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ARTICLES

GOOD CATHOLICS SHOULD BE RAWLSIAN LIBERALS

LESLIE GRIFFIN*

John Rawls's *Political Liberalism* promises to be as important to law and political theory as was his previous work, *A Theory of Justice*. *Political Liberalism* is also an important book about religion. As part of his analysis of politics, Rawls examines the role of religion in the liberal state. While some readers have praised certain aspects of Rawls's account of religion, he has to date received extensive criticism of it. A major concern has been that Rawlsian liberalism is too "secular," too "exclusive," and not sufficiently "inclusive" of religious opinions and commitments.

Rawls's position—and the criticisms of it—are reminiscent of the complaints made about John Courtney Murray's writings in the 1940s and 1950s. Murray was the American Jesuit whose arguments justified American Catholic support of the First Amendment. His articles on church and state eventually prompted the Roman Catholic Church to change its official teaching on religious liberty. This occurred, however, only after years in which, under orders from Rome, Murray stopped publishing articles about church-state theory because they contradicted Catholic faith. Murray's writings are now enjoying a renaissance among Catholic scholars who are struggling with the difficult church-state questions of our era. However, many of them have forgotten or abandoned a central insight of Murray, shared by John Rawls, that political and legal discourse and decision-making should

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be conducted according to norms accessible to all citizens, i.e., according to “natural law” or “public reason.” This “retreat from Murray” among theologians parallels a trend in the legal academy, where, e.g., Stephen Carter and the Catholic Michael Perry (who begins his book on religion and law with a quotation from Murray) oppose the “trivialization” or “bracketing” of religion. They strive for more inclusion of religion in law and politics, with implicit and sometimes explicit criticism of the Rawlsian framework.

In this Article I defend the Rawlsian account of religion’s role in law and politics. In Part I, I examine Rawls’s account of religion and identify the features of Rawlsian religion that appear objectionable to adherents of religion. Part II examines Murray’s thought and notes the similarities between Rawls’s and Murray’s attempts to resolve the problem of pluralism. There are continuities, e.g., between Murray’s “natural law” theory and Rawls’s account of “public reason.” In addition, both Murray and Rawls recognize the independence of law and politics from certain religious arguments. In Part III I analyze what I have labeled the “retreat from Murray.” This section examines the dissatisfaction among some writers with Murray’s public philosophy framework. Among these critics I focus on Michael Perry, who in *Love and Power* claims to follow in the tradition of Murray at the same time that he rejects Rawls’s “neutralist” account of politics. I argue that Perry’s “ecumenical political dialogue,” as well as the “inclusivist” view of religion he adopts post-*Love and Power*, are inadequate accounts of the relationship of religion to law and politics. Politics and law are better served by the autonomy of law and politics from religion that Rawls and Murray propose.

I. RAWLS ON RELIGION

A. COMPREHENSIVE DOCTRINES

To some extent, religion is the source of Rawls’s project; the “historical origin of political liberalism . . . is the Reformation and its aftermath.”¹ After the Reformation (and in contrast to the ancient world), deep and irreconcilable differences in religious belief occur. “Political liberalism starts by taking to heart the absolute depth of that irreconcilable latent conflict.”²

1. JOHN RAWLS, *POLITICAL LIBERALISM* xxiv (1993) [hereinafter *POLITICAL LIBERALISM*].

2. *Id.* at xxvi.

Rawls's account of religion emerges in his discussion of comprehensive doctrines. In his classic *A Theory of Justice*, Rawls had argued that "[a]n essential feature of a well-ordered society associated with justice as fairness is that all its citizens endorse this conception on the basis of . . . a comprehensive philosophical doctrine."³ In *Political Liberalism*, Rawls states that this account of justice is "unrealistic"⁴ and encounters a "serious problem."⁵ "A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines."⁶ Moreover, "[n]ot all reasonable comprehensive doctrines are liberal."⁷ *Political Liberalism's* theory of political justice is no longer based on a comprehensive liberal philosophical doctrine.⁸

Rawls poses the "philosophical question" of political liberalism more sharply in the new introduction to the paper edition, and his question focuses on the subject of religion. "[C]onflicting comprehensive liberalisms such as those of Kant and Mill" do not pose the fundamental philosophical problem.

Thus the question should be more sharply put this way: How is it possible for those affirming a religious doctrine that is based on religious authority, for example, the church or the Bible, also to hold a reasonable political conception that supports a just democratic regime? The point is that not all reasonable comprehensive doctrines are liberal comprehensive doctrines; so the question is whether they can still be compatible for the right reasons with a liberal political conception?⁹

3. *Id.* at xvi. In the Introduction to the Paper Edition of *POLITICAL LIBERALISM*, Rawls states that *A THEORY OF JUSTICE* relied on the premise "that in the well-ordered society of justice as fairness, citizens hold the same comprehensive doctrine, and this includes aspects of Kant's comprehensive liberalism." JOHN RAWLS, *POLITICAL LIBERALISM* xlii (paper ed. 1996) [hereinafter *POLITICAL LIBERALISM, PAPER ED.*].

4. *POLITICAL LIBERALISM, supra* note 1, at xvii.

5. *Id.* at xvi.

6. *Id.* at xvi.

7. *POLITICAL LIBERALISM, PAPER ED., supra* note 3, at xxxix.

8. See also John Rawls, *Reply to Habermas*, 92 J. PHIL. 109, 132, 135 (1995) ("Of the two main differences between Habermas's position and mine, the first is that his is comprehensive while mine is an account of the political and it is limited to that." "Habermas's position, on the other hand, is a comprehensive doctrine and covers many things far beyond political philosophy. Indeed, the aim of his theory of communicative action is to give a general account of meaning, reference, and truth or validity both for theoretical reason and for the several forms of practical reason. It rejects naturalism and emotivism in moral argument and aims to give a full defense of both theoretical and practical reason. Moreover, he often criticizes religious and metaphysical views.").

9. *POLITICAL LIBERALISM, PAPER ED., supra* note 3, at xxxix.

This "pluralism of incompatible yet reasonable comprehensive doctrines" is the starting point of *Political Liberalism*, the central problem with which Rawls wrestles. Problem may be the wrong word. Rawls does not describe this situation of pluralism as "evil," or as a "disaster," nor does he expect that one reasonable comprehensive doctrine will ever be affirmed by all citizens. Instead, "[p]olitical liberalism assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime."¹⁰ In a constitutional democracy, many comprehensive doctrines are "reasonable yet incompatible."¹¹ From this assumption Rawls develops an account of a "political conception of justice."¹²

The "burdens of judgment" help to explain why *reasonable* disagreement among persons remains, i.e., why even reason cannot resolve these disagreements.¹³ Rawls states that "[i]t is unrealistic—or worse, it arouses mutual suspicion and hostility—to suppose that all our differences are rooted solely in ignorance and perversity, or else in the rivalries for power, status, or economic gain."¹⁴ Instead, the burdens of judgment account for many of these differences. Those burdens of judgment include: conflicting evidence; disagreement about the weight of relevant considerations; the indeterminacy of all our concepts, an indeterminacy that requires judgment and interpretation; individuals who are shaped by their different experience; ways of weighing different normative concepts; and limited social space.¹⁵ These burdens contribute to the coexistence of "reasonable yet incompatible" doctrines.

10. *Id.* at xviii. See also *id.* at xxvi-xxvii ("[P]olitical liberalism assumes the fact of reasonable pluralism as a pluralism of comprehensive doctrines, including both religious and nonreligious doctrines. This pluralism is not seen as disaster but rather as the natural outcome of the activities of human reason under enduring free institutions. To see reasonable pluralism as a disaster is to see the exercise of reason under the conditions of freedom itself as a disaster."); *id.* at 36 ("[D]iversity . . . is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy. Under the political and social conditions secured by the basic rights and liberties of free institutions, a diversity of conflicting and irreconcilable—and what's more, reasonable—comprehensive doctrines will come about and persist if such diversity does not already obtain."); *id.* at 37 ("[T]he fact of reasonable pluralism is not an unfortunate condition of human life.").

11. *Id.* at xviii.

12. *Id.* at 44.

13. *POLITICAL LIBERALISM*, *supra* note 1, at 54.

14. *POLITICAL LIBERALISM*, *PAPER ED.*, *supra* note 3, at 58.

15. *Id.* at 56-57.

Religious views are obviously implicated in Rawls's project, as he acknowledges that some of the "main existing reasonable comprehensive doctrines . . . are religious."¹⁶ Even at this level, with a brief indication of Rawls's discussion of comprehensive doctrines, one glimpses why Rawls's proposal may be questioned by some religious believers. For example, a person who believes in the *truth* of her religion may not accept this pluralism of comprehensive doctrines. Believers who insist on the truth of their comprehensive doctrine may find Rawls unsatisfyingly agnostic on the subject of religious truth. Some religious believers, of course, agree with Rawls that there is a pluralism of comprehensive doctrines in liberal society. In this account, Rawls's description of society is not incorrect. However, they resist the next step of Rawls's argument, that this pluralism is "normal" and will not disappear. Some believers in the truth of their comprehensive doctrines will prefer to lead others to the truth, to overcome the pluralism of conflicting views, to fight conflicting comprehensive doctrines in order to achieve agreement on the truth. Others may attribute the pluralism to human sin, or to moral or religious failure, and so commit themselves to changing what Rawls accepts as the inevitable pluralism of our political life. Ecumenical religious believers may reject that type of truth, yet still seek an ecumenical comprehensive doctrine to resolve questions about justice. Rawls himself notes the difference between political liberalism and the theories of Plato, Aristotle, and the Christian tradition, which identified one comprehensive doctrine for all citizens.¹⁷

For critics, however, more unsatisfactory than Rawls's acceptance of pluralism are the implications of that pluralism. In a brief summary that encapsulates his project, Rawls identifies three features that characterize political liberalism in a constitutional democracy.

[T]hree conditions seem to be sufficient for society to be a fair and stable system of cooperation between free and equal citizens who are deeply divided by the reasonable comprehensive doctrines they affirm. First, the basic structure of society is regulated by a *political conception of justice*; second, this political conception is the focus of an *overlapping consensus* of reasonable comprehensive doctrines; and third, *public discussion*, when constitutional essentials and

16. POLITICAL LIBERALISM, *supra* note 1, at xviii.

17. *Id.* at 134 (Rawls characterizes the Christian view as one of "[s]uch views [that] hold that institutions are justifiable to the extent that they effectively promote that good.").

questions of basic justice are at stake, is conducted in terms of the political conception of justice.¹⁸

These three central features of political liberalism—the political conception of justice, the overlapping consensus, and public discussion (“public reason”)—are also the most important elements for readers who are interested in religion. Indeed, all three features have been criticized by authors who conclude that Rawls’s account of political liberalism is inadequate in its treatment of religion, inadequate in large part because it excludes too much religion from liberal society.

B. THE POLITICAL CONCEPTION OF JUSTICE

Rawls’s first condition for democratic society, then, is a political conception of justice that is not in itself a comprehensive doctrine. If pluralism of comprehensive doctrines is an abiding feature of our political landscape, then citizens must find a way to live within this pluralism. The pluralism will abide; we will not find a comprehensive doctrine of justice that all citizens can support. Such unity of doctrine among citizens will occur only if the state enforces it. “[A] continuing shared understanding on one comprehensive religious, philosophical, or moral doctrine can be maintained only by the oppressive use of state power.”¹⁹ As from the Middle Ages the Inquisition emerged to enforce unanimity, so coercion is necessary to maintain any society joined by a common comprehensive doctrine, whether philosophical or religious.²⁰ Rawls labels this need for force to enforce a common doctrine “the fact of oppression.”²¹

In a constitutional regime, then, there are two general facts of public culture: “the fact of reasonable pluralism and the fact that this diversity can be overcome only by the oppressive use of state power.”²² But in a constitutional democracy, it is not appropriate to

18. *Id.* at 44 (emphasis added).

19. *Id.* at 37.

20. Rawls states:

If we think of political society as a community united in affirming one and the same comprehensive doctrine, then the oppressive use of state power is necessary for political community. In the society of the Middle Ages, more or less united in affirming the Catholic faith, the Inquisition was not an accident; its suppression of heresy was needed to preserve that shared religious belief. The same holds, I believe, for any reasonable comprehensive philosophical and moral doctrine, whether religious or nonreligious. A society united on a reasonable form of utilitarianism, or on the reasonable liberalism of Kant or Mill, would likewise require the sanctions of state power to remain so.

Id.

21. *Id.* (citing Sanford Shieh).

22. *Id.* at 54.

use force in order to impose one's comprehensive world view on others who do not share that commitment. "[N]o comprehensive doctrine is appropriate as a political conception for a constitutional regime."²³ Constitutional regimes should not impose comprehensive world views by force.

And so a political conception of justice must be found that does not impose a comprehensive world view on others, and that is itself not comprehensive. Political justice is instead an independent "module" that can be plugged into numerous reasonable but competing comprehensive doctrines. This political conception of justice encounters some of the same challenges as Rawls's acceptance of a pluralism of comprehensive doctrines, namely that it ignores the *truth* (or *falsity*) of certain world views. The module (the "freestanding view") is problematic to comprehensive doctrines that require a *true* conception of justice. Rawls insists that political liberalism is primarily concerned with the *reasonable*, not the *true*.

[The] idea of the reasonable is more suitable as part of the basis of public justification for a constitutional regime than the idea of moral truth. Holding a political conception as true, and for that reason alone the one suitable basis of public reason, is exclusive, even sectarian, and so likely to foster political division.²⁴

Religious believers may insist that the true should trump the reasonable in politics and so strive to build a political order based on truth.

23. *Id.* at 135.

24. *Id.* at 129. But see Paul F. Campos, *Secular Fundamentalism*, 9 COLUM. L. REV. 1814, 1816, 1820 (1994) ("Rawls's analysis of political issues amounts to little more than the shamanistic incantation of the word 'reasonable.'"; "It seems that, for Rawls, 'reason' and 'reasonable' fill the lexical space that in many other discourses would be filled by 'God,' or 'the scriptures,' or 'moral insight.'"); Abner S. Greene, *Uncommon Ground*, 62 GEO. WASH. L. REV. 646, 650 (1994) (book review) ("By excluding sectarian views of the good from politics without acknowledging the ensuing legitimacy problem, Rawls denies, albeit implicitly, that such sectarian views might be true; this denial is consistent with comprehensive, not political, liberalism."); Daniel J. Gifford, *Interpersonal Distrust in the Modified Rawlsian Society*, 48 SMU L. REV. 217, 218 (1994) ("Rawls has unnecessarily confused his new framework and alienated many of his potential supporters by imbuing the definition of reasonableness with his own political preferences."); Joshua Cohen, *A More Democratic Liberalism*, 92 MICH. L. REV. 1503, 1537 (1994) (book review) (expressing general concern about the exclusionary definition of reasonable; "If, however, *reasonable* is defined independently from acceptance of the political conception—say, in terms of a willingness to entertain and respond to objections—then reasonable citizens will likely affirm reasonable views that reject the political conception."); Jean Hampton, *The Common Faith of Liberalism*, 75 PAC. PHIL. Q. 186, 210 (1994) ("However, there is no place in Rawls's book where the notion of the reasonable is given clear and precise definition. Such a vaguely defined notion will therefore be filled out by one's intuitions, and of course, intuitions can vary. When Rawls uses his intuitions to fill out the word, and then classifies some views as unreasonable, he will come into conflict with those whose intuitions on such matters are substantially different.").

But Rawls opposes the imposition of "true" comprehensive doctrines in a constitutional democracy: "it is vital to the idea of political liberalism that we may with perfect consistency hold that it would be unreasonable to use political power to enforce our own comprehensive view, which we must, of course, affirm as either reasonable or true."²⁵ Such consistency may be difficult for religious believers who do not find it unreasonable to enforce the truth.

The political conception of justice offers an additional problem for those who hold a religious world view as a comprehensive doctrine: Rawls does not derive or deduce the political conception of justice from any comprehensive world view.²⁶ This module may be troubling to philosophers as well as theologians who expect a conception of justice to be comprehensive or who insist that such justice must be derived from comprehensive world views.²⁷ Critics have suggested that Rawlsian political justice is in fact derived from the comprehensive doctrine of Kantianism. This may well be true, but this criticism need not change Rawls's theory. Rawls acknowledges that the political conception of justice *may be* derived from a number of competing comprehensive doctrines. The derivation does not matter as long as the political conception of justice is reasonable.²⁸ It is the derivation

25. But see Greene, *supra* note 24, at 669 ("An actual political liberal [in contrast to a comprehensive liberal] would, after arguing for a rule excluding certain arguments from politics, be concerned with the theoretical possibility that he has just silenced the truth."); Peter F. Lake, *Liberalism Within the Limits of the Reasonable Alone: Developments of John Rawls' Political Philosophy, Its Political Positivism, and the Limits on Its Applicability*, 19 VT. L. REV. 603, 608-09 (1995) ("I believe that much of Rawls' tendency to limitation and abstraction comes from his fear of the unreasonable and a skepticism about the possibility of the discovery of truth and the attainment of excellence in human form. Political liberalism, at least as Rawls conceives of it, fights the belief that we exist in a comprehensive, ordered universe and has adopted as its *raison d'être* the defense of the illusion of a place of safety (the domain of the political) as its alternative to the acceptance of truth.").

26. Although some citizens may in fact so derive it, see *infra* note 70. For the criticism that Rawls's theory is inadequate because "a person's perception of the relationship between political principles and his comprehensive view is itself a part of that person's comprehensive view," see generally Miriam Galston, *Rawlsian Dualism and the Autonomy of Political Thought*, 94 COLUM. L. REV. 1842, 1844 (1994).

27. Rawls himself addresses this criticism of the overlapping consensus in POLITICAL LIBERALISM, *supra* note 1, at 154-58. See also Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 CHI.-KENT L. REV. 619, 657 (1994) (analyzing the claim that "religious persons, or for that matter anyone who affirms a metaphysical or ethical doctrine, can only conduct their political deliberations by appealing to their comprehensive views").

28. See also Rawls, *supra* note 8, at 136 ("For in presenting a freestanding political conception and not going beyond that, it is left entirely open to citizens and associations in civil society to formulate their own ways of going beyond, or of going deeper, so as to make that political conception congruent with their comprehensive doctrines. Political liberalism never denies or questions these doctrines in any way, so long as they are politically reasonable.").

of the political conception of justice from the comprehensive doctrines of citizens that occurs in the overlapping consensus.

C. OVERLAPPING CONSENSUS

In the midst of disagreement, citizens require stability in their political lives, and so need a political conception of justice. In the presence of reasonable pluralism, the political conception of justice will be based on an overlapping consensus²⁹ among the citizens of the democracy. The consensus is overlapping because citizens can agree on the political conception even though they possess a variety of comprehensive doctrines. The overlapping consensus allows citizens to live together in a constitutional democracy. The overlapping consensus recalls the module;³⁰ it is one piece of citizens' comprehensive doctrines.

Rawls himself recognizes that this account of political life is controversial, and so identifies four objections to the overlapping consensus. Critics will argue that it is really a *modus vivendi*; that the concept implies indifference or skepticism about the truth; that a workable political conception must be comprehensive; and that it is utopian, either because it cannot be brought about or because it will not be stable if it exists.³¹ Rawls rebuts all four criticisms. I focus on the first two charges because they are important to religious critics of political liberalism.

Rawls insists that the overlapping consensus is not a *modus vivendi*,³² in part because "the object of consensus, the political conception of justice, is itself a moral conception. And second, the overlapping consensus is affirmed on moral grounds."³³ Stability—for the right reasons—turns out to be the important third element of the overlapping consensus that distinguishes it from the *modus vivendi*. Citizens in a *modus vivendi* compromise because they must. However, should circumstances change, they will renegotiate their settlement, usually in an attempt to improve their situation. If they acquire more power after the negotiation of the *modus vivendi*, they will push

29. POLITICAL LIBERALISM, *supra* note 1, at 126; *see generally id.* at 133-72.

30. *Id.* at 144.

31. *See generally* Lawrence E. Mitchell, *Trust and the Overlapping Consensus*, 94 COLUM. L. REV. 1918 (1994) (discussing argument that it is too difficult to get to a real overlapping consensus because of the disparity in comprehensive views).

32. POLITICAL LIBERALISM, *supra* note 1, at 147.

33. *Id.*

to improve their situation. Thus life in a *modus vivendi* may not be stable as power shifts and will never be stable for the right reasons.

Citizens in an overlapping consensus, however, value stability for the right reasons.

This means that those who affirm the various views supporting the political conception will not withdraw their support of it should the relative strength of their view in society increase and eventually become dominant. . . . [T]he political conception will still be supported regardless of shifts in the distribution of political power. Each view supports the political conception for its own sake, or on its own merits.³⁴

The overlapping consensus is a "moral conception" that is "affirmed on moral grounds"³⁵ and is of a different order from the *modus vivendi*. Thus citizens do not seek to change it when they gain more power.

Rawls employs a religious example to distinguish the overlapping consensus from the *modus vivendi*. For Catholics and Protestants in the sixteenth century, religious toleration was a *modus vivendi* because each group wanted to establish the true religion. If their power changed, then the *modus vivendi* would evaporate. But political justice in an overlapping consensus does not fluctuate with power. Political concepts should not be altered because one comprehensive doctrine gains more members. Once again, such a notion is controversial for those whose comprehensive doctrines mandate modifications in politics as power changes hands, or as the "truth" gains supporters. Consensus may be difficult for some comprehensive doctrines. It may also be difficult for some religious believers to prefer stability to truth.

Rawls's second criticism of the overlapping consensus echoes the truth criticisms noted above, with the specific concern that religious adherents are asked to follow the overlapping consensus "even when it is known not to be true."³⁶ Once again, truth is not Rawls's first

34. *Id.* at 148. "The test for this is whether the consensus is stable with respect to changes in the distribution of power among views. This feature of stability highlights a basic contrast between an overlapping consensus and a *modus vivendi*, the stability of which does depend on happenstance and a balance of relative forces." *Id.* at 48. *But see* Mitchell, *supra* note 31, at 1929 (Rawls's theory is "inadequate to sustain the trust necessary to bind the overlapping consensus," because people will interpret fundamental principles differently because of their comprehensive doctrines.).

35. POLITICAL LIBERALISM, *supra* note 1, at 147.

36. *Id.* at 150.

concern;³⁷ the reasonable makes overlapping consensus possible in a way that truth does not.³⁸ In another religious example, Rawls does not state "that the doctrine *extra ecclesiam nulla salus* is not true."³⁹ Rather, he contends that citizens are *unreasonable* when they try to enforce such a view upon others.⁴⁰

Rawls's primary response to these two criticisms, *modus vivendi* and truth, is that citizens have reasons within their own comprehensive doctrines to support the overlapping consensus. Individuals work from their comprehensive doctrines to some agreement about the public basis for liberalism. Thus the overlapping consensus is more than a compromise: "in the overlapping consensus consisting in the views just described, the acceptance of the political conception is not a compromise between those holding different views, but rests on the totality of reasons specified within the comprehensive doctrine affirmed by each citizen."⁴¹ The overlapping consensus is not an average of comprehensive doctrines. Rawls does not, of course, explain

37. *But see* Greene, *supra* note 24, at 646 (Rawls presupposes the truth of his view and so is a comprehensive, not a political, liberal.).

