which has subsequently been disestablished. Dionne describes a contemporary American dynamic in which religion is unsure of its proper equilibrium in post-Protestant American politics. In his view, Rawls’s “proviso” is a salutary reminder, in an American context, of a duty to make our religious views on politics genuinely accessible to others.

Michael McConnell, in his essay, scrutinizes strands of the same historical background as Dionne, but is led to different conclusions. McConnell relates the influence of Protestant churches on the historic debates accompanying the adoption of the United States Constitution. He interprets the First Amendment as friendly to religious grounds in public conversation, even today. In contrast to Dionne, McConnell views Rawls as seriously at odds with a constitutional order that, properly read, accords religious arguments an equal place at the public table, with the important caveat that they are subject, like any other viewpoint, to unrestricted criticism by all. McConnell contests Rawls’s assertion that the American constitutional order confers less than full standing on religious arguments as expressions of political reason.

94 E.J. Dionne, Jr., Idea of Public Reason: Not a Warrant for Ceasing in the Effort to Live the Truth as We are Able, 1 J.L. PHIL & CULTURE 69, 73-74 (2007).
95 Id. at 74-75.
96 Id. at 75-76.
98 McConnell asserts that there is “an equal right to argue for collective public ends with the most persuasive arguments they can muster, without prior limitations based on the epistemic, methodological, or ideological premises of their arguments” and an equal right for other “citizens to accept or reject [those arguments] based on their own opinions.” Id. at 171.
99 McConnell declares this reasoning “faulty and its results perverse.” Id. at 160.
John Haldane, like McConnell and Dionne, remarks on the distinctively American quality of Rawls’s work. He does not draw from that American context any further element to complete his understanding of Rawls, but rather is led by it simply to question the universality with which Rawls frames the question. He sees Rawls as hampered in his ability to understand political institutions as expressions of practical reason, suggesting that a cause of this lack of ability may be an immersion in a legally oriented national culture accustomed to its written constitution.

B. Rawls’s Formulations of the Problem to be Resolved and its Answer

John Rawls regards the central problem of politics to be the problem deep pluralism on matters of religious and comprehensive doctrine poses for the legitimacy and stability of democracy. Paul Weithman, in his essay, interprets the threat Rawls sees to both democracy’s legitimacy and stability as ultimately arising through any imposition on citizens of distributions that they are unable to affirm as reasonable. Weithman traces the delegitimating and destabilizing tendency Rawls discovers in such distributions to the encumbrance they imply of citizens’ autonomy in the autonomous choice of their own life plans.

Rawls does not validate a proposition as being in accord with a citizen’s view that it is “reasonable” through their actual agreement, but rather, only, more loosely, on a showing that the proposition in question derives from postulates that can be known by all to be “uncontroversial historical commitments” of the democracy in which they live. Because comprehensive notions of truth fall, by definition, outside this stipulated set of postulates, Rawls asserts that our commitment to democracy constrains us to deny that political views based thereon are “reasonable” and thus requires us to hold that they are inadmissible in democratic debate. Rawls stipulates that allocations in a democracy must be distributed ultimately on terms grounded exclusively in the “freestanding” reasons that remain after such exclusions.

The essays that follow reflect, from their various perspectives, Rawls’s statement of this problem and his answer to it. One might expect them to figure like so many subtly differing views of the Cathedral at Rouen, disclosing subtle and unexpected implications and hitherto unnoticed aspects of Rawls’s ideas, but, in fact, they work

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100 Haldane asks whether the issues “arise universally within liberal societies, or whether they are particular, if not unique, to the circumstances of North America, particularly the United States.” Haldane, supra note 22, at 175.

101 Haldane notes an assumption by Rawls of a “broader pattern in American political thought” within which the “sole grounds of fair cooperation are either liberal, and largely formal; or else are substantive and generally illiberal.” Id. at 179; and he makes the contrast with Britain which does not employ a written constitution. Id. at 183.


103 McConnell, supra note 97, at 162.

104 Id. at 159.

105 Weithman, supra note 102, at 59-61.

together only to give an impression of what appears as an evermore unambiguous and inflexible unitary conceptual edifice. The multi-sided scrutiny these essays provide, allows the interlocking terms of Rawls’s system to appear increasingly like the various internally cross-referenced provisions in a complex legal statute. It is hard to see what would be gained by belaboring the separate recitation of his terms by the different authors.

