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Ian C. Bartrum

University of Nevada, Las Vegas – William S. Boyd School of Law

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NONPUBLIC REASONS AND POLITICAL PARADIGM CHANGE

IAN BARTRUM[†]

INTRODUCTION

John Rawls has famously argued that citizens in a just democracy have a moral duty to ensure that “the principles and policies they advocate and vote for can be supported by the political values of public reason.”¹ This so-called “duty of civility” obligates us to cast our votes on “‘constitutional essentials’ and questions of basic justice” for reasons that we can explain in terms of the public good and the “ideals and principles expressed by society’s conception of political justice.”² Rawls contrasts these public reasons with “nonpublic reasons”—such as “comprehensive religious [and] philosophical doctrine[s]”—which he claims cannot legitimize acts of political coercion.³ Yet, our Constitution singles out and protects certain paradigmatic kinds of nonpublic reasons, at least in the private sphere, and arguably in the political sphere as well. This Article attempts to justify these constitutional protections by offering a structural account of the essential role that nonpublic reasons play in the progress and evolution of a liberal democratic state. Many thoughtful and influential scholars—Charles Taylor, Alasdair MacIntyre, Michael Walzer, Jeremy Waldron, and Michael Sandel, to name just a few—have written on the place of nonpublic reasons in

[†] Associate Professor, William S. Boyd School of Law, UNLV. I would like to thank the participants in the Religious Legal Theory Conference held at St. John’s Law School on November 5, 2010 for their insight and comments. Thanks also to Paul Horwitz, John Inazu, Mark Kende, Miguel Schor, the members of the Drake Law School faculty workshop, and my invaluable research assistant Ross Laird for their help along the way.

¹ JOHN RAWLS, POLITICAL LIBERALISM 217 (1993).

² *Id.* at 213, 214, 217.

³ *Id.* at 220–23.

democratic debate, and Kent Greenawalt has devoted two entire books to the subject.⁴ However, none of them have advanced, at least directly, the arguments in this Article.

Most attempts to justify the place of nonpublic reasoning in political discourse proceed along deontological lines. That is, these efforts ground the claim to constitutional protection in the primacy of religious duties or obligations and suggest that we must treat religiously minded people as autonomous ends in themselves. This is hardly surprising, because these are the very reasons that motivated the framers to enshrine the Test Oath and Free Exercise Clauses in the constitutional text. This may also explain why Rawls framed his objections to non-public reasoning in the language of deontology⁵: After all, it is hardly a satisfying objection to a deontological claim to suggest that renouncing a duty would produce more efficient results. This Article contends, however, that—despite the deontological veneer—Rawls's proposed exclusion of nonpublic reasons is actually grounded in consequentialist arguments about the types of debate and discourse that will produce the best kind of democracy.

It is, in part, this crossing of deontological and consequentialist wires that has made the debate over nonpublic reasoning appear so intractable. The competing arguments often seem to speak in incommensurable terms, with one side claiming the privilege of absolute right and the other extolling the democracy promoting virtues of productive civil discourse. This Article confronts Rawls's argument on its own consequentialist ground. Although the discussion of the religion clauses begins with a brief exploration of the intellectual history that roots the text in deontological appeals to religious duty and individual autonomy, in the end it provides an alternative, consequential account of the reasons why we should continue to protect nonpublic reasoning in our political discourse and voting. In this way, this Article offers a reply to Rawls's position that does not

⁴ See generally KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995) [hereinafter *PRIVATE CONSCIENCES*]; KENT GREENAWALT, *RELIGIOUS CONVICTION AND POLITICAL CHOICE* (1988).

⁵ Deontology, often contrasted with consequentialism or utilitarianism, provides an account of "moral" reasoning and behavior rooted in a priori duties that we must fulfill no matter the consequences. Rawls often grounded his claims about basic political fairness in deontological reasons, and so his arguments about the "duty" to provide public reasons may simply be an effort to remain consistent in this regard.

simply talk past his premises by presenting deontological objections to a consequentialist claim. Ultimately, of course, any competing consequential claims must be assessed against our political experience, but hopefully this account points out a productive avenue for future empirical work.

The first Part of this Article discusses the historical conception of the liberty of conscience, argues that this idea was the central theoretical justification for the religion clauses at the time of the founding, and suggests that we can plausibly read the constitutional text as protecting the right to debate and vote for nonpublic reasons. Part II sketches Rawls's arguments and argues that—the language of duty notwithstanding—these arguments basically appeal to consequentialist kinds of reasons. It then presents an original structural account of the value of nonpublic reasons in political discourse, and looks to both Thomas Kuhn and the theory of natural selection as illustrative analogs. The third and final Part briefly recounts the New York City Catholic schools controversy as a historical example of a productive political interaction between public and nonpublic reasoning.

I. THE LIBERTY OF CONSCIENCE AND POLITICAL DISCOURSE

Perhaps the most influential recent account of the central role that the liberty of conscience played in the history of the religion clauses is that which Noah Feldman gave in his 2002 article *The Intellectual Origins of the Establishment Clause*.⁶ While Feldman is particularly persuasive, he is hardly alone in recognizing the importance that many of the Constitution's principal framers and advocates placed on the rights of conscience.⁷ It seems fairly clear to most observers that the constitutional language embodied at least some of the rich

⁶ Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002).