38. POLITICAL LIBERALISM, *supra* note 1, at 94.

39. POLITICAL LIBERALISM, PAPER ED., *supra* note 3, at 138.

40. *Id.* See also *id.* at 61:

Since many doctrines are seen to be reasonable, those who insist, when fundamental political questions are at stake, on what they take as true but others do not, seem to others simply to insist on their own beliefs when they have the political power to do so. Of course, those who do insist on their beliefs also insist that their beliefs alone are true: they impose their beliefs because, they say, their beliefs are true and not because they are their beliefs. But this is a claim that all equally could make; it is also a claim that cannot be made good by anyone to citizens generally. So, when we make such claims others, who are themselves reasonable, must count us unreasonable. And indeed we are, as we want to use state power, the collective power of equal citizens, to prevent the rest from affirming their not unreasonable views.

But see Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1776 (1994) (book review) ("Where grave moral questions are concerned, whether it is reasonable to bracket moral and religious controversies for the sake of political agreement partly depends on which of the contending moral or religious doctrines is true.").

41. POLITICAL LIBERALISM, *supra* note 1, at 170-71. *But see* Galston, *supra* note 26, at 1851 ("Thus, Rawls excludes from his democratic society any comprehensive view that sees political theory as part of and inseparable from a comprehensive view. Rawls's political liberalism, in other words, is based upon a comprehensive view that posits the autonomy of political theory."); Timothy P. Jackson, *To Bedlam and Part Way Back: John Rawls and Christian Justice*, 8.1 FAITH AND PHIL. 423, 423-47 (1991) (Christians must affirm the priority of Christian love over Rawlsian justice) [hereinafter Jackson, *To Bedlam*]; Timothy P. Jackson, *Love in a Liberal Society: A Response to Paul J. Weithman*, 22.1 J. RELIGIOUS ETHICS 29, 30 (1994) (arguing that Christians cannot accept a Rawlsian account of justice based on their comprehensive world view. Christians are troubled by this view of justice because "the logic of this argument still sacrifices individual integrity for corporate benefit.") [hereinafter Jackson, *Love in a Liberal Society*]; Greene, *supra* note 24, at 649 ("Rawls and Dworkin find such coercion justified through a common-ground view of politics, but that view brushes aside the coercion of citizens whose foundational views won't allow the cleansing of politics in this way.").

how *every* individual comprehensive doctrine comes to accept the overlapping consensus. He does examine Kant's moral philosophy, the utilitarianism of Bentham and Sidgwick, and "a pluralist account of the realms of values"⁴² to illustrate how different comprehensive views could support the political conception ("deductively," as the "best workable approximation," and by "balancing competing values, all things tallied up").⁴³ He does not tell all comprehensive doctrines how to accept the overlapping consensus.

But he does insist that they should do so. Recall that citizens accept the overlapping consensus because in Rawls's view it is unreasonable for them to coerce others on the basis of their comprehensive views. But this consensus poses a difficult challenge to religious believers. Once again, truth claims emerge as a problem for the believer. The *modus vivendi* may be easier for the believer to accept. At times one is forced by society to compromise in the name of survival, or because one does not have the votes. Political stability—even political stability for Rawlsian right reasons—appears to offer an insufficient reason to abandon the truth. If one's religious beliefs are true, how can she agree to participate in a consensus that is not true, but only reasonable? Does the citizen not act immorally when she subordinates the higher value of truth to the lower value of stability—no matter how reasonable the stability? "[H]ow can we affirm our comprehensive doctrine and yet hold that it would not be reasonable to use state power to gain everyone's allegiance to it?"⁴⁴ Must not believers always view their role in political liberalism as a *modus vivendi* until the truth emerges or until they have the votes to enforce the truth?

For political liberalism, the answer is no, for two reasons. Rawls insists that political values (especially of stability) are great and not easily overridden, even by comprehensive doctrines. The virtues of political cooperation are "*very great virtues*,"⁴⁵ and so the comprehensive values that conflict with the political conception of justice are normally outweighed within the overlapping consensus.⁴⁶ It is unclear if

42. POLITICAL LIBERALISM, *supra* note 1, at 170.

43. *Id.* at 169-71.

44. *Id.* at 139.

45. *Id.* (emphasis added).

46. *But see* Stuart Hampshire, *Liberalism: The New Twist*, THE N.Y. REV. OF BOOKS, Aug. 12, 1993, at 43, 44 ("At one point Rawls asserts, to me alarmingly, that 'under reasonably favorable conditions that make democracy possible, political values normally outweigh whatever nonpolitical values conflict with them.' This meta-statement surely conveys a very substantial and definite moral point of view, putting the duties owed to basic institutions that are just ones

believers will accept the primacy of these "very great virtues" over other virtues such as faith, hope, and charity.⁴⁷ However, Rawls does *not* state that individuals must always prefer stability to other virtues. This point is made more forcefully in the new introduction to *Political Liberalism*, where Rawls insists that this valuable stability is not any stability, but stability for the right reasons. Moreover, individuals determine the balance between stability and other values.

Thus, it is left to each citizen, individually or in association with others, to say how the claims of political justice are to be ordered, or weighed, against nonpolitical values. The political conception gives no guidance in such questions, since it does not say how nonpolitical values are to be counted. This guidance belongs to citizens' comprehensive doctrines.⁴⁸

In the overlapping consensus, "we hope that citizens will judge (by their comprehensive view) that political values are normally (though not always) ordered prior to, or outweigh, whatever nonpolitical values may conflict with them."⁴⁹

The second reason is the point we have already seen, that the "plurality of not unreasonable comprehensive doctrines" does not let one impose her comprehensive views on others.⁵⁰

To conclude: reasonable persons see that the burdens of judgment set limits on what can be reasonably justified to others, and so they endorse some form of liberty of conscience and freedom of thought. It is unreasonable for us to use political power, should we possess it,

ahead of all other human commitments. This ruling brings political liberalism, supposedly not itself a comprehensive morality, into direct conflict with many comprehensive moralities that are likely to flourish in a modern democracy."); Joshua Cohen, *Pluralism and Proceduralism*, 69 CHI-KENT L. REV. 589, 591 (1994) ("sid[ing] with Rawls against Hampshire").

47. See generally Jackson, *To Bedlam*, *supra* note 41; Jackson, *Love in a Liberal Society*, *supra* note 41.

48. Rawls, *supra* note 8, at 143.

49. *Id.* at 147.

50. See POLITICAL LIBERALISM, *supra* note 1, at 60-61. ("Beyond this, reasonable persons will think it unreasonable to use political power, should they possess it, to repress comprehensive views that are not unreasonable, though different from their own. This is because, given the fact of reasonable pluralism, a public and shared basis of justification that applies to comprehensive doctrines is lacking in the public culture of a democratic society. But such a basis is needed to mark the difference, in ways acceptable to a reasonable public, between comprehensive beliefs as such and true comprehensive beliefs."); Cohen, *supra* note 24, at 1539 (defending the notion of reasonableness in the overlapping consensus: "To permit those [unreasonable] views to shape the content of a conception of justice is to permit the content of justice to be determined by the power of those views to make themselves heard. But no attractive conception can be built around such an accommodation to power.").

or share it with others, to repress comprehensive views that are not unreasonable.⁵¹

This limitation means that decisions in the overlapping consensus are made only on the basis of reasons that appeal to all citizens.⁵² As part of their “duty of civility,”⁵³ citizens in the overlapping consensus must employ “public reason.” Public reason has been the most controversial aspect of Rawls’s theory for advocates of religion.⁵⁴

D. PUBLIC REASON

These two grounds (i.e., the great political values and the congruence of many comprehensive doctrines with the political conception of justice) “secure the basis of public reason, for they imply that fundamental political questions can be settled by the appeal to political values expressed by the political conception endorsed by the overlapping consensus.”⁵⁵ Societies and individuals use many kinds of reason to formulate and execute their plans. For Rawls, public reason is a specific type of reason, employed by equal citizens in a democracy.

Public reason, then, is public in three ways: as the reason of citizens as such, it is the reason of the public; its subject is the good of the public and matters of fundamental justice; and its nature and content is public, being given by the ideals and principles expressed by society’s conception of political justice, and conducted open to view on that basis.⁵⁶

Public reason is quite demanding, especially for adherents of comprehensive doctrines. It “means that in discussing constitutional

51. POLITICAL LIBERALISM, *supra* note 1, at 61.

52. *Id.* at 137. *See also id.* at 217: (“[O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.”).

53. *Id.* at 253.

54. For critical treatment of this concept, see generally Kent Greenawalt, *On Public Reason*, 69 CHI.-KENT L. REV. 669 (1994) [hereinafter Greenawalt, *On Public Reason*]; Lawrence B. Solum, *Constructing An Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729 (1994) [hereinafter Solum, *Constructing*]; Peter de Marneffe, *Rawls’s Idea of Public Reason*, 75 PAC. PHIL. Q. 232 (1994); Lawrence B. Solum, *Inclusive Public Reason*, 75 PAC. PHIL. Q. 217 (1994); Kent Greenawalt, *Some Problems With Public Reason in John Rawls’s Political Liberalism*, 28 LOY. L.A. L. REV. 1303 (1995) [hereinafter Greenawalt, *Some Problems*]; Elizabeth H. Wolgast, *The Demands of Public Reason*, 94 COLUM. L. REV. 1936 (1994).

55. POLITICAL LIBERALISM, *supra* note 1, at 169.

56. *Id.* at 213.

essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrines—to what we as individuals or members of associations see as the whole truth”⁵⁷ Instead, public reasoning should rest on more “widely accepted, or available”⁵⁸ arguments. “[E]ach of us must have, and be ready to explain, a criterion of what principles and guidelines we think other citizens (who are also free and equal) may *reasonably be expected to endorse* along with us.”⁵⁹ Rawls emphasizes this “criterion of reciprocity” in the new edition of *Political Liberalism*.⁶⁰

To its critics, public reason is too restrictive; it *excludes* religion from public life.⁶¹ Society’s discourse is impoverished by the banning of religious language. Biblical narratives, religious imagery, or theological claims nourish moral insight, and so should be a central part of public discourse. The historical insight of religious communities may be neglected.⁶² Religious voices are “privatized” by the requirements

57. *Id.* at 224-25.

58. *Id.* at 225-26 (“The point of the ideal of public reason is that citizens are to conduct their fundamental discussions within the framework of what each regards as a political conception of justice based on values that the others can reasonably be expected to endorse and each is, in good faith, prepared to defend that conception so understood. This means that each of us must have, and be ready to explain, a criterion of what principles and guidelines we think other citizens (who are also free and equal) may reasonably be expected to endorse along with us.”).

59. *Id.* (emphasis added). See also *POLITICAL LIBERALISM, PAPER ED.*, *supra* note 3, at 1 (“This ideal is that citizens are to conduct their public political discussions of constitutional essentials and matters of basic justice within the framework of what each sincerely regards as a reasonable political conception of justice, a conception that expresses political values that others as free and equal also might reasonably be expected reasonably [sic] to endorse.”).

60. *POLITICAL LIBERALISM, PAPER ED.*, *supra* note 3, at 1-li.

61. For the point that public reason is restrictive, see generally Galston, *supra* note 26, at 1844 (noting “how exclusionary his political theory in fact is in its characterization of certain comprehensive views [both religious and non-religious] as unreasonable”); Sandel, *supra* note 40, at 1776 (“[Public reason] is an unduly severe restriction that would impoverish political discourse and rule out important dimensions of public deliberation.”); *Id.* at 1790 (“restrictive character of liberal public reason”); Wolgast, *supra* note 54, at 1943 (In the context of the passage of a law on inoculation for children opposed by a Christian Science congressman, Rawls’s approach deprives individuals of the “considerable power” and “passion” of religious argument. “Framed in this cooler, more legalistic way, some of its power has certainly been lost.”); Cohen, *supra* note 24, at 1540-41 (“The account of public reason may seem, then, to undervalue the importance of forms of *critical discourse* that do not respect the distinction between moral and political argument and as a result to truncate politics and practical reason.” Consensus should “emerge [] from unconstrained discussion,” and public discussion may be too limited. Public reason “perhaps excludes constructive possibilities of consensus and community that might emerge from challenging received moral traditions.”).

62. See generally John Langan, *Overcoming the Divisiveness of Religion: A Response to Paul J. Weithman*, 22 J. RELIGIOUS ETHICS 47 (1994).

of public reason when our culture needs the public voice of religion.⁶³ Moreover, public reason *discriminates* against religion; it allows secular voices to dominate political discussion.⁶⁴ Once again, its criteria may exclude the truth. Religious adherents thus become unequal participants in their society, their critical perspectives silenced, their theories of justice suppressed, their moral claims ignored.

However, many of these complaints are contradicted by Rawls's careful construction of the ideal of public reason. For example, public reason is required for constitutional essentials and basic justice, not for all political questions.⁶⁵ Public reason must occur in the "public

63. See David Hollenbach, *Religion and Political Life*, 52 THEOLOGICAL STUD. 87, 94, 95 (1991) (voicing criticism of earlier articles by Rawls on the Overlapping Consensus, stating that religious conceptions of the human good are privatized by Rawls and that Catholics cannot agree with "his privatized definition of the role of faith"); David Hollenbach, *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877, 893 (1993) (insisting on the importance of public conversation in culture. "To the extent that moral and political theories seek to exclude the task of education and inquiry from the public forum by privatizing all full visions of the human good, they undermine the very foundations of public life.") [hereinafter Hollenbach, *Contexts of the Political*]; David Hollenbach, *Public Reason/Private Religion: A Response to Paul J. Weithman*, 22.1 J. RELIGIOUS ETHICS 39 (1994). But see Paul J. Weithman, *Rawlsian Liberalism and the Privatization of Religion: Three Theological Objections Considered*, 22.1 J. RELIGIOUS ETHICS 3 (1994) (defending Rawls against theological criticisms).

64. See generally Gary C. Leedes, *Rawls' Excessively Secular Political Conception*, 27 U. RICH. L. REV. 1083, 1104 (1993) (book review) ("This kind of discriminatory treatment is unlikely to end the culture wars between many Americans and their adversaries including Christian fundamentalists, Islamic fundamentalists, conservative Catholics, and Orthodox Jews. Rawls is in cloud-cuckoo land if he thinks that religious disagreements will be reduced in number by a political theory that stigmatizes devout persons whose political opinions are consistently aligned with their religious orientation."); Campos, *supra* note 24, at 1825 ("Despite its highly abstract endorsement of moral and religious pluralism, *Political Liberalism* is ultimately a paean to a secular creed that has within it the potential to become every bit as monistic, compulsory, and intolerant of any significant deviation from social verities as the traditional modes of belief it derided and displaced."); Greenawalt, *On Public Reason*, *supra* note 54, at 688 ("Liberal non-religious comprehensive perspectives are bound to 'suffer less' from a principle of self-restraint than both religious views and nonreligious, nonliberal views. This difference may reasonably be thought to involve a kind of inequity.").

65. These essentials include fundamental principles on the structures of government, and the equal basic rights and liberties of citizenship. In *Political Liberalism*, Rawls writes that "Constitutional essentials concern questions about what political rights and liberties, say, may reasonably be included in a written constitution, when assuming the constitution may be interpreted by a supreme court, or some similar body. Matters of basic justice relate to the basic structure of society and so would concern questions of basic economic and social justice and other things not covered by a constitution." POLITICAL LIBERALISM, PAPER ED., *supra* note 3, at 1 n.23. But see Greenawalt, *On Public Reason*, *supra* note 54, at 687, 689 (criticizing this distinction: "Rawls, I believe, has not yet faced the extent to which interpretation of constitutional essentials infects ordinary political argument."); Greenawalt, *Some Problems*, *supra* note 54, at 1305-07 ("For people to recognize this categorization among issues and to act differently in respect to the two categories requires considerable political sophistication and discipline."); *id.* at

political forum," which includes judicial decisions, government officials' discourse, and the discourse of "all citizens . . . who take part in political campaigns in whatever capacity, and especially to their oratory, party platforms and statements."⁶⁶ Many political discussions fall outside this sphere. Moreover, Rawls encourages open discussion of comprehensive doctrines in many of society's "nonpublic" organizations, e.g., universities, churches, and associations. *Labeling* these associations "nonpublic" is somewhat confusing, but Rawlsian public reason allows a multitude of social conversations about comprehensive doctrines. Doctrinal discussions are not stifled.⁶⁷

Furthermore, if discrimination occurs in Rawls's theory, it is not discrimination against *religious* views. While some accounts of constitutional democracy may privilege philosophical beliefs over religious ones,⁶⁸ Rawls's "discrimination" is philosophical as well as religious. It applies to utilitarians as well as to Catholics.⁶⁹ Defenders of religion should be grateful that Rawls restores religion to an equal footing with philosophy in its status as a comprehensive doctrine. Critics

1306 (employing examples of abortion and fetal research to illustrate difficulty of this distinction).

66. John Rawls, *The Idea of Public Reason: Further Considerations* 7 (1994) (unpublished manuscript on file with the author). See Hollenbach, *Contexts of the Political*, *supra* note 63, at 900 (allowing different standard for politics and the judiciary). But see Greenawalt, *Some Problems*, *supra* note 54, at 1317 ("The result is that ordinary citizens should regard themselves as much less constrained and legislators somewhat less constrained than Rawls asserts with respect to constitutional essentials; but legislators and quasi-public citizens should consider themselves more constrained than Rawls suggests for ordinary issues.").

67. But see Greenawalt, *On Public Reason*, *supra* note 54, at 679 ("Rawls's limiting of the requirement of public reasons to voting and public advocacy is less significant than one might initially suppose; that requirement would infect thought and discussion of relevant issues in all settings.").

68. See, e.g., RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993); Frances M. Kamm, *Abortion and the Value of Life: A Discussion of Life's Dominion*, 95 COLUM. L. REV. 160, 172-75 (1995) (book review) (analyzing Dworkin's "distinction between religion and philosophy").

69. If some philosophical doctrines gain more adherents or are more common than others, this is not the fault of Rawls's theory. This point is reiterated in *Further Considerations*: "[A]ll reasonable comprehensive doctrines are treated in the same way, whether religious, philosophical, or moral. Religion is no more disfavored, or favored, than metaphysics and moral philosophy. A doctrine of natural, or higher, law is on a par with biblical theology." Rawls, *supra* note 66, at 1. In *Further Considerations*, in the context of the judicial nominee, the nominee says: "What I have said should be said by anyone, whether their comprehensive doctrine is religious or not. A candidate whose philosophical doctrine is Kantian, say, or else founded on a conception of natural law and the natural rights of persons, should answer as I have." *Id.* at 4. But see Greene, *supra* note 24, at 659 (questioning Rawls's exclusion of all comprehensive views and distinguishing religious from non-religious views; "Only religious reference, however, relies on a source of normative authority that is claimed by its proponents to be beyond the scope of human

may be correct that Rawls himself favors Kantianism over other comprehensive doctrines.⁷⁰ Yet in doing so he does not discriminate against religion. The political conception of justice can be derived from Kantianism as well as from other religious and philosophical comprehensive doctrines. In this essay I argue that it is consistent with Roman Catholicism. Although he does not demonstrate this derivation in *Political Liberalism*, as a citizen Rawls may consistently derive the political conception of justice from Kantianism while he invites others to derive justice from their different, equal, philosophical, and religious comprehensive doctrines.

More difficult for political liberalism than the general charges of exclusion of and discrimination against religion are criticisms of the "bracketing" category. At this point it is worth remembering how demanding public reason is for individuals. Rawls identifies the Supreme Court as the exemplar of public reason. Public reason applies to legislatures and the judiciary, to politicians, and to judges.⁷¹ Citizens should employ it in public political advocacy. In addition, citizens should *vote* on constitutional essentials and basic justice according to the standards of public reason, not on the basis of their fundamental comprehensive convictions.⁷² This standard for voting may be the most difficult for readers to understand. Public reason rules even in the midst of social disagreement. Although it may appear reasonable to "invoke principles appealing to nonpolitical values to resolve [disagreement] in a way they find satisfactory,"⁷³ citizens should not do so on matters of constitutional essentials and basic justice. Public reason is not abandoned because of disagreement; "if

experience and to be based in special relationships that the Believers have with that source of authority and that other citizens might not have.").

70. See E.A. Goerner, *Rawls's Apolitical Political Turn*, 55 REV. POL. 713, 715 (1993) (book review):

Rawls's new theory imposes second-class citizenship on most religious believers and on many of those who hold philosophical doctrines in morals that are not tributary to Kant. . . he repeatedly shows how his doctrine, although it does not need a Kantian background, is congruent with or even derivable from more-or-less comprehensive views of a Kantian sort. But he does not try to show how other comprehensive doctrines may relate to his political principles.

71. POLITICAL LIBERALISM, *supra* note 1, at 216.

72. See Freeman, *supra* note 27, at 656 (noting that public reason is hypocritical if it allows individuals to "vote their personal preferences and comprehensive views with impunity," and suggesting that Greenawalt must allow for this).

73. POLITICAL LIBERALISM, *supra* note 1, at 240 (citing KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE chs. 6-7 (1988)).

when stand-offs occur, citizens invoke the grounding reasons of their comprehensive views, the principle of reciprocity is violated."⁷⁴

From these demands arise the accusations of bracketing. Rawls asks the citizen to vote (and to legislate, and to judge) according to public reason, and so to "bracket" her comprehensive doctrine.⁷⁵ Such bracketing raises numerous concerns. It poses problems for moral *psychology*, e.g., by dividing the individual's comprehensive doctrine from her public life.⁷⁶ The individual's religious and political obligations may conflict.⁷⁷ Her *integrity* may be undermined by the demand that she publicly support positions that violate deep convictions.⁷⁸ The requirement to use public reason may produce individuals who lack *sincerity* because they publicly advocate reasonable positions not based on their personal commitments to comprehensive doctrines.⁷⁹ "Thus the paradox: one must somehow separate the values leading to one's positions from the public argument given for

74. POLITICAL LIBERALISM, PAPER ED., *supra* note 3, at lv.

75. See generally Sandel, *supra* note 40, at 1776-82.

76. See Wolgast, *supra* note 54, at 1939 ("Thus the paradox: one must somehow separate the values leading to one's positions from the public argument given for them. How, one asks, can a person's responsibilities as a citizen require this?"); Susan Moller Okin, *Political Liberalism*, 87 AM. POL. SCI. REV. 1010, 1011 (1993) (book review) ("[S]uch a conceptual 'splitting' [between political and non-political] of persons surely works to provide the stability that Rawls aims at only if real human beings can think of themselves this way.").

77. Rawls acknowledges this in Further Considerations: "The political conception gives us no guidance in such questions of conflict, since it doesn't say how nonpolitical values, religious or philosophical, should be taken into account." Rawls, Further Considerations, *supra* note 66, at 23A.

78. See Wolgast, *supra* note 54, at 1941 ("the requirement of civility is problematic in encouraging the absence of personal integrity in debate."); *id.* at 1943 ("The representative who recasts his objections to conform to public reason not only argues with less than maximum force, but also speaks disingenuously. One's reasons for holding a position are integral to the position itself. They are not chosen after the position is arrived at, except disingenuously."); Jackson, *Love in a Liberal Society*, *supra* note 41 (addressing Christian loss of integrity if one gives priority to justice over charity).

