ABSTRACT

John Rawls and the Supreme Court:
A Study in Continuity and Change

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In his influential book *A Theory of Justice*, John Rawls indicates his approval of an independent judiciary and judicial review for stabilizing a just regime. His later works, particularly *Political Liberalism*, place increased emphasis upon the Court for bringing about and securing his realistic-utopian vision of a constitutional democracy. This is highlighted by his calling the Court the exemplar of public reason; it is to take the institutional lead in re-founding the U.S. Constitution upon an overlapping consensus on issues of public morality based upon a liberal theory of justice. Democratic theorists have argued that Rawls's version of constitutionalism is an undemocratic means of protecting democratic principles, to which Rawls responds that the initial role of assertion given to the Court can eventually be replaced by a more passive role once the overlapping consensus is adequately established. I argue that Rawls reverses the traditional understanding of change being a necessary component of continuity. He allows continuity for the sake of implementing change, a strategy that ultimately undermines the stable constitutional government he claims to be seeking.

John Rawls and the Supreme Court:
A Study in Continuity and Change

by

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A Dissertation

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Submitted to the Graduate Faculty of
Baylor University in Partial Fulfillment of the
Requirements for the Degree
of
Doctor of Philosophy

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May 2011

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ACKNOWLEDGMENTS

Whatever merit the following pages contain is owed in large part to the many friends who challenged, critiqued, and encouraged me as I finished my studies at Baylor University. My interest in the thought of John Rawls was initially sparked in a Twentieth-Century American Political Thought class I took as an undergraduate at the University of Dallas. The course was taught by Tiffany Jones-Miller who later agreed to help me with my undergraduate thesis in which I compared Rawls's original position to John Locke's state of nature. I received excellent instruction from her as well as R. J. Pestritto, Tom West, Leo Paul S. de Alvarez, and Richard Dougherty not only on contemporary political thought but also American constitutionalism and political philosophy. With the instruction I received at the University of Dallas I was well prepared for graduate school at Baylor.

I must admit, however, that I did not intend nor desire to write a dissertation that included heavy attention to Rawls when I moved to Waco. Dwight Allman is to thank for challenging me to reconsider Rawls, particularly the developments in the later-Rawls that contain implications for the judicial branch of government. He and I met on multiple occasions to have serious discussions about Rawls's thought; these conversations were instructive in themselves, but they also provided me with the initiative to re-read Rawls with a charitable solicitude. And though we may still have some unresolved quibbles in our analyses of Rawls's work, much of my interpretation springs from discussions over coffee with Dr. Allman. Once I decided to undertake the project, David Corey

generously listened to my ideas before they were in writing, and offered comments that were greatly helpful in terms of both content and organization. He likewise provided thoughtful comments on the writing that greatly improved the argument and general tone. Likewise, Jerold Waltman has graciously offered thoughtful advice that has improved my approach to this project in terms of constitutional theory. Conversations with him in the early stages of writing provided me with both direction and encouragement. Much the same can be said for other Baylor professors including David Clinton, Mary Nichols, Curt Nichols, and Frank Beckwith, all of whom offered thoughts and comments that were helpful both in terms of thinking through my argument more clearly and finding the academic courage to press on—no small thing for one undertaking the task of a dissertation.

From beginning to end, however, there was no one I relied upon more than David Nichols for thoughts and criticism. As my mentor, he waded through more drafts of these chapters than anyone else, and yet—despite his busy schedule—he never showed signs of fatigue however much he might have felt it. Nor was he begrudging of the time I asked of him, but rather he willingly entertained my countless questions and comments with an inquisitiveness to the subject equal to my own. From him I gained both an increased appreciation for and deeper understanding of American political institutions, which I have tried here to apply in the case of Rawls and the Court. However much David Nichols could not have imagined directing a Rawls dissertation before mine, I certainly cannot imagine working with anyone else on it.

If I have at all illuminated anything about Rawls or the role of the Supreme Court in America, or have said anything substantive about the relationship between continuity

and change in our constitutional regime, it is only because Baylor has afforded me the best mentoring and instruction imaginable. The faults that remain are due only to my shortcomings in learning the lessons of my many thought-provoking and amiable professors.

Lastly, in acknowledging my professional debts, I must add that I have the privilege of doing my work from a foundation that lies outside of academia. Without the encouragement of my parents and family I would have had much less success as a graduate student. My four young sons are owed special thanks for the motivation that they quite unknowingly provided for me to finish promptly. But no one is owed more thanks than their mother, who helped me weather the storm of graduate school with an undaunted resolution. Through all the stints of uncertainty, academic maturing, and late nights working at the kitchen table, she has been a sturdy shelter of patience and confidence. In gratitude for her boundless self-giving, the pages that follow are dedicated with love to her, my wife.

To Karen

CHAPTER ONE

Introduction

When the Framers of the American Constitution met in Philadelphia to deliberate over the proper forms of a national government, they may have excluded non-delegates from their proceedings but not the ideas bequeathed to them by their forefathers. We often imagine them—and we are right to do so—as consciously undertaking something new. A frequent Anti-Federalist critique of the Grand Convention's proposed government was the novelties in its design.[1] Yet, as innovative as the institutional arrangements were, the Framers devised them under the influence of lessons learned through traditions of thought and practice with roots as far back as Ancient Greece.

Among the lessons that guided the Framers in their work was the idea that governments require deliberate maintenance in order for them to obtain longevity in a world of changing circumstances. If the blessings of liberty were to be secured not only for the Revolutionary War generation, but posterity as well, a stable constitution that could adequately achieve certain basic ends was needed. What is paradoxical about the pursuit of stability is that it requires allowance for change when needed, something that many great minds of the Western tradition have recognized and taught, from Aristotle to Machiavelli to Edmond Burke. One of the great balances to be struck in constitutional design is between providing too much leeway for change and not enough. The Articles

[1] See for instance Centinel 1, Brutus 1, Cato 3, and Agrippa 4 in *The Anti-Federalists*, ed. Herbert Storing (Chicago: University of Chicago Press, 1985).

of Confederation, in requiring all thirteen states to ratify amendments, fell too far on the side of rigidity. The men who met in the summer of 1787 knew an adjustment was needed.

What was clear to the Framers, in other words, was that an alternation in the amendment process was itself a change that needed to be brought about in replacing the Articles of Confederation with the Constitution. The process agreed upon in the Philadelphia Convention provided Congress and the states the power to propose changes to the people who then in turn, acting within their states, could decide whether the change was indeed necessary and prudent. The idea here was that the Constitution, though crafted behind closed doors, was ultimately the instrument adopted by the people to empower institutional government for the benefit of themselves and their children. Any change to the Constitution likewise had to be adopted by the people in order to be legitimate. This formal mechanism for changing the frame of government was meant to provide the appropriate balance between continuity and change.

The longevity that the United States Constitution has thus far enjoyed may be evidence enough that the balance was well struck, but there have been those who have felt otherwise, insisting that, in the end, the Constitution does not significantly differ from what it replaced. Amending the document is difficult and time consuming. But what is more, the required process presupposes that a written constitution is itself a just form of government. Should one generation be made to abide by an agreement reached long before its birth? Would following the detailed procedure for changing the agreement itself be an implicit acceptance of that agreement? If so, can a constitution be called legitimate when those living under its institutions have not explicitly consented to it and

its laws? These questions eventually boil down to one: Can a constitution, particularly a written constitution, really be democratic in the long term? A written constitution's purpose is to settle basic institutional questions that, in time, can be viewed as stifling the ability of the people to govern themselves as they wish.[2] Anyone who would take on the task of democratic reform in America therefore would be concerned with overcoming such hindrances. But how?

This project began by observing a paradigmatic answer to this question. Democratic theorists have attempted to overcome what they perceive to be a rigid political system through the use of established institutions. In doing so, they have turned to an informal means of bringing about constitutional change rather than the Article V process. The common recipe of combining democratic theory and real institutional power can be seen throughout our history, though with slightly different varieties of the concoction depending upon the particulars of the ideals and the chosen institution. The particular brew at issue here has implications for the Supreme Court in America.

I will be looking at the change John Rawls and his students hope to bring about using the existing judiciary as an institutional device to put beneath the Constitution a modern theory of democratic justice. He indicates his approval for an independent judiciary and judicial review in his early work, and supports it with greater emphasis throughout his career. He would like to see it take the lead in bringing about reform in American politics and then hand the baton to the people once they have been fully convinced of the necessity for Rawls's freestanding political conception of justice. I

[2] For an account of this tension in America from an outsiders perspective, see Richard Bellamy and Dario Castiglione, "Constitutionalism and Democracy—Political Theory and the American Constitution," *British Journal of Political Science*, Vol. 27, No. 4 (Oct., 1997), 595-618.

argue here that Rawls reverses the traditional understanding that change is a necessary component of continuity. He allows continuity for the sake of implementing change, a strategy that ultimately undermines the stable constitutional government he claims to be seeking.

Problematic as I find Rawls's work to be, the questions he raises for the Court are of real importance. Continuity and change is a theme too often ignored in our study of the American polity, and this is particularly true of attempts to understand the work of the Court. When we look at actual cases in constitutional law, we do find judges grappling with this theme, but the institutional realities, including the need to interpret the Constitution, do not lend themselves to Rawls's approach. As the latter part of this work argues, Justice Anthony Kennedy provides an alternative understanding of continuity and change that is more conducive to maintaining the regime.

Regardless of what judges actually are doing right now, Rawls's influence on constitutional theory is gaining increased strength among public law scholars. That theory, put plainly, is that interpretations of the Constitution should reflect those principles a rational person would choose when placed under certain hypothetical constraints that would encourage him to act reasonably. In this view, it is not the Constitution that binds what the government may or may not do, but an overlapping consensus of right principles—the abstract ideals we could all agree to agree upon. Rawls hopes to overcome the rigidity of the Constitution by asking us to interpret it in light of a moral theory that could be derived independent of anyone's comprehensive doctrine, or basic beliefs about the good life. This proper interpretation of the

Constitution, he tells us, can secure the substantive prerequisites to an authentically democratic polity.

Among the most famous and most prolific advocates of this Rawlsian vision is Ronald Dworkin, who has famously called upon judges to fuse their jurisprudence with moral theory.[3] Dworkin believes that a moral interpretation, or reading, of the Constitution is the only way to give democratic legitimacy to a frame of government written more than two hundred years ago. He is concerned primarily with protecting those rights associated with a liberal polity, whether or not they are specifically mentioned in the Constitution. In other words, he asks us to take individual rights rooted in a conception of justice more seriously than the utterances of the Constitution.

This approach has gained increased credence among constitutional scholars of various stripes, as evident in Sotirios Barber and James Fleming's joint advocacy of what they call a philosophic approach to constitutional interpretation.[4] Samuel Freeman, perhaps the most prominent student of Rawls, encourages the Court to exercise judicial review with an eye toward establishing a more democratic regime.[5] David A. J. Richards would have the Court do the same thing, particularly with regard to the Rawlsian right of

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[3] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 149. More generally see *Law's Empire* (Cambridge: The Belknap Press, 1986) and *Freedom's Law: The Moral Reading of the America Constitution* (Cambridge: Harvard University Press, 1996). I do not mean to suggest Dworkin agrees with Rawls in every particular, only that Dworkin makes more explicit aspects of Rawls's work that were initially left implied.

[4] Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (New York: Oxford University Press, 2007). Their differences are evident in their independent work. Barber favors a moral realist constitutional theory in *The Constitution of Judicial Power* (Baltimore: Johns Hopkins University Press, 1993) while Fleming (a student of Rawls) prefers a constructivist approach in *Securing Constitutional Democracy: The Case of Autonomy* (Chicago: University of Chicago Press, 2006).

[5] Samuel Freeman, *Justice and the Social Contract,* (Oxford University Press, 2006); "Original Meaning, Democratic Interpretation, and the Constitution," *Philosophy and Public Affairs*, Vol. 21, No. 1 (Winter 1992), 3-42; and "Constitutional Democracy and the Legitimacy of Judicial Review," *Law and Philosophy*, Vol. 9, No. 4 (1990-1991), 327-270.

self-respect.[6] Richards is particularly eager to fight any notion of the Court's duty to defend democracy less aggressive than his own. He takes particular issue with John Hart Ely, who argues that the Court is primarily responsible for checking the democratic process of legislating, and not the outcomes of the process. For Richards, the Court should ensure that the very substance of policies is consistent with democratic values as derived from moral theory.[7] This has been echoed more recently by a younger generation of scholars such as Ronald Den Otter, who believes that a truly democratic state can only come about if we are willing to hand over significant political control to the Court, which in turn is encouraged to keep up with the ideas flowing from universities.[8] Those like Den Otter have become increasingly adamant that professional philosophers be given a role in determining the principles by which the Constitution should be interpreted if it is to have legitimacy. Given the almost universal agreement that John Rawls revitalized the possibility of evaluating politics on the basis of moral theory, this trend in public law owes much to the influence of Rawls's work and ideas, even if scholars such as Den Otter go farther than Rawls would have ever advocated.[9]

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[6] David A. J. Richards, *The Sodomy Cases: Bowers v. Hardwick and Lawrence v. Texas* (Lawrence: University Press of Kansas, 2009); *The Case for Gay Rights: From Bowers to Lawrence and Beyond* (Lawrence: University Press of Kansas, 2006); *Foundations of American Constitutionalism* (New York: Oxford University Press, 1989); David A. J. Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986).