⁷ See generally, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, (1996).

heritage of theological and philosophical thought that had absorbed Europe in the centuries leading up to American colonization.⁸

If we believe Feldman, both James Madison and Thomas Jefferson inherited an intellectual tradition that traces its lineage from Thomas Aquinas, through Martin Luther, John Calvin, William Perkins, Roger Williams and the dissenting Baptists in New England, and on to John Locke.⁹ This tradition began with Aquinas's thoughts about individual human beings' innate ability to comprehend good and bad as reflected in the natural law,¹⁰ and would later form the basis for Luther's revolutionary defiance of Papal authority: "I am bound by the Scriptures I have quoted and my conscience is captive to the word of God. I cannot and I will not retract anything, since it is neither safe nor right to go against conscience."¹¹ Thus, it is with Luther, and Calvin immediately thereafter, that the definitively Protestant conception of an individual conscience that imposes duties upon us prior to any civil or ecclesiastical authority was born.¹²

It was through Calvin that the liberty of conscience made its way into the English Puritan world, and was then later carried on to New England.¹³ Indeed, despite their notorious intolerance in the New World, the Puritans included in the famous Westminster Confession a chapter entitled "Of Christian Liberty, and Liberty of Conscience,"¹⁴ which topic would be the source of a heated public dispute between Boston minister John Cotton and Rhode Island's Roger Williams.¹⁵ Williams accused Cotton of opposing the liberty of conscience. In reply Cotton claimed to have no problem with a conscience "rightly informed," but argued that civil authorities must step in to provide corrective

⁸ See Feldman, *supra* note 6, at 353–54.

⁹ *Id.* at 354–55, 362, 374–78.

¹⁰ ST. THOMAS AQUINAS, 1 *SUMMA THEOLOGICA*, pt. I-II, Q. 94, art. 1, at 1008 (Benziger Bros., Inc. ed. 1947) (1266–1273) ("Synderesis [conscience] is said to be the law of our mind, because it is a habit containing the precepts of the natural law, which are the first principles of human actions.").

¹¹ Feldman, *supra* note 6, at 358.

¹² See *id.* at 359–61.

¹³ *Id.* at 359.

¹⁴ WESTMINSTER ASSEMBLY, THE CONFESSIO OF FAITH, AND THE LARGER AND SHORTER CATECHISMS 31 (Majestic Printers, 1711) (1647).

¹⁵ Feldman, *supra* note 6, at 365.

punishment for those suffering from “erroneous” consciences.¹⁶ Williams, not surprisingly, found this to be a distinction without a difference, and argued instead for the kind of religious toleration that would form the backbone of Locke’s famous letter on religious freedom.¹⁷

Writing from de facto exile in Holland, Locke made the case that civil government enjoys very limited jurisdiction over the religious life of its subjects and certainly has no authority to “compel any one to his religion.”¹⁸ According to Locke’s reading of Scripture, God had never delegated such a power to the civil authority, and, as a consequence, must have retained in himself sole jurisdiction over matters of religion and faith.¹⁹ From this premise, Locke argued that a civil government that attempts to compel a subject against the dictates of conscience—that innate knowledge of natural law—actually enforces a kind of hypocrisy of action against belief, and in this way commits an affront against God.²⁰ Thus, Locke concluded that, even if the state could produce certain behavior or action in citizens, this “would not . . . help at all to the salvation of their souls,” and thus, “when all is done, they must be left to their own consciences.”²¹ And it was very much this Lockean conception of the liberty of conscience, filtered through a generation of Baptist and Congregationalist struggles in the northern colonies, that informed Madison’s and Jefferson’s views in post-revolutionary Virginia.²²

Jefferson began the Lockean thrust with his 1779 *Virginia Statute of Religious Freedom*, in which he made two interrelated arguments in support of the rights of conscience: (1) civil lawmakers are incompetent to evaluate religious truth; and (2) a true religion thrives without coercion.²³ Jefferson’s statute did

¹⁶ *Id.* at 365–66.

¹⁷ *Id.* at 366.

¹⁸ John Locke, *A Letter Concerning Toleration* (1689), reprinted in 35 GREAT BOOKS OF THE WESTERN WORLD 1, 3 (Charles L. Sherman ed., 1952).

¹⁹ *Id.*; accord Feldman, *supra* note 6, at 368.

²⁰ Locke, *supra* note 18; accord Ian Bartrum, *Paradise Lost: Good News, Charitable Choice, and the State of Religious Freedom*, 27 VT. L. REV. 177, 182 (2002).

²¹ Locke, *supra* note 18, at 4, 10.

²² Feldman, *supra* note 6, at 381–83.