79. Greenawalt, *On Public Reason*, *supra* note 54, at 677-79, discusses these tensions in his analysis of "public justification" and "decision." Greenawalt states that *Political Liberalism* suggests that public reason is concerned with public justification and not with decision-making. However, in the examples of judging and voting, Greenawalt thinks that Rawls makes it clear that "public reasons should guide decision as well as debate and opinion writing." *Id.* at 677. "Rawls's discussion leaves a bit of uncertainty on one subject that is critical to the relation between actual grounds of decision and public justification--whether the proponent of a position must himself believe in the public justification he offers." *Id.* at 678. For example, is the legislator allowed to "vote with an argument of public reasons in which she does not fully believe?" *Id.* Greenawalt concludes that Rawls does require a sincere appeal to public reason. See also Leedes, *supra* note 64, at 1114-15 (Politically astute leaders who follow Rawls's standard will conceal their actual goals and become "stealth candidates," who will impose their hidden views once elected. "Surely, a candid public airing of a religious person's dogmatic worldview is preferable to stealth or terrorism."). For the argument that the Rawlsian framework encourages

them. How, one asks, can a person's responsibilities as a citizen require this?"⁸⁰

Rawls's rejoinder to these bracketing criticisms in the context of a Supreme Court nomination hearing is illuminating. The nominee is asked if he can "separate" his religious beliefs from his judicial decisions. Rawls distinguishes between two senses of separation or bracketing; the first is impossible and the second is required by public reason. "Should to separate mean to put aside as irrelevant and not to rely on in my reasoning, or not to regard these beliefs as among my first premises, and in that way to bracket my religious beliefs, then I must answer, No. In that sense separation is impossible."⁸¹ However, justices are required to bracket in the second sense, "not to invoke certain kinds of reasons in making their decisions, even when those reasons would be appropriate in other offices and roles."⁸² Public reasons, not the reasons of comprehensive doctrines, are obligatory in judicial opinions (as well as in legislation and voting).

Rawls resists the criticism of bracketing in the first sense. He does not ask citizens "to pluck out their religious convictions" as if "they started from scratch, disregarding what they presently take as basic premises of moral thought."⁸³ Citizens and judges do not abandon or ignore their religious convictions, for they remain "the grounds of the political values of public reason affirmed in the political conception itself." Citizens accept and participate in the political conception based on their comprehensive doctrines, and so do not bracket the comprehensive in their political participation.

Rawls does not envision a complete divide between public reason and comprehensive doctrine. When faced with the question of how to participate in public discussion, "we hope that answer lies *within the*

mistrust in government, see Gifford, *supra* note 24, at 226 ("Rawlsian society is prone to develop pervasive mistrust between groups of citizens, especially between the classes, as well as pervasive mistrust between citizens and government officials.").

80. Wolgast, *supra* note 54, at 1939, 1947. Wolgast is especially concerned for members of small religious sects who might not speak without violating public reason and so give other reasons.

81. Rawls, *supra* note 66, at 3. The quotation continues: "Peoples' religious doctrines are an essential part of their moral and political view; they cannot put aside that foundation, source, or basis of their beliefs as irrelevant, or not to rely on it as a fundamental aspect of their thought." *Id.*

82. *Id.* ("They must bracket, in this second sense, and hence not invoke, reasons that are inappropriate in their role as an advisor, even when those reasons may be relevant in other circumstances.").

83. POLITICAL LIBERALISM, *supra* note 1, at 244 n.33 (quoting KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 155 (1988)).

leeway allowed by each of the reasonable comprehensive doctrines making up an overlapping consensus. By that *leeway* I mean the scope within which a doctrine can accept, even if reluctantly, the conclusions of public reason, either in general or in any particular case.”⁸⁴ Nor does Rawls ever instruct individuals on how to decide questions within their comprehensive doctrine. “[P]olitical liberalism itself cannot argue that each of those comprehensive doctrines should find the conclusions of public reason nearly always *within its leeway*. To argue that transcends public reason.”⁸⁵ However, Rawls does insist on limits upon comprehensive doctrines. Once citizens turn to their comprehensive doctrines instead of to public reason, they have turned to the coercion of others forbidden in a constitutional democracy. Once they do so, “others in self-defense can oppose [them] as using . . . unreasonable force.”⁸⁶

It is perhaps here that Rawls takes his leap of faith, voicing his hope that religious adherents will be able to accept the political concepts of public reason “within the leeway,” that comprehensive doctrines will be consistent with the demands of public reason. Rawls acknowledges that they may not always be able to do so. For example, “citizens recognize the familiar distinction between accepting as (sufficiently) just and legitimate a constitution with its procedures for fair elections and legislative majorities, and accepting as legitimate (even when not just) a particular statute or a decision in a particular matter of policy.”⁸⁷ For example, Quakers may refuse to engage in war while continuing to support a constitutional regime.⁸⁸ But Rawls is in general optimistic that comprehensive doctrines can find agreement on constitutional essentials. He is optimistic that religion can be reasonable.

84. *Id.* at 246 (emphasis added). On what the justice should say at the confirmation hearing, Rawls says in *Further Considerations*, *supra* note 66, at 3: “I hope I may remind you that my religion leads me to endorse a political conception of justice that supports the full range of constitutional values and the main political institutions of our society.”

85. *POLITICAL LIBERALISM*, *supra* note 1, at 246 (emphasis added). *But see* Greenawalt, *Some Problems*, *supra* note 54, at 1315-17 (“If the implications of Rawls’s view are as I have indicated, his constraints of public reason do impose somewhat sharper limits on the use of comprehensive views than I believe are appropriate.”).

86. *POLITICAL LIBERALISM*, *supra* note 1, at 247. *But see* Galston, *supra* note 26, who argues against Rawls’s assumptions that comprehensive doctrines that dictate political outcomes are unreasonable.

87. Rawls, *supra* note 8, at 148.

88. *Id.* at 148-149. The same may be true of those who reject abortion rights. *Id.* at 149 n.32.

Some religious critics do not share that optimism, and instead fear that a Rawlsian approach corrupts comprehensive doctrines, preventing them from being critical of the political realm. The “bracketing” criticism thus extends beyond individual moral psychology to questions of social reform. In Rawls’s account public reason may be wrong, or at least “untrue,” while an individual may know the truth through religion.⁸⁹ What happens to justice if public reason is mistaken, while religious adherents see the truth? Religious voices may be prophetic and lead citizens to correct their nations’ faults.⁹⁰ Democratic society itself may need reform, and public reason may blind people to injustice. Society could be harmed by the silence of the comprehensive view. Comprehensive doctrines may be necessary to reform society so that it attains its fundamental political values. The truth of comprehensive doctrines may free society of injustice. Needed social reform may be prevented if comprehensive doctrines are ignored.

At this level, criticisms of Rawls have been historical as well as philosophical. Commentators argue, e.g., that it was religious insight that guided the abolitionists and the Civil Rights Movement. Critics claim that public reason would have gagged Martin Luther King and the abolitionists, and so cannot be adequate as political theory.⁹¹ A

89. Rawls gives two examples of this: Quaker pacifism and Roman Catholic views of abortion.

The example of the Quakers illustrates how this could happen. If their doctrine is true, then pacifism is true and those who engage in war, even a just war (on the most reasonable conception), are acting incorrectly, as judged by the true doctrine. There can be a discrepancy in particular cases between the true doctrine and a reasonable conception of justice. The case of abortion offers another example. The most reasonable political doctrine (should there be one) may grant the right of abortion in the first trimester say; yet the Catholic doctrine denying that right as violating a divine command not to take innocent human life may still be true. The most reasonable political conception cannot be invoked to deny that.

Rawls, *supra* note 66, at 26-27.

90. But see David A.J. Richards, *Public Reason and Abolitionist Dissent*, 69 CHI.-KENT L. REV. 787, 835 (1994) (The abolitionist dissent was not successful *because* it was religious, but due to its moral independence: “the interpretive understanding of the role of public reason in such abolitionist dissent is no more its religious or irreligious character than its scientific or anti-scientific character, but its critical moral independence in all domains (including science and religion) in forging arguments of public reason in opposition to the role that both dominant established science and religion played in the defense of slavery and racism.”).

91. See Sandel, *supra* note 40, at 1778-82 (using the Lincoln-Douglas debates over slavery to illustrate “the difficulty with a political conception of justice that tries to bracket controversial moral questions”); but see Richards, *supra* note 90, at 838-39 (identifying and opposing these criticisms of Rawls. Richards also points out that Martin Luther King was against the “dominant religious opinion” of his day. “Religion as such hardly deserves the exclusive compliment of supporting abolitionist dissent when, in fact, most of it opposed it.”); Paul J. Weithman, *Taking Rites Seriously*, 75 PAC. PHIL. Q. 272, 284 (1994) (mischaracterization of King’s view “gives a

political conception of justice deprived of the abolitionists, King, and the Civil Rights Movement is no basis for an overlapping consensus. Rawls presents the Civil Rights Movement and the abolition of slavery as examples of public reason.⁹² But his critics see in these movements the victory of a true comprehensive religion over an unjust political conception of justice.

In response to these additional bracketing complaints, Rawls distinguishes between the "exclusive view" and the "inclusive view" of public reason. He admits that he originally favored the former, which holds that on fundamental political matters, citizens must not give reasons in terms of their comprehensive doctrines. However, in *Political Liberalism* he supports the latter. Under the inclusive view, citizens may at times refer to their comprehensive doctrines, as long as they meet a criterion that Rawls later builds into the public reason "proviso."⁹³ Citizens may speak on the "basis of political values rooted in their comprehensive doctrine, provided they do this in ways that *strengthen the ideal of public reason itself*."⁹⁴

Rawls opts for the inclusive view when it supports public reason. In a well-ordered society, the exclusive view suffices. However, if a serious disagreement arises in a "nearly well-ordered society,"⁹⁵ the inclusive view may be more appropriate. In such disputes, citizens may doubt each other's commitment to fundamental political values. For example, in the debate over funding for religious schools, atheists may assume that religious citizens argue for funding on the basis of their comprehensive doctrines, and so question believers' participation in politics. In that case, public reason is served if the parties "explain in the public forum how one's comprehensive doctrine affirms the political values"⁹⁶ of democratic society.

democratic people a misleading interpretation of crucial events in their past" that might "lead them to believe that religion played a different and more minimal role than in fact it did.").

92. *POLITICAL LIBERALISM*, *supra* note 1, at 251.

93. *POLITICAL LIBERALISM*, PAPER ED., *supra* note 3, at lii.

94. *POLITICAL LIBERALISM*, *supra* note 1, at 247 (emphasis added). *But see* Jackson, *Love in a Liberal Society*, *supra* note 41, at 34 n.6 ("My objection is that the emphasis should be the other way round: priority should be given to truths of comprehensive morality over public reason, even as did King. This means, for Christians, that 'charity' is not the problematic exception in political discourse, but the normative rule; love has 'regulative primacy,' to borrow Rawls's phrase."); Weithman, *supra* note 91, at 284-85 ("[I]mplausibly strong specification of the inclusive view, conduces to the further marginalization of religion from public life.").

95. *POLITICAL LIBERALISM*, *supra* note 1, at 248-49.

96. *Id.* at 249. *But see* Greenawalt, *Some Problems*, *supra* note 54, at 1316 ("Very briefly, one might have a high degree of trust that people with other comprehensive views will, when they rely on them, reach conclusions that are acceptable.").

A third situation occurs when a society is not well ordered and confronts division about its constitutional essentials. Here too the inclusive view is warranted.

It appears from the text of *Political Liberalism* that Rawls moves from the exclusive to the inclusive version of public reason because of "bracketing" concerns. He concedes that the exclusive approach does not permit the Christian arguments of King and the abolitionists. However, the inclusive account of public reason is not violated by these reformers. "In this case [abolition] the nonpublic reason of certain Christian churches supported the clear conclusions of public reason. The same is true of the civil rights movement . . . except that King could appeal—as the abolitionists could not—to the political values expressed in the Constitution correctly understood."⁹⁷ The abolitionists and the civil rights leaders did not violate public reason, "or rather, they did not provided they thought, or on reflection would have thought (as they certainly could have thought), that the comprehensive reasons they appealed to were required to give sufficient strength to the political conception to be subsequently realized."⁹⁸ It was not unreasonable for Martin Luther King to use Christian language *for the sake of public reason itself*.⁹⁹ Here religion may serve as

97. POLITICAL LIBERALISM, *supra* note 1, at 249-50. "Religious doctrines clearly underlie King's views and are important in his appeals. Yet they are expressed in general terms: and they fully support constitutional values and accord with public reason." *Id.* at 250 n.39.

98. *Id.* at 251. "The ideal also expresses a willingness to listen to what others have to say and being ready to accept reasonable accommodations or alterations in one's own view." *Id.* at 253.

99. See generally Weithman, *supra* note 91, at 279-85 (1994) (interpreting "for the sake of public reason"); but see Samuel Scheffler, *The Appeal of Political Liberalism*, 105 ETHICS 4, 16-17 (1994) (adding to King and abolitionists the examples of the Quakers, the Black churches, the sanctuary movement, and others, and concluding, "The idea that in all such examples the reliance on a comprehensive moral or religious doctrine must either be necessary to strengthen the ideal of public reason or else unjustified seems highly questionable. And in any event, the availability of so many examples does nothing to enhance the plausibility of the idea that an overlapping consensus might actually converge not only on Rawls's two principles of justice but also on the guidelines of public reason as he describes them."); Cohen, *supra* note 24, at 1540 ("None of the exceptions mentioned in *Liberalism*--and none added in a recent essay modifying *Liberalism's* account of public reason--would permit citizens, in the normal course of political argument, to bring the comprehensive views of others to the surface for the purpose of criticizing those views and the political implications that flow from them. Nor does the Rawlsian view encourage or require citizens to express their comprehensive conceptions in the course of political debate with a view to opening those conceptions up to the challenge of public discourse. The account of public reason may seem, then, to undervalue the importance of forms of *critical discourse* that do not respect the distinction between moral and political argument and as a result to truncate politics and practical reason.").

paraenesis, to exhort Christians to act, and to help them learn or follow public reason. In these historical circumstances, when many citizens were religious, Christian language "gave a special force and urgency to their appeal. Indeed, this special force and urgency may have been essential in making the historical changes that eventually came about."¹⁰⁰

Post-*Political Liberalism*, Rawls has described this inclusive account of public reason as "too narrow,"¹⁰¹ and has proposed a "wide" (but not an "open") view of public reason. In the "wide" view, Rawls expands the inclusive exception: "[i]n public political discourse citizens (though not judges and other government officials) may freely introduce their reasonable comprehensive doctrines, with one crucial proviso: namely, that in due course they support the political measures they propose in terms of the principles and values of a public political conception of justice."¹⁰² Such an approach allows the "vital social roots"¹⁰³ of the overlapping consensus to be developed and strengthened by reminding citizens of their comprehensive doctrines.

Within this wide view, Rawls identifies different types of discourse. The believer may begin with *declaration* of her religious beliefs, "which ends by showing how the religious view supports, or leads to, the basic ideas of a complete political conception of justice."¹⁰⁴ In the next step, *justification*, citizens argue within the political conception of justice, which their religious doctrines support. For example, the religious believer may narrate the story of the Good Samaritan but must then recount the arguments of public reason for aid to the neighbor. In *persuasion*, we try to show other citizens that they can support public reason based on their own comprehensive doctrines. In *witnessing*, citizens do not appeal to the political conception of justice, but instead appeal to God or truth. Opposition to war or to abortion, for example, could take this form.

Rawls rejects the "open view: anything goes and all constraints are removed."¹⁰⁵ This view cannot be accepted because it abandons

100. Rawls, *supra* note 66, at 12. See Richards, *supra* note 90, at 787 for a lengthy defense of the Rawlsian position in the context of the history of the abolitionists. Richards insists that the abolitionists did meet the test of public reason; "Rawls's interpretation of such rights-based dissent is . . . a tribute to its interpretive scope and depth." *Id.* at 787.

101. Rawls, *supra* note 66, at 11.

102. *Id.* at 12.

103. *Id.* at 13.

104. *Id.* at 14.

105. *Id.* at 16.

public reason. "Those who reject democracy will of course reject the ideal of public reason."¹⁰⁶

The distinction between the inclusive view and the wide view is subtle. Even that shift, however, will not satisfy some adherents of religions. Public reason, whether inclusive or wide, does pose a difficult challenge to them within their religious comprehensive doctrines. Rawls would not deny this. He does not give them any guidance on how this reconciliation of comprehensive doctrine and public reason should take place. He does not need to do so; he does not claim to examine all the comprehensive doctrines. But it is clear that some comprehensive doctrines will reject the wide view. Rawls will have to dismiss them as unreasonable, at least insofar as they try to impose their comprehensive doctrines in the political arena.

However, one final challenge is posed by this rejection of the open view in favor of the wide view. In this distinction, another question of discrimination against religion arises. This is not discrimination between religious and secular thought, but between religions.¹⁰⁷ Rawls asks that theological arguments about constitutional essentials and basic justice be translated into public reason. In so doing, Rawls favors a religion of reason against religions that prefer to use their distinctive arguments and are suspicious of the need to translate everything into public reason.¹⁰⁸ Reason, after all, may corrupt rather than clarify faith.

106. *Id.* at 17 ("The zeal to embody the whole truth in politics is incompatible with an ideal of public reason appropriate for democratic citizenship.").

107. See Greene, *supra* note 24, at 670 ("Rawls' theory, however, does not treat all citizens alike, and Rawls admits as much [citing POLITICAL LIBERALISM, *supra* note 1, at 138, 152, 194-200]. Some comprehensive doctrines will hold a view of the good that is consistent with a rule of excluding references to such doctrines from politics; other comprehensive doctrines will find it inconsistent with their views of the good to adopt such rules of exclusion. Rawls' 'across-the-board' rule of exclusion would have a disparate impact on the latter group of comprehensive doctrines, thus effectively favoring the former group."); Stephen Macedo, *Liberal Civil Education and Religious Fundamentalism: The Case of God v. John Rawls?*, 105 ETHICS 468, 478 (1995) ("The very aspiration to think about politics from a perspective that is in this way independent of religious views and other controversial comprehensive conceptions is nonneutral: its appeal will vary greatly among people of different faiths. Totalistic faiths (such as Vicki Frost's belief in the Christian Bible as the 'whole truth') will be especially resistant to thinking about politics (or anything else) from a perspective that in any ways 'brackets' the truth of their particular religious views."); Nomi Maya Stolzenberg, *'He Drew a Circle That Shut Me Out': Assimilation, Indoctrination, and the Paradox of Liberal Education*, 106 HARV. L. REV. 581, 616-34 (1993) (bracketing religious beliefs takes sides in a Protestant debate).

108. See, e.g., Leedes, *supra* note 64, at 1108 (using example of the Amish to question political liberalism, arguing that Rawls does not even give the Amish the protection of Wisconsin v. Yoder, 406 U.S. 205 (1972)); Galston, *supra* note 26, at 1843 ("Rawls is forced to exclude from his politically liberal society a wide range of comprehensive views that cannot adopt political

Religions have different accounts of the importance of reason. Some will be more easily translated into public reason than others. Christians have for centuries argued about religion's relationship to faith. Rawls's account of public reason may be facially neutral, but in impact it will favor those believers for whom reason is consistent with religion, for whom reason is a source of religious insight. Political liberalism is not compatible with all religions and not all believers can support a constitutional regime. Justice as fairness imposes "the constraint of their being reasonable on comprehensive doctrines." "[A] comprehensive doctrine [is] incompatible with public reason only if it cannot support a reasonable political conception of justice with its conceptions [of] society and citizen; or when on a particular question, it does not lead to reasonable balance, or ordering, of political values."¹⁰⁹ Rawls does not elaborate on how one recognizes an "unreasonable" comprehensive doctrine, but states that one needs strong

liberalism enthusiastically because their political beliefs are integrated with their other beliefs."); Greene, *supra* note 24, at 668-69 ("A cogent political liberalism—acknowledging the possibility that common-ground politics might fail to bring about the best moral order, leaving open the theoretical chance that a sectarian theory of the good is in fact best—would recognize the legitimacy problem that flows from silencing certain theories of the good in politics.").

109. Rawls, *supra* note 66, at 6. Rawls has faced extensive criticism for his treatment of comprehensive doctrines that reject abortion in a footnote to *Political Liberalism*. "Now I believe any reasonable balance of these three values [the due respect for human life, the ordered reproduction of political society over time, including the family in some form, and finally the equality of women as equal citizens] will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester. . . . [A]ny comprehensive doctrine that leads to a balance of political values excluding that duly qualified right in the first trimester is to that extent *unreasonable*." *POLITICAL LIBERALISM*, *supra* note 1, at 243 n.32 (emphasis added). For criticisms of this argument, see Gifford, *supra* note 24, at 218-19 (arguing that Rawls has alienated potential supporters by "deem[ing] unreasonable any comprehensive doctrine that would use the political process to deny a pregnant woman a right to terminate"); Greenawalt, *Some Problems*, *supra* note 54, *passim* (questioning public reason because it prohibits Catholics from relying on comprehensive views about abortion); Sandel, *supra* note 40, at 1778 ("But if the Catholic Church is right about the moral status of the fetus, if abortion is morally tantamount to murder, then it is not clear why the political values of toleration and women's equality, important though they are, should prevail."); *id.* at 1790 ("Relevant though it clearly is to the question of abortion rights, Catholic moral doctrine cannot be debated in the political arena that political liberalism defines."); Campos, *supra* note 24, at 1826 ("What can one say to the modern liberal intellectual who writes that abortion cannot be prohibited in the first trimester because 'any reasonable balance' of political values requires recognizing such a right, and then 'explains' this conclusion by pointing out that 'at this early stage of pregnancy the political value of the equality of women is overriding, and this right is required to give it substance and force?' Such persons can no more be argued with than those who simply declare that a particular result is required because 'God says so.'"); Mitchell, *supra* note 31, at 1934 ("[T]he striking characteristic of abortion's opponents is not that their views are unreasonable, in any sensible meaning of that term, but rather that they appear to adhere to the overlapping consensus despite the existence of strongly held, and intolerantly expressed, beliefs as to the wrongness of even a qualified right to abortion. What does this empirical fact tell us about the overlapping

grounds before ruling a doctrine unreasonable.¹¹⁰ Society remains stable if the unreasonable doctrines “do not gain enough currency to undermine society’s essential justice.”¹¹¹

Rawls’s theory is clearly critical of unreasonable religions, or of unreasonable resolutions of political questions within religions. But religious adherents should not reject *Political Liberalism* for that reason. In his analysis of the abolitionists’ use of public reason, David Richards reminds us that not all Christians opposed slavery; not all Christians supported the Civil Rights Movement. According to Richards, abolitionist dissent was not successful *because* it was religious. What mattered was its “critical moral independence in all domains (including science and religion) in forging arguments of public reason in opposition to the role that both dominant established science and religion played in the defense of slavery and racism.”¹¹² “Religion as such hardly deserves the exclusive compliment of supporting abolitionist dissent when, in fact, most of it opposed it.”¹¹³ Christian justifications for slavery persisted for centuries. Richards also points out that Martin Luther King opposed the “dominant religious opinion” of his day.¹¹⁴

Rawls has good reason to include in his theory a criterion that can be critical of comprehensive doctrines. Reason is valuable in correcting mistaken religious as well as constitutional interpretations. His public reason requirement may foster “critical moral independence” in comprehensive doctrines. Yet it remains noteworthy that Rawls’s purpose (in contrast, e.g., to Michael Perry) is not to provide a theory of comprehensive doctrines. Within the constraints of his

consensus?”); Greenawalt, *On Public Reason*, *supra* note 54, *passim*; de Marneffe, *supra* note 54, at 235 (“The issue of abortion suggests, then, that there are important liberal positions on the scope of basic liberty that cannot be adequately defended in terms of liberal political values alone. If so, then there are important liberal positions on the scope of basic liberty that cannot be taken in voting or political advocacy while adhering to Rawls’s idea of public reason, and this is a serious objection to this idea from the liberal point of view.”). Most of these authors mention Catholics as the example of a group who would protest Rawls’s public reason position on abortion. However, some Catholics are Rawlsian about abortion, *see infra* note 207.