[7] See *Toleration*, 14-19.

[8] Ronald C. Den Otter, *Judicial Review in an Age of Moral Pluralism* (New York: Cambridge University Press, 2009).

[9] The works of Rawls that I am primarily concerned with include *A Theory of Justice* (Cambridge: The Belknap Press, 1971; Revised, 1999); "The Independence of Moral Theory," *Proceedings and Addresses of the American Philosophical Association*, Vol. 48 (1975), 5-22; "Justice as Fairness: Political not Metaphysical," *Philosophy and Public Affairs*, Vol. 14, No. 3 (1985), 223-251; "The Domain of the Political and Overlapping Consensus," *New York University Law Review*, Vol. 64, No. 2 (1989), 233-255; *Political Liberalism* (New York: Columbia University Press, 1996); "The Idea of Public Reason Revisited," *University of Chicago Law Review*, Vol. 64, No. 3 (1997), 765-807; *The Law of Peoples* (Cambridge: Harvard University Press, 1999); *Lectures on the History of Moral Philosophy*, ed. Barbara

Strangely, however, there is very little in the Rawlsian literature, of which there is a mountain, grappling with his view of the Court's role in America or how the Constitution should be interpreted. Most recent volumes that provide overviews of Rawls's thought fail to even mention constitutional law or the role of the Court.[10] Frank Michelman's contribution to the *Cambridge Companion to Rawls* really only scratches the surface of the issue.[11] Though he provides a helpful commentary on Rawls's views of constitutionalism and legitimacy, he underestimates the role Rawls asks of the Court in bringing about a more democratic regime in America. One gets the impression in reading Michelman that Rawls had a real faith in legislatures, yet this does not account for the consistent advocacy of judicial review throughout Rawls's work. As I will argue in a later chapter, Rawls's willingness to rely on more popular institutions like legislatures to carry the burden of fairly regulating society can only take place once the people and their elected representatives have learned to properly interpret the Constitution by way of the Court's instruction.[12] He favors what Leslie Goldstein calls guardian democracy over representative democracy, at least initially.[13] Built into Rawlsian jurisprudence is a

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Herman (Cambridge: Harvard University Press, 2000); *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge: The Belknap Press, 2001); and *Lectures on the History of Political Philosophy*, ed. Samuel Freeman (Cambridge: The Belknap Press, 2007).

[10] See for example, *Reflections on Rawls: An Assessment of his Legacy*, ed. Shaun P. Young (Burlington, VT: Ashgate Publishing Company, 2009).

[11] Frank I. Michelman, "Rawls on Constitutionalism and Constitutional Law," *The Cambridge Companion to Rawls*, ed. Samuel Freeman (New York: Cambridge University Press, 2003), 394-425.

[12] Joshua Cohen's chapter in *The Cambridge Companion*, "For a Democratic Society" (86-138) also misses the Court's role in bringing about a democratic society. See especially pages 118-121.

[13] Leslie F. Goldstein, "Judicial Review and Democratic Theory: Guardian Democracy vs. Representative Democracy," *The Western Political Quarterly*, Vol. 40, No. 3 (Sep., 1987), 391-412.

conception of society and the person that the Court is asked to protect.[14] Those self-consciously following Rawls's lead—Freeman, Fleming, Richards, Den Otter—understand this, but no one has provided a critical assessment of Rawls's teaching on the role of the Court.

The consistent exception to this is deliberative democrats—those democratic theorists committed to government legitimacy based upon the authentic opportunity for citizens to engage in meaningful deliberation regarding the laws and policies that constrain their lives. Many pursuing inquiries in this field, such as Christopher Zurn, recognize the tension between the ideal of deliberation and the reality of constitutional forms.[15] Zurn in particular recognizes the degree of power Rawls is handing over to judges as the exemplars of public reason, or as he says, defenders of the public argot. Democracy becomes in this scheme a "conversation carried out by linguistic experts—especially judges and lawyers addressing them—and located in that political institution most insulated from the input of citizens."[16] Zurn's worry, much like Jürgen Habermas's, is that Rawls's scheme will rob the system of its democratic zeal.[17] Democrats have long

[14] I differ here from David Gray Carlson who suggests a tension between Rawls's mature conception of the person and the role of the Court. See his "Jurisprudence and Personality in the Work of John Rawls," *Columbia Law Review*, Vol. 94, No. 6 (Oct., 1994), 1828-1841.

[15] Christopher F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (New York: Cambridge University Press, 2007). Though deliberative democrats haggle over details, Zurn's critique of Rawls's public reason is fairly representative of others such as John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (New York: Oxford University Press, 2000), and Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge: The Belknap Press, 1996).

[16] Ibid., 19.

[17] See Jürgen Habermas, "Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism," *Journal of Philosophy*, Vol. 92, No. 3 (March, 1995), 109-131.

been wary of judicial review for this reason.[18] Rawls's theory in particular has caused some to speculate that the consensus demanded would mark the end of politics.[19]

My assessment of Rawls's Court is not unlike Zurn's, but whereas he is interested in promoting deliberative democracy I am more concerned with preserving constitutionalism. Zurn may be right that a judiciary that exemplifies a publicly acceptable basis of reasoning on constitutional essentials and matters of basic justice—which is to say a proper mode of interpreting the Constitution—will allow the fire for self-government to fade. But equally important to democratic zeal is the liberty to self-govern secured under a well-maintained constitution. As Mark Button has recently observed, public reason has a formative effect on how we think of ourselves as citizens and the society we inhabit.[20] I add that for it to have this effect it requires as a starting point an institutional arm, one that Rawls finds in the Supreme Court.

Some of Rawls's most harsh critics have taken note of the invitation being offered to the judiciary to bring about a polity of justice as fairness. David Lewis Schaefer has done so in has assessments of Rawls's thought from the standpoint of the American political tradition.[21] Clifford Orwin and James Stoner likewise recognize this invitation,

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[18] Consider, for instance, James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review*, Vol. 7 (1893), 129-156. One should note that deliberative democrats differ on the legitimacy of judicial review. Zurn allows for the Court to insure the modes of deliberation are open. Others, such as Dryzek, come down more squarely against it.

[19] Bonnie Honig, *Political Theory and the Displacement of Politics* (New York: Cornell University Press, 1993). Micheal Sandel's claim is similar when he says public reason will lead to disenchantment with politics. See his *Liberalism and the Limits of Justice* (New York: Cambridge University Press, 1982 [Second Edition 1998]).

[20] Mark E. Button, *Contract, Culture, and Citizenship: Transformative Liberalism from Hobbes to Rawls* (University Park, PA: The Pennsylvania State University Press, 2008).

[21] David Lewis Schaefer, *Illiberal Justice: John Rawls vs. the American Political Tradition* (Columbia: University of Missouri Press, 2007), 89. See also his earlier critique of Rawls: *Justice or Tyranny?: A critique of John Rawls's "Theory of Justice"* (Port Washington, NY: Kennikat Press, 1979).

arguing that Rawls wants to utilize the Court as an institutionalized mechanism for civil disobedience.[22] Others have noted the strategy as well: Michael Zuckert thinks it is too beset with ambiguities to settle any real political questions while Gary Jacobson fears the strategy's imminence is at hand.[23] While these critics are right in seeing the implications of Rawls's work for the judiciary, I think Rawls may be more sensitive to the importance of constitutional government than they have noted. He is much more nuanced than Dworkin, for example, about the relationship between constitutional law and moral theory, recognizing that the move toward a realistic utopia—or, as he elsewhere calls it, a constitutional democracy—is a long-term project that will have to be seen by the people in continuity with the larger American political tradition. And his later work makes clear that the Court is not so much an institutional version of civil disobedience as an instrument for bringing about change while downplaying any disruptions to constitutional law, something the civilly disobedient would not be claiming to do.

I thus share many of the views held by the critics of his thought, but ultimately possess more respect for Rawls as a thinker wishing to implement his theory in practice. Though dreadfully dry, his rhetoric has a potency that has captivated the imaginations of political theorists for four decades. My disagreements with Rawls will be made plain in the arguments contained in the body of this work, but I hope it is evident enough in undertaking this project that I find Rawls to be a thinker who needs to be taken seriously by anyone who considers ideas to be an influential force in the world of politics. What

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[22] Clifford Orwin and James R. Stoner, Jr., "Neoconstitutionalsim? Rawls, Dworkin, and Nozick," *Confronting the Constitution*, Allen Bloom, ed. (Washington: AEI Press, 1990), 437-470.

[23] Michael P. Zuckert, "The New Rawls and Constitutional Theory: Does it Really Taste that much Better?" *Constitutional Commentary* 11, (1994-1995), 227-245; Gary J. Jacobson, "Modern Jurisprudence and the Transvaluation of Liberal Constitutionalism," *The Journal of Politics*, Vol. 47, No. 2 (June, 1985), 405-426.

other theorist in the past fifty years has had the success of Rawls in getting his peers to re-imagine the basis of constitutionalism in America? Who else has introduced a new language for American political life that has gained the currency of public reason? And who else has provided a plan for achieving an overlapping consensus on the issue of justice by way of an existing institution? Detailing this plan is what I hope to accomplish here.

What follows, then, is highly descriptive. My main task is to articulate how Rawls foresees a constitutional democracy emerging in America. By constitutional democracy, Rawls has in mind a realistic utopia in which questions about constitutional essentials and matters of basic justice are settled on the basis of principles that would be chosen by parties to a hypothetical original position bound in their knowledge of particulars by a veil of ignorance. Rawls famously argued that they would choose liberal principles of justice similar to what he calls *justice as fairness*.[24] This is composed of two principles: put roughly, the first protects equal basic liberties while the second assures everyone equal opportunities for gaining the means to a fulfilling life, which he says would include a scheme of redistributing property (the difference principle). Rawls of course hopes that the day will come in America when a sufficient number of citizens embrace these principles, conceived of as being freestanding or without reference to anyone's conception of the good life, as the basis for a public conception of justice that could animate politics and achieve self-reinforcing stability. Getting to this point, however, is the difficulty.

[24] Rawls never italicizes *justice as fairness*, but I will throughout in order to be clear that I am referring to Rawls's specific theory of liberal justice composed of the two principles that he tells us would be chosen in an original position.

In his earliest book, *A Theory of Justice*, Rawls lays forth a plan for realizing a constitutional democracy that requires a rather heavy-handed government to administer an educative scheme that would begin in early childhood. People would emerge from the process so fully convinced of the soundness of the two principles of justice that they would form their own conception of the good, their own comprehensive doctrine, based upon them. In other words, everyone would have a similar, liberal understanding of the world—non-liberals be damned. Rawls himself came to realize the political impropriety—the outright illiberal tyranny—of the strategy and sought to revise his position in his later years. *Political Liberalism* begins with an assertion that plurality is simply a reality in a liberal regime, and non-liberals are certainly welcome. But he hopes that everyone, even religious non-liberals, can at least agree to be governed by a liberal conception of justice such as *justice as fairness*.

Rawls's emphasis on the Court thus comes into full blossom in his later, more mature work. No longer is a formal educative scheme to be administered by the state; it is replaced by a reliance on the law, especially fundamental law, to shape the way citizens conceive of themselves and their society. This of course requires thinking of fundamental law, namely the Constitution, in the way most conducive to bringing about the type of regime that fulfills the requirements of *justice as fairness*. While convincing people to interpret the Constitution in this light might be ideally accomplished by way of public dialogue, it never hurts to have a powerful institution on one's side. What better forum for teaching people about the proper interpretation of the Constitution than the modern U.S. Supreme Court, particularly if it can be convinced to restrict its arguments to Rawlsian public reason? The need for formal education can be reduced to law schools,

and an informal education can then spring from the Court and trickle down to the main currents of public discussion. Rawls no doubt sees other institutions playing a part in realizing a constitutional democracy, but the Court is integral.

What Rawls is encouraging the Court to do does bear resemblance to what Bradley Watson has called the new science of jurisprudence, but has an important difference.[25] What Watson accurately describes is the theory behind a progressive, which is to say historicist, understanding of jurisprudence that embraces the notion of a living constitution to be interpreted in light of historical exigencies. In this view the Constitution is organic, and as such, subject to unlimited change. The job of justices in this scheme is to recognize the winds of the time and interpret the Constitution accordingly. History in this view is more than the record of events as they have unfolded; it is a movement of nature beyond human control or agency. It is something for us to grasp but not necessarily direct. While there are theorists and practitioners who embrace the idea of a living Constitution, I do not place Rawls and his progeny in this camp. Rawls's faith is not in an unshakeable History, but in the ability of humans, through their agency, to shape their own political landscape. He looks at contemporary America, thinks we can do better, and provides a charter for getting there without radically breaking from our past, at least not in an instant.