²³ Thomas Jefferson, *The Virginia Statute of Religious Freedom* (1779), reprinted in THOMAS JEFFERSON: WORD FOR WORD 55, 55–57 (Maureen Harrison & Steve Gilbert eds., 1993).

not immediately pass the Virginia Assembly, however, and in 1784 Patrick Henry introduced his own legislation intended to remedy a perceived decay in public morality.²⁴ Henry sought statutory support for a program of religious assessments to pay Anglican teachers around the Commonwealth, and though Jefferson was on his way to Paris, Madison took up the flag and offered a principled objection to the bill.²⁵ In a hastily distributed pamphlet entitled *Memorial and Remonstrance Against Religious Assessments*, Madison undertook a vigorous defense of Jefferson's views.²⁶ In truth, Madison's approach was something of a scattershot broadside—he mustered any plausible argument he could against Henry's proposal—but the core of his objections recalled Locke's liberty of conscience: Civil jurisdiction is limited and does not touch the "conscience of every man," and state attempts at coercion amount to "an offence against God, not against man."²⁷ Ultimately, Madison's case was persuasive, and six years after its drafting, Jefferson's statute of religious freedom became law in the place of Henry's assessment bill.²⁸

It seems very likely indeed that these same ideas informed Madison's thinking as he drafted and defended the Free Exercise Clause as a member of the First Congress.²⁹ Though the precise record of congressional debate on the clause is quite limited, Madison did clearly say that he understood the language to prohibit Congress from "compel[ling] men to worship God in any manner contrary to their conscience."³⁰ This certainly seemed to be the hope of many concerned parties during the ratification

²⁴ Bartrum, *supra* note 20, at 186.

²⁵ See James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 7, 7–8 (Marvin Meyers ed., 1973) [hereinafter *MIND OF THE FOUNDER*].

²⁶ *Id.* at 8.

²⁷ Feldman, *supra* note 6, at 383–84 (internal quotation marks omitted) (quoting JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* (1785), reprinted in 8 *THE PAPERS OF JAMES MADISON* 300, 300 (Robert A. Rutland & William M.E. Rachal eds., 1973)).

²⁸ See *MIND OF THE FOUNDER*, *supra* note 25, at 8.

²⁹ The Establishment Clause is another matter entirely. For a persuasive account of that clause's original import, see AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 42–45 (1998).

³⁰ House of Representatives, *Amendments to the Constitution* (Aug. 15, 1789) (comments of Madison), reprinted in 5 *THE FOUNDERS' CONSTITUTION* 92, 93 (Philip B. Kurland & Ralph Lerner eds., 1987).

debates that took place the preceding year.³¹ The Virginia Ratifying Convention thus proposed an amendment to protect “the free exercise of religion according to the dictates of conscience,”³² and during the North Carolina debates Henry Abbot expressed his concern that the proposed Constitution did not guarantee citizens “the privilege of worshipping God according to their consciences.”³³ In short, the Free Exercise Clause that the ratifying states demanded, and which Madison intended to provide, was one grounded in the intellectual tradition that had grown up around the liberty of conscience.

These same sentiments characterize the ratification debates surrounding the Test Oath Clause, which prohibits any religious test for federal office, included in Article VI of the original text.³⁴ Again, the material on the actual drafting of the clause is limited: It was added with very little debate near the end of the convention at Madison’s urging—with some slight modification by Charles Pinkney and Gouverneur Morris³⁵—and the only brief objection came from Roger Sherman, who thought it unnecessary given the “prevailing liberality” of the times.³⁶ But, as with the Free Exercise Clause, the intellectual motivations are made clearer in the ratification debates. Oliver Ellsworth probably shed the most light on the question in Connecticut, where the established congregationalists saw the Test Oath Clause as a concession to the dissenting Baptists, and thus worried that the language was hostile to organized religion.³⁷ Ellsworth argued that, on the contrary, the clause was meant to “exclude persecution, and to secure to you the important right of religious liberty,” a liberty which he defined as every man’s “right to worship God in that way which is most agreeable to his

³¹ See generally Virginia Ratifying Convention, *Proposed Amendments* (June 27, 1788), reprinted in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 30, at 89, 89; *Debate in North Carolina Ratifying Convention* (July 30, 1788) (cmts. of Henry Abbot), reprinted in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 30, at 89, 89.

³² Virginia Ratifying Convention, *supra* note 31.

³³ *Debate in North Carolina Ratifying Convention*, *supra* note 31.

³⁴ U.S. CONST. art. VI.

³⁵ *Madison’s Notes* (Aug. 30, 1787), reprinted in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 475, 461 (Max Farrand ed., 1911).

³⁶ *Id.* at 468.

³⁷ Oliver Ellsworth, *Landholder No. 7* (Dec. 17, 1787), reprinted in 4 THE FOUNDERS’ CONSTITUTION 639, 640–41 (Phillip B. Kurland & Ralph Lerner eds., 1987).

conscience.”³⁸ Ellsworth in Connecticut was not alone: Tench Coxe in Pennsylvania argued that with the clause, the government had “divested itself of a power, every exercise of which is a trespass on the Majesty of Heaven,”³⁹ and Reverend Samuel Payson told the Massachusetts ratifying convention that “human tribunals for the consciences of men are impious encroachments upon the prerogatives of God.”⁴⁰ It seems then that the same protection of conscience which the Free Exercise Clause promised to citizens in 1789, the Test Oath Clause had already extended to federal legislators in 1787.