Rawls has explained that this footnote about abortion was not an argument, but an opinion (“an opinion is not an argument”). *POLITICAL LIBERALISM*, PAPER ED., *supra* note 3, at lv n.31. The original footnote was to “illustrate” the reasonable balance of political values on this issue. *Id.* at lv n.31. Moreover he has noted that Cardinal Bernardin’s argument about abortion “is clearly cast in the form of public reason.” *Id.* at lvi n.32.

110. *POLITICAL LIBERALISM*, *supra* note 1, at 59.

111. *Id.* at 39. “Reasonable pluralism” is not “pluralism as such.” *Id.* at 36.

112. Richards, *supra* note 90, at 835 (emphasis added).

113. *Id.* at 839.

114. *Id.* at 838.

own theory, Rawls does not comment on the truth of individual comprehensive doctrines, or on their ability to accept the demands of public reason. It is clear that not every comprehensive doctrine will be able to use public reason.

Yet Rawls does state that "if any of those reasonable comprehensive doctrines supports only true moral judgments,"¹¹⁵ or "if any of the reasonable comprehensive doctrines in the existing overlapping consensus is true, then the political conception itself is true, or close thereto in the sense of being endorsed by a true doctrine."¹¹⁶ I do not argue in this essay that Catholicism supports only true moral judgments or that its reasonable comprehensive doctrines are true. That is a task for theologians. However, Catholicism does support the Rawlsian conception of political justice, and so lends support to Rawls's claim that the political conception itself is true.

In a footnote to his further considerations on public reason, Rawls notes that "the idea of wide public reason is closely related to ideas expressed some time ago by John Courtney Murray, S.J."¹¹⁷ There are of course some changes, which reflect the thirty-three years since the publication of *We Hold These Truths*. But the similarities are striking. To the Catholic Murray I now turn.

II. JOHN COURTNEY MURRAY

A. INTERCREDAL COOPERATION

In the 1940s, Catholics faced their own questions about pluralism. Murray's writings in that decade addressed these Catholic concerns in the context of "intercredal cooperation," a challenge posed to Christians by the Second World War. Christians of different denominations, especially in England, were collaborating in the work of "social reconstruction" and "social justice" in response to the ravages of the war. Murray's early academic articles address the theological and ethical problems with this collaboration.

115. *POLITICAL LIBERALISM*, *supra* note 1, at 128.

116. *Id.* at 153 n.19. See also *id.* at 128: [I]f any of those reasonable comprehensive doctrines supports only true moral judgments, the political conception itself is correct, or close thereto, since it is endorsed by a true doctrine. Thus, the truth of any one doctrine in the consensus guarantees that all the reasonable doctrines yield the right conception of political justice, even though they do not do so for the right reasons as specified by the one true doctrine."

117. Rawls, *supra* note 66, at 13 n.27 (citing JOHN COURTNEY MURRAY, *THE PROBLEM OF RELIGIOUS FREEDOM* (1965), and JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS* (1960)).

Such cooperation was important and valuable work; the war, after all, threatened civilization as Christians knew it. It posed special "danger and difficulty"¹¹⁸ to Catholics, however. Catholics believed that theirs was the one true religion. Collaboration with non-Catholics threatened to undermine or compromise that true faith. An obvious danger is that individuals in groups with members of different faiths learn about other religions and convert to those faiths. More worrisome was the problem of "indifferentism," which plagued Murray throughout his career.¹¹⁹ Catholicism is the one true religion. Yet if Catholics cooperate with other Christians, all religions appear *equal* in the truth. The important differences between Catholicism and other churches are obscured. The public witness contradicts the Catholic truth claims. Critics of these groups argued that Catholic cooperators become "unduly tolerant"¹²⁰ toward other religions. They succumb to "the danger, namely, of some yielding of dogmatic integrity, some subordination of religion to temporal interest."¹²¹ An additional concern is that Catholics *privatize* their own religious commitments in these groups, where they are prevented from proclaiming the truth of the Catholic faith, silenced by their collaborators.

Catholics in the '40s faced this difficult question: "can we in complete loyalty to the truth, and in perfect integrity of conscience, come together in a unity of co-operative action for the solution of our common temporal problems?"¹²² Murray provided a theological rationale for cooperation. He insisted that Catholics should not compromise their *religious* commitments and should hold firmly to the *truth* of their religion. Murray always affirmed the truth of Catholicism. True faith does set limits to one's *religious* cooperation. "For instance, formal Catholic participation in an act of interconfessional worship would imply a doctrinal and ecclesiastical unity with the non-Catholic participants that would be contradictory of the Catholic Unity of the Church as a reality with definite frontiers."¹²³ Catholics could never

118. John Courtney Murray, *Current Theology: Christian Co-operation*, 3 THEOLOGICAL STUD. 413, 413 (1942) [hereinafter Murray, *Christian Co-operation*].

119. *Id.* at 414. Indifferentism had been condemned by Pius IX in the *Syllabus of Errors*. See "indifferentism" and "Syllabus of Errors" entries in THE HARPERCOLLINS ENCYCLOPEDIA OF CATHOLICISM 662, 1233 (Richard P. McBrien ed., 1995).

120. Murray, *Christian Co-operation*, *supra* note 118, at 414.

121. *Id.* at 422.

122. John Courtney Murray, *Current Theology: Co-operation--Some Further Views*, 4 THEOLOGICAL STUD. 100, 108 (1943) [hereinafter Murray, *Some Further Views*].

123. John Courtney Murray, *Current Theology: Intercreedal Co-operation: Its Theory and Its Organization*, 4 THEOLOGICAL STUD. 257, 257 (1943) [hereinafter Murray, *Intercreedal Co-operation*].

accept "interdenominational Christianity as a religious system."¹²⁴ "[T]here is no suggestion of 'equating churches,' or of countenancing the idea that a man may freely choose from among a variety of ecclesiastical allegiances, as if all were equally valid for eternal salvation."¹²⁵

However, in Murray's argument, "interconfessional agreement on certain necessary religious and moral bases of a just social order"¹²⁶ is permitted and does not contradict Catholic faith. "Properly understood, these agreements leave the integrity of Catholic faith untouched."¹²⁷ Such agreement is rooted in the natural law, upon which Murray relied consistently in his social and political writings throughout his life. The natural law provides common principles to all human persons, of different religious beliefs. On these principles, Catholics may cooperate with creeds that are not true. In the '40s, Murray did not elaborate on the natural law principles which he would develop at length later in his career. But the natural law clearly allows cooperation for the work of social justice. "The separation of the divergent doctrines on church unity from a theory of co-operation is quite possible, and would do violence to neither party in their religious convictions. Such a separation leaves intact their mutually-shared doctrine of human unity, whose bond is the law of nature."¹²⁸ Cooperation on natural law grounds was not only possible in theory, but was already taking place in practice, in England, where "co-operation between Catholics and non-Catholics . . . is explicitly based on the ground of a common acceptance of the natural law."¹²⁹ Such cooperation should occur in the United States as well.

Murray's critics feared cooperation, even at the natural law or moral level. For example, Paul Hanly Furfey argued that "Catholics may freely co-operate with non-Catholics in arranging a Fourth of July celebration, in favoring or opposing proportional representation, or in organizing a new insurance company," as well as in some aspects of

124. *Id.* at 272. Murray insists that such cooperation cannot be used to found a "super organization' that would somehow consider itself an interdenominational 'church.'" "[C]ooperation does not create any interdenominational unity among 'religions.'" John Courtney Murray, *The Pattern for Peace and the Papal Peace Program*, in BRIDGING THE SACRED AND THE SECULAR 6, 15, 17 (J. Leon Hooper ed., 1994) [hereinafter Murray, *Pattern for Peace*].

125. Murray, *Pattern for Peace*, *supra* note 124, at 15.

126. Murray, *Intercredal Co-operation*, *supra* note 123, at 272.

127. *Id.*

128. Murray, *Some Further Views*, *supra* note 122, at 109.

129. Murray, *Christian Co-operation*, *supra* note 118, at 430.

"our peculiarly American type of labor movement."¹³⁰ However, Furfey opposed cooperative actions "which by their very nature touch directly on fundamental moral and religious principles."¹³¹ Furfey argued that the discussion of moral principles heightens people's religious differences, and so encourages indifferentism. Furfey advocated "parallel" cooperation, with separate Catholic groups working with non-Catholic groups on common problems.¹³² An overlapping cooperation was too dangerous to the faith.

Unlike other Catholics of his era, Murray accepted religious pluralism, especially in the United States. At the same time he insisted that Catholicism is *true*. Even at this early date, Murray recognized that Catholics (especially American Catholics) live "within the context of a society that will, as a matter of fact, continue for a long time to be religiously pluralistic."¹³³ "Whether we like it or not, we are living in a religiously pluralist society at a time of spiritual crisis; and the alternatives are the discovery of social unity, or destruction."¹³⁴ With Rawls he sees the importance of consensus amidst pluralism. Murray urged a practical resolution of the theological problem. Christians had to work together on matters of social reconstruction and justice. They could find common ground in these areas without appeals to religious truth, and without compromise of religious truth. The virtues of a practical solution should not be underestimated.

Intercredal cooperation was not problem-free. It might tempt some individuals to indifferentism or scandalize some Catholics. However, the solution was not refusal to cooperate in the work of social justice and reform. Instead, the burden shifts to Catholic education. Catholics must be taught to understand the grounds on which they cooperate and to understand that such cooperation is not inconsistent with their faith in the one true church.

Murray does not employ Rawls's expression that the virtues of stability are "very great virtues." But his writings in the midst of the

130. Paul Hanly Furfey, *To the Editor*, 4 THEOLOGICAL STUD. 467, 467 (1943).

131. *Id.* at 467. He includes here divorce, birth control, Communism, Fascism, the ethics of war, fundamental race relations, and the labor question as a whole.

132. *But see* John Courtney Murray, *To the Editor*, 4 THEOLOGICAL STUD. 472, 474 (1943) ("The concept of parallel co-operation would hardly permit an essential part of the papal program, namely, a respectful but vigorous educative action on the thought, attitudes, sympathies, etc. of our separated brethren, with a view to persuading them that our social doctrine and program does appeal to the collective conscience of mankind, and can command their honest assent.").

133. Murray, *Some Further Views*, *supra* note 122, at 100.

134. Murray, *Intercredal Co-operation*, *supra* note 123, at 274.

Second World War convey the urgency of agreement about the social order in the midst of religious pluralism. "When it is a question of a common effort to combat inadequate housing, alcoholism, or the exploitation of the economically underprivileged, I do not first have to ask my associate whether he believes in the divinity of Christ."¹³⁵ Murray did not believe that people who work together for justice have to share a common motivation or converse about their common convictions. Moreover, he supported practical solutions to social problems, even if they posed theoretical difficulties: "what is being sought everywhere today, is a practical solution to a concrete problem, whose terms we cannot change at will."¹³⁶ Murray acknowledged frankly—and practically—that "Catholic social action alone, for all its intrinsic resources, is simply not up to the enormity of the task that confronts it with frightening urgency."¹³⁷

For Murray, the "Declaration on World Peace" by Catholics, Protestants, and Jews illustrated the benefits of cooperation; to his opponents it represented the dangers. Catholics, Protestants, and Jews issued the statement in agreement about the moral bases for a new world order. "The Declaration did not, of course, contain the full Catholic program, nor, for that matter, the full Protestant or Jewish program, nor even a full statement of the points of agreement in the three programs."¹³⁸ Yet Catholics, Protestants, and Jews agreed on the essentials. Religious adherents can retain their distinctive commitments while working together for peace. They can cooperate for peace without abandoning their comprehensive doctrines.

This concern with cooperation among religious groups led Murray to begin his examination of religious freedom. Murray devoted much of his later career to this question. The *Declaration on Religious Freedom* (1965) at the Second Vatican Council, which reversed centuries of Catholic teaching on religious liberty, is due primarily to his efforts. In 1945 he was examining religious freedom in terms of "the question of a common stand," i.e., the common ground on which religious groups can agree.¹³⁹ Murray concluded that religious groups take a common stand in this manner:

135. Murray, *Some Further Views*, *supra* note 122, at 105.

136. Murray, *Intercredal Co-operation*, *supra* note 123, at 274.

137. Murray, *The Pattern for Peace*, *supra* note 124, at 14.

138. *Id.* at 6.

139. John Courtney Murray, *Freedom of Religion, I: The Ethical Problem*, 6 THEOLOGICAL STUD. 229, 239 (1945).

(1) we can reach an important measure of agreement on the *ethical plane*; (2) we must *agree to disagree* on the *theological plane*; (3) but we can reach harmony of action and mutual confidence on the *political plane*, in virtue of the agreement previously established on the ethical plane, as well as in virtue of a shared concern for the common good of the political community, international and national.¹⁴⁰

The ethical plane corresponded to the natural law; the theological plane involved canon law; the political plane related to civil law.

In a pluralistic society, Murray's plane of agreement amidst pluralism was the ethical plane of the natural law; he devoted much of his writing to this natural law theory. But "harmony" and "mutual confidence" occur in the political realm, the real realm of consensus. There individuals "agree to disagree" on theological (and possibly on ethical) questions. The political realm united citizens on common ground in the midst of religious pluralism. The common ground is reason. Let us call it public reason, although Murray called it natural law, reason, or public philosophy:

Our subsistent theological disagreements will cease to generate suspicion and separatism on the level of social life, when both sides have the assurance that their opposing theologies of the Church are projected against the background of an ethic of conscience and a philosophy of political life that are based on reason, that are therefore mutually acceptable, and that are not destroyed by the disagreements in ecclesiology.¹⁴¹

Murray's writings on intercredal cooperation were controversial in his era. They introduced solutions to the problem of pluralism that he pursued in more depth for the rest of his life. They show some similarities to Rawls's struggles with a different era of pluralism fifty years later. Murray accepts religious pluralism, yet insists on the truth

140. *Id.* at 239-40 (emphasis added).

It is this third objective that is presently desirable--in fact, strictly necessary; for both Catholics and Protestants have a common obligation to preserve harmony of action and mutual confidence on the political plane, in the interests of their common good--public peace, civic friendship, the reign of justice in social life, temporal prosperity . . . Here, therefore, is our problem--a common problem: While preserving intact our theological disagreement (which has its own grounds), how shall we abolish mutual distrust, and strengthen our social unity, civic amity, harmony of action and mutual confidence in a common pursuit of the common good? Obviously, the dilemma is not to be solved by abolishing one of its horns, the theological disagreement.

141. *Id.* at 240-41. "This ethic of conscience and this political philosophy will stand guarantee that our respective theologies can under no circumstances have such implications in the temporal order as would be injurious to the integrity of conscience, be it Catholic or Protestant." *Id.*

of his religion. Disagreements on the truth need not bar social agreement. People of different religions find common ground in the political plane. Agreement looks possible but more difficult on the ethical plane.

However, in his first articles Murray was addressing a limited question of social cooperation by some Christians in the unique circumstances of the Second World War. Murray had yet to examine the problems of political liberalism. He did so after the war, however, when he wrote extensively on church-state theory. In doing so, he confronted one of Catholicism's fiercest enemies—Liberalism. In the 1940s and 1950s Catholics were not Rawlsian liberals.¹⁴²

B. CHURCH AND STATE

Already in the writings of Murray and his opponents on inter-credal cooperation, the spectre of liberalism appears. Furfey sounded the warning about liberalism, a warning that reverberates today in religious criticisms of *Political Liberalism*.

We have been ineffective because we have been too uncritically cooperative. We have been so feverishly anxious to co-operate *with liberals* and all sorts of people that we have kept our distinctively Catholic social doctrine in the background. To the general public we have not emphasized our faith in supernatural means, in all that is distinctively Catholic in the Encyclicals. Our Catholic social doctrine, as presented by many of our leaders, must appear to outsiders as a sort of *expurgated liberalism*.¹⁴³

Furfey expressed the fear that religious cooperation with the liberal state weakens comprehensive doctrines. Furfey urged the church "to become more aggressively Catholic, not less so."¹⁴⁴ Murray disagreed; we have seen that he favored cooperation by Catholics on natural law grounds. Yet Murray had his own differences with liberalism. He was careful to distinguish Catholic from liberal cooperation:

The Catholic takes hold of the social end, and asks for agreement on the natural religious and moral principles of social unity and peace; he, therefore, reduces religious pluralism to unity on the social plane, and thus reaches a practical (though not ideal) solution of the problem. The "liberal" takes hold of the religious end of the

142. For the relationship between Catholicism and Liberalism, see generally R. BRUCE DOUGLASS & DAVID HOLLENBACH, *CATHOLICISM AND LIBERALISM: CONTRIBUTIONS TO AMERICAN PUBLIC PHILOSOPHY* (1994).

143. Furfey, *supra* note 130, at 471 (emphasis added).

144. *Id.*

problem, and asks for agreement on certain "fundamentals of Christianity"; he, therefore, reduces religious pluralism to unity on the religious plane, and thus solves—absolutely nothing. For a false solution in the religious order cannot be a true one in the social order. On his basis, the Catholic can appeal to the conscience of mankind for support and co-operation, as Pius XII has done; for his solution respects at once the exigencies of truth and the rights of conscience, both Catholic and non-Catholic. On the contrary, the "liberal" solution rests ultimately on a sentimentalism that confuses all the values, both religious and social, that he sincerely wishes to protect; and it leads inevitably to a brutal realism that denies all his values.¹⁴⁵

Under this description Rawls is more Catholic than liberal in his refusal to seek the unity of comprehensive doctrines and in his insistence that citizens participate in the overlapping consensus based on these doctrines. We see again how important it was for Murray to maintain the truth of his comprehensive doctrine while uniting with others on the political plane. Rawls's theory respects that commitment.

Having resolved to his own satisfaction the Catholic issue of intercredal cooperation, Murray was left with a far more difficult problem. It was one thing for Catholics to work with non-Catholics in social organizations, or in groups committed to social reform, but quite another for Catholics and non-Catholics to cooperate in *political* society, and specifically in the state. Murray identified the political as common ground for different religious individuals, but this argument had serious implications for the institutional relationship of church to state. As he developed his account of the Catholic relationship to the state, Murray battled both liberals and Catholics.

In the nineteenth century the Roman Catholic Church confronted its loss of political power, in particular the loss of the papal states. Some European nations confiscated church property and the church lost its privileged position in some historically "Catholic" nations. These changes left the church to reconfigure its relationship to the modern state. The popes attacked the liberal reforms that had

145. Murray, *Intercredal Co-operation*, *supra* note 123, at 273-74. "The Catholic solution, on the other hand, rests ultimately on a hard intellectualist position—the distinction between the natural and the supernatural order, and the enduring validity of nature within the order of grace. Because of this distinction, every affirmation of nature—in the concrete, of the religio-ethical bases of society—so long as it is simply an affirmation, is entirely Catholic." *Id.* at 275.

provoked the changes in Europe. Papal documents condemned liberalism and in particular the liberal reforms of the separation of church and state, religious liberty, and freedoms of speech and press.¹⁴⁶

By the time that Murray addressed Catholicism's relationship to the modern state, the dominant account of Catholic church-state theory was the thesis/hypothesis distinction. Its central premise (as in any Catholic theory) was that Catholicism is the one true religion. Because Catholicism is the one true religion, it should be the *established* religion of the state. Establishment is necessary because the church is never concerned only with the spiritual or the supernatural. The state is to establish the one true church and to govern in accordance with Catholic principles.

Liberal reforms had threatened, at times ended, the church's establishment in Europe. The thesis/hypothesis language evolved in reaction to those reforms. The thesis states that Catholicism should be the established religion of the state. By the twentieth century, however, Catholics knew that Catholicism was not always the established religion, and that it would be difficult to gain or regain established status in some nations. The difficult question was how to interpret this situation. Could Catholics accept non-establishment? Must they always support establishment? As Murray put it,

Does the dogmatic concept, "the freedom of the Church," entail by necessary consequence the constitutional concept, "the religion of the state," in such wise that, where the latter concept does not obtain, an inherent right of the Church is violated and the constitutional situation can therefore be the object only of *toleration, on grounds of factual necessity, the lesser evil, etc.*?¹⁴⁷

146. See generally ANTHONY RHODES, *THE POWER OF ROME IN THE TWENTIETH CENTURY* (1983). For the relationship of Catholicism to liberal democracy, see generally Paul Sigmund, *Catholicism and Liberal Democracy*, in *CATHOLICISM AND LIBERALISM: CONTRIBUTIONS TO AMERICAN PUBLIC PHILOSOPHY*, *supra* note 142, at 217-41.

147. John Courtney Murray, *Current Theology: On Religious Freedom*, 10 *THEOLOGICAL STUD.* 409, 422 (1949) (emphasis added) [hereinafter Murray, *On Religious Freedom*]. See also *id.* at 423 (emphasis added) ("Is this constitutional concept, as applied in the nation-state, simply a particular and contingent, historically and politically conditioned realization of the dogmatic concept, 'the freedom of the Church,' in such wise that, even where it does not obtain, all the inherent exigencies of the freedom of the Church may still be adequately realized and the constitutional situation may be the object of *approval in principle as good in itself?*"); John Courtney Murray, *Government Repression of Heresy*, 3 *PROC. CATHOLIC THEOLOGICAL SOC'Y AM.* 26, 33-37, 66 (1948) (The spiritual, not political power of the church is now the thesis.) [hereinafter Murray, *Government Repression*].

Many Catholic writers in Murray's age believed that a non-Catholic state was the "hypothesis" that had to be tolerated as an evil.¹⁴⁸ Catholics had to tolerate non-establishment because they could do no better. The thesis is establishment; the hypothesis is non-establishment. The thesis is good; the hypothesis is evil. The corollary was clear: Catholics could tolerate the hypothesis, but were obligated to change the hypothesis to thesis when they could do so. The slogan connected to this theory was "Error has no rights."¹⁴⁹ This slogan raised an additional issue about the thesis/hypothesis that Murray addressed later in his life, i.e., the question of public worship. Catholics in the minority clearly have the right to public worship; their religion is true. But error does not have "rights" to public worship.¹⁵⁰ Non-Catholics in the minority should not have the right to public worship.

The thesis/hypothesis is a striking illustration of a Rawlsian *modus vivendi* that is not an overlapping consensus. Rawls is generous to use as his example *sixteenth* century Catholics; twentieth century Catholics still wanted to change the settlement. Catholics know that they do not always have the political clout to be the established religion of the state. Therefore, they must tolerate their non-establishment in some nations. Should that situation change, however, then

148. Murray, *On Religious Freedom*, *supra* note 147, at 420 ("And the practical question was, whether this or that nation-state was in the situation of 'thesis' or of 'hypothesis.' If the latter, a constitutional guarantee of religious freedom was the rule; if the former, the constitutional concept, 'religion of the state,' had to apply. And there you were.").