Rawls does, however, recognize that his particular theory is indebted to ideas and work that has come before him. He knows he stands upon the shoulders of others, and he continually bumps into the question of history at nearly every turn. Indeed, his view of political philosophy's role includes an interpretation of history that has, as I will show,

[25] Bradley C. S. Watson, *Living Constitution, Dying Faith: Progressivism and the New Science of Jurisprudence* (Wilmington: ISI Books, 2009).

profound implications on what he is asking the Court to do in its jurisprudence, and it does mirror what Watson calls the new science of jurisprudence. The difference is that the Court in Rawls's view is not trying to arrive at an end outside of human deliberation. This is why judges are encouraged to pay more attention to political theory, so that they can better understand the requirements of justice as they emerge, not in History, but in the deliberations among professional philosophers. The facts of history are to be reconciled to the goal of establishing a constitutional democracy animated by *justice as fairness*. And once that occurs, the role of the Court can be passive, for at that point, citizens and their representatives will have sufficiently absorbed the principles of justice as the motives of their own political decisions. The eventual backseat that Rawls wants to see the Court take is not apparent in progressive theories of jurisprudence.

As is no doubt evident in what I have said thus far, I am offering more than just an account of Rawls's position on the Court; I am also critically assessing his position. As I have mentioned, what Rawls is advocating is a constitutional democracy, and many of his critics find fault with him from a democratic standpoint for having too much to do with constitutionalism. While their work has produced many insightful critiques of Rawls, I offer here an analysis from the perspective of constitutionalism, the idea that adherence to institutional forms provides the best path toward the protection of liberty while upholding justice. Democratic critics of Rawls are right that he does have an appreciation for institutional government and wants to preserve it, though only after reinventing it.

The organization of this work thus centers upon Rawls's use of the judiciary to bring about change. Chapters two and three both lay the groundwork for the detailed

textual analysis of later chapters. Chapter two enters the war-torn theater where a battle over the status of Rawls's political philosophy rages. The fight is a bit lopsided insofar as most commentators agree that *A Theory of Justice* initiated a revitalization of normative political thought, which had all but died in the behavioral revolution within political science and dominance of utilitarian thought among philosophers. A small number of scholars have resisted this narrative, insisting that what Rawls is doing does not amount to political philosophy *per se*. In truth one can hardly call this a fight since neither side ever seems to address the other. Nonetheless I enter the dispute with the suggestion that Rawls is best understood as a thinker who is offering a constitutional theory. In time, I think what Rawls will be most remembered for is not so much a theory about justice, but a theory about constitutional democracy that is imbued with a particular sense of egalitarian justice. Looking at Rawls this way allows us to get past hang-ups over his status as a great political philosopher.

Chapter three begins by suggesting Rawls is right to emphasize the importance of ideas in political life. Here I think he has much to offer against current trends among some neo-institutionalists who dismiss ideas as unimportant to the study of contemporary politics. In fact, many who hold such a view do so under the influence of a theory of progressivism similar to that Watson describes with regard to the new science of jurisprudence—an idea that History moves forward irrespective of human agency. Rawls disagrees with this perspective. The chapter then describes the ideas Rawls espouses that are of particular relevance to understanding his view of the Court.

With chapter four begins the in-depth description of Rawls's work. Here I will deal with the development of his constitutional teaching, including his response to

democratic critics such as Habermas. More importantly, however, the chapter details the reason why Rawls turns to the Court as a primary player in the realization of an authentic constitutional democracy. His earlier teaching relied upon a more formal reliance on education of all citizens, which is to say a deliberate formation of citizenship consistent with *justice as fairness*. While the strategy, as he later admitted, dismissed human freedom and was therefore morally unacceptable even on the basis of Rawls's own theory, it was also completely impractical. It relied upon citizens properly formed to create institutions that would properly educate citizens. Thus when Rawls set out to avoid the moral discrepancies of his earlier work's attempt to implement *justice as fairness*, he also had to overcome the circularity of the previous strategy. Turning to the Court allowed him to do so.

Chapter five builds upon this with a more direct look at Rawls's understanding of the Court's role in the American political system. I take note of the fact that Rawls consistently embraces judicial review as a legitimate tool for securing a constitutional democracy, yet he also recognizes the inherent tension between it and democratic government. At the same time, as one unconvinced that history has any real power absent deliberate human intervention, Rawls wants an institutionalized mechanism that can defend the principles of justice he advocates. By giving the Court this task he is asking it to use judicial review now so that democracy can one day be enjoyed. When that day comes, the Court can ease into a more comfortable position of simply adjudicating disputes in the law, leaving to those branches closer to the people the responsibility of deciding how best to administer a constitutional democracy animated by

justice as fairness. But until they can be trusted to do so, judicial review will have to be an instrument of both institutional power and education.

Chapter six will assess in more detail the Court's interpretation of the Constitution. Rawls offers them a language for doing so in accord with his theory—public reason. But he also recognizes that the Court cannot simply disregard the text of the document. What they are to do is read it in light of the principles that would be chosen in a fair original position. Political philosophy is to assist judges in this duty. Furthermore, Rawls recognizes that the full achievement of a properly read Constitution will be the product of a slow-paced effort in which *justice as fairness* slowly creeps beneath the words of the document. Rawls often says that the Court will only read the first of the two principles into the Constitution, but as I will show, the Court is also needed to validate a constitutional power for Congress to regulate society according to the dictates of the second principle. The Court's interpretation of the document is as purposeful here as it is with the basic liberties springing from the first principle.

Chapters seven, eight, and nine look at concrete instances of constitutional interpretation beginning with Rawls's example of the Court properly applying liberal principles in its jurisprudence, then moving to a more recent case that many Rawlsian scholars point to (wrongly) as exemplary, and finally turning to a case that illustrates an alternative approach to issues of continuity and change that better explains the Court's work in a constitutional system. Rawls's treatment of freedom of speech jurisprudence in *Political Liberalism* will be the subject of chapter seven. His treatment of this topic is somewhat puzzling: he is using specific cases, primarily *Brandenburg v. Ohio* and *Buckley v. Veleo*, to show us how participants in a hypothetical constitutional convention

would (or would not) specify rights derived from the first principle of justice, but at the same time he is urging judges to imitate the reasoning that would occur within this hypothetical convention in their interpretations of the Constitution.[26] But upon closer examination of the actual opinions written in these cases it is evident that Rawls is constructing a jurisprudence without any real precedence and largely disconnected from the text of the Constitution.

In chapter eight I turn to a case that many disciples of Rawls hail as a great example of the Court properly fulfilling its role of securing a constitutional democracy—*Lawrence v. Texas*.[27] Justice Anthony Kennedy wrote the opinion for the Court in this case, one that scholars such as David A. J. Richards praise as properly securing a basic right inherent to a morally correct reading of the Constitution. Indeed, some of the language used by Kennedy does seem to indicate moral affirmation of the homosexual lifestyle and thus an incorporation of a Rawlsian conception of public justice into constitutional law. Furthermore, Richards depicts the opinion as being on the right side of history by constructing a narrative tale meant, in Rawlsian fashion, to reconcile a modern acceptance of gay rights with a history of moral disapproval. But closer inspection of the opinion presents a different perspective, one more responsive to the demands of constitutionalism than protecting the social basis of self-respect.

Chapter nine builds upon the previous chapter's argument by examining another case in which Kennedy defends constitutionalism over arguments akin to those in support of *justice as fairness*. The case is a recent one, *Ricci v. DeStefano*, and the facts of the

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[26] *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Buckley v. Valeo*, 424 U.S. 1 (1976).

[27] *Lawrence v. Texas*, 539 U.S. 558 (2003).

dispute are ripe for a Rawlsian interpretation of the Constitution.[28] But such an interpretation is clearly absent. My reason for looking at this case is based on the additional fact that Kennedy's opinion presents an alternative approach regarding the Court's accommodation of change in America, one that is arguably more consistent with the Constitution than that suggested by Rawls. This is not meant to be a conclusive argument, only a tentative suggestion of how the Court might facilitate some change without having to give the Constitution away in marriage to a particular moral theory. Furthermore, Kennedy is of interest because he both vindicates Rawls's belief that the Court can have an influence on how continuity and change relate in America and provides an alternative approach that is ultimately more consistent with constitutional government.

In chapter ten I conclude my account of Rawls and the Court. What emerges in the course of the chapters that follow is this: though Rawls recognizes the importance of political institutions in preserving order, his goal of making them consistent with egalitarian principles of justice leads him to misunderstand the purpose of constitutional government. He would use a constitution to enforce and propagate his own moral theory by way of the Court rather than allow it to be a bulwark for everyone's liberty without a prejudice in favor of those with a particular moral outlook. We do have a concrete public consensus in America as to what marks the rule of law—the text of the Constitution. Moving toward an agreement on antecedent moral principles is an attempt to slip a new foundation under our political feet. It is a re-founding, yet one meant to be in apparent continuity with our current system. But replacing a foundation is risky business, and

[28] *Ricci v. DeStefano*, 129 S. Ct. 2658, 2671, 174 L. Ed. 2d 490 (2009).

threatens to undermine our strongest legal protections against despotism. Nonetheless, I believe Rawls's strategy cannot be fully achieved because of the very nature of the Court's actual institutional role in America. It simply cannot fully embrace a public reason steeped in moral theory, even a so-called free standing moral theory, without calling into question its own institutional integrity.

In the end, a mechanism for change is important for maintaining any political community, including that of America. That Rawls should want to suggest changes to our system of government is not a fault, but the means of doing so matter. The frame of government we have inherited was designed with an institutional means of allowing change, both through the formal amendment process and within the bounds marked out by the text. Either of these alternatives is open to Rawls just as much as they are to any other citizen. But empowering the Court, however temporary, to be the instrument of constitutional change is too great a risk to constitutionalism to be pursued lightly. Showing how Rawls does this and why it is problematic is the purpose of this dissertation.

CHAPTER TWO

Rawls's Political Thought:
Constitutional Theory, Not Political Philosophy

Commentators seem to be divided between those who believe John Rawls is the pinnacle of twentieth-century political philosophy and those who see him as a careless shepherd leading a flock of sheep toward the end of history and, in effect, killing political philosophy. Among the former, disputes with Rawls are always familial, acknowledging as a starting point Rawls's influence and prominence. With the latter, Rawls is hardly worth discussing unless it involves an intellectual berating. Working in the middle is dangerous, not only because of potential crossfire, but also because of the target one becomes for direct-fire from both sides.

Nevertheless, I wish to plant my flag between the two fronts, at least as a starting point. I find both sides to be prone to a common mistake; each analyzes Rawls's work from the heights of philosophy. Was he a good philosopher or not? When this is the question, common ground between opposing answers is lost. While I generally will take a critical view of Rawls in the pages that follows, I think it at least fair to say of him that bridging gaps between seemingly incompatible positions was one of his greatest aspirations. In that spirit I now write to suggest that measuring Rawls by his philosophic achievements is misleading. From the perspective of the tradition of political philosophy, Rawls's ideas—as he himself humbly admits—are not particularly novel.[1] The animating

[1] See for instance John Rawls, *Theory of Justice* (Cambridge, MA: Belknap Press, 1971; revised 1999), xviii: "Indeed, I must disclaim any originality for the views I put forward. The leading ideas are classical and well known. My intention has been to organize them into a general framework by using

questions of his work are tied to justification and legitimacy, not wisdom or truth. *Theory* takes the greatest strides towards forming a systematic account of reality, but even there he is working with inherited ideas, attempting to strike a balance between them that modern individuals could affirm as consistent with their intuitive, democratic convictions. It is worth noting further that even *Theory* was largely concerned with the question of legitimacy, not with the nature of things or an account of reality.

This is not to say that Rawls lacked original ideas. He had a creative mind even if his works read, as his good friend Burton Dreben said, "as though they were translated from the original German."[2] Despite the banality in tone, he has garnered extensive attention, and there is a reason for it. That reason, I argue, is not the originality of his philosophic insights, but rather the creativity of his constitutional theorizing. What makes him a remarkable thinker is that he has shaped the conversation of fields in which he had little formal training—first among these, I believe, is the discussions he has influenced in constitutional law and jurisprudence. If we think of him as a constitutional theorist rather than a political philosopher a more fruitful conversation regarding the merit of his work can be conducted. His devotees will do more to honor his work by reading it in its best light while his most strident opponents will have to reevaluate the grounds upon which they critique him. Thus I state my middle position: Rawls is not a great political philosopher, but his constitutional theory is the work of a serious thinker.

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certain simplifying devices so that their full force can be appreciated." He made a similar claim in his undergraduate thesis; see *A Brief Inquiry into the Meaning of Sin and Faith* (Cambridge, MA: Harvard University Press, 2009), ed. Thomas Nagel, 110: "We intend to state nothing new, startling or original. What follows is a rehash of what everybody knows."

[2] See Samuel Freeman, "John Rawls: Friend and Teacher," in *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (New York: Oxford University Press, 2007), 327.