While these essays are useful enough to the reader seeking a technical understanding of how Rawls’s interlocking terms function, their greater significance surely is to be found in what they communicate of their authors’ own alternate statements of the problem and solution as these come to light by refraction off of Rawls. Assembling and comparing their views allows one to identify the salient criteria for political theory they put forward and to demark the paths they outline for further exploration where they find that Rawls’s proposals fail to satisfy.

Several authors begin from the tertium quid of Robert Audi’s theory of political liberalism as a means of placing Rawls’s idea of public reason in comparative profile. Their common reference is to the objection to coercion that is at the base of Audi’s exclusion of certain reasons from public discourse. Where the author is less interested in the technical details of Rawls’s proposal, and more interested in a “public reasons” school, aligning Rawls with Audi serves the cause of generalizing about that school.

John Haldane, among the authors, is perhaps least willing to credit the idea that an objection to a law might persuasively follow from disagreement with reasons offered at its enactment. He frames the problem of pluralism instead as being one of achieving a modus vivendi among conflicting views in the hiatus between practical reason’s commencing its inquiry into politics and its finally discovering a sound consensus on what works. He recommends an attitude of civic fellowship calling for restraint in the manner of framing one’s proposals for one’s fellow human beings.

Michael McConnell, in a certain parallel to Haldane, likewise grasps the problem as one of coordinating plural approaches in what is finally an essentially unitary field. He shifts the field, however, from justification in a moral/philosophical sense to
legitimacy within a particular ongoing legal/political enterprise, i.e. the historic undertaking of the American Republic. More precisely he asks how one is to foster the equality and inclusiveness of participation in public debate that are basic constitutional purposes without incurring the factionalization against which Madison cautioned.\textsuperscript{112} McConnell proposes, as answer, respect for basic constitutional principle of non-establishment but, no less, of nondiscrimination.\textsuperscript{113}

Kent Greenawalt and Jeremy Waldron each frame the question by asking how respect for the individual places some irreducible constraint on common action. Waldron, for his part, focuses on the force of distributive justice in requiring society's fullest possible rational deliberation over the justification of the burdens it imposes. In his view, society owes such deliberation to all those who, in the end, bear the costs of common choices.\textsuperscript{114} He advocates subjecting both political and judicial reason to the most exacting critique to ensure that society has a reliable justification for the burdens it distributes.\textsuperscript{115} On this basis, he rejects Rawls's public-reason constraints. Greenawalt poses the issue as being, in broad terms, one of regard for the equal participation of all in political decision-making.\textsuperscript{116} He considers this concern for individual autonomy, however, to be just one among a fuller complement of political values.\textsuperscript{117} Adopting a more nuanced position than does Rawls, Greenawalt, nonetheless, concludes, in partial agreement with Rawls, that equal respect for the deliberative intelligence of one's fellow citizens may, in some settings but not others, call for more or less categorical exclusions of some reasons as nonpublic.\textsuperscript{118}

Paul Weithman and Nicholas Wolterstorff both appear, in broad terms, willing to adopt John Rawls's statement of the problem posed for the legitimacy and stability of democracy by deep societal pluralism on matters of religious and other comprehensive doctrine. They each, however, reject his conclusion that a democracy's reliance on more ultimate notions of truth undermines its legitimacy or stability. Weithman interprets Rawls as asserting that citizens can, within their authority \textit{qua} citizens, decide collectively to limit what will count as a reason for affecting conditions relevant to the project of autonomous living.\textsuperscript{119} Weithman finds grounds for rejecting this assertion. He suggests that citizens reasonably could endorse the idea of government based on a societal consensus relying on overlapping notions, including ones of comprehensive truth or received tradition, especially where

\textsuperscript{112} McConnell, \textit{supra} note 97, at 163 (citing THE FEDERALIST NO. 10 (James Madison)).

\textsuperscript{113} With respect to the antidiscrimination principle, see id. at 160-61; with respect to separation of church and state, see id. at 173.