149. THE HARPERCOLLINS ENCYCLOPEDIA OF CATHOLICISM, *supra* note 119, at 476.

150. See John Courtney Murray, *Religious Freedom*, in FREEDOM AND MAN 134-35 (J.C. Murray ed., 1965) for a summary of this position [hereinafter Murray, *Religious Freedom*]. See also THOMAS T. LOVE, JOHN COURTNEY MURRAY: CONTEMPORARY CHURCH-STATE THEORY 29-30 (1965) ("The view of the conservative Catholic may be summarized as follows: (1) There is only one true Church or religion; it is the highest good for man; hence, the state must aid the Church positively and defend it from all attacks. This is to say that only the Catholic Church is to have full religious liberty. (2) All other so-called religions are in error and error does not have the same rights as truth. Error must not be freely propagated. Individual persons are, of course, free to be in error, but such persons are not to be permitted to gather with others of similar error and to propagate error. The conservative wishes to *contain* error by legally prohibiting public assemblage and propagation. (3) If Catholics are in a *majority* (e.g., Spain, Colombia) they are to oppose the external and public freedom of those holding different religious beliefs. However, if Catholics are in the *minority* they are to ask for religious freedom. It is *rationally expedient* to put up with the existing situation until a future time, until the minority becomes the majority or certain power structures change. At some more *opportune* time through some form of legitimate political power (e.g., majority, concordat) the Roman Catholic Church will be able to establish itself in its proper preferential status. (4) The conditions upon which it might again become rationally expedient to actualize the rights of the true religion are so impossible of fulfillment, and that epoch so distant, as to be almost unimaginable, even in so-called 'Catholic' lands.").

Catholics should advocate a change in their nation's political structure, so that Catholicism becomes the established religion. If the thesis/hypothesis is the correct account of Roman Catholic church-state theory, then the separation of church and state is clearly wrong, an evil to be tolerated.

Murray opposed this interpretation of the thesis/hypothesis. He based his argument on lengthy analyses of papal documents, which I will not review here. He used the language of his comprehensive doctrine to challenge fellow Catholics to reinterpret that comprehensive doctrine. Although his focus was papal doctrine he was guided and inspired by his experience of the separation of church and state in the United States. Murray argued that the papal documents had to be read as a response to *Continental* liberalism; "[t]he Liberalism condemned by the Church is rightly written with a capital L."¹⁵¹ What Liberalism stands for, and what Catholics cannot accept, is the "absolute autonomy of the individual reason," and the "political principle of the juridical omnipotence of the state."¹⁵² "What [Liberals] really wanted to achieve was a completely secularized society"¹⁵³—the charge still made against Rawlsian liberalism. Like Rawls, Murray defended a liberalism that allowed a proper role for comprehensive doctrines.

The popes' critiques of the liberal state made some sense on the Continent. However, Murray argued that the thesis/hypothesis, establishment/non-establishment rule differed in the historical context of the United States. In the 1950s, American Catholics were often accused of desiring to impose Catholic or papal rule on the United States. That fear had waylaid the presidential aspirations of Alfred E. Smith. John F. Kennedy's advisors consulted with Murray as Kennedy faced those charges in his presidential campaign and as he prepared his address to the Houston ministers.¹⁵⁴ The thesis-hypothesis distinction fueled such fears. If thesis/hypothesis was the correct interpretation of Catholic teaching, then Catholics, a minority in the United States, should tolerate the separation of church and state as an evil

151. John Courtney Murray, *How Liberal is Liberalism?*, 75 AMERICA 6, 6 (1946) [hereinafter Murray, *How Liberal*]; see also JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 67 (1960) [hereinafter MURRAY, WE HOLD].

152. Murray, *How Liberal*, *supra* note 151, at 6.

153. *Id.* at 7.

154. DONALD E. PELOTTE, JOHN COURTNEY MURRAY: THEOLOGIAN IN CONFLICT 76 (1975).

and work to establish Catholicism if they had the opportunity. Some Catholic writers proposed Spain as the thesis and the United States as the hypothesis; American Catholics should prefer to be governed by a Spanish-style state.

Murray vigorously opposed this interpretation of the constitutional separation of church and state in the United States. "Are we to suppose that 30,000,000 Catholics must live perpetually in a state of 'hypothesis'?"¹⁵⁵ Murray denied that "civil intolerance is inherent in the Catholic doctrine of the Church and the state."¹⁵⁶ Catholic participation in the United States was not the toleration of an evil, but "has been a matter of conscience and conviction, because its motive was not expediency in the narrow sense—the need to accept what one is powerless to change."¹⁵⁷ Murray reinterpreted the thesis/hypothesis distinction in his analysis of the religion of the state. He reworded the thesis. He argued that an (established) religion of the state is *not* "a permanent and necessary part of the 'thesis.'"¹⁵⁸ The relationship of church to state is not an abstract, ahistorical concept. The church's

155. *Id.* at 38; *see also id.* at 46 ("Pius XII had demolished 'the false idea' that the Spanish system stood for a 'thesis' and the American system merely for a 'hypothesis.'").

156. Murray, *Government Repression*, *supra* note 147, at 26; *see also* John Courtney Murray, *Leo XIII and Pius XII: Government and the Order of Religion*, in *RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM* 49, 97 (J. Leon Hooper ed., 1993) ("The former view in its more extreme expositions has given rise to widespread belief that when Catholics possess the requisite political power they are obliged in principle to use the coercive force of government to repress other religious beliefs, more or less severely; whereas when they lack political power they suspend their principle, recur to expediency, and defend a general civil right to the free exercise of religion. In other words, Catholics are intolerant when it is possible to be intolerant; they are tolerant only when it is necessary to be tolerant. Intolerance is the ideal, justified by principle; tolerance is an evil, justified as a lesser evil by factual circumstances. If this popular belief is true Catholic doctrine, it is indeed good that it is popular. But if it is not true, its popularity is a scandal.") [hereinafter Murray, *Leo XIII and Pius XII*].

157. MURRAY, *WE HOLD*, *supra* note 151, at 43.

158. Murray, *On Religious Freedom*, *supra* note 147, at 423.

teaching about the state must reflect historical change.¹⁵⁹ "[T]he discussion must proceed from an historical point of view. Nothing is more unhelpful than an abstract starting point."¹⁶⁰

Murray insisted on an inductive, not deductive, approach to Catholic social ethics.¹⁶¹ "The two links [between religious freedom and limited constitutional government and between the freedom of the church and of the people] were not forged by abstract deductive logic but by history, by the historical advance of totalitarian government, and by the corresponding new appreciation of man's dignity in society."¹⁶²

Murray, like Rawls, adopted a political theory that was historically situated and abandoned a comprehensive political theory that would apply in all times and all places. That type of theory had led to the thesis/hypothesis failure. Murray grew wary of theories that offered comprehensive, abstract, and historical doctrines of church and state.

159. *Id.* at 425. ("However, the cardinal question--not indeed unrelated to the foregoing ones--concerns, as I said, the relation between the constitutional concept, 'religion of the state,' and the dogmatic concept, 'the freedom of the Church.' The standing of this constitutional concept within the framework of Catholic doctrine turns on the nature of this relation, whether it is necessary and absolute, or conditioned and historical. Admittedly, this concept may be a means to the preservation of a particular national unity or to the maintenance of the integrity of a particular national culture; as such, however, it cannot claim the patronage of the Church or of Catholic doctrine; for national unities and cultures do not rank as ends or values proper to the Church, nor is her doctrine a means to them. The only proper point of reference is the freedom of the Church, which is the single necessary end that the Church directly seeks in her relations with political society. Consequently, only insofar as the constitutional concept, 'religion of the state,' is a means to this end can it claim any doctrinal standing. The question then is, what kind of a means is it? Is it a permanently necessary means apart from which the freedom of the church cannot be properly secure? If so, it becomes a constitutional 'ideal' by this relation to a dogmatic 'ideal,' and can claim to be 'thesis,' as the freedom of the Church is 'thesis.' If not, it sinks to the rank occupied by other constitutional institutionalizations of principle--the rank of a relative, not an absolute, a valid and valuable institution that can be defended in a context but that need not and cannot be proclaimed an 'ideal.'").

160. See also Murray, *Government Repression*, *supra* note 147, at 33.

161. For discussion of the inductive method in Catholic social (but not sexual) ethics, see generally MARIE-DOMINIQUE CHENU, LA "DOCTRINE SOCIALE" DE L'EGLISE COMME IDÉOLOGIE (1979); CHARLES E. CURRAN, MORAL THEOLOGY: A CONTINUING JOURNEY 173-208 (1982).

162. PELOTTE, *supra* note 154, at 115-16. See also Murray, *Religious Freedom*, *supra* note 150, at 137-38 ("Therefore argument about human rights, including religious freedom, has to be informed by historical consciousness, by an awareness that demands inherent in the nature of man manifest themselves and come to recognition in history, under the impact of developing human experience. Deductive argument therefore is not enough. Good moral philosophy, like all good philosophy, must begin with man's historical experience and undertake to discern in it the intentions of human nature, the rational imperatives that rise from the depths of the concrete human person, the dictates of reason that claim affirmation as natural law.").

Murray argued that the thesis is the freedom of the church, not the establishment of the church.¹⁶³

Since the institution of the state-church was an adaptation to a particular historical context, it does not represent a permanent and unalterable exigence of Catholic principles, to be realized in any and all historical situations in which there is verified the general hypothesis of a "Catholic population." This legal institution need not be defended by Catholics as a sort of transtemporal "ideal," the single and only institutionalized form of Church-State relationships which can claim the support of principles, the unique "thesis" beside which all other solutions to the Church-State problem must be regarded as "hypothesis," provisional concessions to *force majeure*.¹⁶⁴

Murray preferred the language of principle and application of principle to thesis and hypothesis. The application of principles changes in changing circumstances.¹⁶⁵ "What necessitates changing applications of principle and a vital process of adaptation is the changing character of 'the state.'"¹⁶⁶ In the United States, separation is not the thesis or the principle. Instead, the First Amendment of the United States protects the thesis/principle of the freedom of the church. To the Catholics, American as well as Roman, who had argued that the United States violated *per se* the Catholic thesis, Murray demonstrated that the First Amendment protected the liberty of the church espoused by all the popes. *Time* magazine put him on its cover after Kennedy's election in recognition of the intellectual work he had done

163. John Courtney Murray, *Contemporary Orientations of Catholic Thought on Church and State in the Light of History*, 10 THEOLOGICAL STUD. 177, 224 (1949) ("There is first the free obedience of the Christian conscience to the magisterial and jurisdictional authority of the Church; there is secondly the free participation of the citizen, as a Christian, in the institutions whereby all the processes of temporal life are directed to their proper ends.") [hereinafter Murray, *Contemporary Orientations*].

164. John Courtney Murray, *The Problem of State Religion*, 12 THEOLOGICAL STUD. 155, 161 (1951) [hereinafter Murray, *State Religion*]. See also Murray, *Contemporary Orientations*, *supra* note 163, at 229 ("For the theologian, the basic question concerns that constitutional situation itself--is it or is it not the theologically necessary, permanently valid, unalterably ideal realization of Catholic principles on Church-state relationships, in such wise that any constitutional situation which deviates from it can be the object only of 'toleration,' not of approval in principle--a concession to the exigencies of an 'hypothesis,' prompted by expediency, and not the embodiment of a 'thesis,' warranted by theological and political doctrine. In other words, the question is whether the concept of *libertas ecclesiastica* by intrinsic exigence requires political embodiment in the concept of 'the religion of the state,' with the 'logical and juridical consequences' that have historically followed from that concept. Surely the answer must be no.").

165. Murray, *State Religion*, *supra* note 164, at 160.

166. *Id.*

to demonstrate that Catholics could be American citizens, politicians, and presidents.

Murray's writings were addressed to a Catholic audience, but not only to a Catholic audience; he frequently commented on the role of religion in the United States. In his essays on intercredal cooperation and church-state theory, he was proposing positions that had implications for political philosophy or political liberalism. Moreover, in the 1950s, his arguments were important to the American public, whose anti-Catholic sentiment was strong, with animosity exacerbated at the end of the decade by the presidential campaign of a Roman Catholic. Yet many of his articles were primarily arguments "within" a comprehensive doctrine, interpreting what the Catholic tradition said about the church and the state for theologians.

Within his comprehensive doctrine, Murray paid a price for his opinions. In 1954 he was ordered by Rome to desist from writing about church and state. The effect on Murray is expressed in his letter to a fellow Jesuit:

All the books on Church and State and on allied topics have been cleared from my room, in symbol of retirement, which I expect to be permanent. When Frank Sheed returns, I shall cancel the agreement I had with him to edit and revise the articles on Church and State for a book. Fortunately, my gloomy prescience impelled me to refuse an invitation to give the Walgreen Lectures at the U. of Chicago. And all other practical measures will be taken to close the door on the past ten years, leaving all their mistakennesses to God.¹⁶⁷

He began to send his manuscripts to Rome for approval before publication; approval was at times denied.¹⁶⁸

Murray moved to different topics, while continuing to struggle with the weaknesses in his church-state theory. In 1945, Murray had rooted religious freedom in a political principle. At that time, he interpreted religious liberty in terms of the duties of the state to the common good, as a political compromise, if you will.¹⁶⁹ By the 1950s, Murray rooted the principle of religious freedom in the dignity of the human person, all human persons. Religious freedom was no longer a right for Catholics only, but a right of human persons. The right of

167. PELOTTE, *supra* note 154, at 53.

168. *Id.* at 52.

169. See John Courtney Murray, *Current Theology: Freedom of Religion*, 6 THEOLOGICAL STUD. 85, 98 (1945) (describing religious liberty as a political principle).

religious freedom was not dependent on the truth of one's religious doctrine. It did not belong to Catholics only.

Murray was eventually vindicated by the Second Vatican Council, which met in Rome from 1962-1965. He was "disinvited" from the early sessions of the Council.¹⁷⁰ Then Cardinal Spellman appointed him a *peritus*. Murray's early opponent, "the dark spectre that brooded over the conciliar debates—the historical and doctrinal spectre of religious indifferentism"¹⁷¹ was present. The bishops battled fiercely over the Council documents, to maintain or change the traditional thesis. Murray's influence is evident in the Council's *Declaration on Religious Freedom*.¹⁷² With the Declaration, the church recognized the "affirmation of religious freedom as a human and civil right," "the right of the person."¹⁷³ The "schema on religious freedom was often called the 'American schema'" because it "derived its basic inspiration from the American experience."¹⁷⁴ It was Murray's schema. The *modus vivendi* was finally over.¹⁷⁵

C. TWO THERE ARE: CHURCH AND STATE

The problem of religious pluralism was "solved" by Murray by turning to a political, and then an ethical principle, and not a theological one. In Murray's view, Catholicism was still the one true religion. To his opponents, that truth had meant that only Catholics had rights

170. CHARLES E. CURRAN, *AMERICAN CATHOLIC SOCIAL ETHICS* 177 (1982).

171. John Courtney Murray, *Declaration on Religious Freedom: Commentary*, in *AMERICAN PARTICIPATION AT THE SECOND VATICAN COUNCIL* 668, 673 (V.A. Yzermans ed., 1967) [hereinafter Murray, *Commentary*].

172. Second Vatican Council, *Declaration on Religious Freedom*, in *THE DOCUMENTS OF VATICAN II* 675 (Walter M. Abbott, S.J. ed., 1966).

173. See Murray, *Religious Freedom*, *supra* note 150, at 134-35.

174. Murray, *Commentary*, *supra* note 171, at 668.

175. See also John Courtney Murray, *The Declaration on Religious Freedom*, in *BRIDGING THE SACRED AND THE SECULAR*, *supra* note 124, at 198-99:

Therefore, the *Declaration on Religious Freedom* puts aside the post-Reformation and 19th-century of civil tolerance. The fault is not error but archaism. A new philosophy of society and state has been elaborated, more transtemporal in its manner of conception and statement, less time-conditioned, more differentiated, a progress in the understanding of the tradition. Briefly, the structural elements of this philosophy are the four principles of social order stated, and developed in their exigencies, in *Pacem in terris*—the principles of truth, justice, love and freedom. The declaration of the human and civil right to the free exercise of religion is not only in harmony with, but also required by, these four principles. The foundation of the right is the truth of human dignity. The object of the right—freedom from coercion in religious matters—is the first debt due in justice to the human person. The final motive for respect of the right is a love of appreciation of the personal dignity of man. Religious freedom itself is the first of all freedoms in a well-organized society, without which no other human and civil freedoms can be safe.

to religious freedom. Murray sought agreement on religious freedom apart from the truth claims of religion. The right inhered in human persons. This identification of a human, not Catholic, right to religious freedom was accompanied by a recognition of the autonomy of the state.

Within his comprehensive doctrine, Murray identified a realm "independent" (could we say "freestanding"?) of his comprehensive doctrine, a realm that all human persons inhabit without reference to their comprehensive doctrines. Behind his interpretation of the thesis/hypothesis lay a vision of politics as the realm in which humans of all comprehensive doctrines find common ground. "Political unity is now a particular order of unity in its own right, and it has its own foundations, which are not necessarily a unity in supernatural faith. Citizenship and all the rights of the citizen rest on purely political grounds."¹⁷⁶ In the United States, Americans shared a common ground of political citizenship based on the natural law.

Murray argued that church and state were separate institutions. The interaction yet separation of the two maintained an appropriate balance. Citizens should not *absolutize* the state. The church keeps the state from becoming an absolutist, totalitarian institution. Nor should citizens *sacralize* the state. The state is not supposed to be a religious institution. It has its own ends. This recognition of the autonomy of the state strengthened Murray's support of the First Amendment. "The immediate point here is that the American political tradition, whose parentage was English rather than Continental, has remained substantially untouched by the two radical vices which ruined the medieval heritage on the Continent—absolutism and the sacralization of politics."¹⁷⁷ In the United States, separation of church and state

does not make the state a church, nor does it establish a political religion. It does not envisage an evacuation of the Christian substance of society; it simply imposes restrictions on the legal activity of the state. It has an effect quite opposite to that of Continental

176. See also Murray, *Government Repression*, *supra* note 147, at 64.

177. John Courtney Murray, *Leo XIII: Separation of Church and State*, 14 THEOLOGICAL STUD. 145, 151 (1953) [hereinafter Murray, *Leo XIII*]. See also John Courtney Murray, *Leo XIII: Two Concepts of Government*, 14 THEOLOGICAL STUD. 551, 564 (1953) ("The role of government, and its essential contribution in this field, remain on principle always political, not religious."). But see MURRAY, *WE HOLD*, *supra* note 151, at 201 ("My generalization will be that the political experiment of modernity has essentially consisted in an effort to find and install in the world a secular substitute for all that the Christian tradition has meant by the pregnant phrase, the 'freedom of the Church.'").

separation. So far from sacralizing the political community or the legal order, it secularizes both. That is, *it confines law and government to secular purposes* (which are understood to include the moral purposes of freedom, justice, peace, and the general welfare).¹⁷⁸

The First Amendment protects this proper Christian understanding of the state. The separation of church and state in Europe was not the separation of church and state of the United States. Roman criticisms of the First Amendment were wrong. The First Amendment does not implicitly establish "the doctrine that all churches are simply voluntary societies of equally human origin and of equal value in the sight of God, each of them offering to man an equally good way to eternal salvation."¹⁷⁹ The First Amendment is a *political*, not a theological or ethical agreement. It does not establish indifferentism.

Catholics support the First Amendment from their comprehensive world view. In Murray's language, the First Amendment is *not* "articles of *faith*"; it does not assert a theological truth. Catholics support the First Amendment as "articles of *peace*."¹⁸⁰ "He takes the highest ground available in this matter of the relations between religion and government when he asserts that his commitment to the religion clauses of the Constitution is a moral commitment to them as articles of peace in a pluralist society."¹⁸¹ Some modern interpreters of Murray interpret this distinction between *faith* and *peace* to mean that Catholics tolerate the First Amendment, that it is a lesser good.¹⁸² Murray rejected that view when he dismissed the thesis/hypothesis distinction. Articles of peace have "high moral value"¹⁸³ ("very great virtue"?).¹⁸⁴ A political agreement in a pluralistic society is a good

178. Murray, *Leo XIII*, *supra* note 177, at 153 (emphasis added). See also MURRAY, WE HOLD, *supra* note 151, at 66 ("Christianity has always regarded the state as a limited order of action for limited purposes, to be chosen and pursued under the direction and correction of the organized moral conscience of society, whose judgments are formed and mobilized by the Church, an independent and autonomous community, qualified to be the interpreter of man's nature and destiny.").

179. John Courtney Murray, *Separation of Church and State*, 76 AMERICA 261, 261 (1946).

180. MURRAY, WE HOLD, *supra* note 151, at 49.

181. *Id.* at 78. But see Gerard V. Bradley, *Beyond Murray's Articles of Peace and Faith*, in JOHN COURTNEY MURRAY AND THE AMERICAN CIVIL CONVERSATION 200 (R.P. Hunt & K.L. Grasso eds., 1992) (noting "how precarious Murray's distinction is" between articles of faith and peace).

182. See, e.g., Bradley, *supra* note 181, at 194 (noting confusion of faith and peace language. "But it remains the case that Murray's work suggests that our institutions are Christian, and that is incompatible with what he characterizes as 'articles of peace.'").

183. MURRAY, WE HOLD, *supra* note 151, at 60.

184. But see Bradley, *supra* note 181, at 200:

thing. A political realm not governed by theological principle is a good thing. "Two there are," church and state.¹⁸⁵

D. THE SECULAR PURPOSE OF THE LAW

Murray was confident in leaving secular affairs to the state because he believed that other institutions of *society* would pursue additional human goals and purposes.¹⁸⁶ "Properly 'society' designates a structured order of human relationships (familial, civic, economic, religious, etc.) which is constituted in view of an end."¹⁸⁷ While "two there are," church and state, Murray also emphasized the importance of intermediate social institutions. Murray distinguished among "civil society," "political society," "state" and "government."¹⁸⁸ Civil society's "scope is as broad as civilization itself,"¹⁸⁹ including the full range of human associations and groups. It "designates the total complex of organized human relationships on the temporal plane, which arise either by necessity of nature or by free choice of will, in view of the cooperative achievement of partial human goods by particular associations or institutions."¹⁹⁰ "Society is composed of a rich and overlapping set of human communities such as families, neighborhoods, churches, labor unions, corporations, professional associations, credit unions, cooperatives, universities, and a host of other associations."¹⁹¹ "Society" in Murray's thought is similar to the "nonpublic" institutions recognized by John Rawls. Murray's definition of society should explain why some critics of Rawls dispute his characterization of these groups as "nonpublic."

The burden of his "two articles" analysis is to argue *for* Catholic acceptance of the clauses. In other words, Catholics need not derive their political allegiance from "internal" Catholic criteria. This much establishes that Murray is no liberal in the theoretical sense represented by John Rawls . . . The hallmark of such liberalism is construction of political institutions and principles of justice to govern them completely independent of religious belief. Rawls's method is to prescind from virtually all moral and religious commitments in the "original position" of choice. Murray sees that this stance is neither religiously neutral nor "areligious"; he recognizes that it implicitly involves the privatization of religion.

185. MURRAY, WE HOLD, *supra* note 151, at 197-217.

186. See Hollenbach, *Contexts of the Political*, *supra* note 63, at 883-84 ("In the 1950's, Jacques Maritain and John Courtney Murray argued for the compatibility of a public role for religion with the institutions of democracy by reaffirming the distinction between society and the state. . . . [T]he society-state distinction is at the root of their affirmation both of religious freedom and of constitutional democracy. It is the basis for their firm opposition to all forms of totalitarianism, state absolutism, or religious coercion.").