Before turning my attention to the details and analysis of his constitutional theory, my claim that Rawls is misunderstood when read as a political philosopher requires a defense to those accustomed to the praise of Rawls's philosophic efforts. Such admirers point to him as the "the greatest political philosopher of the twentieth century… responsible for the revival of serious philosophical thought about concrete social questions,"[3] and that his work claims "continuity with the greats of the past."[4] Several critics agree with this sentiment. For example, an early skeptic of *Theory* claimed that despite the fact the general idea "does not work" and that many of Rawls's arguments are "unsound," he was certain the book deserved "prolonged and intensive study" as a major work of moral and political philosophy. A more recent critic refers to him as "the preeminent academic moral philosopher of the last 50 years."[5] Furthermore, such acknowledgements exist among legal scholars and constitutional theorist who occasionally feel compelled to engage someone whose judicial references are "intended to be illustrative of philosophical points."[6] A defense likewise is owed to those with

[3] Thomas Nagel, "John Rawls and Affirmative Action," *The Journal of Blacks in Higher Education*, Vol. 39 (Spring, 2003), 82-84. For similar comments see Martha C. Nussbaum, "Conversing with the Tradition: John Rawls and the History of Ethics," *Ethics* 109 (January 1999), 424; and Eric Gregory, "Before the Original Position: The Neo-Orthodox Theology of the Young John Rawls," *Journal of Religious Ethics*, Vol. 35. No. 2 (2007), 180. See also Christopher F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (New York: Cambridge University Press, 2007).

[4] Chandran Kukathas and Philip Pettit, *Rawls:* A Theory of Justice *and its Critics* (Stanford: Stanford University Press, 1990), 5.

[5] Brian Barry, *The Liberal Theory of Justice* (New York: Oxford University Press, 1973), ix; and Peter Berkowitz, "John Rawls and the Liberal Faith," *Wilson Quarterly* (Spring 2002), 61. Others who might fit into this category would be Michael Sandel*, Liberalism and the Limits of Justice: Second Edition* (New York: CambridgeUniversity Press, 1998); and Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca: Cornell University Press, 1993).

[6] Christopher F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (New York: Cambridge University Press, 2007), 18 n20.

much less respect for the work of Rawls and therefore may be skeptical of an extended discussion on his work.[7]

The object of this opening chapter therefore is to clarify the general nature of Rawls's project so as to best understand his treatment of the Court. If he can indeed be thought of as engaged in philosophy, as so many friends and foes claim him to be, then what he says about the judiciary's role should be derivative of his principles and not instrumental in realizing them. Of course, the line between questions of principle and questions of practice are not mutually exclusive and finding a clear line between the two is far from easy. Nevertheless, there is a distinction to be drawn; those primarily concerned with the first are more readily identifiable as philosophers while those concerned more with the second are rightly given a different title. Rawls is no doubt concerned with principles, but his main contributions and the thrust of his efforts deal with bringing about a constitutional order in conformity with an ideal conception of justice leaning heavily on the thoughts of others. In the chapters that follow I treat Rawls as one better thought of as a constitutional theorist than a philosopher. This chapter aims at briefly illustrating why.

The Common Tale Questioned

The story often told about Rawls's work as a philosopher looks to the context in which he was writing. The usual narrative is that Anglo-American political philosophy

[7] I include in this category Allen Bloom, "Justice: John Rawls versus the Tradition of Political Philosophy," *American Political Science Review* 69 (1975), 648-62; reprinted in *Giants and Dwarfs: Essays 1960-1990* (New York: Simon and Schuster, 1990), 315-345; Michael Zukert, "Justice Deserted: A Critique of Rawls' *A Theory of* Justice," Polity, Vol. 13, No. 3 (Spring, 1981), 466-483; and David Lewis Schaefer's two books: David Lewis Schaefer, *Illiberal Justice: John Rawls vs. the American Political Tradition* (Columbia: University of Missouri Press, 2007) and *Justice or Tyranny?: A critique of John Rawls's "Theory of Justice"* (Port Washington, NY: Kennikat Press, 1979).

had dried up as an independent discipline after World War II. So-called normative values were viewed with skepticism by analytic philosophers and political scientists alike. The analytic school concerned itself with the clarification of thoughts rather than the defense of particular positions, ethical or otherwise. Though many war-time emigrants to the United States— Hannah Arendt, Hans Morgenthau, Leo Strauss, Eric Voegelin, and others—continued teaching a traditional approach to political philosophy, an American-born philosopher was not on the scene who could justify the moral inquiry through philosophic engagement. *Theory* is widely held to be the renewal of a tradition of philosophy associated with the English-speaking world and concerned with questions such as justice and individual liberty. Since the task at hand is to understand the nature of Rawls's work as a precondition for grasping his view of the Court, it will be useful to review the common way his thought is described.

Chandran Kukathas and Philip Pettit provide a helpful way of doing so in their book on Rawls.[8] They describe two traditional aspects of political philosophy: feasibility and desirability.[9] As the terms suggest, feasibility is concerned with the possible while desirability identifies options that are choice-worthy. Modern political philosophers, they argue, are defined by their systematic teachings on the purpose of government with attention to what is possible and choice-worthy. The greatness of *Theory*, they claim, is that it sought the desirable without ignoring the possible. They additionally praise Rawls for his ability to do this without breaking from the analytic tradition, but by broadening

[8] Chandran Kukathas and Philip Pettit, *Rawls:* A Theory of Justice *and its Critics* (Stanford: Stanford University Press, 1990).

[9] Kukathas and Pettit use the words theory and philosophy interchangeably, and tend to use theory more often. Since I am drawing a distinction between political philosophy and constitutional theory, I will consistently use replace their use of theory with philosophy.

the methods of that tradition to once again include questions of morality and values.[10] He accomplishes this by beginning with principles that are intuitively held by members of a society and clarifying their meanings so that they lead to "sound judgments in concrete cases."[11] Thus a theory could be validated by looking at policies that are widely held to be right or wrong; any theory that would allow for slavery, despite its logical clarity, would fail since we intuitively understand slavery to be wrong. On this telling, political philosophy systematizes these intuitive judgments in a logically consistent way and constructs a theory on this basis. While this may appear to only be a defense of modern-day prejudices, Rawls argues that to be logically consistent, some intuitive judgments may have to be altered to fit the theory, thus overturning such prejudices. Deciding if the theory or opinions need to be altered is part of the process to a state Rawls calls reflective equilibrium. Finding desirable principles that conform to our intuitive sense of correctness and clarify our convictions is the principal task of *Theory's* first part.

Part Two of *Theory*, Kukathas and Pettit tell us, is concerned with the issue of feasibility rather than desirability. The principles reached in Part One have to be realized in institutional forms. One might expect a discussion of government, including a discussion of the Court, in this part; instead one finds a defense of the previously identified principles of justice in terms of a thought experiment famously dubbed the original position. Here the principles are shown to be feasible in the sense that parties to a hypothetical meeting in which no one has self-knowledge yet all retain an inclination toward self-interest would recognize the desirability of the proposed principles. These

[10] This was the subject of Rawls' first published work, "Outline for a Decision Procedure for Ethics," *Philosophical Review*, Vol. 60, No. 2 (1951), 177-197.

[11] Kukathas and Pettit, 7.

principles are then to guide the hypothetical personages taking part in this meeting in the design of a constitution, laws, and administration (which includes juridical work). At each stage, more particular information is available to the parties; their veil of ignorance is gradually lifted. What particular constitution or institutional forms should be adopted, Rawls does not say. What he makes plain is that they are to be consistent with the two principles of justice chosen in the original position.

This way of bringing the desirable and the feasible together is famously summed up by saying that the right takes priority over the good, that is, a public conception of justice takes priority over privately conceptions of the good life.[12] Thus a moral theory is made prior to politics, thereby animating its operation and limiting its ends.[13] The administration of this public conception of morality becomes the very definition of good government. What form government takes seems to matter very little to the early Rawls, who says that particular circumstances are to dictate whether a free-market or government-controlled economy is to be adopted. The later Rawls comes to focus more on America, but in doing so is less appealing to Kukathas and Pettit, because he becomes increasingly concerned with the feasible and less with the desirable.[14] While he never abandons the idea that the ethical takes priority to the political in designing a just regime,

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[12] See Rawls's *Political Liberalism* (New York: Columbia University Press, 1996), 173-207.

[13] It is not uncommon for political philosophers to describe good government in terms of an understanding of reality that is prior to political life—Locke's state of nature for example—but Rawls is unclear as to whether his original position is a new way of understanding reality or a prescription for a new type of liberalism. The difficulty is increased by the fact that Rawls wants to disconnect his public conception of justice from any foundations, comprehensive doctrines, or basic claims of truth. He seems sincere in this regard, and that is indeed the problem insofar as his the implementation of his theory requires citizens to possess a particular understanding of political reality that cannot easily be disentangled from private conceptions of truth or goodness. I would be more comfortable calling him a philosopher if he would own up to the foundation he is eager for us to accept.

[14] Kukathas and Pettit, 150.

Kukathas and Pettit object to his increased concern for implementation over a search for desirable principles.

The question, then, is whether his concern with implementation, which animates most of his thought, can rightly be called political philosophy. One might ask why this question matters. Is there anything more at stake than a title? If we think of him as a philosopher, we may be inclined to see his primary concern as that of justice, particularly given the abstractness of his writing. I maintain that despite his very general approach, he is paradoxically addressing concrete political matters first and foremost. Ultimately he has ambitious hopes for changing the way Americans live under a written constitution. He takes principles as givens and seeks to make them practicable. If we only seek to understand the principles he advocates, then we will not fully understanding John Rawls. We only begin to do so once we recognize what he is doing—working out a new theory of constitutional legitimacy.[15]

To illustrate this, imagine a range on one end of which is a philosophic standpoint while at the other is highly partisan position of some sort. We might expect a different reason for considering the Court's role given the vantage-point. If he is coming from a philosophic standpoint, then we could expect his teaching to be that the Court, at least in America, is best suited for fulfilling some essential component of governing. If he is a mere partisan then his endorsement may amount to using the Court in order to bring about some set of pre-determined policies. The first would judge the Court's actions

[15] "Rawls is making a very radical move," states Burton Dreben, adding that Rawls must "convince you that move must be made if you can even hope to have a viable liberal constitutional democracy." See Dreben's lecture "On Rawls and Political Liberalism," in *The Cambridge Companion to Rawls* (New York: Cambridge University Press, 2003), 325. He also makes clear the degree to which Rawls is concerned with legitimacy on pages 326-327.

according to its adherence to formal rules meant to provide sound adjudication; the other would be judged based on its usefulness in affecting political change. Determining what it is Rawls is doing—where he falls on the range—will give us an indication of what to expect when we consider his remarks on the Court.

Rawls himself describes his project as one in which an ideal picture of the how life could be is presented as a goal to be worked out over time. In *The Law of Peoples*, a work that comes toward the end of his career, he says, "By showing how the social world may realize the features of a realistic utopia, political philosophy provides a long-term goal of political endeavor, and in working toward it gives meaning to what we can do today."[16] Rawls is offering us, in his own words, a realistic utopia to be worked out. He is only providing the broad outline, and avoids saying much about details in most of his work. The realistic utopia he envisions for America is what he often calls a constitutional democracy, which—sounding benign enough—entails committing our political institutions to the mandates and limits emanating from those principles of justice that would be chosen by impartial participants to a fair original position. He does think that we, as citizens of a liberal polity, already have the intuitive sense of justice consistent with these principles. He simply wants to help us better live in accordance with them.

Rawls's account of political philosophy is summarized well by David Miller.[17] Political philosophy, he explains, "is thought whose final aim is to guide action, as opposed to having a merely speculative purpose." The question that then arises is whose action it is intended to guide. It could be "political rulers, as it was in the so-called

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[16] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), 128.

[17] David Miller, "Political Philosophy for Earthlings," *Political Theory: Methods and Approaches*, David Leopold and Marc Stears, eds.(New York: Oxford University Press, 2008), 44.

'mirrors for princes' tradition in medieval political thought," or it "might be written to direct legislators and administrators, as (at least arguably) was the older utilitarian political philosophy." But in the case of Rawls, Miller explains, "political philosophy in democratic societies should be aimed at citizens generally, setting out principles that they might follow when supporting or changing their institutions and practices." The work of philosophers in democracies is to help the people better govern themselves. It is the handmaid to democracy.

But as Andrew Vincent points out, this is not really political philosophy properly understood. "Political philosophy," he states, "trying to maintain its professionalism, universal patina, and moral gravitas, usually denies its relation with the grubby world of ideology," but "the oddity of this point is that the dominant branches of justice discussion (particularly the contractarians arguments) have all been resolutely ideologically liberal in character … All have stressed the practical policy implications of their work."[18] This, he says, is particularly true of Rawls who constructs a "bleached foundation" for political society, that is, one that pretends not to be there.[19] George Klosko has similarly critiqued Rawls's use of political philosophy as a tool for American democracy.[20] Klosko argues that a real overlapping consensus is based upon the political system, not abstract moral principles. Both Vincent and Klosko recognize that Rawls's brand of political philosophy ultimately aims to support a particular ideology rather than clarify reality.