\textsuperscript{114} Waldron, \textit{supra} note 12, at 123.

\textsuperscript{115} Id. at 121-23.

\textsuperscript{116} "The animating spirit is that people should not be coerced about important matters on the basis of reasons they cannot be expected to accept." Greenawalt, \textit{supra} note 41, at 81.

\textsuperscript{117} "The usual way to judge normative theories [is by] their persuasiveness in light of reflections on how they do, or would, work in practice and in light of criticisms leveled against them." Id.

\textsuperscript{118} Id. at 102-05 (explaining that in those situations where public reasons seem most appropriate, there is nevertheless a large spectrum of reasons from the "fully public" to reasons that "should not be relied upon at all").

\textsuperscript{119} Weithman, \textit{supra} note 102, at 65.
such a consensus honored the idea of human rights. Nicholas Wolterstorff, for his part, observes that Rawls asks what reasons people would find non-coercive assuming that they reasoned in a hypothetical way. He highlights the oddness of the concept, and concludes that the question ought properly to be framed in terms of what people do think and not “would” think. As Rawls’s formulation stands, Wolterstorff finds that it fails to respect equality.

C. Evaluating Rawls in Light of Religion’s Significance for Politics

Rawls’s concept of “public reason” is well known for limiting the role of religion in politics. As noted at the outset, this concept permits religion to enter public debate, on serious matters, only where those holding religious views either express themselves in a manner premised on a liberal conception of justice, as Rawls defines it, or, in the alternative, translate of their point, in keeping with Rawls’s proviso, into secular terms within a reasonable time. The reason for these constraints is potential insult to the autonomy of others.

The viewpoints, assembled here, are such that one searches the essays that follow in vain for support for the categorical exclusion of distinctly religious ideas from politics. Kent Greenawalt, who gives theoretical assent to the idea that, in some settings, e.g. that of judicial reasoning, some reasons ought to be excludable as “nonpublic,” disagrees that political discourse comes within this class. He offers a complex set of variables for use in determining when a reason must be seen as nonpublic. He views a reason as the more probably nonpublic the more comprehensive, less rational, less widely accepted, and more reliant “on some controversial conception of the good life” it is. The calculus he proposes may result in the exclusion of religious reasons or of natural law reasons associated with religion from judicial and other analogous forms of decision-making—this as a matter, he believes, of the practical wisdom of our national traditions. Greenawalt’s equation is more subtle than the Rawlsian one of “comprehensive doctrine = religion = some form of exclusion.” The opacity that might lead to a conclusion that a reason is nonpublic derives, in Greenawalt’s view, from an inaccessibility apparent in some openly religious formulations, but which is no less manifest in the nonreligious

120 “[G]rounds for settling fundamental questions can be located by surveying the comprehensive doctrines that happen to have adherents in a society, seeing what political values they share, and settling questions on the basis of those shared values.” Id. at 59. This is premised on the recognition of all citizens “as full, equal participants in their society” and as “bearers of rights with inviolable human dignity.” Id. at 65.
121 Wolterstorff, supra note 108, at 149-51.
122 Id. at 138.
123 Wolterstorff asserts persons stipulated to be “not-fully rational” are “not treated as fully equal.” Id. at 155.
124 “Rawls identifies public reasons as the values and principles specified by conceptions of justice that can be presented independently of comprehensive doctrines.” Weithman, supra note 102, at 61.
125 Id. at 47.
126 Weithman sees as the distinguishing feature in Rawls’s vision of autonomy the citizens’ “interest in being able to identify with the aims and aspirations that shape their plans of life.” Id. at 51.
posnerian premise of wealth maximization and in allegedly rational “Finnis-like” assertions on behalf of public morality.\(^{127}\)

John Haldane and E.J. Dionne, each in their own way, countenance restraint in public discourse resembling to some extent Rawls's constraints. Both, however, emphasize that they do so out of respect for civility among citizens joining in common deliberation under conditions of human fallibility.\(^{128}\) Dionne stresses the importance of accessibility to this requirement of civility, in a way that echoes Rawls's proviso.\(^{129}\) Neither objects to the admissibility in politics of religious reasons, as such. Haldane, explicitly, and Dionne, implicitly, appears to ground the requirement of civility in a concept of practical reason that might, if more fully developed, at some point, actually trigger Rawlsian disqualification as comprehensive doctrine.