187. Murray, *State Religion*, *supra* note 164, at 175.

188. *Id.* at 158 n.6.

189. *Id.* See generally CURRAN, *supra* note 170, at 197.

190. *Id.*

191. Hollenbach, *Contexts of the Political*, *supra* note 63, at 883-84.

Political society “designates civil society as politically organized, i.e., organized for the common good.”¹⁹² The state is “that particular subsidiary functional organization of the body politic, whose special function regards the good of the whole.”¹⁹³ Government is “the ruler-in-relation-to-the-ruled; it is likewise the ruled-in-relation-to-the-ruler.”¹⁹⁴ The state and government are to serve civil society. “The writ of government does not reach as far as the full scope of the public life of society.”¹⁹⁵

Murray’s insights into politics also applied to the law. Of one legal conclusion Murray was clear. “The First Amendment surely passes the test of good law.”¹⁹⁶ Both law and politics serve secular purposes. As he distinguished between the church and the state, so Murray distinguished between divine and moral law and human law. “The area of state—that is, legal—concern was limited to the pursuit of certain enumerated secular purposes (to say that the purposes are secular is not to deny that many of them are also moral.)”¹⁹⁷ The state enforces civil law; it is not required to enforce the whole moral law. In an unpublished article of 1955 (unpublished because of Rome’s edict), Murray distinguished between Catholicism’s divine law and human law. There is a “distinction between Church and state, between the order of ethics and theology and the order of law and politics, between the dogmatic judgments of the Church and the legal decisions of government.”¹⁹⁸ “The jurist’s work proceeds from the axiom that the principles of religion or morality cannot be transgressed, but neither can they be immediately translated into civilized human law.”¹⁹⁹ The government, e.g., cannot compel acts of worship.²⁰⁰

192. Murray, *State Religion*, *supra* note 164, at 158 n.6.

193. *Id.*

194. *Id.*

195. Hollenbach, *Contexts of the Political*, *supra* note 63, at 884. See also John Courtney Murray, *The Problem of Religious Freedom*, in RELIGIOUS LIBERTY, *supra* note 156, at 144-45 (identifying distinctions between sacred and secular, society and state, common good and public order. “In general, ‘society’ signifies an area of freedom, personal and corporate, whereas ‘state’ signifies the area in which the public powers may legitimately apply their coercive powers. To deny the distinction is to espouse the notion of government as totalitarian.”).

196. MURRAY, WE HOLD, *supra* note 151, at 72.

197. *Id.* at 66.

198. Murray, *Leo XIII and Pius XII*, *supra* note 156, at 90.

199. *Id.* at 60; see also *id.* at 58: (recognizing “the distinction between the order of divine law, natural and revealed, and the order of human law; between ethical and theological principle and legal rules; or, if you will, between principles and their application.”).

200. *Id.* at 57 (“One might further say that, in proportion as a society approaches the Christian ideal, law becomes less and less important.”).

This is another reason why Catholics may participate in the overlapping consensus. They do not expect their comprehensive doctrine to become the law of the United States, even when their comprehensive doctrine is true.

It is sufficient to say that the distinction between moral and theological questions and questions of human law derives from the fact that the former raise only one issue—the issue of truth and right, whether natural or revealed; whereas the latter raise two distinct issues. Legal questions do indeed raise an issue of truth and right, the *quaestio iuris*, the relation of the proposed enactment to the order of moral and theological principle. But they also raise an issue of prudence, the *quaestio facti*, the relation of the proposed enactment to the common temporal good of the society for which it is proposed. Legal questions therefore depend for their right solution, not only upon general principles of the moral or theological order, but also upon an intermediate set of norms, the norms of jurisprudence and political wisdom.²⁰¹

Murray relied upon this prudential aspect of the law to argue that the church should not oppose the decriminalization of contraception in the law of Massachusetts.²⁰² In his article on the *law* of contraception (written before *Humanae Vitae*), Murray did not question the church's teaching to Catholics.²⁰³ Catholics should affirm the ban on contraception as a matter of *private* morality, but should not enforce this ban as a matter of *law*. It sounds as if Catholics should approach contraceptive legislation as Rawlsians. They accept the truth of the pope's teaching; they practice that teaching in their private lives; they vote against a ban because they cannot defend their position by a principle held in common with their fellow citizens. In this case, religious and moral pluralism mean that Catholics may not ask the state to criminalize artificial contraception.

The more decisive reason [against the legal ban] is that the practice . . . has received official sanction by many religious groups within the community. It is difficult to see how the state can forbid, as

201. *Id.* at 59.

202. John Courtney Murray, *Memo to Cardinal Cushing on Contraception Legislation*, in *BRIDGING THE SACRED AND THE SECULAR*, *supra* note 124, at 81-86 [hereinafter Murray, *Memo to Cardinal Cushing*].

203. *But see* John Courtney Murray, *Appendix: Toledo Talk*, in *BRIDGING THE SACRED AND THE SECULAR*, *supra* note 124, at 336 (On birth control, "[t]he church reached for too much certainty too soon, it went too far. Certainty was reached in the absence of any adequate understanding of marriage. This, many would hold--I would hold--is today no longer theologically tenable. . . . It is also psychologically untenable.").

contrary to public morality, a practice that numerous religious leaders approve as morally right. The stand taken by these religious groups may be lamentable from the Catholic moral point of view. But it is decisive from the point of view of law and jurisprudence, for which the norm of "generally accepted standards" is controlling.²⁰⁴

Public reason applies. When Catholics discuss contraception law publicly, they "must make publicly known the grounds of their approval, namely, that they, like all citizens, are bound on the principles of law, jurisprudence, and religious freedom."²⁰⁵

Catholics of course will continue to teach other Catholics not to use artificial contraception. They will continue to proclaim that contraception is morally wrong, but

out of their understanding of the distinction between morality and law and between public and private morality, and out of their understanding of religious freedom, Catholics repudiate in principle a resort to the *coercive instrument* of law to enforce upon the whole community moral standards that the community itself does not commonly accept.²⁰⁶

Enforcing a comprehensive doctrine on one's fellow citizens would be coercion, prohibited by both Rawls and Murray. Since *Roe v. Wade*, decided six years after Murray's death, Catholic scholars have debated whether this prudential account of the law applies to the issue of abortion.²⁰⁷

204. Murray, *Memo to Cardinal Cushing*, *supra* note 202, at 83.

205. *Id.* at 84.

206. *Id.* at 85-85 (emphasis added).

207. See generally Charles E. Curran, *Civil Law and Christian Morality: Abortion and the Churches*, in ABORTION: THE MORAL ISSUES 143, 143-165 (E. Batchelor ed., 1982); RICHARD P. MCBRIEN, *CAESAR'S COIN: RELIGION AND POLITICS IN AMERICA* 126-29, 164-68 (1987); Mary C. Segers, *Murray, American Pluralism, and the Abortion Controversy*, in JOHN COURTNEY MURRAY AND THE AMERICAN CIVIL CONVERSATION, *supra* note 181, at 228-248; Todd David Whitmore, *What Would John Courtney Murray Say? On Abortion and Euthanasia*, COMMONWEAL, Oct. 7, 1994, at 16. Segers and Whitmore disagree about whether abortion is a matter of private or public morality and so disagree about the application of Murray's contraception standard. An additional reason to adopt a Rawlsian position on abortion (i.e., allowing it in the first trimester) is that in the past, the Catholic tradition did not hold that abortion was killing from the moment of conception, but at a later date, "more precisely between the sixth week and the third month of pregnancy." Joseph F. Donceel, *Abortion: Mediate vs. Immediate Animation*, in ABORTION: THE MORAL ISSUES, *supra*, at 110, 111. I argue elsewhere that in *Evangelium Vitae* John Paul II has moved away from natural law arguments about abortion to specifically Catholic reasons to oppose abortion. See *infra* text accompanying notes 260-67. If the Catholic argument against abortion is no longer primarily a natural law argument, then Catholics have good reason not to impose their comprehensive religious doctrine on abortion as the law of the United States. But see MICHAEL PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY*

E. WE HOLD THESE TRUTHS

Murray's confidence in the autonomy of politics and law, and in the U.S. system of government, rested in his confidence in the natural law. His natural law assumptions are spelled out in *We Hold These Truths*. Murray's best-known work, this volume collects revised versions of essays published in the '50s; it was "deliberately" released as a book in the spring of 1960, before the Kennedy/Nixon election.²⁰⁸ Murray examined (and accepted) pluralism in the United States, and urged an American "consensus" on the natural law. He referred to this book as a "primer of pluralism"; "[t]he term 'primer' is used . . . not to indicate that the book is projected for the unsophisticated, but merely to indicate that there is, despite decades of experience and discussion so much learned ignorance on the subject."²⁰⁹

By pluralism here I mean the coexistence within the one political community of groups who hold divergent and incompatible views with regard to religious questions—those ultimate questions that concern the nature and destiny of man within a universe that stands under the reign of God. Pluralism therefore implies disagreement and dissension within the community. But it also implies a community within which there must be agreement and *consensus*.²¹⁰

No wonder Rawls suggests that *Political Liberalism* and this work are "closely related."²¹¹ The task, of course, still incomplete, is to find "common principles" that do not "hinder the maintenance by each group of its own different identity."²¹² Murray did not think the task would be easy. Amidst religious pluralism, civil discourse is difficult; when the conversation turns to "metaphysics, ethics, theology" the participants reach "confusion" because their "universes are incommensurable."²¹³ "We have no common universe of discourse."²¹⁴

IN AMERICAN POLITICS 16 (1991) ("[R]eligious argument in support of coercive legislation often can and does satisfy the public accessibility standard.").

208. PELOTTE, *supra* note 154, at 76.

209. See *id.* at 75 on Murray's typed notes on the book.

210. MURRAY, WE HOLD, *supra* note 151, at x (emphasis added).

211. Rawls, *supra* note 66, at 13.

212. MURRAY, WE HOLD, *supra* note 151, at x. See *id.* at 45 ("the public consensus, on which civil unity is ultimately based, must permit to the different communities the full integrity of their own religious convictions."); but see Kenneth L. Grasso, *We Held These Truths: The Transformation of American Pluralism and the Future of American Democracy*, in JOHN COURTNEY MURRAY AND THE AMERICAN CIVIL CONVERSATION, *supra* note 181, at 89-108 (The solution to the loss of our society's public philosophy is "moral absolutes" with "objective foundation in reality.").

213. MURRAY, WE HOLD, *supra* note 151, at 15.

214. *Id.* at 16.

Moreover, the history and experience of these different religious groups are so varied that the "differences among us appear to be almost unbridgeable."²¹⁵

Murray, like Rawls, recognized the difficulty of bridging these differences, yet argued that the search for consensus must be undertaken. Citizens must live together in the midst of this pluralism and they do so by employing the language of reason. The "distinctive bond of the civil multitude is reason, or more exactly, that exercise of reason which is argument."²¹⁶ The language of reason is the natural law.²¹⁷ The natural law provides the language of *consensus*, the constitutional consensus²¹⁸ by which citizens of the United States live together (the "conspiracy").²¹⁹ The constitutional consensus is "an ensemble of substantive truths, a structure of basic knowledge, an order of elementary affirmations that reflect realities inherent in the order of existence."²²⁰ Consensus is not the same as the majority opinion; a minority could have the public consensus. "The validity of the consensus is radically independent of its possible status as either majority or minority opinion."²²¹

Both Murray and Rawls, then, are committed to seeking common ground in politics and law in reason. Natural law and public reason serve similar functions in their writings. I am not suggesting that the writings of Rawls and Murray completely agree on the *content* of natural law/public reason. Were they to meet to discuss the consensus, Murray's Catholic and Rawls's Kantian presuppositions about the reasonable would probably come into conflict on some points. On the occasion that they did meet, at a 1963 conference on law and philosophy, the disagreements were more evident than the agreements.²²²

215. *Id.* at 17.

216. *Id.* at 7.

217. *See generally id.* at 109-120.

218. *See generally id.* at 107-109 ("The public consensus appears as the systematization of experience. . . . The consensus is not simply 'the facts.' It is a set of principles or standards in terms of which to pass judgment on the facts. . . . In a word, the very conception, 'public consensus,' is a moral conception. Morality and the consensus have at least this in common, that they are not simply reflections of fact, as if whatever is must be considered right. . . . The consensus itself is simply the tradition of reason as emergent in developing form in the special circumstances of American political-economic life.").

219. *Id.* at 30, 39.

220. *Id.* at 9.

221. *Id.* at 98.

222. *See* John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3, 3-18 (Sidney Hook ed., 1964); John Courtney Murray, *The Problem of Mr. Rawls's Problem*, in *LAW AND PHILOSOPHY*, *supra*, at 29, 29-34 [hereinafter Murray, *The Problem*].

Rawls's paper focused on the question of the "anomalous" situation of one who "finds himself morally obligated to obey an unjust law."²²³ Murray challenged Rawls's "problematic," "the problem of Mr. Rawls's problem." He argued that Rawls's approach "remove[d] from human law all manner of transcendental reference, and indeed any note of heteronomy, in the name of a morality of perfect personal autonomy."²²⁴ In contrast Murray identified himself with the "older tradition" whose "problematic" is "how shall it be brought about, in theory and in practice, that in society a man should, in the end, obey only God?"²²⁵ Perhaps they differed because Rawls was talking about politics and Murray about civil society.²²⁶ In 1997, one imagines that they would have a civil conversation in which they would work out their differences. We know at least that Rawls agrees with the Murray of *We Hold These Truths*.

As we have seen in the contraception example, Murray conceded that in a pluralistic society, a minority must not impose its comprehensive views as law. This was quite a concession for Murray, who knew that in the United States all religious groups are minority groups. Perhaps it was his long struggle against the "error has no rights" school that led him to caution against the imposition of philosophical and religious commitments upon others. *We Hold These Truths* summarizes Murray's Rawlsian conclusions about coercion and consensus in an essay on the law of censorship:

First, within the larger pluralist society each minority group has the right to censor for its own members. . . .

223. Rawls, *Legal Obligation*, *supra* note 222, at 5.

224. Murray, *The Problem*, *supra* note 222, at 32.

225. *Id.*

226. The two authors agree about Abraham Lincoln. According to Rawls, Lincoln's Proclamation of a National Fast Day in August of 1861 and his two Proclamations of Thanksgiving in October of 1863 and 1864, as well as the Second Inaugural "with its prophetic (Old Testament) interpretation of the Civil War as God's punishment for the sin of slavery" are not violations of public reason for *Lincoln's* day (although they may be for our own). *POLITICAL LIBERALISM*, *supra* note 1, at 254. Murray praises Lincoln's proclamation of May 30, 1863 as the "authentic voice of America," MURRAY, *WE HOLD*, *supra* note 151, at 30, which reminds us that "the first article of the American political faith is that the political community . . . looks to the sovereignty of God as to the first principle of its organization." *Id.* at 28.

The 1863 Proclamation states: "Whereas the Senate of the United States, devoutly recognizing the supreme authority and just government of Almighty God in all the affairs of men and nations, has by a resolution requested the President to designate and set apart a day for national prayer and humiliation; And whereas it is the duty of nations as well as of men to own their dependence upon the overruling power of God, to confess their sins and trespasses in humble sorrow, yet with the assured hope that genuine repentance will lead to mercy and pardon. . . ." *Id.* at 29.

Second, in a pluralist society no minority group has the right to demand that government should impose a general censorship, affecting all the citizenry . . . with a view to punishing the communication of materials that are judged to be harmful according to the special standards held within one group.

Third, any minority group has the right to work toward the elevation of standards of public morality in the pluralist society, through the use of the methods of persuasion and pacific argument.

Fourth, in a pluralist society no minority group has the right to impose its own religious or moral views on other groups, through the use of the methods of force, coercion, or violence.²²⁷

Murray could argue these points because he believed in the truth of the consensus.²²⁸ "There are truths and we hold them."²²⁹ Rawls appears to be more agnostic than Murray about the truth. Murray did fear at times that the consensus was eroding, yet still urged its renewal.²³⁰ Murray retained his confidence in reason, although he knew that not everyone shared his confidence:

Someone is sure to rise with this question: Sir, you refer to "these truths" as the product of reason; the question is, whose reason? I reply that it is not a question of whose reason but of right reason. But, says the questioner, whose reason is right? And with that question the whole footing is cut from under any discussion of the public philosophy. For the implication is that there can be no philosophy which is public. Philosophy, like religion, is a purely private affair. Indeed, there is no philosophy; there are only philosophies, or better, philosophers. And for all anyone knows or could possibly tell, any of them may be right, or none of them.²³¹

The same skepticism of this hypothetical questioner greets Rawls's account of public reason, as critics charge Rawls with imposing his own account of reason on others. Rawls has been accused of asking individuals to *privatize* their religious beliefs, their comprehensive doctrines, in the use of public reason. This privatization occurs when

227. MURRAY, WE HOLD, *supra* note 151, at 168.

228. *Id.* at 11, 95.

229. *Id.* at 95.

230. PELOTTE, *supra* note 154, at 57; *see also* CURRAN, *supra* note 170, at 219 ("Unfortunately, today, when it is most needed, the consensus no longer exists. The only solution is to rebuild the consensus on the basis of natural law. Not only can Catholics accept the principle of the founding fathers of our nation, but today the Catholics are the only ones with the ability to rebuild and to rearticulate the consensus.").

231. MURRAY, WE HOLD, *supra* note 151, at 82, 83.

they employ the language of public reason and so "bracket" their religious commitments. Murray would not agree with those critics. He instead was committed to the proposition that philosophy and theology are *not* private, precisely because they can be translated into public reason. The refusal to meet the challenge of public reason is what "privatizes" religion.

Murray knew that his theory was in some sense discriminatory among religions, at least among Christians. He commented on the Protestant discomfort with the natural law style of reasoning, which is the intellectual heritage of the Catholic.²³² The "Catholic joins the conversation with complete ease. It is his language."²³³ For Murray this language of reason was also a safeguard. It avoided the danger that dominant Protestant views would be read into the law or the Constitution of the United States. It is difficult now to capture the intensity of the anti-Catholicism against which Murray struggled and the ferocity with which he fought against Protestant views of church and state. Murray had to explain to Rome that the First Amendment, as well as the natural law, protected American Catholics from the establishment of Protestant churches *and* perspectives. His natural law theory is now accused of being inadequate to public discourse because it is too Catholic in its presuppositions.²³⁴ It is also accused of being too secular, of lacking the spiritual force of explicitly religious language and symbolism. Murray thought that he had in the natural law a language that was properly secular. In one sense, when they used that language, Catholics abandoned any hope that their comprehensive views would become the law of the United States. But there was never any chance that Catholics would rule the United States, Protestant rhetoric notwithstanding. More important was that the language of reason and the First Amendment protected minority Catholics against the imposition of majority Protestant theological world views. For American Catholics, the natural law language gave as much as it took away.

Murray, like Rawls, does not address those whose comprehensive doctrines are completely incompatible with public reason (although he was unsympathetic to them). It was clear to Murray that Catholic

232. *Id.* at 17.

233. *Id.* at 41.

234. See John A. Coleman, *A Possible Role for Biblical Religion in Public Life*, 40 THEOLOGICAL STUD. 700, 705 (1979) ("A second weakness in Murray's strategy for public discourse is his failure to admit that his own theory of natural law rests on particularistic Catholic theological principles and theories which do not command widespread allegiance.").

Americans could accept a political conception of justice, join the overlapping consensus and use the language of public reason.

Catholic participation in the American consensus has been full and free, unreserved and unembarrassed, because the contents of this consensus—the ethical and political principles drawn from the tradition of natural law—approve themselves to the Catholic intelligence and conscience.²³⁵

Following Murray, good Catholics should be willing participants in Rawls's consensus. Yet thirty-seven years later, many of them question whether such a consensus endures, or should endure.

III. THE RETREAT FROM MURRAY

John Courtney Murray died in 1967, before Pope Paul VI issued his encyclical letter, *Humanae Vitae*, prohibiting artificial contraception, in 1968, and before the Supreme Court's abortion decision in *Roe v. Wade*. He did not live to join the ecclesial debate about contraception that consumed Catholics after the pope's ban. He had argued in 1965 that Catholics should not oppose the decriminalization of contraception in Massachusetts.²³⁶ He never wrote about abortion law. This author who had written so extensively about *religious* pluralism did not survive to address significant questions of *moral* pluralism: pluralism among Catholics about the morality of contraception and pluralism among citizens of the United States about the morality of abortion.²³⁷

Many Catholics have wished that Murray had survived to address these complex questions. Murray now enjoys a renaissance among Catholic scholars who have used his work to address many of the social issues that currently confront the United States. Some authors have speculated about what Murray himself would have said about

235. MURRAY, WE HOLD, *supra* note 151, at 41.

236. MURRAY, *Memo to Cardinal Cushing*, *supra* note 202, at 81-86.

237. See Bradley, *supra* note 181, at 193 ("Nowhere does Murray welcome 'moral pluralism,' nor did he think American institutions could survive it."); Grasso, *supra* note 212, at 100 ("The loss of the public philosophy entailed a fundamental change in the nature of our pluralism. Specifically, it resulted in a transition from a religious to a moral pluralism, a transition from a community consisting of a plurality of churches and faiths divided by religious questions but united in their adherence to a common set of substantive moral principles to a community united only by geographical proximity and the acceptance of a common set of political and legal procedures."); Robert P. Hunt, *Moral Orthodoxy and the Procedural Republic*, in JOHN COURTNEY MURRAY AND THE AMERICAN CIVIL CONVERSATION, *supra* note 181, at 252, 268 (refusing "to portray Murray as an indifferentist who would be willing to sacrifice moral principle at the altar of expediency or a truncated view of civil peace." "Murray was not a defender of moral neutrality.").

these issues; others have used Murray's work as a framework for resolving these issues. As one might expect, interpretations of Murray's legacy and relevance for current issues vary.²³⁸

We will never know, of course, what Murray would say now. My own intuition is that Murray would agree with Rawls. More important is that the critical response to Murray on the part of many authors—what I label the “retreat from Murray”—illuminates contemporary criticisms of Rawls's account of religion, law, and politics.

A. MURRAY'S UNFINISHED AGENDA

A 1976 “Symposium on John Courtney Murray's Unfinished Agenda” expresses some of the criticisms that characterize the “retreat from Murray.” The participants of course do not describe themselves as in retreat from Murray. It is fair to describe them as men sympathetic to Murray's agenda. The symposium focuses on whether Murray's natural law approach “underestimates the potential contribution which explicitly Christian theological discourse can make to a comprehensive understanding of justice and human rights.”²³⁹ Here we see the question that now preoccupies the public debate: How much *religious* language should we include in public discourse?

Only Bryan Hehir, then of the United States Catholic Conference, defended “the perennial need for philosophical discourse,” not public theology. He concluded that “the complexity of the major social issues we face, combined with the need to enlist allies who must be persuaded of both the justice and feasibility of specific proposals, requires the sophisticated structure of the kind of philosophically rigorous social ethic which the Catholic tradition has produced in the past,”²⁴⁰ namely, the approach of Murray's natural law. Hehir employed this method in the 1980s when he participated in the writing of the United States bishops' pastoral letters on war and the economy.

The other participants were more critical of the natural law. Jesuit John Coleman noted “the relative lack . . . of appeals to biblical

238. See generally George Weigel, *The Future of the John Courtney Murray Project*, in JOHN COURTNEY MURRAY AND THE AMERICAN CIVIL CONVERSATION, *supra* note 181, at 273-96 (describing interest in Murray after Murray's death).