Once we have established that these provisions of the constitutional text came into being to protect individual conscience and the duties it imposes against the coercive power of the state, it is not too great a leap to conclude that the text must also protect our right to deliberate and cast votes for paradigmatically nonpublic kinds of reasons. It is, after all, in matters of great political controversy and import that this protection may be most needed, and it seems to be precisely the problem of enforced heterodoxy or conformity that the constitutional text is intended to combat. It is true, of course, that if wielded in certain ways—for what Kent Greenawalt has called “imposition” kinds of nonpublic reasons⁴¹—the power of the vote may in fact work to burden others’ rights of conscience. But it may very well be that this is the very evil that the Establishment Clause—at least the substantive version we have come to know through the Fourteenth Amendment—aims to prevent. That is, the Free Exercise and Test Oath Clauses exist in a kind of dialectic tension with the Establishment Clause: The former clauses guarantee citizens and legislators the right to vote with their consciences, while the latter clause ensures that truly “imposition” kinds of policies cannot have the force of law. At the core of this dialectic, however, remains the

³⁸ *Id.* at 639.

³⁹ Tench Coxe, *An Examination of the Constitution* (1787), reprinted in 4 THE FOUNDERS’ CONSTITUTION, *supra* note 37, at 639, 639.

⁴⁰ *Debate in the Massachusetts Ratifying Convention* (Jan. 30, 1788) (cmts. of Mr. Payson), reprinted in 4 THE FOUNDERS’ CONSTITUTION, *supra* note 37, at 642, 643.

⁴¹ PUBLIC CONSCIENCES, *supra* note 4, at 57. Greenawalt opposes uses of nonpublic reasoning that “impose” burdens on *other’s* freedom of conscience and/or exercise. He contrasts this with nonpublic reasoning that imposes burdens only on the reasoner herself.

same fundamental constitutional purpose: We should protect individual conscience against state intrusion precisely because it is a source of nonpublic reasons—reasons that we cannot hope to protect through the public political process—and because conscience imposes deontological duties upon us with which the just state should not interfere.

II. THE “DUTY” OF CIVILITY AND POLITICAL PARADIGM SHIFT

It is, perhaps, because the constitutional protections provided to religious reasoning seem so deeply rooted in deontology that Rawls styles his objection to nonpublic reasons in political discourse as grounded in a “duty of civility.”⁴² Indeed, Rawls expressly argues that this duty imposes “a moral, not a legal” obligation on us,⁴³ and he locates the very idea of “public reasons” in the Kantian tradition.⁴⁴ With this in mind, it is clear that Rawls at least claims to justify his proposed exclusion of nonpublic reasoning on deontological grounds; that is, he frames his argument so as to present an obligation that can compete with—and perhaps exclude—other kinds of obligations, including those imposed by religion or conscience. A slightly deeper look at Rawls’s—at least original—account, however, suggests that his underlying worries about the place of nonpublic reasons in political discourse are actually concerns about consequences. This becomes clearer when we explore the *role* that public reasoning is supposed to play in bringing about the “[i]deal of [d]emocratic [c]itizenship.”⁴⁵

Rawls’s ideal citizen exists within an inherited social structure, and understands the just exercise of political power as the collective will of free and equal citizens.⁴⁶ With these considerations in mind, Rawls contends that the ideal citizen will recognize certain “legitimate” grounds for the exercise of coercive political power.⁴⁷ He claims these grounds are those “which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and

⁴² RAWLS, *supra* note 1.

⁴³ *Id.*

⁴⁴ *Id.* at 213 & n.2.

⁴⁵ *Id.* at 216.

⁴⁶ *Id.*

⁴⁷ *Id.* at 216–17.

rational.”⁴⁸ Thus, as it is “reasonable[ness] and rational[ity]” that give rise to political legitimacy, the “ideal” obligates a citizen to advocate only those exercises of power she can explain in terms of public reasons.⁴⁹ Significantly, while the ideal may impose upon us a duty not to coerce people irrationally, it is not clear that this duty carries through and obligates us to base our political arguments or votes on public reasons. Rather, it is only because Rawls believes that the right kinds of arguments and deliberations—those based in public reasoning—are *most likely to produce* rational—and thus legitimate—exercises of coercion that he would exclude nonpublic reasons from the debate.⁵⁰ It might, in fact, be true that the injection of unreasonable and irrational arguments into political discourse ends up producing a quite reasonable and rational instantiation of political power, and if this were the case then the nonpublic reasoner would have fulfilled her obligation to the democratic ideal. But to Rawls this seems unlikely, and so it is the probable *consequence* of nonpublic reasoning—its tendency to produce irrational, and thus illegitimate, laws—that principally concerns him.⁵¹

Upon close examination, then, we should understand Rawls’s objection to nonpublic reasoning itself as grounded in consequentialism. Essentially, his claim is that nonpublic reasons are likely to produce the wrong kind of political debate—one that results in acts of illegitimate political coercion. At this point, this may seem unnecessarily formalistic or to be splitting hairs—why should we care if his account is deontological or consequentialist at root? There is actually a good reason to care in this case: If we want to confront Rawls’s claim on its own merits and in terms of its own justifications, we need to be clear about what those merits and justifications are. Here, as those justifications are consequentialist in nature, it is necessary to provide a competing consequentialist account; an account that suggests that nonpublic reasoning in public discourse may sometimes promote the kinds of political decision making that produce the best, or most ideal, democratic results. And, even if this is not true *most* of the time, the effect of nonpublic reasoning

⁴⁸ *Id.* at 217.