Among the authors remaining, one finds support only for the conclusion that the exclusion of religion from discourse is unjustified and unsustainable. Among them, one finds no endorsement for Rawlsian constraints in any sense. Some note, for instance, the impossibility of separating religious from other kinds of reasons. Jeremy Waldron points out that religious reasons are particularly likely to be of decisive weight on sensitive points arising within untrammeled justificatory reasoning.\(^{130}\) He also draws attention to distortions, that the exclusion of religious reasons would cause to the pattern of reasoning remaining admissable, through a logical inter-relatedness among religious and other considerations.\(^{131}\)

Nicholas Wolterstorff cites Locke for support for his conclusion, parallel to Waldron's, that purely generic political reason, unlinked from expressly religious ideas, is unattainable. He reminds us that by virtue of being deeply ingrained, such ideas influence assessments of probabilities and presumptions within putatively secular modes of reasoning, even after every explicit reference to religion has been removed.\(^{132}\) Rejecting the categorical character of Wolterstorff's and Waldron's position, Kent Greenawalt, nonetheless, explores some implications of the same difficulty.\(^{133}\)

Michael McConnell argues that religious reasoning cannot even be distinguished from other modes of political reasoning. He asserts that religious belief in the primacy of God's will has a necessary bearing on all facets of existence, such that, for a religious believer, politics itself has an intrinsic religious reference.\(^{134}\) He argues

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\(^{127}\) Greenawalt, supra note 41, at 104.

\(^{128}\) Haldane, supra note 22, at 190. Dionne concludes that what is appropriate is "an honest attempt by tolerant citizens to find, to approach, and to live the truth as best they can, knowing that they will need help from one another." Dionne, supra note 94, at 77.

\(^{129}\) Dionne, supra note 94, at 72-73.

\(^{130}\) Waldron, supra note 12, at 123.

\(^{131}\) Id. at 119-22.

\(^{132}\) Wolterstorff, supra note 108, at 157.

\(^{133}\) Greenawalt, supra note 41, at 97-99.

\(^{134}\) McConnell, supra note 97, at 172-73.
that, as a matter of politics, religious reasons are put forward (with the exception of arcane religions) for the rational evaluation of the listener, and are, in this sense, no less reasonable than any other grounds.\textsuperscript{135} McConnell finds confirmation in the framers who, he asserts, themselves did not distinguish between religious and other political reasons.\textsuperscript{136}

D. \textit{Evaluating Rawls in Light of Reason’s Role in Politics and in Justifying Political Institutions}

Rawls advances a distinctive concept of “reasonableness” as the test, in a democracy, for admission to public discussion on politically important matters. Several of the essays highlight the tendency under this concept of reasonableness for a formal ideal of law and legitimacy to take the place of untrammeled moral reasoning. More than one of the authors calls attention to the resemblance of Rawls’s version of political reason, by analogy, to the adjudicative logic of court opinions.\textsuperscript{137} All the authors take up viewpoints consciously outside of Rawls’s law-and-legitimacy model, from which they seek to assess his cogency. Each implicitly offers an alternative vision of political reason.

Jeremy Waldron and Kent Greenawalt both hold Rawls’s mode of reasoning up to the critical light of what they would pursue by way of untrammeled justificatory inquiry.\textsuperscript{138} Nicholas Wolterstorff, in a certain parallel, emphasizes that, if Rawls’s constraint is a moral duty of the citizen, it must, then, as such, come within a fuller hierarchy of comprehensive moral obligation.\textsuperscript{139} In principal, it would, of necessity, then, in Wolterstorff’s view, be subject to the same fully open justificatory reasoning which Waldron and Greenawalt advance.