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[18] Andrew Vincent, *The Nature of Political Theory* (New York: Oxford University Press, 2004), 133.

[19] Ibid., 135.

[20] George Klosko, "Rawls's "Political" Philosophy and American Democracy," *American Political Science Review*, Vol. 87, No. 2 (Jun., 1993), 348-359.

My assessment is similar. If a person is engaged in a sport not because he enjoys the sport, but because he desires the exercise, that person would be considered a casual rather than serious athlete. Likewise, Rawls's engagement with political philosophy is casual rather than serious. He is primarily interested in its consequences for a partisan political position, not the activity in and of itself. Furthermore, his use of political philosophy is partisan. He seeks to utilize it in order to build a case for a specific moral outlook. To borrow a phrase from Rawls himself, his project is political not metaphysical. My point is not so much to criticize him anymore than to vindicate his work. I merely want to distinguish what he is doing from what many believe him to be doing. Once this is accomplished, we can make sense of his turn to the Court and endorsement of judicial review. What we shall find is that the role he assigns to the Court is not derived from the activity of philosophizing, but from advocacy of a specific cause, namely, that of reforming our understanding of constitutional government.

Rawls's Four Roles of Political Philosophy

Rawls refers more often to political philosophy toward the end of his career, but in doing so reveals with greater clarity the political rather than philosophic nature of his work. In coming to terms with Rawls's political project, the best place to begin is the end, with the last book he published before his death. *Justice as Fairness: A Restatement* opens with a discussion of political philosophy. Rawls does not define for us the concept he has in mind when he uses the terms "political" and "philosophy" but rather lays out "four roles that political philosophy may have as part of a society's public political culture."[21] This statement itself is telling, for it reveals that Rawls understands political

[21] John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: The Belknap Press, 2001), 1.

philosophy to have a part in what he calls a society's public political culture, by which he means the basic ideas and principles implicit in the common convictions held by citizens of a particular regime. It includes the "political institutions of a constitutional regime and the public traditions of their interpretation (including those of the judiciary), as well as historic texts and documents that are common knowledge."[22] These basic ideas and principles act as fixed starting points for discussion, but are also subject to change in time.[23] I take these four roles of political philosophy to be remarkably telling of Rawls's work, and they will be of importance to his discussion of the Court. As I will be referring to them often throughout this work, Table 1 will be of assistance in quickly recalling their details.

The first of the four roles of political philosophy described by Rawls is "its practical role arising from divisive political conflict and the need to settle the problem of order."[24] As an example he lists the wars over religion in the sixteenth and seventeenth centuries in Europe. Philosophers like Hobbes, Locke, and Montesquieu went to work to resolve the conflict between various Christian sects, "which eventually led to the formulation and often reluctant acceptance of some form of the principle of toleration."[25] He explains that the result was not just the principle of toleration, but liberalism itself, including the social contract tradition. All of this, though originally a solution to a problem, has become part of the current public political culture on which Rawls claims to be drawing in his construction of a theory. The implications in this first role of political

[22] *Political Liberalism*, 13-14.

[23] For example, see *Political Liberalism*, 8; *Justice as Fairness*, 5-6.

[24] *Justice as Fairness*, 1.

[25] Ibid., 1.

philosophy for changing culture are apparent immediately. Rawls points out other examples from America's experience to drive home the point: the conflict between the Federalists and Anti-Federalists and the dispute over slavery's extension prior to the Civil War had to be resolved and settled fundamentally. This, Rawls claims, was in large part accomplished by political philosophy in its uncovering an underlying philosophical and moral agreement on which both sides could agree.

Table 1. The Four Roles of Political Philosophy

Role of Political Philosophy	Purpose	Associated With
One	Resolve Societal and Political Conflicts	Hobbes, Locke, Montesquieu
Two	Orientation towards our Political Society	Kant
Three	Reconcile us to our Past	Hegel
Four	Articulate an Ideal Realistic Utopia towards which we can Move	(Rawls?)

Rawls is quite clear in identifying the conflict that he sees plaguing contemporary political life in America. He asks us to "consider the conflict between the claims of liberty and the claims of equality in the tradition of democratic thought … there is no public agreement on how basic institutions are to be arranged so as to be most appropriate to the freedom and equality of democratic citizenship."[26] Using Constant's distinction between the liberties of the ancients and moderns, Rawls argues that the

[26] Ibid., 2.

Lockean tradition emphasizes freedom of thought and conscience, basic rights of the person and property, and the rule of law, while the Rousseauean tradition stresses equal political liberties of participation. The first task of political philosophy as Rawls understands it is not just to understand the distinction between these competing traditions, but to balance them or, better yet, solve the conflict. And by solving this conflict he believes he will contribute to a future public political culture that changes the way humans live together just as Locke's and Montesquieu's teachings on toleration have done.

The second task of political philosophy that Rawls describes is that of "orientation," which provides a basis for people to understand the social and political institutions they live under and their status as a member of the regime. In a democracy, Rawls makes plain, that status is one of equal citizenship. This second task is not so much to answer the question of status as it is to draw the necessary implications for political life from the commonly accepted answer. In this way orientation sets boundaries; it works up principles that promote human ends or goods, among the list of all conceivable ends or goods, that cohere with a "well-articulated conception of a just and reasonable society."[27] And by promoting some, others are necessarily discouraged. This task he associates with Kant, from whom the word *orientation* is borrowed.[28] What Rawls wants to emphasize is that individuals need to be made good citizens, to be oriented toward the list of ends that are compatible with the principles of the regime, including the idea, in a democracy, that all possess equal citizenship.

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[27] Ibid., 3.

[28] Ibid., 3, n2.

What is striking about this role for political philosophy is just how different it is from the traditional role of political philosophy associated with Socrates, the gadfly of Athens. As we learn in Plato's *Apology*, Socrates did not seek to orient his fellow citizens with the democratic principles of ancient Athens. Rather, he questioned the convictions which they had acquired as citizens of the *polis*. He attempted to show them that what they believed to be true knowledge was really mere opinion that conformed with the Athenian way of life. The idea is that one has to overcome the prejudices of one's city if truth can be sought philosophically. Rawls, on the other hand, seeks to use political philosophy to bring people's opinions more in line *with* the prejudices of society. That said, Rawls does attach an important corollary to political philosophy's second role. Orientation to a regime's principles presumes that those principles can be understood in a just way. This may not always be easy if the institutions, customs, and practices that make up a society have not lived up to the principles of, what we might call, democratic justice.

The third role takes stock of these past injustices and is said by Rawls to be derived from Hegel's *Philosophy of Right*. Rawls calls the third role *reconciliation*. As he explains, "political philosophy may try to calm our frustration and rage against our society and its history by showing us the way in which its institutions, when properly understood from a philosophical point of view, are rational, and developed over time as they did to attain their present, rational form."[29] What reconciliation, or *Versöhnung*, asks of citizens is not just that they resign themselves to their regime, but positively affirm it. Rawls explains that he is engaged in this task insofar as pluralism is a reality of the

[29] Ibid., 3.

modern democratic society, which, he says, is not always easy to accept. He intends to use political philosophy to reconcile us to this reality by "showing us the reason and indeed the political good and benefits of it."[30] This third role does more than affirm the idiosyncratic opinions that develop within a political community, it helps shape and fashion those opinions. In a footnote Rawls warns that this third role of political philosophy, reconciliation, is to be used cautiously, for "political philosophy is always in danger of being used corruptly as a defense of an unjust and unworthy status quo, and thus being ideological in Marx's sense." Reconciliation's danger is that it might be used illegitimately to defend present or past evils rather than seeking to overcome and use their legacies for presently preferred ends.

What Rawls reveals here is that he indeed sees political philosophy as something that one uses, like a tool, and not an activity for its own sake. What distinguishes worthy from corrupt political philosophy is the end for which it is utilized. Though he indicates that this question needs to be asked of his own theory, one wonders where the answers can be found. What makes Rawls's use of political philosophy in this sense worthy and not corrupt? From the basis of the warning he gives, the answer lies in the fact that Rawls is not defending things as they are, which necessarily means he is not trying to reconcile his readers to the present, but direct them to a coming state of affairs. Whereas orientation seeks to align citizen's prejudices to those of the regime, reconciliation seeks to shape the prejudices themselves. Rawls intimates that he understands himself as a shaper of opinions. Reconciliation with the past is done with an anticipation of the future.

[30] Ibid., 4.

The fourth and final role of political philosophy validates the interpretation made thus far, that Rawls's project is political rather than philosophic, and that he is using philosophy as a tool to bring about something new. He is using it to craft new modes and orders. The fourth role makes this plain. Here political philosophy is seen as realistically utopian, "probing the limits of the practicable political possibility" with the "hope for the future" that a "reasonably just, though not perfect, democratic regime is possible."[31] Here Rawls is most explicitly directing his gaze toward the future, and asking how the particular regime he favors could be brought about given historical conditions and "tendencies of the social world." There are some things, he says, we are stuck with and cannot overcome. He points to reasonable pluralism as his example, and again argues that this is not a fate that we should lament. Rather, it can be the basis for a just democratic regime.

Rawls does not tell us here what other conditions are set; rather, he indicates that very little is given or set in stone. He explains that "the limits of the possible are not given by the actual, for we can to a greater or lesser extent change political and social institutions, and much else."[32] The world seems remarkably malleable from the perspective of this fourth role, if one but learns how to use it. The sentence just quoted raises important questions: How are social and political institutions changed? What else can be changed? What exactly are the limits of the practicable? But Rawls says he

[31] Ibid., 4.

[32] Ibid., 5. See also *Law of Peoples*, 12, where the same sentence is used, but here he adds, "Hence we have to rely on conjecture and speculation, arguing as best we can that the social world we envision is feasible and might actually exist, if not now then at some future time under happier circumstances."

cannot pursue the question of change here.[33] We are left wondering why. This is disingenuous on Rawls's part, for he has already gone done the road of change too far to suggest he is not interested in it.

Each of the four roles of political philosophy ultimately aims at the task of changing things as we know them. Whether it is through the resolution of a present dispute, orienting us to a conception of justice based on our intuitions as citizens of a particular regime, or reconciling us to our past in light of some future realistic utopia, Rawls's work is necessarily pursuing change. He is not engaging in political philosophy, but philosophic politics. He is campaigning for a particular vision of the future with philosophy as a tool by his side. As we will see, his ultimate interest is in promoting a particular constitutional order and the Supreme Court is to play an important role in bringing it about.

Rawls's "Platonic" Philosophy

Whether Rawls can rightly be said to be a political philosopher can be approached from a different perspective, one in fact that Rawls invites. Those who are typically seen as modern political philosophers—Machiavelli, Hobbes, Locke, Rousseau, Kant, Hegel, etc.—are doing more than simply seeking answers to the fundamental questions of politics. They are also advocating particular types of regimes. Rather than the imagined principalities of Plato and Aristotle, they seek to show the way towards new, practicable republics where human peace, comfort, and (or) stability can be achieved. Talk of a theoretical highest human good is to be deemphasized or at least privatized.[34] Or if a

[33] Ibid., 5.

[34] Machiavelli's *The Prince*, or John Locke's *Letter Concerning Toleration* come to mind.

human good is to be sought, it is to be one that can be achieved widely, and not reserved for the contemplative few.[35] Either way, a new type of human community, with new modes and orders, is presented and prescribed by arguing for new answers to the fundamental questions of politics.

The issue at this point is whether Rawls is a modern political philosopher in this sense. I believe he sees himself in this role, pointing toward a new way of conceiving politics. But unlike many of the modern thinkers he often refers to—Locke, Rousseau, and Kant—Rawls consciously tries to avoid grounding political life upon an understanding of moral reality. He proceeds to lay a foundation for a new way of life without explicitly answering those fundamental questions that have animated modern political thought, questions intimately tied to the meaning of life. Indeed, he increasingly points toward a political regime that can be organized on the basis of an agreement to *not* publicly answer the basic questions that have traditionally defined political life.

To see this, recall that Rawls understood political philosophy as a means rather than an end in itself as is further demonstrated in his posthumously published *Lecture Notes on the History of Political Philosophy*, which is taken from a class he taught at Harvard for nearly thirty years. In the introduction to this work, Rawls offers a brief reflection on political philosophy that provides a helpful indication of how he understands his work. On one hand, he presents its role in very humble terms: "Political philosophy has no special access to fundamental truths, or reasonable ideas, about justice and the common good, or to other basic notions."[36] Its purpose, particularly in a

[35] Rousseau's *On the Social Contract*, for instance.

[36] *Lectures on the History of Political Philosophy* (Cambridge, MA: The Belknap Press, 2007), 1.

democracy, is to be one voice among many, with no special status other than its focus on providing reasonable arguments that are meant to deepen the conceptions of basic political ideas and help citizens clarify their judgments about institutions and policies. Its "not insignificant role" is to provide a "source of essential political principles and ideals" and to strengthen "the roots of democratic thought and attitudes … educating citizens to certain ideal conceptions of person and political society before they come to politics."[37] Again we see that political philosophy is the handmaid to democracy.