⁴⁹ *Id.*

⁵⁰ *Id.* at 215–16.

⁵¹ *Id.* at 221–22.

may be so valuable on those occasions when it does produce good results that we are willing to protect its place in all political discourse.

The competing account this Article offers draws on two scientific analogies, and, as with most analogies, it is imperfect. Nonetheless, these analogies remain useful and productive, and hopefully the reader will treat them charitably. The first analogy is to Thomas Kuhn's theoretical account of scientific revolutions rooted in instances of "paradigm change."⁵²

A Kuhnian "paradigm change" is a revolutionary moment in scientific progress where some insight changes the entire focus and object of scientific inquiry in a particular field.⁵³ Typically, such an insight follows on the heels of an increase in anomalous empirical observations: Instances where the accepted theoretical paradigm cannot predict or explain a particular set of data.⁵⁴ As these anomalies continue to mount, the existing paradigm strains to provide a consistent account of the problematic data, and eventually the paradigm itself crumbles in the light of a fundamental insight that allows for a more comprehensive and coherent explanation of the observations.⁵⁵ There are many examples of such revolutionary moments, but perhaps the most illustrative is the shift from a Ptolemaic, geocentric paradigm of the solar system to the Copernican heliocentric model. For years, astronomers tacked increasingly complex and convoluted addenda onto Ptolemy's basic structure in order to explain anomalous observations such as planetary retrograde; but eventually the Copernican model—which could account for the anomalies quite simply—won over the scientific community.⁵⁶ The blinding insight, of course, was simply to move the sun to the center of the system.

For the purposes of this Article, the important point about these kinds of insights is that they are not available or explainable within the existing paradigm of scientific thought—

⁵² See generally THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 52–53 (3d ed. 1996).

⁵³ See generally *id.* at 92–97.

⁵⁴ *Id.* at 52.

⁵⁵ *Id.*

⁵⁶ RICHARD TARNAS, *THE PASSION OF THE WESTERN MIND: UNDERSTANDING THE IDEAS THAT HAVE SHAPED OUR WORLD* 248–51 (First Ballantine Books ed. 1993) (1991).

they require a thorough recalibration of fundamental premises.⁵⁷ Indeed, in comparing paradigm changing insights to political revolutions, Kuhn observes, "Though revolutions have had a vital role in the evolution of political institutions, that role *depends* upon their being partially extrapolitical or extrainstitutional events."⁵⁸ Put simply, a paradigm changing insight is, by definition, not fully explainable within the structures of the existing paradigm. To analogize this thought to our examination of nonpublic reasons, consider that a "duty of civility," which requires us to deliberate and vote only in terms of publicly accessible, "overlapping consensus" kinds of reasons, works to suppress and subvert the possibility of "paradigm change" kinds of moments in political science.⁵⁹ This is so because it may be that a political position is not explainable in terms of existing public values and rationales precisely because those values and rationales are, in some important way, wrong.

Concededly, if values and rationales are widely held, they are likely to be right—of course, we might at one time have said the same thing of Ptolemy's model of the solar system. But they might not be—in which case dissenters will need to reach for something transcendental on which to base their arguments. Think, for example, of South Africa, or the American south, and racial slavery or segregation. The existing public reasons in those communities were a matter of some debate, but at least the dominant kinds of reasons appeared to justify racially discriminatory sorts of practices. It was only by reaching outside of those communities—to world opinion, to northern liberal opinion, or, indeed, in many cases to religious principles—that people within those systems could ground their arguments against the existing value structures. Like a scientific paradigm change, which cannot be justified within the existing paradigm, deep political innovation sometimes requires a recalibration of fundamental assumptions and principles. And while it may well be true that the majority—perhaps even the vast majority—of nonpublic reasons for political advocacy will *not* be productive, paradigm changing kinds of insights, these insights are so

⁵⁷ See generally KUHN, *supra* note 52, at 92–94.

⁵⁸ *Id.* at 93–94 (emphasis added).

⁵⁹ For the concept of "overlapping consensus," see RAWLS, *supra* note 1, at 133.

important and valuable when they do come along that we should always provide a structural place for nonpublic reasoning at the political table.

The second, shorter, analogy is to the theory of natural selection and its role in the evolution of species. In this analogy, nonpublic reasoning fulfills something like the function that “mutation” does in Darwin’s model. Mutation, recall, is the engine of design change that drives the selection process forward.⁶⁰ Without some, at least small, leaps forward in biological design—leaps that occur for no reason readily explainable in terms of the existing biological system—there would be no significant design differences for nature to select among. There would be only the status quo.