Waldron argues that deliberation over decisions affecting peoples’ lives brooks no \textit{a priori} constraint, but calls for openness to all available reasons.\textsuperscript{140} On this basis, he finds Rawls’s idea of reason misguided, and his constraints unjustified.\textsuperscript{141} Greenawalt asserts, in a parallel but more qualified way, that justification, by its

\textsuperscript{135} Id. at 170-71.
\textsuperscript{136} Id. at 162-66.
\textsuperscript{137} See Waldron, supra note 12, at 116-23; see also Greenawalt, supra note 41, at 81 (stating that he employs “the usual way to judgment normative theories” with “their persuasiveness” to be judged “in light of reflections on how they do, or would, work in practice and in light of criticisms leveled against them.”).
\textsuperscript{138} Wolterstorff observes that “each of us occupies a number of distinct social roles incorporating distinct rights and responsibilities, so that what is required by one of these roles may conflict, in a given case, with what is required by another . . . [and] the social roles one occupies are not the sole source of one’s duties.” Wolterstorff, supra note 108, at 135-36.
\textsuperscript{139} Id. at 116 (“Now, this idea of justification in itself involves no restriction on the range of reasons that it is appropriate to mention.”).
\textsuperscript{140} He concludes that it is “in danger of becoming not just truncated but distorted.” Id. at 121. He asserts that this is a “disaster,” that trades “real engagement” for a “recipe for peace and for a sort of simplified mutual intelligibility.” Id. at 134.
nature, cannot proceed in the categorical manner of Rawls, and that the public reason constraints that have been proposed by Rawls and others must be tested on a case-by-case basis that fully examines all arguments and facts in play in each specific case. Greenawalt concedes that Rawls-style constraints may be justified in at least the restricted case of judicial reasoning. Greenawalt, then, differs from Waldron in that he concludes that untrammeled justificatory reasoning may, for sufficient cause, to be required to yield to constraints on modes of reasoning in some settings.

In contrast to Waldron and Greenawalt, Nicholas Wolterstorff and Paul Weithman appear to approach the cogency of Rawls's idea of public reason from within a more specific vantage of concern for the legitimacy of political institutions. Both authors set out to test the persuasiveness of the reasoning by which Rawls constrains a democratic polity. Nicholas Wolterstorff challenges Rawls's assertion that the legitimacy of democratic decisions can be premised on a standard of reasonableness equating reasonableness with de facto consensus, observing, in a memorable formulation, that reason—even when fully informed—moves not towards consensus, but towards dissensus. Wolterstorff contests, as well, the cogency of Rawls's premise that autonomy is not violated by the imposition of a reason to which others believe he "should" have assented. In complementary moves, Paul Weithman deploys the principles of sufficient reason and non-contradiction to demonstrate, that even assuming, as given, the duty of respect Rawls posits for the autonomy of humans as rational self-realizing beings, Rawls, nonetheless, fails to establish his pivotal normative claim that citizens are duty bound to exclude from political deliberation viewpoints grounded in comprehensive notions of the truth.

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142 See Greenawalt, supra note 41, at 79-80 (counseling that "[w]e should be open to various nuances in these matters" because the "lines of division [are] more complicated than those yet offered.").
143 Id. at 102-05. Greenawalt holds that the conversation should focus on "reasons that are public for certain contexts and... reasons that are more or less public, rather than public or not." Id. at 102.
144 See id. at 103 (observing that exclusion of nonpublic reasons already occurs as required within the "legal tradition."); Waldron, supra note 12, at 120 (arguing that the judicial review process tends to "crowd[ ] out any serious discussion of the moral issues at stake"). Greenawalt, however, adds that although the judge is bound, the legislator may not be so bound. Greenawalt, supra note 41, at 104. He asks the reader to consider whether a tradition of public reason could arise for "broader political discourse that is not... self-contained and that continually requires overall judgments about justice and human welfare." Id. at 103.
145 Wolterstorff critiques in relation to the significance to be accorded the roles of citizens, Wolterstorff, supra note 108, at 136, and the justification of "political coercion," id. at 158. Weithman offers argument regarding the nature of the "obligation of citizenship" and the "authority" of political decisionmaking by citizens. Weithman, supra note 102, at 48.
146 Weithman says that it is reasonable for some to reject the notion of authority claimed by Rawls for his view of citizenship as entailing a collective authority to exclude what will count as a political reason. Weithman, supra note 102, at 65. He mentions in this category both church-going citizens who hold non-freestanding natural law reasons and also those with "moderate perfectionist" notions of justice that do not count as liberal conceptions. Id. at 66. Wolterstorff refutes Rawls's idea that "generic human reason" emerges when argument is purportedly detached from tradition, religion, and comprehensive doctrine. Wolterstorff, supra note 108, at 157.
147 Wolterstorff, supra note 108, at 156.
148 Id. at 153-55.
149 Weithman concludes that "[s]ome citizens reasonably... refuse to think their authority extends so far," Weithman, supra note 102, at 65, and observes that "[e]ven if someone else's conception of justice can be presented as freestanding, it is still someone else's conception," id. at 59.
150 Id. at 65 (referring to the "Rawlsian view of citizens' authority").
Michael McConnell parallels Wolterstorff and Weithman in making the legitimacy of political institutions his focus. But he transposes the framework of the discussion to the concrete and living historical tradition of the American constitutional order. McConnell’s concept of constitutional order requires that political discourse be unrestrictedly open to proffered reasons and views, parallel to Waldron’s imperative for open reasoning as a matter of moral justification. McConnell acknowledges that religious views can become problematic in the constitutional order, not qua religion, but as occasions for factionalism. The constitutional solution to this potential problem, he argues, is the wide-open inclusion of all viewpoints, nonreligious and religious alike. McConnell concludes that criteria found within the American constitutional order establish that Rawls’s content-based exclusions are illegitimate.