Rawls insists that this view is different from what he calls the "Platonic" understanding of political philosophy in which a philosopher claims special access to truth and seeks a means of designing political institutions to reflect and promote that truth.[38] Rawls claims to be avoiding this by denying that political philosophy is interested in the truth and circumscribing its role to that of clarification of our political intuitions, that is, education. To the degree that his attitude is in fashion, Rawls can claim a share in the designing credits.

Education, no doubt, is very closely connected to political philosophy, but what is striking about Rawls's unassuming depiction of it is the content of the education. It is more political than philosophic. Unlike more traditional understandings of political philosophy, which promote a liberal arts education for the pursuit of truth, Rawls promotes a liberal politics education—or formation—to strengthen democracy. With Lincolnian language he tells us that a "constitutional regime may not long endure unless

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[37] Ibid., 6-7.

[38] To be clear, I do not agree with Rawls's reading of Plato. He provides no evidence to support his view that Plato desires to actualize the city in speech. He reads *The Republic* quite superficially, and even compares Plato's philosopher-king to Lenin's revolutionary vanguard. A better reading, I would suggest, would take *The Republic* to be creating a city in speech to advise against utopian politics.

its citizens first enter democratic politics with fundamental conceptions and ideals that endorse and strengthen its basic political institutions."[39] In other words, the formation of liberal-democratic citizens is an essential part of maintaining a constitutional democracy, not an education that seeks a standard of truth outside the political community so that important political decisions can be evaluated in the highest light.

A brief look at Aristotle might help clarify the radical nature of Rawls's understanding of political philosophy's relationship to education. Aristotle famously drew a distinction between the good man and the good citizen.[40] The former's goodness is based on a standard that is unconnected to any political conception of reality, to some idea that transcends the political and particular. This standard, of course, must be lived up to in the context of particular circumstances, and thus requires justice. But if the values held by the political community do not cohere with the transcendent standard that guides the good man, then that man may find himself an alien within his community. The man who uses local rather than transcendent standards as his guide to living may very well be a good citizen, but will fall short of being a good man to the degree that the political standard differs from that which is universal. For Aristotle, philosophy sought the standard that was independent of any particularity. It may also attempt to better understand local standards, but it is not to mistake them as universals. For Rawls, philosophy seeks a better understanding of the political community's standards from within the community, and, particularly in later years, disclaims any attempt to

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[39] Ibid., 5. For a similar view see Stephen Macedo, "Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism," *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change*, eds. Sotirios A. Barber and Robert P. George (Princeton: Princeton University Press, 2001), 167-192.

[40] Aristotle, *The Politics*, Book III, Section 4.

understand truth as such. This does not mean necessarily that Rawls believes there is no truth or is skeptical that truth can be known, but simply that he does not understand it to be something political philosophers seek. Rather, their job is to advance a conception of justice, which includes forming individuals in such a way that the good man and good citizen become indistinguishable. Rawls urges contemporary political philosophers to see the good citizen as an antecedent to the good man. They are to recognize and teach that one becomes a good citizen by aiming at being reasonable. It is much easier to speak of reasonable than good; many, even if mistaken in their view of goodness, may be reasonable. Truth, if it exists—and for Rawls the political philosopher can be confident or skeptical on this point—will hopefully lie somewhere within the range of reasonableness. Political philosophy is to concern itself with the range and not the point; its main task, according to Rawls, is to designate the boundaries, peaks, valleys, and gaps of this range—they are to define the terms of reasonableness.

The relevance of this is to show that Rawls, for all of his modesty, had ambitious political goals in mind and was willing to use philosophy to achieve them. As such, his work is best seen as a conscious effort to help bring about a new basis for politics, a new way of understanding the relationship between citizens in a liberal democracy, and a fundamentally new way of life. Despite his claims to the contrary, Rawls at times seems to be aspiring to the realm of canonical thinkers whose ideas brought about new modes and orders, those unarmed prophets who were able to inspire change without any force beside the arguments they offered.

This would mean that his theory is "Platonic" not so much in seeking truth but in trying to bring about political arrangements based on a philosophic vision. As we saw,

Rawls criticizes Plato for claiming access to the truth and then trying to institutionalize it. But reading Plato as one trying to institutionalize the truth seems less than fair. *The Republic* establishes only a city in speech, not in actuality. Rawls, particularly the mature Rawls, disclaims any efforts to discover truth, and thus avoids part of his criticism of Plato. But he also tries to institutionalize his own view of political life through the establishment of what he calls a constitutional democracy. He is doing the very thing he faults in Plato; however, he justifies it by claiming his theory is not based upon a conception of truth. Be this as it may, he thinks something is right about his theory and he asks us to accept it. And as we will see, he asks the Court to help us learn to accept it.

For purposes of understanding the role Rawls assigns to the Court, it is better to first see him as one hoping to bring about a new type of constitutional order. Despite the numerous accolades to the contrary, he is better understood as a partisan of his own vision than a philosophic thinker. Rawls is not practicing political philosophy in the classical sense insofar as his interest in it is for purposes other than engaging in the activity itself. He is not so much seeking truth and wisdom as hoping to clarify and augment his argument for a liberal polity. With regard to modern political thought, Rawls's work bears a certain resemblance to this tradition, but with some caveats that raise important questions. Like Machiavelli, Hobbes, Locke, Rousseau, Kant, and others, Rawls is hoping to pave the way for a new type of political life. His work has lofty political aspirations but could not legitimately be called philosophy. He is chiefly concerned with laying a theoretical foundation for a realistically utopian constitutional democracy.

CHAPTER THREE

Continuity for Change:
New Ideas and Old Institutions in Rawls's Thought

Rawls's political theory entails changes to America's constitutional order. No serious reader of Rawls would deny this. Such things as campaign finance reform and alterations in our perspective of private property are derivative of a larger change, our understanding of constitutional legitimacy.[1] No longer is the consent of the governed enough—consent for the right reasons is now required. We are asked to agree not only to a particular constitution, but abstract principles of justice by which the constitution can be commonly evaluated and interpreted. Indeed, we are supplied a language for doing so.

What is strange is that despite the very real and significant changes that are being proposed, Rawls's rhetoric often gives the impression that he is defending a regime that already exists. His work combines radical passion with sober reflection, making it unclear at times whether change or maintenance is the ultimate goal. Though he hopes to bring about a new constitutional democracy, he is unwilling to simply start afresh, so much so that very often it is difficult to see what is added or removed from current institutional arrangements. He can begin with traditions and "familiar ideas" that can be "worked up" into a new theory of constitutionalism based upon a hypothetical thought

[1] For a statement of particular changes, see John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: The Belknap Press, 2001), 149-150. For the importance of Rawls's teaching on constitutional legitimacy, see Burton Dreben, "On Rawls and Political Liberalism," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (New York: Cambridge University Press, 2003), 316- 346.

experiment.[2] As his friend Burton Dreben describes it, Rawls's work takes place *in medias res*, between the moral intuitions of our existing society and the hopes for a more just political future.[3] Of course, depending upon the end hoped for, one could be selective in highlighting familiar ideas and intuitions. Regardless, however, using existing ideas as a means of suggesting innovations is one way of bringing continuity and change together, and it is characteristic of Rawls.

Accordingly, the goal of this chapter is to better understand how Rawls uses existing ideas to promote a new template for constitutional government, particularly in America. Interestingly, this is a topic that has gained currency as of late in studies of American political development. Rawls's work differs from these in his emphasis upon ideas, which are usually pushed to the sidelines among neo-institutionalists. Of course, it is Rawls's own ideas that are at issue. I will thus use this chapter to explicate those ideas of Rawls that are most relevant to his vision for the Court in America.

Continuity and the Idea of Change

Traditionally, constitutions—particularly written constitutions—have been seen primarily as instruments of continuity.[4] One challenge in writing out a constitution, then, is to assure that sufficient room is left for needed changes to legitimately take place. In America, Article V lays out the formal means of amending the Constitution, a fairly difficult process. For day-to-day circumstantial changes, bounded discretion is given to

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[2] *Justice as Fairness*, 5.

[3] Dreben, 322.

[4] See for instance Herman Belz, *A Living Constitution or Fundamental Law?: American Constitutionalism in Historical Perspective* (Boulder: Rowman and Littlefield Publishers, 1998).

the legislative and executive branches, and the states are left free to deal with local needs. Thus there is some flexibility within the Constitution itself. And the fact that the text is in need of interpretation adds another layer of flexibility, though one with an inherent durability. Interpretations and constructions are only as good as their fidelity to the words of the Constitution. Though there may be disagreement on what the words *mean*, there is none over what they *are*. The very nature of a written constitution lends itself as a tool for preserving a regime. Political thinkers have long tried to grasp and articulate how deliberate maintenance and change relate. Aristotle, Machiavelli, and Edmund Burke have all contributed to discussion with a similar teaching: providing for continuity and allowing for change are both necessary ingredients for maintaining a stable regime.[5] An exact recipe, however, is difficult to give because so much depends on the particular circumstances.

This traditional view, however, has been questioned by some of the leading neo-institutionalist scholars. Karen Orren and Stephen Skowronek's recent account of American Political Development argues that a polity is historically constructed, its parts developing in time.[6] One cannot simply study the framing of an institution, if it in fact is ever deliberately framed; its coming to be is part of an ongoing process. Ronald Kahn and Ken Kersch make a similar argument in terms of the Supreme Court, arguing that its practices have been shaped in time and in turn help shape other institutions.[7] While

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[5] Generally speaking, see Aritstole's *The Politics*, Machiavelli's *Discourses on Livy*, and Edmund Burke's "Reflections on the Revolution in France."

[6] Karen Orren and Stephen Skowronek's *The Search for American Political Development* (New York: Cambridge University Press, 2004). See also Paul Pierson, *Politics in Time* (Princeton: Princeton University Press, 2004).

[7] Ronald Kahn and Ken I. Kersch, eds., *The Supreme Court and American Constitutional Development* (Lawrence: University Press of Kansas, 2006), 1-20.

specific institutional practices, such as judicial review, certainly do develop over time, there is a general tendency in studying these things historically to overlook the continuity of the constitutional system as a whole, instead only seeing developments.[8] What is more, human agency gets wrapped up in the historical evolution of institutions even to the point of questioning the possibility of deliberate decision-making. A written constitution is no longer understood as a rational attempt to overcome accidental forces in order to establish a government of one's own choosing. Instead, it is seen as the result of historical circumstance, the forces of chance, and not deliberation. What discussion took place in framing it is itself the result of background institutions that shape the way people think and conduct their lives. Continuity is lost in the shuffle of ongoing change, even becoming synonymous with change. Deliberate attempts to maintain become futile.

What distinguishes Rawls from those studying institutional development is a conviction that change can be deliberate. Rawls's professional work rests on a confidence that intentional reform toward a given object is a possibility. It is a conviction quite at home in America, for it echoes Alexander Hamilton's remark that "it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."[9] Furthermore, the notion of deliberate constitution-making is a prerequisite for most forms of liberalism. Lockean

[8] I have in mind here statements such as Orren and Skowronek's description of American Political Development: " … the insistence on treating every state of affairs as in transition, a state, as it were, in the process of becoming, sets APD's understanding of politics apart," *The Search for American Political Development*, 19.

[9] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor Books, 1961), 1.

liberalism presumes individuals could deliberately enter a social contract for their protection and can alter it when necessary. Kantean liberalism, that often associated with Rawls, sees authentic liberty in being able to consciously choose the institutions and laws under which one lives.

But rather than following the traditional thought that changes are periodically needed in order to conserve the established order, Rawls reverses the formulation, instead suggesting that conservation is a necessary component to change. He is willing to preserve certain ideas and institutions so long as they can be made to conform to principles of public morality. Or, even better, existing institutions may be of use in bringing about a society governed by such principles. As we will see, this is primarily true of the Court. What Rawls has in mind is a long-term process of bringing about a new order, one that is seen largely in conformity with the current tradition. A radical break may result in unnecessary amputations of the body politic, or even death. He urges caution. The best way to bring about a new order, in his view, is to do so calmly and deliberately, preserving what can be preserved, but doing so in order to secure a new future.