But it is also worth remembering Niles Eldredge and Stephen Jay Gould’s important contributions to our understanding of this process.⁶¹ Their landmark paper—which supplants the traditional model of “phyletic gradualism” with a theory of “punctuated equilibria”—pointed out that Darwin viewed the actual fossil record of species “more as an embarrassment than as an aid to his theory.”⁶² This is because Darwin’s theory suggested that there should be “infinitely numerous transitional links” that would show the slow, steady, and gradual process of biological evolution—but the fossil record actually reveals long periods of evolutionary stasis, or “morphologic stability,” when very limited adaptation seems to have occurred.⁶³ Indeed, rather than a steady, gradual process, the evidence seems to indicate that biological change happens in spurts; what Eldredge and Gould called periods of “punctuated equilibria.”⁶⁴ While Darwin tried to explain this phenomenon away as the product of an incomplete evidentiary record,⁶⁵ Eldredge and Gould theorized that, although mutations are happening all the time, true biological evolution occurs only

⁶⁰ Ruth Hershberg & Dmitri A. Petrov, *Evidence that Mutation Is Universally Biased Towards AT in Bacteria*, PLOS GENETICS, Sept. 2010, at 1, available at <http://petrov.stanford.edu/pdfs/73.pdf>.

⁶¹ See generally Niles Eldredge & Stephen Jay Gould, *Punctuated Equilibria: An Alternative to Phyletic Gradualism*, reprinted in MODELS IN PALEOBIOLOGY 82, 82–115 (T.J.M. Schopf ed., 1972).

⁶² *Id.* at 87.

⁶³ See *id.* at 110.

⁶⁴ *Id.*

⁶⁵ *Id.* at 87.

when there is some change in a local *environment* that happens to benefit a particular change in biological design.⁶⁶ Thus, the periods of punctuated equilibria—those characterized by rapid and prevalent evolutionary change⁶⁷—are precipitated by changes in the environment with which the ever-present process of mutation may or may not correspond.

The theory of punctuated equilibria is important to the analogy for this reason: it is probably true that the vast majority of mutations—in this analogy, the vast majority of nonpublic reasons for voting—will not match up with a particular change in the democratic environment. Thus, these mutations will not be selected for, and will wither away as do unproductive biological mutations. But some mutations—again, some nonpublic reasons—*will* actually match up with nascent changes in the democratic environment in ways that the status quo—existing public reasons—could not have done. It is as a result of these mutations that a democracy can reach a state of equilibrium that best reflects the actual liberal democratic environment—the collective will of free and equal citizens—it is meant to represent. By the same mechanism, we are protected against the commonplace, counterproductive nonpublic reasons that might otherwise threaten democratic stability. In a *Federalist 10* meets *Origin of Species* kind of way, then, our greatest hope for meaningful freedom *and* political stability lies in our willingness to give a wide diversity of views a voice in a pluralist political structure.

Hopefully these analogies offer at least some reason to think that giving nonpublic reasons a place in our political discourse may actually produce good consequences of the kind that move us closer to an “ideal” democratic state. It may, in fact, be true that nonpublic reasons are most valuable in political discourse when they force us to revise and refine our public reasoning so that it better reflects what we believe are its idealistic goals. Nonpublic reasoning’s main value, that is, may be as a foil—a devil’s advocate—that helps us better understand the public values and overlapping consensus we envision. A truly compelling evaluation of this account will, of course, require real empirical evidence; that is, after all, the proper method by which to

⁶⁶ See *id.* at 94–95 (“[S]election always maintains an equilibrium between populations and their local environment.”).

⁶⁷ *Id.* at 84.

evaluate competing consequentialist claims. At this time, however, all this Article can offer is anecdotal evidence; it does so below with a very brief account of the controversy over Catholic schooling that took place in New York City in the early 1840s.

III. THE NEW YORK CITY SCHOOL CONTROVERSY

The roots of the Catholic school controversy in New York City actually stretch back well before the 1840s, to the beginnings of the “common school” movement in New England and the northeastern states.⁶⁸ That movement, which aimed to provide education for all, not just poor, children in the same state-funded classrooms, also hoped to use schooling as a vehicle by which to ease social tensions and promote a common sense of purpose and identity.⁶⁹ The common school movement began in New York City in 1805, when nearly one hundred of the “best elements of the old English, Dutch, and other families” petitioned the state legislature for incorporation of what they called the “Free School Society.”⁷⁰ By 1813, the Society was receiving New York City’s portion of the funds that the state legislature had allocated for education. In 1826 the group changed its name to the New York Public School Society (the “Society”) and took nearly sole responsibility for public education in the city.⁷¹

After 1824, the state school funding statute expressly provided that no public money would go to support sectarian religious organizations—but the term “sectarian” was widely understood as referring only to the practices of specific religious denominations.⁷² By contrast, the Society operated its schools on a nonsectarian basis, which meant its teachers promoted generic Protestant values, and encouraged general readings from the King James Bible and the Book of Common Prayer.⁷³ While the Society saw “nonsectarianism” as religiously neutral, the policy plainly did not serve the interests of a growing Catholic

⁶⁸ Much of the material, and some of the language, in this section appeared originally in Ian Bartrum, *The Political Origins of Secular Public Education: The New York School Controversy, 1840–1842*, 3 N.Y.U. J. L. & L. 267 (2008).

⁶⁹ *Id.* at 281.