At least from a certain angle, E.J. Dionne and John Haldane offer qualified support for Rawls’s concept of public-reason constraints. E.J. Dionne resembles Michael McConnell in that he seeks to understand Rawls within an American context, but he departs sharply from McConnell in endorsing Rawls’s proviso precisely as authentically American. At the same time, the manner in which Dionne uphold Rawls’s proviso is distinctly un-Rawlsian. He bases his version of this proviso on a duty he understands as borne of the requirements of participating in a community of learning in which one seeks to get along with others and to learn from others in one’s own finitude. Not dissimilarly, Haldane bases the “restraints” he recommends as called for by a modus vivendi furthering the realization of the good of fellowship in the pursuit of the shared political good. In what would appear to be an explicitation of what Dionne’s position implies as an unstated philosophical basis, Haldane approaches politics and law by way of links among “nature, reason, action, and the good,” which he explicitates in exploring the requirements of untrammelled practical reason.

As a group, the authors decline to join Rawls in severing reasoning about political legitimacy from unrestricted reasoning towards moral justification. From their various starting points, they find converging reasons for rejecting Rawls’s constraints as forming the threshold of political discourse. Even those who themselves adopt

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151 McConnell, * supra* note 97, at 161. McConnell finds reason to reject claims where they are “inconsistent with the American constitutional tradition,” id., or “inconsonant with America’s constitutional practice and history,” id. at 162, in view of “the evidence of our national experience,” id. at 166.

152 Id. at 161, 163. McConnell asserts that “[b]road inclusion of diverse arguments from many different sources, not repression of particular arguments or sources, was the Framers’ answer to the potentially deadly problem of religious disunity.” Id. at 163 (citing THE FEDERALIST NO. 10 (James Madison)).

153 He judges it to be “inconsistent with the American constitutional tradition,” id. at 161, and with the “[v]ery ideals of democratic equality that the principle of secular rationale ostensibly seeks to protect,” id. at 174.

154 Dionne describes Rawls as “inviting a rational discourse” in which the “principles rooted in religion can be explained rationally and accessible to those who do not share them.” Dionne, * supra* note 94, at 76.

155 He says that democratic modesty “accepts the limits of each individual’s capacity to know and the limits on our individual capacity to grasp the truth fully.” Ion. at 70.

156 Haldane describes it as a “respectable and responsible arrangement,” Haldane, * supra* note 22, at 190, and as appropriate to a “project limited by shared human fallibility,” id. at 189.