239. David Hollenbach, *Theology and Philosophy in Public: A Symposium on John Courtney Murray's Unfinished Agenda*, 40 THEOLOGICAL STUD. 700, 701 (1979).

240. Bryan Hehir, *The Perennial Need for Philosophical Discourse*, 40 THEOLOGICAL STUD. 700, 712 (1979).

imagery" in Murray's corpus, arguing that "this lacuna skews Murray's writings on public issues too strongly in the direction of *liberal individualism*, despite his own intentions."²⁴¹ Coleman offers numerous criticisms of a natural law discourse without biblical imagery. For example, "secular" language is "chaste, sober, and thin," "unable to evoke the rich, polyvalent power of religious symbolism, a power which can command commitments of emotional depth."²⁴² Biblical imagery can thus motivate and inspire in a way that public reason cannot.

Jesuit David Hollenbach recognized the complexity of this question about universalistic and particularistic language, and identified the advantages and disadvantages of each. Murray's approach "presumes that an American public philosophy is in our possession, that the concepts and norms of such a mode of discourse are stable and well articulated, and that they are adequately correlated with the Christian vision."²⁴³ Such a presumption, of course, is questionable. Hollenbach had noted in an earlier, more lengthy, article that Murray himself questioned whether such a philosophy exists.

In Murray's opinion, such a public philosophy had ceased to exist in the United States when he was discussing the question in the 1950s. In the face of this reluctant conclusion, his strategy became that of arguing that such a publicly shared set of moral beliefs *ought* to

241. Coleman, *supra* note 234, at 702 (emphasis added); see also CURRAN, *supra* note 170, at 224 ("There can be no doubt that Murray does not give enough significance to the role of the gospel and of the mystery of Christ in the political and social orders of human existence. The gospel, grace, and Christ must have something to say about all worldly realities."); David Hollenbach, *Public Theology in America: Some Questions for Catholicism After John Courtney Murray*, 37 THEOLOGICAL STUD. 290, 301 (1976) (citing JAMES GUSTAFSON, CHRISTIAN ETHICS AND THE COMMUNITY 53 (1971)) ("[O]ne never finds a serious example of biblical exegesis in the entire Murray corpus on Church-state relations.").

242. Coleman, *supra* note 234, at 706. See also JOHN A. COLEMAN, AN AMERICAN STRATEGIC THEOLOGY 193 (1982) ("It is my reading of the American record, however, that the strongest American voices for a compassionate just community always appealed in public to religious imagery and sentiments, from Winthrop and Sam Adams, Melville and the Lincoln of the second inaugural address, to Walter Rauschenbusch and Reinhold Niebuhr and Frederick Douglass and Martin Luther King."). But see ROBERT W. McELROY, THE SEARCH FOR AN AMERICAN PUBLIC THEOLOGY: THE CONTRIBUTION OF JOHN COURTNEY MURRAY 154 (1989) (While agreeing with Coleman that scripture is important, "the acknowledgment of the need for biblical symbolism and religious imagery does not lead to the conclusion that a contemporary American public theology should be a biblically-founded theology. . . . [T]he core of that public theology [should be] a natural law base.").

243. Hollenbach, *supra* note 239, at 714.

exist, even though it did not; for without such a public philosophy no nation could long survive.²⁴⁴

Hollenbach disagrees with that choice. Murray feared that public philosophy was in danger, and identified faith as an important element to undergird that philosophy.²⁴⁵ Yet in the absence of public philosophy, Murray urged its return, "the eternal return of natural law."²⁴⁶ In contrast, for Hollenbach, the failure of public *philosophy* requires a move to public *theology*.

[T]he presupposition that there exists a public philosophy and a public language for moral discourse common to all Americans which Christians can adopt as their own in public debate is no longer acceptable. In particular, American Catholics need to move beyond an approach to public questions based on Murray's version of the public philosophy to the formulation of a *public theology*, which attempts to illuminate the urgent moral questions of our time through explicit use of the great symbols and doctrines of the Christian faith.²⁴⁷

244. Hollenbach, *supra* note 241, at 296. Hollenbach describes this as "a major admission," "an implicit acknowledgment that the appeal to reason in the sphere of social morality was not in fact carrying the weight which Murray hoped it would carry in building bridges between the diverse groups which make up a pluralistic America." *Id.* at 297.

245. *Id.* at 297. Murray opposed a secular culture. See John Courtney Murray, *The Construction of a Christian Culture*, in BRIDGING THE SACRED AND THE SECULAR, *supra* note 124, at 103 (American culture "has given citizens everything to live for and nothing to die for. And its achievement may be summed up thus: it has gained a continent and lost its own soul."); *id.* at 108 ("Beside those ringing [Christian] words, how cheap and vacuous sound the voice of the modern liberal humanitarian."). He warned against "the growth among us of a civil religion, that would somehow be a substitute secular faith, that would undertake to take the place of the traditional religious faith that has historically given substance to the civilization that we call Western." The "candidate" for that civil religion is "democracy conceived as a quasi-religious faith." John Courtney Murray, *The Return to Tribalism*, in BRIDGING THE SACRED AND THE SECULAR, *supra* note 124, at 149; PELOTTE, *supra* note 154, at 19-21 (expressing Murray's great fear of secularism).

246. MURRAY, WE HOLD, *supra* note 151, at 295.

247. Hollenbach, *supra* note 241, at 299. "He [Murray] feared that, lacking this theological grounding and support, the public philosophy would be too unstable to survive." *Id.* at 297. See also CURRAN, *supra* note 170, at 224-25 ("Murray can also be criticized for failing to recognize the reality of sin and its influence on human existence in the temporal sphere. Again, such a failure comes from a narrow view of seeing the political, social, cultural, and economic aspects almost univocally in light of the natural."); Joseph A. Komonchak, *Fullness of Faith: The Public Significance of Theology*, COMMONWEAL, Sept. 24, 1993, at 28 (book review) ("The book thus adds its support to a view of Murray's project that threatens to become a consensus: that Murray's appeal to natural law philosophy in order to generate the public consensus through which religious meanings and values could be publicly mediated was a mistake theologically (the remark was recently made that Murray had thereby 'muzzled' his faith), strategically, and effectively.").

Hollenbach appears to express similar criticisms of the public reason of John Rawls.²⁴⁸

Hollenbach concedes that Murray was “uneasy” with public *theology*, for four reasons.²⁴⁹ First, he did not want to impose a theological view by means of the power of the state; second, he did not want the First Amendment to become a theological statement; third, “he was concerned to protect the proper autonomy of the secular sphere.”²⁵⁰ Hollenbach agrees with these reasons. However, he disputes the fourth reason why Murray preferred public philosophy to public theology. Hollenbach thinks that “[t]here is a kind of dualism in Murray’s thinking which, despite this stress on the presence of the sacred in the temporal through graced humanity, sets a great divide between the religious and the secular.”²⁵¹ The religious and the secular meet in the individual human person,²⁵² but “not in the public sphere.”²⁵³ Murray’s theory has “institutional dualism as its primary principle.”²⁵⁴ (Two there are.) Hollenbach acknowledges that dualism is valuable as a foundation for religious liberty, but adds that its value is limited in a society that does not possess a public philosophy. Hollenbach opposes such dualism and prefers to bring the two realms together. He concludes: “In a pluralistic society such as contemporary America, an attempt to develop a social ethic which is rooted in Christian faith *without* beginning with the biblical symbols and never leaving them entirely behind is, I think, doomed to failure.”²⁵⁵

The only non-Catholic author in the symposium, Robin Lovin, identifies the difficulty in maintaining the society-state distinction favored by Murray. “A rigid division of social life between subsidiary

248. David Hollenbach, *A Communitarian Reconstruction of Human Rights: Contributions from Catholic Tradition*, in CATHOLICISM AND LIBERALISM: CONTRIBUTIONS TO AMERICAN PUBLIC PHILOSOPHY, *supra* note 142, at 134-135 (“If Rawls meant that his newly pragmatic approach to the justice of political institutions would ensure public space for debate about larger and more encompassing visions of the good, then the Catholic tradition would have no difficulty entering the fray. But Rawls denies that debates about our common life in the *polis* should grapple with ‘comprehensive’ visions of the social good. . . . But for Rawls there is no way to resolve these disputes.”).

249. Hollenbach, *supra* note 241, at 299.

250. *Id.*

251. *Id.* at 300.

252. *Id.* (“The relation between the sacred and the secular, as Murray understand it, becomes a relation of unity only within the experience of the individual person, not in the public sphere.”).

253. *Id.*

254. *Id.*

255. *Id.* at 301-02. (“[M]issing element” in public discussion is “sense of the sacred,” and Murray’s language cannot capture that.).

institutions, which are guided by moral norms, and the state, which is guided by jurisprudence, does not accurately reflect the functional interpenetration of society and state nor the unavoidable impact of state policy on the moral possibilities open to persons in society.”²⁵⁶ Thus Lovin too is troubled by the strict divisions or strict dualism in the realm of the state. He, too, prefers “public theology” to “public philosophy” as the approach more open to explicitly religious language, more responsive to the interpenetration of realms in modern society.

Since 1978 the unfinished agenda for the Catholic Church has been set by the Polish pope, who has led the retreat from the American Murray’s commitment to constitutional democracy. John Paul’s view of politics marks a change from his predecessor Pope Paul VI,²⁵⁷ whose encyclicals reflect a Thomistic perspective. Twentieth century papal social thought was profoundly influenced by the renewed study of Thomas Aquinas, which was recommended by Pope Leo XIII at the end of the nineteenth century. That renewal, e.g., fostered inductive instead of deductive theories of social ethics and politics. Modern interpreters of Thomas argued that his natural law theory was not a set of abstract principles from which one deduces moral norms, but was instead inductive and historical.²⁵⁸ The latter view is captured in Paul VI’s famous statement that the church cannot always offer *universal* solutions to *political* problems.²⁵⁹ Paul’s humility about the church’s expertise in politics was joined to a positive, optimistic view of the state’s role in promoting justice.

John Paul II is more Augustinian in outlook, more pessimistic about political life than his predecessors. One of the first steps of his pontificate was to order priests to leave political office (as in the case of Robert Drinan, S.J., in the U.S. House of Representatives) or to refrain from political activism (as in his criticism of the liberation

256. Robin Lovin, *Resources For a Public Theology*, 40 THEOLOGICAL STUD. 700, 708-09 (1979).

257. John Paul I is technically John Paul II’s predecessor, but he did not live to develop a political philosophy or theology.

258. See *supra* note 161.

259. See Paul VI, *Octogesima Adveniens*, in THE GOSPEL OF PEACE AND JUSTICE 485, 487 no. 4 (Joseph Gremillion ed., 1976) (“In the face of such widely varying situations it is difficult for us to utter a unified message and to put forward a solution which has universal validity. Such is not our ambition, nor is it our mission. It is up to the Christian communities to analyze with objectivity the situation which is proper to their own country, to shed on it the light of the Gospel’s unalterable words and to draw principles of reflection, norms of judgment and directives for action from the social teaching of the Church.”).

theologians in Latin America). John Paul prefers the deductive application of Christian principles in politics to the inductive, more historically situated approach of Paul VI and John Courtney Murray.²⁶⁰ His skepticism about politics may reflect his life-long opposition to the Communist state in Poland. However, he has shown little appreciation for the American culture and democratic institutions that battled Communism.

John Paul has grown suspicious of the influence of democracy on morality and moral truth. Late in his pontificate, he has declared war on moral pluralism ("ethical relativism").²⁶¹ To the relativism of modern morals he offers Catholicism's absolute moral truth.²⁶² John Paul has rejected the possibility of moral pluralism in the church, where he has silenced dissenters who question his interpretation of the Catholic moral tradition. He has pushed to extend infallibility to moral, not dogmatic, teachings to an extent unparalleled in the modern papacy. Nor does he accept moral pluralism outside the church. His 1995 encyclical *Evangelium Vitae* opposes modern culture as a culture of death and calls for a return in all societies to the moral truths taught by the church. Truth, including moral truth, is the only proper basis for society. John Paul asserts that democracy is "an empty word"²⁶³ without an objective moral order (the moral order taught by the church). John Paul does not "agree to disagree" about moral pluralism.

Evangelium has been interpreted as a document aimed specifically at the church in the United States, where "cafeteria Catholics" have strayed from the church's moral teaching by picking and choosing the teachings they will follow. Meanwhile, as Poland drafted its constitution, the church-state issue was controversial.²⁶⁴ "The Catholic Church here 'is very allergic to this separation of church and state,' said Jerzy Turowicz [in 1995], the influential editor of the independent Catholic weekly, *Tygodnik Powszechny*, in Cracow."²⁶⁵ "In the discussions over the constitution, the church got its way on wording

260. I explain that John Paul has shifted to the deductive method in his encyclical letter *SOLLICITUDO REI SOCIALIS* in Leslie Griffin, *Moral Criticism as Moral Teaching*, in *THE MAKING OF AN ECONOMIC VISION* 240 (Oliver F. Williams & John W. Houck eds., 1991).

261. See generally POPE JOHN PAUL II, *EVANGELIUM VITAE* (1995).

262. See also Grasso, *supra* note 212, at 114 ("Political unity, in short, presupposes, and must be informed by, an antecedent moral unity.").

263. POPE JOHN PAUL II, *supra* note 261, at no. 70.

264. Jane Perlez, *Shrinking Gap Between Polish Church and State*, N.Y. TIMES, July 17, 1995, at A3.

265. *Id.*

describing the relationship between church and state," with the government "agreeing to strike a phrase that would have characterized it as 'neutral.'"²⁶⁶ "A compromise formula, which replaced the word 'neutrality' with 'impartiality,'"²⁶⁷ also faced opposition from the bishops. Such disputes suggest the eternal return of the thesis/hypothesis, the ultimate retreat from Murray.

The spectrum from Robin Lovin to John Paul II is broad indeed, and authors on that spectrum, including the pope, continue to agree with much that Murray has written. Yet their differences with Murray echo the critical reaction to *Political Liberalism*. We hear that the consensus in public philosophy or public reason no longer exists. Some argue that the consensus cannot exist. If the consensus is to be reconstituted, religious sources are necessary. The language of public reason or natural law is inadequate to resolve our moral pluralism; we need further insights from religion. The language of consensus is not true, and only the truth is an adequate basis for any society. Religious truth is needed. Public reason does not motivate; its secularity discriminates against believers who are entitled to equal status in the community. The secular is not neutral, but harmful to religion.

These complaints are clearly important to Catholics arguing within their comprehensive doctrine. Yet they are not unique to Catholics. Many of these concerns about a secular culture have been expressed by Stephen Carter, who in *The Culture of Disbelief* argues that American *law* and *politics* trivialize religion.²⁶⁸ His solution to this problem appears to be that we add more theological language to the public square. He favors an "open view" of public discourse, a view that Rawls rejects as far too open to meet the criteria of public reason. The most interesting aspect of Carter's analysis of our culture is the extent to which *law* and *politics* are culpable for what has happened to religion. The book is about our culture, but our culture is encapsulated in our legal and political practices. In that he shares the focus of the Catholic law professor Michael Perry, who situates his

266. *Id.* The church also pushed for the "most restrictive" abortion laws in Europe and opposed legislation protecting gays.

267. *New Constitution: No End in Sight*, POLISH NEWS BULL., Dec. 5, 1996, available in Lexis, News Library, Curnws File. See also *Presidential official says constitution more important than Concordat*, BBC SUMMARY WORLD BROADCASTS, Jan. 17, 1997, available in Lexis, News Library, Curnws File ("Marek Siwiec explained on Polish radio that the guarantee of the separation of the state from the Church was included in the draft constitution, which has a higher status than an agreement with the Vatican.").

268. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

writing on law and religion in the tradition of Murray and yet has also joined the retreat from Murray.

B. MICHAEL PERRY

Michael Perry introduces his book, *Love and Power: The Role of Religion and Morality in American Politics*, with a reference to Murray. "*Love and Power* is, in part, an effort to grapple with what has aptly been called 'no small political problem.'"²⁶⁹ The quoted words are Murray's, from a paragraph of *We Hold These Truths* on the problem of pluralism. Perry includes Murray's statement that "the problem is also theoretical; its solution is an exercise in political intelligence that will *lay down, as the basis for the 'working out,'* some sort of doctrine."²⁷⁰ Perry then states that "[i]n *Love and Power* I 'lay down' several principles 'as a [sic] basis for the "working out" '—principles to guide religious participation in the politics of a religiously/morally pluralistic society like our own."²⁷¹ Thus Perry explicitly takes up Murray's project on pluralism in a different era. "The pluralism that figures most prominently in my [i.e., Perry's] discussion is the pluralism to which Murray referred . . . : moral, including religious-moral, pluralism."²⁷² Perry begins his constructive chapter six, "Ecumenical Political Dialogue," with another long *We Hold These Truths* quotation, which ends with the sentence "Civility dies with the death of dialogue."²⁷³

Thus Perry endorses and continues Murray's work. However, he is sharply critical of John Rawls, both in *Love and Power* and in his earlier book *Morality, Politics, and Law*.²⁷⁴ These books antedate *Political Liberalism*, but they contain some analysis of the essays that comprise *Political Liberalism*. Moreover, Perry's writings since *Love and Power* suggest that he would disagree with *Political Liberalism*, even as he "hopes that John Rawls' new book, *Political Liberalism*, will significantly advance the discussion."²⁷⁵

269. PERRY, *supra* note 207, at 5 (emphasis added).

270. *Id.* (emphasis added) (quoting MURRAY, *WE HOLD*, *supra* note 151).

271. *Id.* (emphasis added).

272. *Id.* at 6 (emphasis added). See also *id.* at 8 (noting that American pluralism is "congenital," citing MURRAY, *WE HOLD*, *supra* note 151, at 27).

273. *Id.* at 83 (quoting MURRAY, *WE HOLD*, *supra* note 151, at 6, 14).

274. MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* (1988).

275. Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts—And Second Thoughts—On Love and Power*, 30 SAN DIEGO L. REV. 703, 727 (1993); see also MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* 54-61 (1997) (finding Rawls's ideal of public reason in *Political Liberalism* "inadequate").

Perry argues that the liberal solutions to religious/moral pluralism have proven inadequate. He criticizes "neutralist" or "impartial" theories of religion and politics (by Bruce Ackerman, Thomas Nagel, Ronald Dworkin and Kent Greenawalt) that posit a neutral or secular ground on which citizens of different religions can agree.²⁷⁶ These theories are "impossibly restrictive"²⁷⁷ in their account of politics, especially for believers. "[T]he quest for the Holy Grail of neutral/impartial political justification is spent and . . . it is past time to take a different, more promising path."²⁷⁸

Perry is a powerful exponent of the "bracketing" charge, and raises it against *A Theory of Justice*. A Rawlsian does not reason as "the *particular* person *she* is";²⁷⁹ "it is, rather, for her to play the role of *someone else* reasoning towards principles of justice."²⁸⁰ His criticism of *Justice* provides a careful statement of the bracketing criticism that continues to plague Rawls after *Political Liberalism*.

If it is the case (as I believe it is) that a person—a "self"—is partly constituted by her moral convictions, then, in choosing principles of justice, the partisan cannot bracket her membership in her moral community, her particular moral convictions, for that membership, those convictions, are constitutive of her very self. To bracket them would be to bracket—indeed, to annihilate—herself. And doing that would preclude *her*—the *particular* person *she* is—from engaging in moral discourse with other members of society. Because the partisan's membership in a particular moral community—her participation in a particular moral tradition—is self-constitutive, she must find a way to engage persons outside her moral community in moral discourse that does not require her to do what in any event she cannot do—bracket that membership. But is there such a way?²⁸¹

This bracketing criticism explains why the neutralist theories do not satisfy Perry.²⁸²

276. PERRY, *supra* note 207, at 15 ("[A] truly neutral/impartial practice of political justification is inappropriate in American society.").

277. *Id.* at 29. See also *id.* at 81 (Ackerman and Nagel privatize religion, which "entails repression of the essentially political nature of religion.").

278. *Id.* at 28.

279. PERRY, *supra* note 274, at 61 (emphasis in original).

280. *Id.* (emphasis in original).

281. *Id.* at 72-73 (emphasis in original).

282. See also Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2065 (1992) (book review) (noting the "'dignitary harm' suffered by religious believers who, like Perry, feel silenced and forced to become only truncated selves when they enter the public square").

An added feature of the bracketing accusation appears in Perry's analysis of Ackerman. If the non-religious Ackerman and the Catholic Perry are in an argument and strive to be neutral in Ackerman's sense, "Ackerman might get to rely on much of the relevant part of his web of beliefs, while I would get to rely only on strands of my web, strands approved—'shared'—by Ackerman."²⁸³ This is an *unfair* balance, in no way neutral. Nagel's neutralism is similarly unfair: "I suspect that the proportion of Nagel's moral (including political-moral) beliefs that are privileged under his approach is much larger than the proportion of mine that are privileged."²⁸⁴ This is a "disadvantage" to Perry. Murray, in contrast, was comfortable with "bracketing." Catholics did not have to bracket anything when they spoke the language of natural law. Nor was it unfair to them to use the "neutral" language; "neutral" language protected them from the imposition of Protestantism.

In *Love and Power*, Perry describes Rawls as "more promising" than the neutralists but "still not satisfactory."²⁸⁵ Rawls is "more promising" because he is not as restrictive; he does not privilege secular over religious convictions. However, Rawls is "not satisfactory" because the overlapping consensus and the political conception of justice do not exist. Perry doubts that they ever will.²⁸⁶ "Even if a political conception of justice supported by an overlapping consensus is possible in American society, there is at present no such conception in the United States."²⁸⁷ There may be some consensus on some political-legal questions in the United States, but it is "indeterminate" or too "narrow." One senses Perry's sympathy with Rawls's project, but he dismisses the possibility that it can work in practice.²⁸⁸ Perry acknowledges "some affinity" with Rawls, but then concludes that the hope of a political conception of justice is "wistful," and so should be

283. PERRY, *supra* note 207, at 10.

284. *Id.* at 14.

285. *Id.* at 23. See also PERRY, *MORALITY*, *supra* note 274, at ch. 3, for extensive "critique of the liberal political-philosophical project." In PERRY, *supra* note 207, at 22, Perry retains his "neutral" opponents of *Morality, Politics, and Law* (Ackerman, Nagel and Rawls) although he thinks his new book is now "congruent" with Greenawalt.

286. PERRY, *supra* note 207, at 26.

287. *Id.* at 26-27.

288. Such principles of justice "simply don't exist." PERRY, *supra* note 274, at 63.

discarded.²⁸⁹ Perry does not say so, but Murray's call for the "eternal return of natural law" must appear equally "wistful" to him.