Rawls and the Tradition of Liberal Constitutionalism

Most typically, when Americans hear the word constitution they think of a written document, but that is just an example of a particular Constitution, and does not exhaust the full meaning of the term. Yet in today's public rhetoric, both *constitution* and its cousin word *regime* have come to designate more narrow concepts than they once did. In everyday English, for example, both are used often with a negative connotation. In Ancient Greece, a regime was understood to be the arrangement of offices and honors

that defined a particular *polis*, and thereby indicated the way of life that was encouraged within that *polis*. The word constitution is another way of referring to the arrangements of offices and honors that define a political community.[10] A democratic constitution would encourage different civic virtues than an aristocratic or monarchic arrangement, thus fostering different expectations and commitments by the inhabitants of a particular city. As Aristotle explained, citizens of a democracy would tend to favor conditions of equality more than under other constitutions, which may hold such things as honor, wealth, or individual liberty in higher esteem.[11] Thus an important thing to note when talking about constitutions—one that modern day critics are quick to point out—is that there is nothing inherent in the concept of constitutional government that favors democratic rule.[12]

The American idea of liberal constitutionalism as it is understood today refers to the actual, and not just nominal, rule of law under which even the highest office holders are subject. As a concept it is rooted in three items inherited from colonial days.[13] The first is the constitutional tradition of Great Britain, particularly with regard to certain rights that were to be held by the people. Boundaries were set on political authority, and individual liberty was protected. Secondly, America's colonial heritage helped build confidence in written constitutions due to the experience of being governed under

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[10] Belz, 1. See also Nathan Tarcov, "Ideas of Constitutionalism Ancient and Modern," *The Supreme Court and the Idea of Constitutionalism*, eds. Steven Kautz, Arthjur Melzer, Jerry Weinberger, and M. Richard Zinman (Philadelphia: University of Pennsylvania Press, 2009), 11-29.

[11] Aristotle, *The Politics* , Book II, chapters 2 and 3.

[12] John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, and Contestations* (New York: Oxford University Press, 2000), 9-20.

[13] For similar treatments see Donald S. Lutz, "From Covenant to Constitution in American Political Thought," *Publius*, 10 (Fall 1980), 101-133;Belz, 15-20.

charters. The third is a theoretical defense of constitutional government that has informed American thinking for over two-hundred years based upon a popular understanding of Locke's social contract teaching. The use of a social contract to explain the origins of government took on a reality in America after independence was declared and won. Coming together in order to form governing institutions was something that was actually happening, and seen as a great moment for mankind to prove that government need not be the result of fate or force, but of deliberate decision-making. And the idea of writing down the social contract in the form of a Constitution was widely accepted, despite the fact that doing so was not a part of the English model.

Written Constitutions, both of the state and federal governments, primarily laid out the institutions and offices of government with an attached bill of rights. Much was made of political authority, but not much was said of moral authority; for example, little is mentioned in the way of honorable or shameful activities. For Aristotle, honor and shame play an important role in shaping citizens within the political community. For founders like James Wilson, putting a constitution in written form serves much of this function insofar as the written document served an educative function.[14] Without having to spell it out in detail, the crafting and documenting of political institutions plays a formative role in the lives of citizens. Political aspirations will be directed to the offices created and fundamental rights will be learned by name, and even sanctified. Religious liberty, free speech, due process guarantees, and protections of private contracts all have an influence on the formation of citizenship when acknowledged in a Constitution.

[14] See James R. Zinc, "The Language of Liberty and Law: James Wilson and America's Written Constitution," *American Political Science Review* Vol. 103, No. 3(Aug. 2009), 442-455.

Rawlsian constitutionalism attempts to build upon these roots of the American experience. In his preface to *Theory* Rawls states that he is attempting to "generalize and carry to a higher order of abstraction the traditional theory of the social contract as represented by Locke, Rousseau, and Kant."[15] That tradition, however, is less unified as he presents it here—Rousseau, for example, was not simply building upon Locke, but presenting an alternative to him. Whether the younger Rawls was aware of the important distinctions between the two thinkers is unclear, though there is no doubt he did in later years. In *Political Liberalism* he goes so far as to say that the driving motivation of political philosophy today is reconciling Lockean and Rousseauan thought into a coherent view.[16] Whether or not this is possible (and it appears to me impossible), this goes a long ways towards explaining the way Rawls understood his work as a whole. He wants to build a bridge between the individualism of the liberal-constitutional Locke and the doctrine of the general will as found in the egalitarian-democrat Rousseau. He wants to use the idea of the social contract in order to arrive at a theory of egalitarian justice that can inform a constitutional government.

An irony to this is that the recent publication of Rawls's senior thesis at Princeton reveals that he was not always so friendly to the social contract tradition.[17] Though a concern with the political is evident throughout that document, it is written as a theological essay. At the time, Rawls was a practicing Christian contemplating the

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[15] *Theory*, xviii.

[16] *Political Liberalism*, 5.

[17] John Rawls, *A Brief Inquiry into the Meaning of Sin and Faith*, ed. Thomas Nagel (Cambridge, MA: Havard University Press, 2009). As the editor indicates, Rawls never intended for this document to be published in connection with his professional work (4). Its use should be confined to shedding light on the mature Rawls' work.

priesthood in the Episcopal Church. Taking his bearings from the revelation that God is a Triune Being and man is stamped in his image, the young Rawls argues that communal life is necessary for what he calls personality, which is the distinctive feature that separates mankind from the other earthly beings. Because he considers humans to be fundamentally communal, he understands sin to be actions that lead to the breakdown of community. He is primarily concerned with attitudes of egotism that put the self above the community and treat other human beings as means rather than ends in themselves. The problem with social contract doctrines, he says, is that they misunderstand the nature of man, forgetting that he is a social being that "does not bring anything to society for the simple reason that he is nothing until he is in community."[18] Similar to Rousseau's critique of Hobbes and Locke, Rawls disagrees with the notion that humans outside of society possess the attributes necessary to create a community. What is more, social contracts assume a radical form of individualism even after community is established. This, he says, is most evident in Hobbes, who teaches that man is naturally in a state of war against all, and the community is formed not for its own sake, but in order to overcome mutual fear. Society is thus a means and not an end in which everyone continues to be suspicious of one another, since everyone fundamentally remains an individual.[19]

Of course, Rawls's undergraduate thesis should not be taken for more than it is, but one can ask a highly relevant question based upon it: how did this young detractor of the social contract tradition come to be its leading advocate in the twentieth century?

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[18] Ibid., 126.

[19] Ibid., 226-229.

Answering this question, even speculatively, may help illuminate the latent ideas of Rawlsian constitutionalism.

As mentioned above, the basis for human community for the young Rawls is the *imago Dei* and the Trinity. After his experiences in World War II, his Christian belief evaporates, but his faith in community remains firm, though in need of a new foundation. As he embarked upon an academic career, utilitarianism was in fashion as a moral theory, but it was unable to defend humans as ends rather than means. In forming an argument against utilitarian approaches, the individualism of contract theories could be seen as useful in holding up the individual importance of each human person. Rather than utilizing the contract as a basis for describing legitimate constitutional arrangements settled upon consent, Rawls picks it up to show how legitimate principles of justice can inform a constitution. These principles determine the legitimacy of a constitution, ensuring that democratic commitments to the community will be upheld even if individual self-interest is assumed at the outset. In other words, Rawls comes to see the social contract as a useful tool for combating utilitarian moral theory so long as it remains abstract enough that the perceived errors of individualism are avoided.

Furthermore, the idea of a social contract connects Rawls, despite his analytic prose, to a current of thought in American culture that identifies with the idea of a social contract as the basis for constitutional government. The basic idea, again, is that no one is above the law, and that the basic procedures and rights enshrined in a constitution are upheld equally. Legitimacy is based upon the following of a higher-law to which popular consent has been given, at least tacitly. Dreben points to the significance of this move holding, and I agree with him, that Rawls's primary academic contribution has not been

his remarks on justice, but his idea of constitutional legitimacy.[20] His attention to the latter increased over time as he sought to correct what he understood to be the fundamental error of *Theory*—that its realization into a stable form of government would require political actions of force that were in stark contradiction to the principles worked out in the original position.[21]

The Familiar Ideas and Intuitions of a Democratic People

Beginning with *A Theory of Justice*, Rawls takes constitutional government as a given. His main purpose is not to defend it or any other form of government. The purpose of his depiction of the social contract is not "to set up a particular form of government," but to identify coherent principles of justice based upon our deepest inclinations as citizens of a democratic society. These, he tells us, would be "the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association," and they "are to regulate all further agreements" including "the forms of government that can be established."[22] This search for first-order principles is famously conducted as a thought-experiment, involving the hypothetical original position with its constraining veil of ignorance. While this device for arriving at the principles is novel, Rawls tells us the content of the principles is not, but rather is based upon fundamental ideas we already intuitively share as citizens of a democratic regime.

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[20] Dreben, 317.

[21] This will be explained in more detail in the next chapter.

[22] *Theory*, 10.

Looking to the public political culture, Rawls identifies three fundamental ideas that are familiar though not always clearly understood within a democracy.[23] By public political culture, Rawls means the ideas that order our expectations of political institutions and practices. The most fundamental or "central organizing idea" is that of "society as a fair system of social cooperation from one generation to the next." It is accompanied, Rawls tells us, "by two companion fundamental ideas: "the idea of citizens (those engaged in cooperation) as free and equal persons … and the idea of a well-ordered society, that is, a society effectively regulated by a public conception of justice." He adds three more fundamental ideas to this list: the basic structure, the original position, and public justification. I will briefly elaborate on these six fundamental ideas said to be inherent to our democratic regime.[24]

The first fundamental idea, the one that is said to be central, is that society is a fair system of social cooperation both for us now and extending on to out posterity. This does bear some resemblance to the Constitution's Preamble when it lays forth the preservation of liberty for posterity as an objective of establishing a federal government. Constitutional government does aspire to bequeath an established order that has been proven to work for generations to come. In this sense the first fundamental idea of our public political culture seems intuitive enough. Rawls's emphasis, however, is less on institutions than it is on individual behavior. Citizens should hope not so much for a well-directed and efficient government as genuine room for social cooperation. This, he tells us, entails three essential features: publicly recognized rules and procedures

[23] *Justice as Fairness*, 5-6.

[24] Ibid., 8.

reasonably accepted by all, fair terms of cooperation that specify the ideas of reciprocity and mutuality (public reason), and the opportunity for each to pursue what is to their rational advantage so long as it is within the bounds of the publically agreed upon rules and terms.[25] Given Rawls's assurance that this is an idea emanating from our existing political culture, we might expect him to point to our Constitution as an example of a social cooperation. It lays forth rules and procedures by which Americans have agreed to abide, and because it is written it offers us explicit terms to which we can refer. But Rawls makes no mention of the Constitution, telling us instead that we need to adopt principles of justice that can serve as the basis of our social cooperation. We are asked, in other words, to agree upon a standard of justice morally prior to the Constitution. Though this first fundamental idea initially resembled a familiar idea within our political culture, the additional details clarify the degree to which it is not intuitive to our experience. It is more a blend of an older idea with something new.

The same can be said for the second fundamental idea mentioned by Rawls, the view that citizens are free and equal. One should note how Rawls identifies citizens—those engaged in social cooperation. This is obviously not a technical definition; nevertheless, it does cause one to pause considering his treatment of social cooperation. Can one challenge the principles that are to serve as a standard for our social cooperation and still be considered a citizen? Rawls does not address this question specifically, but avoids it by operating in what he call ideal theory, that is, he proceeds on the assumption that people will in fact cooperate when they learn that it is to their mutual advantage. They will do so, he says, because as persons they have two moral powers: the capacity

[25] Ibid., 6.

for a sense of justice and the capacity for a conception of the good. In other words, all people capable of citizenship will have the ability to recognize that the principles of justice provide fair rules and terms for social cooperation that are to everyone's mutual advantage yet leave room for each person, as an autonomous individual, to pursue their own conception of the good.[26] While this does bear a resemblance to Locke's *Letter Concerning Toleration*, applying it to society more broadly again is a blending of the old and the new.

The third fundamental idea is that of a well-ordered society effectively regulated by a public conception of justice.[27] Rawls tells us that this idea conveys three things: first, "it is a society in which everyone accepts, and knows that everyone else accepts, the very same political conception of justice;" secondly, the main political and social institutions that make up the basic structure of society are publicly known to satisfy the principles of public justice; and thirdly, citizens abide by their sense of justice as informed by the public conception of right. Rawls admits that this is "plainly a very considerable idealization," yet is needed to set the criterion for comparing different conceptions of public justice, which Rawls tells us might include natural rights doctrines, utilitarianism, or his *justice as fairness*. He believes that ultimately a democratic people can only be engaged in a fair system of cooperation if they can agree on the principles of public justice. When they come to an agreement on principles of justice, organize their institutions in accord with those principles, and generally abide by them in their public lives, a well-ordered society can be said to exist. Once again, however, the degree to

[26] Ibid., 18-19.

[27] Ibid., 8-9.

which this is a shared intuitive idea is not clear. A well-ordered society may as well be described as one that adequately regulates disputes among citizens that hinge on competing moral commitments, rather than one that seeks to implement a particular conception of justice.