⁷⁰ THOMAS BOESE, PUBLIC EDUCATION IN THE CITY OF NEW YORK: ITS HISTORY, CONDITION, AND STATISTICS 26 (1869).

⁷¹ Bartrum, *supra* note 68, at 288, 291.

⁷² *Id.* at 283.

⁷³ *Id.* at 285.

minority.⁷⁴ Indeed, an 1829 Pastoral Letter suggested that, in the common schools, “the school-boy can scarcely find a book in which some one or more of our institutions or practices is not exhibited far otherwise than it really is, and greatly to our disadvantage: the entire system of education is thus tinged throughout its whole course.”⁷⁵ The influx of Catholic immigrants continued, however, and in 1839 Governor William Seward recognized that the Society’s religious biases were alienating an unacceptable number of the city’s children.⁷⁶ He therefore recommended that the legislature establish “schools in which [Catholics] may be instructed by teachers speaking the same language with themselves, and professing the same faith.”⁷⁷

New York City Catholics, under the leadership of Bishop John Hughes, quickly seized the political opportunity to petition the city’s Common Council (the “Council”) for a share of the state education funds.⁷⁸ The Society vigorously opposed the Catholic petition, and, not surprisingly, the Council rejected the application.⁷⁹ Undaunted, Bishop Hughes presented the Council with a second petition, this time detailing the Catholics’ specific objections to the Society’s Protestant readings and practices.⁸⁰ After a widely publicized two-day debate between Hughes and the Society’s lawyers—during which vast crowds choked the rooms and corridors of City Hall—the Council again rejected the Catholic petition.⁸¹ But Bishop Hughes remained hopeful, and told his congregation “we have an appeal to a higher power than the Common Council—to the Legislature of the State [A]nd

⁷⁴ *Id.* at 284–85.

⁷⁵ First Provincial Council of Baltimore, *Pastoral Letter to the Laity* (Oct. 17, 1829), reprinted in PETER GUILDAY, *THE NATIONAL PASTORALS OF THE AMERICAN HIERARCHY* (1792–1919) 19, 28 (1954).

⁷⁶ Bartrum, *supra* note 68, at 297–99.

⁷⁷ William Seward, *Annual Message to the Legislature* (1840), reprinted in *THE LIFE OF WILLIAM H. SEWARD WITH SELECTIONS FROM HIS WORKS* 212, 212–13 (George Baker ed., 1855).

⁷⁸ Bartrum, *supra* note 68, at 299.

⁷⁹ *Id.* at 301.

⁸⁰ *Id.* at 303.

⁸¹ *Id.* at 303–05.

though a whole Board should be found to bend the knee to the Baal of bigotry, men will be found who can stand unawed in its presence”⁸²

After Secretary of State John Spencer issued a scathing report based on his study of the New York City public schools, the State Assembly took up a reform bill entitled “An Act to Extend the Benefits of Common School Education in the City of New York.”⁸³ But the Society still had enough political muscle to get the bill tabled for the remainder of the 1841 session, which development distressed Hughes enough that he decided to take direct political action.⁸⁴ During the postponement, a statewide election was held in which the city’s two senate and thirteen assembly seats were up for grabs.⁸⁵ At a meeting just days before the election, Hughes presented Catholics with his own hand-picked slate of acceptable candidates—a slate that opponents would derisively label the “Church and State Party”—and exhorted an excited crowd:

You have often voted for others and they did not vote for you, but now you are determined to uphold with your own votes your own rights. Will you then stand by the rights of your offspring, who have so long suffered under the operation of this injurious system?

[Loud cheering] Will you adhere to the nomination made?

We will! We will!

Will you be united?

[Standing ovation]

Will you let all men see that you are worthy sons of the nation to which you belong?

Never fear—we will! We will till death!

Will you prove yourselves worthy of friends?

[Loud cheering]

Will none of you flinch?

[Indescribable excitement].⁸⁶

⁸² John Hughes, Address to a Meeting in Washington Hall (Feb. 11, 1841), reprinted in 1 COMPLETE WORKS OF JOHN HUGHES, 242, 244–45 (Lawrence Kehoe ed., 1866).

⁸³ Bartrum, *supra* note 68, at 310–13.

⁸⁴ *Id.* at 313–15.

⁸⁵ *Id.* at 313–14.

⁸⁶ JOHN R. G. HASSARD, LIFE OF THE MOST REVEREND JOHN HUGHES, D. D., FIRST ARCHBISHOP OF NEW YORK 245 (1866).