157 Id. at 184, 187-89.
some nuanced or analogous versions of the concept of public reason, do so within more flexible modes of what is essentially untrammeled moral reasoning, evincing un-Rawlsian concreteness, nuance, and fluidity of thought. Nicholas Wolterstorff summarizes what some readers, at least, will feel about the distinctive contrasting style of Rawls, when he remarks that Rawls, although premising his theory on an ideal of “rationality,” himself puzzles us by not giving a persuasive account of the reasonable.158

E. The Negative Effects of Rawlsian Constraints

The authors’ assessment of Rawls “idea of public reason,” considered thus far, revolves around the cogency of its theoretical claims. Their assessment, it will be noted, also turns, at points, on the effects that could be expected if Rawls’s system were carried out in practice. Rawls presents his system as predictably undergirding the stability of democracy and ensuring its integrity. When the authors touch on these practical points, they generally do so in a skeptical vein.

Several point out, against Rawls, various aspects of the unfairness to religious believers and others of denying them participation in democracy under Rawls’s constraints.159 These authors, referencing the basic requirements of their practical or justificatory reasoning, typically find this unfairness to be damaging to the integrity of democracy.160 But Michael McConnell, for his part—as we learn to expect—reaches the identical conclusion via the requirements of the American constitutional order.161 Authors such as Nicholas Wolterstorff and John Haldane, likewise, develop reasons contesting Rawls’s assertion that the effect of his constraints will serve democracy’s stability, arguing that these would, quite to the contrary, undermine that stability, by breeding resentment, frustration, and contempt.162

158 Wolterstorff states: “it is imperative that the liberal theorist provide us with an account of the concept of rationality that he is working with. . . . Of course, we have been wanting such an account for a long time now.” Wolterstorff, supra note 108, at 154.

159 McConnell describes as “an illiberal result” public reason’s denial of “an equal right to put forward our ideas,” McConnell, supra note 97, at 171, 173, while Wolterstorff criticizes Rawls for choosing to “ignore[e] the actual views of all those who are not fully rational,” Wolterstorff, supra note 108, at 153, based on “hypothetical rationality,” id. at 155. Waldron turns his attention to the unfairness of the consequences “[l]urking behind every official decision” potentially entailing “someone’s life and someone’s death, someone’s prosperity and someone’s ruin, not to mention the threat of force to uphold that decision.” Waldron, supra note 12, at 123. Waldron sees injustice in permitting these stakes to be decided carelessly. Greenawalt, for his part, observes that the exclusion of nonpublic reasons requires the utilitarian to “sacrifice[] much less of what he might rely upon according to his comprehensive view” than it does of someone who relies “on scripture or church authority,” and acknowledges that this raises a question of fairness, although he concludes that more must be considered before the question of fairness can be resolved. Greenawalt, supra note 41, at 89-90.

160 Wolterstorff and Waldron both see justificatory incoherence as the threat to the integrity of politics posed by the exclusivist position. See Wolterstorff, supra note 108, at 152-55; Waldron supra note 12, at 121-23.

161 McConnell, supra note 97, at 173.

162 See Haldane, supra note 22, at 183, 189-90.
III. The Idea of Public Reason: Achievement or Failure?

The foregoing discussion makes clear, the authors whom the reader will meet in the essays just ahead are not a band of Rawls disciples. If there is a strong case to be made for Rawls, it appears that it will have to be left for others. In considering each essay, however, the reader cannot but recognize the mighty transformative impact of John Rawls on political philosophy. John Haldane summarizes this impact when he cites Rawls's "imaginative power."

Like Thomas More's *Utopia* or Plato's *Republic*, Rawls's "idea of public reason," failing perhaps to gain assent for the propositions it contains has, nonetheless, through its vision, a valuable heuristic purpose for students of political philosophy.

Rawls, in his parsing and dividing of spheres, reflects, moreover, a deeper Western cultural orientation which he has inherited from the social contract theorists, and which through them connects him, implicitly, to his more distant precursors among the giants of Western Christian thought on law, especially St. Augustine. Rawls, in the spirit of what he attempts, and through the constraints he enjoins upon us for the sake of his vision of equality and liberty—whether we judge that his system, on its own terms, in the end, persuades us or not—can, thus, provoke us, where we subscribe to a religious point of view at least, to seek further insight into what, in fact, is needed if we are to wrest from our experience an adequate concept—if not Rawls's, then what other?—allowing us to progress in the dual task always before us of a political destiny here and now, while we harken still to that unbounded transcendence of the human person resonant still in Rawls's more distant pedigree.

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