Perry also doubts that political theories without a thick conception of the good can sustain society. He questions whether, e.g., a theory of human rights can survive without deeper underpinning. "[A] practice of political justification from which disputed beliefs about human good are excluded lacks the normative resources required for addressing our most fundamental political-moral questions."²⁹⁰ In this he shares Murray's concern that there must be some deeper basis for the natural law consensus—and the concern of Murray's successors that we need richer language to sustain us. Perry's proposal addresses just that issue: "[i]n ecumenical politics beliefs about human good play a basic role in public deliberations about, and public justifications of, contested political choices."²⁹¹

Liberal theories, then, are "impossibly restrictive,"²⁹² unfair to religious believers, unlikely to sustain a society. Inclusive theories that bring all religious beliefs to politics fare no better. *Love and Power* offers Perry's "middle ground" solution between theories that are too inclusive and too exclusive of religion. He calls this "ecumenical politics," at times "religious politics."²⁹³

Ecumenical politics is, in part, a *religious* politics, in this sense: a politics in which persons with religious convictions about the good or fitting way for human beings to live their lives rely on those convictions, not only in making political choices but in publicly deliberating about and in publicly justifying such choices.²⁹⁴

Note that Perry proposes his theory as a middle ground. It is not "open" under Rawls's definition. It is not the same as Stephen Carter's call for more insertion of religious language and perspective into our political and legal debates. Nor is it as restrictive as public

289. Perry states that he "has an obvious affinity with a Rawlsian strategy of identifying normative materials, concerning political morality, supported by a wide consensus. I'm not suggesting, however, that the constitutional and religious premises can support a full-blown, systematically elaborated 'political conception of justice'—or, if they can, that they can support only one such conception. (I'm not denying it either.)" PERRY, *supra* note 207, at 190 n.30.

290. *Id.* at 42. See also Levinson, *supra* note 282, at 2066 ("The second, quite different, rationale for allowing the public articulation of religious commitment lies in the presumption that some kind of religious view is a necessary underpinning for important political values or that it otherwise helps to maintain the liberal political order as a whole.").

291. PERRY, *supra* note 207, at 43.

292. *Id.* at 44.

293. *Id.* at 43, 83, 128.

294. *Id.* at 112.

reason. "The practice I defend makes room for some (but not all) kinds of reliance on some (but not all) kinds of disputed convictions."²⁹⁵ Perry speaks of finding a "common ground"²⁹⁶ amidst pluralism; it is unlikely that "agreement" or "consensus" will occur, so he settles for "dialogue," "ecumenical political dialogue." Following Murray, we should "limit the warfare, and . . . enlarge the dialogue."²⁹⁷

Yet Murray's dialogue was different. Murray recognized the autonomy of politics and law and employed natural law language in those spheres. At the same time he emphasized the liberty of the church and the truth of his religious convictions. Perry's "conditions" for dialogue are different. Two "attitudes" and two "virtues" are necessary for ecumenical political dialogue. The two attitudes are *fallibilism* and *pluralism*.²⁹⁸ The two virtues are *public intelligibility* and *public accessibility*.²⁹⁹ Religion may enter politics and law, and indeed should enter politics and law, but it must be fallible, pluralistic, intelligible, and accessible.³⁰⁰

According to Perry, religion should be self-critical; it should learn and correct itself in its encounter with politics. "Religious people must be more than prepared to see their religious beliefs challenged in the course of political argument."³⁰¹ The "church needs the world" because the church confronts its mistakes in its contact with the world. The church will learn from the world only if the church is fallible and pluralist. Perry thus advocates a particular type of religious faith. Infallible religions should not participate in ecumenical political dialogue (or at least should learn to participate fallibly). With such a criterion one doubts that the pope will encourage American Catholics

295. *Id.* at 44.

296. *Id.* at 45, 47.

297. *Id.* at 48 (quoting MURRAY, *WE HOLD*, *supra* note 151, at 23).

298. *Id.* at 100.

299. *Id.* at 105.

300. While Perry rejects many aspects of liberal theory, he still thinks his is a liberal theory:

With respect to ideals of politics, the opposition between a politics that is "liberal" and one, like ecumenical politics, that is (partly) religious is quite false. Ecumenical politics is a liberal ideal. Granted, the liberal character of the ideal does not inhere in some putatively "neutral" or "impartial" practice of political justification. It inheres, rather, in certain of the values that animate ecumenical politics, in certain of the existential prerequisites to ecumenical politics I detailed in the preceding chapter: fallibilism, pluralism, public intelligibility, and public accessibility. Above all the liberal character of ecumenical politics inheres in the fact that . . . tolerance is a principal constituent of ecumenical politics. Although liberalism-as-neutrality is a dead end . . . liberalism-as-tolerance is not.

PERRY, *supra* note 207, at 137-38.

301. *Id.* at 104.

to participate in Perry's public arena, especially in this era of "creeping infallibility."³⁰² Indeed, it is unclear if Murray himself could join the forum; he consistently insisted upon the *truth* of Catholic belief. From the days of intercredal cooperation, he held to the truth of Catholic faith and belief. Even when he challenged the church's teaching, he did so in the language of the development of doctrine or the application of principle in new circumstances, not in terms of error.

Perry's virtues of public intelligibility and public accessibility³⁰³ should sound familiar to Catholics; they reek of natural law criteria. Public intelligibility and accessibility oppose "sectarian imperialism."³⁰⁴ By intelligibility, Perry means that one mediates or translates her religious language into language others can understand. Perry once again quotes Murray on the importance of civil conversation.³⁰⁵ Accessibility (a "more difficult" concept) "is the habit of trying to defend one's position in a manner neither sectarian nor authoritarian."³⁰⁶ One is sectarian if she "relies on experiences or premises" with little authority beyond the religious community. One is authoritarian if she "relies on persons or institutions" with little authority beyond the religious community.³⁰⁷ These standards resonate with public reason, although Perry suggests that his standard differs from public reason.³⁰⁸ At times, Perry defends accessibility on pragmatic grounds. "The point, rather, is simply that failure to honor a standard like that of public accessibility dooms argument in the public square,

302. JAMES M. GUSTAFSON, *PROTESTANT AND ROMAN CATHOLIC ETHICS* 133 (1978) (citing Charles Curran) (papal documents were "accepted with more authority than in principle they have"). "Creeping infallibility" means that the pope has tried to expand the range of what he may declare infallible, specifically from matters of faith and dogma to questions of morality. For levels of papal teaching, see generally FRANCIS SULLIVAN, *MAGISTERIUM* (1988).

303. PERRY, *supra* note 207, at 105.

304. *Id.* at 108.

305. "As John Courtney Murray emphasized, 'Argument ceases to be civil . . . when its vocabulary becomes solipsist, premised on the theory that my insight is mine alone and cannot be shared; when dialogue gives way to a series of monologues. . . . When things like this happen, men cannot be locked together in argument. Conversation becomes merely quarrelsome or querulous. Civility dies with the death of dialogue.' (Murray's point, it will soon be clear, applies as well to the allied virtue of public accessibility.)" *Id.* at 106 (quoting MURRAY, *WE HOLD*, *supra* note 151, at 14).

306. *Id.* at 106.

307. *Id.*

308. Perry, *supra* note 275, at 727 (citing Solum, *Constructing*, *supra* note 54) ("It is one thing to construct . . . an exclusivist ideal of political choice. . . . It is another thing altogether to make the case that we should accept such an ideal. It does not seem to me that the case has yet been made.").

including religious argument, to play a role that is anything but constructive."³⁰⁹ Perry thinks this standard is fair because inaccessible non-religious as well as religious argument is excluded.

Perry's position emerges in his discussion of the Symposium On Murray's Unfinished Agenda. The strict natural law (public philosophy) language of Hehir is insufficient. Perry "largely endorse[s]" Coleman's call for more biblical religion in public, although he thinks Coleman does not go far enough.³¹⁰ He agrees with Hollenbach that public argument is "incomplete" without some religious reference, some enriching language.³¹¹

Perry criticizes Hehir's universalistic language for two reasons. First, that position assumes that the church participates in the public arena only to *persuade* or to justify its own position.³¹² Second, Hehir is wrong to assume that it is sectarian or divisive for the church to use religious language in public.³¹³ This first criticism is ecclesial rather than political; it reiterates Perry's concern that the church must learn from the world.³¹⁴ It is not clear, however, why Catholics do not become sufficiently self-critical whenever they attempt to translate their beliefs into public philosophy. Indeed the church learned of its error on religious freedom precisely when Murray used the natural law language of human dignity and taught Catholics about the First Amendment. Hehir is not fallibilist enough for Perry, who wants the church to learn and not just to persuade. The second criticism reiterates the point that we need thick, religious concepts to sustain society. Society benefits from explicitly religious language.

The two criticisms of Hehir illuminate Perry's position, but also help to illustrate its flaws. Perry is committed to the reform of religion. To some extent *Love and Power* is an exercise in theology rather than in political philosophy or law. Perry advocates more religion in

309. PERRY, *supra* note 207, at 107.

310. *Id.* at 88.

311. *Id.* at 105.

312. *Id.* at 102.

313. This is Perry's interpretation of Hehir's assumptions. See also McELROY, *supra* note 242, at 154 ("Murray's fundamental insight was correct: in a pluralistic society it is divisive and illegitimate to base claims for society and the state upon grounds which cannot be justified without sectarian warrants.").

314. PERRY, *supra* note 207, at 103 ("Why assume that 'the mind of the Church' or other community is to be shaped only by internal dialogue: deliberation *within* the religious community, among its members? Why shouldn't the mind of the Church or other community be shaped by external dialogue as well: deliberation between those who are members of the religious community and those who are not?").

the public square, but he does not (in *Love and Power*) follow Stephen Carter's "open" route of letting all religious voices into the public square.³¹⁵ Instead, he is concerned with the *quality* of religious voices. In an odd way, Perry is more restrictive of religion than the "neutralist" Rawls.³¹⁶ In stark contrast to Rawls, Perry devotes a significant part of his book to the definition and criticism of religion. Chapter five, "Religion and Morality," defines religion and draws some normative conclusions about it. At one point Perry concludes that the major religions "converge" on the moral concept that we "accept some responsibility for the basic well-being of the Other."³¹⁷ Perry distinguishes religious faith from religious beliefs. Religious beliefs (but not faith) are "changing," so it is appropriate that they be challenged in the midst of public argument. This supports Perry's conclusion that all religions should be fallible and pluralist.³¹⁸

This attempt to define proper types of religious belief leaves Perry susceptible to the charge of discrimination against religion.³¹⁹ We have seen that Rawls too faces this criticism. Yet the discrimination is different in one sense. Rawls's demands on religion are far more limited than Perry's. Rawls does not ask believers to change their beliefs or to admit that their beliefs are fallible. He asks that

315. See David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067, 1076-77 (1991) (book review) ("Perry has used his own vision of good religion as the standard for admission to political and legal debate.").

316. But see *id.* at 1081 (Religious groups discriminated against by Perry would not do any better under a Rawlsian account, although some neutrality theories nonetheless remain preferable to Perry. "[I]t is not surprising that essentially the same groups are disadvantaged under Perry's ecumenical politics as have been disadvantaged under neo-Kantian forms of liberalism. Indeed, Perry's discrimination against those who reject autonomy as their primary commitment actually is more explicit, and hence more brutal, than that of neo-Kantian liberalism. Neo-Kantian liberalism at least claimed to be neutral regarding moral conceptions. For example, although neutrality theory requires that fundamentalist Christians keep their religious and moral convictions out of politics, at least in theory *everyone* is similarly disabled."); Hollenbach, *Contexts of the Political*, *supra* note 63, at 899 ("In an ironic way, Perry now wants to admit *all* religious-moral convictions to the public square for the same reason that Rawls and others want to exclude them: because they are controverted.").

317. PERRY, *supra* note 207, at 81.

318. But see Levinson, *supra* note 282, at 2074 ("What is unacceptable, and indeed astonishing, is Perry's tendentious claim that '[a]uthentic religious faith and the virtue of fallibilism are intimately connected.' This is simply to award his own favorite religious views the prized label of 'authenticity,' and to suggest that other kinds of views are 'inauthentic' and otherwise thoroughly second-rate.").

319. See generally Smolin, *supra* note 315, at 1077 ("It is perhaps no coincidence that Perry's criteria exclude those most hated by the dominant secularist academy: in particular, theologically conservative theists, including various Protestant Christians (evangelicals, fundamentalists, and pentecostals) and traditionalists (Roman Catholics, Anglicans, and Lutherans).").

religions participate in politics on the basis of their comprehensive doctrines. He does not tell them what the comprehensive doctrine should be or how the comprehensive doctrine should find reasons to support the political conception of justice. Rawls's theory does exclude some religions that cannot translate their beliefs into public reason. But he does not ask believers to challenge all their religious commitments as a condition for participation in ecumenical political dialogue. With Murray, he recognizes the importance of letting citizens "agree to disagree" about their theological commitments.

The attempt to define religion contributes another weakness to Perry's ecumenical political dialogue. Perry follows Coleman and Hollenbach, *contra* Murray and Hehir, in an effort to include more religious language in politics. He chides Hehir for thinking that religious language is "sectarian" or "divisive."³²⁰ His own theory, however, stumbles over the definition of *religion*. His "middle ground" between Carter's open view and Rawlsian public reason is not very clearly defined; it is difficult to interpret what counts as a religious argument.³²¹

For example, Perry cites the American Catholic bishops' letters, Joseph Cardinal Bernardin's speeches, Gandhi's political reform, as well as the "human" aspects of the Good Samaritan story as illustrative of ecumenical political dialogue. He defends the religious language of Martin Luther King, Jr. because it was "truly, fully human."³²² That humanity sounds like public reason or natural law, like Murray or Hehir or Rawls. However, for Perry there are religious premises under these human claims, and so the language is religious. Ecumenical politics rely on "religious premises about the human."³²³ It appears that most moral and philosophical arguments are religious for Perry. Hehir would surely argue that the bishops' letters contain moral and philosophical arguments, as well as theological ones. The theological arguments are addressed to Catholics and the moral and philosophical arguments to all human persons. For Perry the bishops' argument is religious because "at its very foundation is a set of related religious convictions: the conviction *that* life is ultimately meaningful, a conviction about *how* it is meaningful, and, in particular, a conviction about the ultimately meaningful way for

320. PERRY, *supra* note 207, at 105.

321. See Levinson, *supra* note 282, at 2068 ("Although Perry calls for the admission of religious discourse into the secular, 'neutral' public square, his vision of religion is a narrow one.").

322. PERRY, *supra* note 207, at 113.

323. *Id.*

human beings to live their lives."³²⁴ Religion is present whenever there are arguments about the meaning of life, but the meaning of life is apparently pluralist and fallible.

In contrast to Murray, who carefully distinguished the theological, ethical, and political, in order to protect the different realms of church, society, and state, Perry has elided all three. Every argument could have some connection to life's meaning, and every argument could be religious. Under Perry's theory, almost every discussion could be a religious one (at least until one makes a claim of truth).

The ambiguity of the definition of religion is evident in Perry's treatment of legislation. He is not troubled by the legislator's passage of legislation for religious reasons. Once an argument is publicly accessible (as it must be for ecumenical political dialogue) it has a secular purpose. Thus ecumenical politics pass constitutional muster because the public accessibility test satisfies the secular purpose prong of *Lemon*.³²⁵ The Establishment Clause does not "proscribe, as a basis for political deliberation, justification, or choice, moral beliefs,"³²⁶ even moral beliefs that are religious in character. One suspects that Murray would read this argument as an invitation to majority Protestants to impose a theological agenda.

As he elides religious, moral and political language, so Perry at times fails sufficiently to distinguish politics and law from public culture. Rawls segregates political discussion about constitutional essentials. Murray separated law and politics from the church. Perry's realms all run together. He encourages so much *theological* discussion that at times it sounds as if the courts and legislatures should be the locus of theological debate. David Hollenbach criticized this ambiguity of spheres in a response to *Love and Power*. Hollenbach stated that he would not want a Catholic judge and a Protestant judge to engage in ecumenical political dialogue in order to decide their cases, but that Perry seems to allow or encourage this.³²⁷ Perry clarified his position, agreeing with Hollenbach that he is not proposing ecumenical politics as a brand of theology for courts and legislatures.³²⁸ Yet

324. *Id.* at 119.

325. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

326. PERRY, *supra* note 207, at 112-13. *But see* Levinson, *supra* note 282, at 2070 ("This claim [of congruence with Establishment Clause jurisprudence] is highly debatable. . . . [I]t nonetheless raises a number of questions in regard to accepted First Amendment doctrine.").

327. Hollenbach, *Contexts of the Political*, *supra* note 63, at 899-900.

328. Perry, *supra* note 275, at 726.

his theory does not provide sufficient grounds to support this correction. Perry does not provide a clear line between the realms of church and state, and he does not provide a clear distinction of theological, ethical, and political argument. While quoting Murray extensively, he has not heeded Murray's warning that neither state nor church is served by the sacralization of the political. He has not followed Murray's route of distinguishing civil society from political society and the state. Ecumenical political dialogue may more appropriately take place in schools, universities, and churches, not in the courts of law, the legislature, and the political discussions of citizens.

Moreover, if (as he suggests in his response to Hollenbach) Perry is serious that his proposals are for a broader cultural dialogue, then his norms for ecumenical political dialogue are especially questionable. In cultural or educational discussions, citizens should be free to express their religious views "openly." Religion does not have to be pluralist and fallible, intelligible and accessible, to join in *cultural* discussions in the United States. John Rawls does not demand that. By limiting public reason to questions of basic justice and constitutional essentials, Rawls allows a freer dialogue about religion in the cultural (for Rawls "nonpublic") arena than does Perry in *Love and Power*.

David Smolin has pointed out to Perry the discrimination of his theory against a number of religious groups. In response to Smolin's criticism, Perry has acknowledged that *Love and Power* was unfair to some religions. Perry has now adopted an *inclusive* view.³²⁹ Perry employs the word "inclusivist," but he is not inclusive (or, I think, even wide) in Rawls's sense. He requires no public reason proviso. Under Rawls's terminology, Perry's new approach appears to be an "open" one. He has rejected the middle ground of ecumenical political dialogue for an open view that lets all religious voices in. This change confirms that ecumenical political dialogue was too restrictive of cultural religion. Perry now states that there may be strategic reasons for not stating "*a religious belief that opponents of the choice, or at least some of them, reject.*"³³⁰ "But there is no reason to doubt that, as a matter of ideal American political morality, she may forsake strategic considerations and make her appeal on a religious basis."³³¹ Perry continues to quote Murray,³³² but he has retreated even further

329. *See id.*

330. *Id.* at 704 (italics in original).

331. *Id.* at 705.

332. *Id.* at 706-07 (quoting MURRAY, *WE HOLD*, *supra* note 151, at 27) (noting Murray's observations of congenial American pluralism).

from Murray's view. "I now see that we Americans should not accept any exclusivist ideal, either of public political argument or of political choice—not even any 'middle ground' ideal."³³³

Perry concludes his revised theory with this summary, a summary that leaves many questions unanswered:

1. The proper role of religious discourse "in public" is a role to be played much more in public culture than in public argument specifically about political issues.
2. Some religious claims represent bad theology and should therefore be rejected.
3. Our politics and law should aspire to be tolerant of moral and religious differences rather than "moralistic."
4. Some styles of religious participation in politics—those that fail the test of civility—represent bad citizenship.³³⁴

Perry could have moved from his middle ground to distinguish political from cultural arguments, with Rawls and Murray. However, he rejects this as unfair.

It is one thing to reject certain beliefs as theologically unsound, or epistemologically unsound, or both, and, where it seems fitting to do so, to be willing to challenge them as such. It is another thing altogether to suggest that such beliefs may not serve as a basis for a political choice (may not, that is, when no other basis is available.)³³⁵

Rawls and Murray, of course, do not suggest that religious beliefs may not "serve as a basis" for politics. But they do reject the appeal to specifically religious arguments for law and politics. Perry's inclusive standard apparently applies to politics and law as well as to churches and universities. Citizens in political debate may use the inclusive view, for Perry does not find it coercive: "Political choices that cannot be defended without relying on religious beliefs do not invariably deny to those who reject (or 'reasonably' reject) the beliefs the respect due them."³³⁶ He is not worried that religion is divisive: "religious discourse in the American public square is not necessarily more sectarian than is much secular discourse."³³⁷ Perry promotes this inclusivist ideal even for judges and legislators, who for Rawls should be the exemplars of public reason. "[I]t is a mistake, in this context, to

333. *Id.* at 713.

334. *Id.* at 726-27.

335. *Id.* at 717.

336. *Id.* at 714.

337. *Id.* at 722.

distinguish between citizens and legislators.”³³⁸ Two there are not. Everyone follows this open/inclusive view.

IV. CONCLUSION

Some clear distinctions among Murray, Rawls, and Perry have emerged. For Murray, religious pluralism forced Christians to find common moral ground with one another, especially in the political realm. Christians should not seek common ground on the religious level; about religion believers will “agree to disagree.” Consensus of all citizens is possible because of the natural law, which all human persons share. Law and politics should not be sacralized; other social institutions beyond state and court promote spiritual well-being.

Rawls accepts moral as well as religious pluralism. Murray acknowledged the possibility of moral pluralism but was more optimistic than Rawls about moral agreement. Rawls urges citizens to seek common ground at the political level, in the overlapping consensus based on a political conception of justice. This account allows individuals to believe in the truth of their comprehensive doctrines, moral and religious. Because of their comprehensive doctrines citizens participate in politics, where they speak the voice of public reason. They “agree to disagree” on the rest.

Perry sees the religious and moral pluralism of our time as a problem to be solved. His initial solution is religious or ecumenical politics. His standards are different from those of Murray and Rawls. Cultural discussions of religion (perhaps even discussions within comprehensive doctrines) must be pluralist, fallibilist, intelligible, and accessible. Religious discourse in politics and law should be the same. Religions should learn to be fallible; Perry does not protect the conflicting truth claims of different religions. The practical effect of Perry’s ecumenical political dialogue may be the same as Rawls’s public reason and Murray’s natural law, although the ambiguity in the interpretation of religion makes that point hard to discern. But post-*Love and Power* ecumenical political dialogue is forsaken for an open view, with Perry’s clear rejection of public reason as well as natural law.

Catholics have a long tradition of accepting arguments because of the authority of the one who utters them. If Murray is authoritative

338. *Id.* at 723 (citing Jeremy Waldron, *Religious Contributions in Public Deliberations*, 30 SAN DIEGO L. REV. 817, 826-31 (1993)).

(because his views were vindicated at the Second Vatican Council, or because of the Murray renaissance among Catholic scholars), then Perry is the heretic in his abandonment of the natural law and of the autonomy of the state, and Rawls is the traditional Catholic. Of course, if the retreat from Murray is the new orthodoxy, then Perry is magisterial in his full retreat from Murray's arguments.

In a tradition where reason is supposed to be the basis of authority, however, Perry is not right or wrong because he disagrees with Murray. The best argument will be the most reasonable, and the most reasonable argument will still allow for faith. For American Catholics in the '90s, the most reasonable account of religion's role in politics is *Political Liberalism*.

In the 1990s, the open view of politics may have great appeal for Catholics disappointed that their comprehensive doctrine has not become the law of the United States. However, the history of twentieth century American Catholicism cautions against any easy acceptance of the open view. Under the open view, in the 1940s American Catholics would have argued in public (and voted in private) for Catholicism to become the established religion of the United States. Under the same open theory their (majority) Protestant opponents would have been free to enact a theological agenda into law. Murray's writings on the problem of pluralism offered Catholics a better option. Instead of an endless theological battle, he encouraged Catholics to participate on natural law grounds in an appropriately autonomous state. Such a state would neither advance nor hinder religious belief; a secular state protects religious belief (especially minority Catholics) far better than a religious one.

John Courtney Murray was not a secular writer. He believed that social institutions, churches, associations, schools, and especially universities, should examine and debate religious questions. Yet now his project looks too secular to many, as does *Political Liberalism*. Appropriate secularity need not destroy religion. In subjecting religion to the demands of reason, the allegedly secular Murray and Rawls may do more to advance religion than those who would give us a religious law and a religious politics.