Hughes would never quite live down his political maneuvering on this day. Indeed, it earned him the nickname "the political bishop" from New York Herald editor James Gordon Bennett. But, the prospect of a unified Catholic vote struck fear in the hearts of the city democrats, and ultimately shaped the debate to come in Albany.⁸⁷

Although the state legislature eventually passed a law centralizing education administration in the city—thus bringing down the Society—it was in many ways a hollow victory for the Catholics.⁸⁸ Despite John Spencer's recommendation that the state set up localized community school districts that could decide for themselves what religious messages they wanted in particular classrooms, the final law expressly banned "sectarian" teaching in public schools.⁸⁹ As a result, Catholics would still have to surrender their children to Protestant nonsectarian schools, and eventually nonsectarianism would give way to secularism.⁹⁰ Hughes would spend his later years lamenting public education's descent into "godlessness," and, after the Civil War, the American Catholic Hierarchy began to make plans for a comprehensive network of independent, privately-funded Catholic schools.⁹¹ It is thus the perhaps ironic legacy of "the political bishop" and his "Church and State Party" that they were unwitting allies in the coming movement to drive religion entirely out of public schooling. As Vincent Lannie has observed:

As a result [of the school controversy], many Catholic authors have honored Hughes as the father of Catholic education in America. If this be so, then it is paradoxical that the father of American Catholic education should also have acted as the catalyst in the eventual secularization of American public education.⁹²

But the preservation of nonsectarianism was a temporary victory for the Protestants, too. Though they had succeeded in defeating Catholic hopes for public school money, their arguments about the need for religious neutrality would

⁸⁷ Bartrum, *supra* note 68, at 314 & n.271, 315.

⁸⁸ *Id.* at 318–19.

⁸⁹ *Id.* at 317.

⁹⁰ *Id.* at 319.

⁹¹ *Id.*

⁹² VINCENT P. LANNIE, PUBLIC MONEY AND PAROCHIAL EDUCATION: BISHOP HUGHES, GOVERNOR SEWARD, AND THE NEW YORK SCHOOL CONTROVERSY 258 (1968).

eventually prove too much. The same arguments that excluded Catholic educational practices would eventually exclude the King James Bible and the Book of Common Prayer as well, and so it may be interesting to realize that those Protestant communities that complain most aggressively about secular schools today are, in a historical sense, hoist on their own petard.⁹³

And so, even though it took time to reach fruition, the injection of nonpublic reasons into both sides of the political debate over the New York City schools would eventually bring us greater clarity about the ways that our educational system should reflect our democratic ideals. The threat of a unified Catholic vote was a shock to the state political system; one that forced both sides of the debate to recognize and take responsibility for an evolving conception of religious freedom and neutrality.⁹⁴ Indeed, it was in building and refining a set of public reasons to oppose the Catholic petitions that the Protestant majority began to identify and construct the values and rationales that would ultimately lead to secular public education on a nationwide basis. In this sense, the “Church and State Party” provided the kind of jolt—the political mutation or anomaly—that would eventually lead to a paradigm changing political insight. And in this way, hopefully the New York City school controversy provides a useful example of a circumstance in which nonpublic reasoning played a critical role in producing political results that we might believe are a better reflection of our American democratic ideals.

CONCLUSION

This Article argues that John Rawls’s so-called “duty of civility,” which obligates us to deliberate and cast our votes for “public reasons,” probably is framed in deontological language because it is intended to compete with the other deontological kinds of reasons—religious duties—that seem to support the constitutional protection of free religious exercise. Despite the styling, however, Rawls’s argument for excluding nonpublic reasons from political discourse actually sounds in consequentialism; essentially he believes that allowing only public

⁹³ Bartrum, *supra* note 68, at 320.

⁹⁴ *Id.* at 320–21.

reasons to enter our political deliberations is the best way to produce rational, and thus legitimate, exercises of democratic political authority. When we recognize that Rawls's argument on this point is actually consequentialist in nature, it becomes necessary to challenge his account on its own grounds—with a competing consequentialist account.

This Article suggests that nonpublic reasons can provide the kind of fundamental ideological diversity necessary to catalyze moments of deep political innovation. In making this argument, this Article draws two imperfect analogies to the world of science. The first is to Thomas Kuhn's conception of scientific revolutions grounded in paradigm changing insights. These insights are not available within the existing paradigms of scientific inquiry, and thus depend upon a fundamental reordering of scientific norms. Nonpublic reasons may serve this purpose in political science, and we should therefore protect their place in our discussions precisely because they represent ideas that we could not explain in terms of the existing paradigm of political values. The second analogy is to the theory of natural selection and punctuated equilibria. Nonpublic reasons may also act in the way that "mutations" do in the evolution of species. That is, they can provide nonlinear kinds of change, which an evolving environment may select for or against. Because these "mutations" only manage to produce real adaptations when such changes suit the shifting democratic environment, the danger they present to political stability is minimal. When such a mutation *does* match up with an important change in environment, however, its value is so great that we need to account for and protect its place in our political discourse at all times.

Finally, this Article presents the New York City Catholic school controversy as a historical and anecdotal illustration of a productive interaction between public and nonpublic reasoning. The injection of nonpublic reasons into the debate over public education in the 1840s presented such a shock to the political system that it forced us to refine and reconstruct the kinds of public reasoning that might bring us closer to our democratic ideals. It was, in other words, in coming to terms with the nonpublic reasons forwarded in the Catholic school debate that we began to recognize the ways that our existing political value structure was out of line with our larger ideals. And, if we are

going to argue in consequentialist terms, this is precisely why we should protect and value nonpublic reasons in our political discourse. They can bring about moments of real political honesty and inspire the kind of deep democratic creativity that may bring our overlapping consensus of political values into closer focus. Most importantly, they may inspire conversations that ultimately bring our political realities into better alignment with our democratic ideals.