Rawls's treatment of the basic structure even more plainly shows Rawls attempting to fashion our ideas rather than articulate what is already there. That said, his description begins innocently enough. He tells us the "basic structure of society is the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time."[28] This includes a constitution with an independent judiciary (as we will see in a later chapter, judicial review is requisite to a just society in Rawls's understanding), the legally recognized modes of owning property, the economic system (capitalist or socialist), and "the family in some form." He then tells us that *justice as fairness* takes the basic structure as its primary subject. In other words, the goal is not only to have just institutions, but an overall just structure, because "the effects of the basic structure on citizens' aims, aspirations, and character, as well as on their opportunities and their ability to take advantage of them, are pervasive and present from the beginning of life." Rawls realizes that achieving a fair system of social cooperation requires shaping the aims, aspirations, and character of citizens toward the desired public conception of justice. He does recognize limits to the basic structure, including certain private associations that can be

[28] Ibid., 10.

freely joined and left, such as churches.[29] The public conception of justice need not regulate the internal decisions of such associations. Yet Rawls is slow to draw specific boundaries between public institutions (including the family) and private associations. Defining it too narrowly leaves too much to chance by allowing private associations to compete in character formation.[30] Once again, this is not a generally accepted proposition in America.

Next Rawls brings to our attention the idea of an original position. Here all pretence to clarifying our intuitive ideas is dropped. The original position is an idea that was introduced in *Theory*.[31] It is a device for specifying the principles by which a fair system of social cooperation can be regulated by terms all could embrace as publicly just. Rawls sometimes uses the more general *initial situation* or *agreement* as a broader category containing the original position along with such things as the social contract arising out of Locke's state of nature.[32] Using this phrasing may be a better way of bringing to light the familiar idea Rawls insists is inherent to our public political culture. Instead he points directly to his own theoretical tool for arriving at principles of justice. I will describe the original position in more detail below.

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[29] Ibid., 11. Associations mark the inner limit. The outer limit is marked by "global justice" or the law of peoples (a phrasing that purposely avoids the more traditional title of law of nations, or international law).

[30] Ibid., 12. Rawls is clear that the reason for applying *justice as fairness* to the basic structure is because it is the only way to "encourage" what he calls an overlapping consensus—a general agreement on the governing principles of public justice.

[31] Ibid., 14.

[32] *Political Liberalism*, 271-275.

The sixth fundamental idea offered to us is that of public justification, which entails an overlapping consensus and public reason.[33] This idea, we are told, becomes necessary once we accept the fact that pluralism is a component of a free, democratic society. What we can hope to do is narrow the diversity of views to those that are consistent with the principles that would be worked out of the original position. Such views are said to be reasonable, thus Rawls would have us aim at *reasonable pluralism*. Those who are reasonable, that is, those who embrace the public conception of justice, are part of the overlapping consensus of society. Once this consensus is achieved, Rawls believes society becomes more than a *modus vivendi*; in his terms, it becomes a system of real social unity and cooperation that aims at equal justice for all. As such, laws that place restrictions on individual behavior—or at least those touching on constitutional essentials and matters of basic justice—have to be justified in terms all *reasonable* citizens can accept. The language used to provide this justification will refer to the overlapping consensus and is dubbed *public reason*. A law justified by arguments or assertions outside of public reason makes that law illegitimate from the perspective of *justice as fairness*, regardless of whether or not the appropriate forms and processes were adhered to in crafting the law.

What becomes evident in closely examining these ideas that are said to be fundamentally inherent to our society is that they are largely the creation of Rawls. He admits that our public culture may currently contain competing ideas, and that he is being selective in choosing which to emphasize.[34] This is justifiable, he explains, if the

[33] *Justice as Fairness,* 26-29.

[34] Ibid., 25-26.

principles of justice that emerge from the selectivity coheres with our considered convictions of what political justice should entail. Thus, it seems far less important what ideas we start with, or even that they be ideas that actually are familiar to us, so long as we arrive at principles that satisfy us.

What Rawls seems to be suggesting we do, then, in turning to our tradition of ideas and institutions, is use and not use them according to their worth in bringing about a "social world" that might be better "for those at another time and place." Change is not a component of continuity, but rather, the appearance of continuity is a needed component for bringing about meaningful change in a world where "the will to dominate and oppressive cruelties" too often prevail.[35] His hope is to convince us of new ideas ambiguously linked to our present culture and show us a path toward a new and better world, if not for us, for our children.

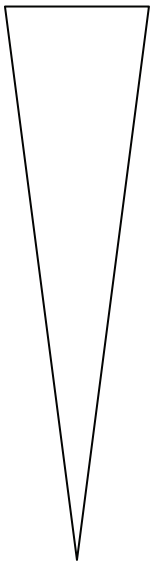
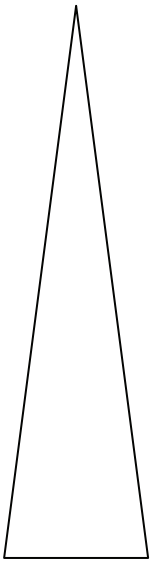
The Four-Step Thought Experiment

In order for a fair system of social cooperation to come about, principles of justice need to be identified and implemented so that they can affectively regulate society. Rawls thus invites us to join him in a thought experiment that will both bring to light the principles that would be chosen by impartial participants in (something like) a social contract and show the path towards implementation. What we are offered is a hypothetical four-step process for our reflection. The first step is the most famous, the original position, and it is followed by the constitutional convention, legislative stage, and administrative (by which Rawls chiefly means judicial) stage. I will make frequent references to this process in the ensuing chapters, and therefore will describe it in detail

[35] Ibid., 38.

here. Table 2 will be helpful for quickly visualizing the process of Rawls's thought experiment.

Table 2. The Four-Step Thought Experiment

Hypothetical Phase	Purpose	Veil of Ignorance	Reasonableness
1. Original Position	Decide upon Principles from a Given List		
2. Constitutional Convention	Decide upon a Constitution or Higher Law from a Given List		
3. Legislative	Draft Legislation Consistent with Higher Law		
4. Administrative / Judicial	Application of Law with Check on Legislature		

As mentioned above, only the first of these four steps is usually referred to in descriptions of Rawls's work. It is indeed important, perhaps the most unique aspect of Rawls's thought, for it is here that the principles of justice that he believes would best regulate a fair system of social cooperation are identified. This device allows the parties representing society to act in a self-interested manner though in such a way that they will be compelled to agree on basic principles of justice that are essentially fair for everyone—*justice as fairness*. The parties who take place in this hypothetical meeting will have the human inclination to do what is in their (and their constituents') best interest, but they are to be under a *veil of ignorance* that prevents them from knowing any

particular facts about themselves, their constituents, or even the circumstances of their society. In this way they can be motivated to choose what is in their rational self-interest yet, due to the constraints of the veil of ignorance, come to a common agreement on the principles that should regulate the basic structure of their society. To help them recognize such principles, the parties are allowed general theoretical knowledge about psychology, economics, and other social sciences.[36]

Now, the parties are not hashing-out their own principles, but choosing from a prepared list given to them in advance, a menu if you will. Due to the set-up of the original position, particularly the veil of ignorance, Rawls is certain they will choose the principles of *justice as fairness*. These principles, Rawls tells us, are ranked in a lexical ordering—the first takes priority over the second, and the first part of the second principle takes priority over the latter part (the difference principle). These principles remain more or less unchanged throughout his career, although Rawls certainly tinkers with them in response to specific criticisms. His most mature formulation of them is as follows:

a. Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and
b. Social and economic inequalities are to satisfy two conditions:
    i. They are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and
    ii. They are to be to the greatest benefit of the least-advantaged members of society (the difference principle).[37]

[36] Ibid., 14-18; *Theory*, 15-19.

[37] For present purposes, the slight variations made to the two principles over the course of Rawls's career are unimportant. I have supplied Rawls's most mature statement of them in *Justice as Fairness*, 42-43.

Once the principles are agreed upon, talk of constitutions becomes possible. We thus move to the second step of the process, the constitutional convention.[38] The same parties that decided upon the regulating principles of justice of political life are to again choose a constitution from a list of alternatives. Here, however, the choice may be influenced by information regarding the particulars of the society at issue. The parties are therefore allowed to lower the veil of ignorance partly. They still are prevented from knowing anything about their personal interests or the interests of those whom they represent to ensure that they adopt a constitution that is just, workable, and likely to lead to just legislation. The standard by which they judge the list of possible constitutions is determined by the principles of justice selected in the original position. Thus the parties must settle on a constitution that can be expected to adequately adhere to and advance those principles that will compose the overlapping consensus of society. In this way the principles are formally secured and institutionalized to ensure their application at the basic structure of society.

What Rawls primarily envisions the constitution doing is protecting the individual rights that are associated with the first principle of justice. The delegates to the hypothetical constitutional convention do not discuss which institutions will provide a good and effective government, but rather look at which constitutions best protect a fully adequate scheme of equal basic liberties. In other words, the constitution's purpose, at least from the perspective of those asked to decide which is best, is to protect the autonomy of individuals with a scheme of rights that can be equally bestowed upon all citizens. The delegates are concerned with institutions to the extent that they want to be

[38] *Political Liberalism*, 336-337.

sure the legislature is empowered to regulate the basic structure, which includes such things as economic institutions and the family, according to the general dictates of the public conception of justice, or overlapping consensus. Yet the legislature is to be limited by the constitution insofar as it cannot violate the basic liberties there enshrined.

The third step of the thought experiment then turns to the legislature.[39] Here we are again to imagine legislators under a veil of ignorance, but a much thinner veil than that of the previous two steps. More particular information about society and the citizens living in that society is available to the decision makes insofar as it is necessary for effectively regulating society. But, as expected, legislation is to be consistent with the public conception of justice that holds together the overlapping consensus. The legislature's particular duty is to specify the liberties that are not basic, which is to say unconnected from the first principle of justice. In other words, the legislature takes up the second principle and seeks to regulate the basic structure in accord with a plan for realizing it, limited of course by the demands of the first principle.

To ensure that the legislature does not violate the constitution by infringing on a basic liberty emanating from the first principle of justice, Rawls includes a fourth and final step to the though experiment, that of the judicial stage.[40] Here the Court checks or reviews legislation and strikes it down if it has violated the constitution's—the higher law's—protection of some basic individual right. The judiciary, in other words, is given an important task of interpreting the constitution and seeing to it that it is appropriately upheld. The imaginary judges of this phase can fully remove the veil of ignorance, or at

[39] Ibid., 338.

[40] Ibid., 339. As chapter five will show, judicial review is commonly referred to in Rawls's work.

least proceed with a very thin veil, because as adjudicators they are to have no rational self-interest in the case. Plus, the demands of judging require that they have full information regarding the particulars of the situation. This stage helps secure the constitution's longevity both by upholding the constitution itself in the face of wayward legislation and by appealing to the principles that the constitution is meant to implement.

As Table 2 indicates, at each step of the process the veil of ignorance becomes thinner while the opportunities for participants to act reasonably, as opposed to merely rationally, broaden.[41] To act reasonably is to act from the shared public conception of justice, and to allow that shared conception to constrain one's rational motivations. By definition the shared conception of justice does not exist in the original position, thus the veil of ignorance is needed as a substitute. As the process unfolds, the two principles of justice gain increased institutional support. As this occurs, the need for the veil of ignorance lessens. The institutions themselves take over the role of constraining individual self-interest.

This highlights the importance of institutions for Rawls. It is unlikely that people will come to accept on their own the principles of justice from simply reading Rawls's thought experiment. But if we can run our existing institutions, to the extent possible, as though they were the outcome of such a process, then they will instill in the citizen who live under them the sense of justice that can one day be the basis for a real overlapping consensus. This, no doubt, takes time. It is the result of long and patient real-life process. Rawls is clear that the thought experiment is not meant to be historical, but it is telling of how he envisions *justice as fairness* gaining real currency in America.

[41] Ibid., 340.

It also highlights the importance of the judiciary in Rawls's estimation. The institutional design of the Court puts it in a position where it can be relied upon, more than other institutions, to operate without a veil of ignorance. In other words, it is in the fourth step of the hypothetical process that the something like real life begins to appear. The description of the Court's work in implementing the principles of justice as it is described by Rawls at least resembles what the actual U.S. Supreme Court does. Judges are the most likely candidate we have today for acting reasonably, in accord with the principles of justice that would result from the original position. It is here we begin to see the relevance of the Court for Rawls and his desire to bring about a change for a future generation.

To be sure, Rawls would not have us mistake his hypothetical thought experiment for what actually occurs in the development of political societies. It is merely a way of thinking about the identification and application of *justice as fairness* on the basic structure. The original position most clearly is imaginary, and the constitutional convention Rawls describes bears no resemblance but in name with that which took place in 1787 Philadelphia. But with the legislative stage, one does begin to see a blurring between the hypothetical and the real. As we will see in a later chapter, Rawls most definitely does want the U.S. Congress to be free to implement rights and liberties associated with the second principle of justice so long as it leaves free the basic liberties associated with the first.[42]

Even more so, Rawls would have the real Court play the part that the hypothetical Court plays, but here it gets more complicated. The role the Court plays in the thought

[42] Rawls criticizes the Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), on these grounds. See *Political Liberalism* , 359-363. I discuss the matter in chapter seven.

experiment only makes sense in the real world if in fact the real Constitution does adhere to the principles of justice that would be chosen in the original position. If the Constitution does not, then if falls short of the conception of justice Rawls is urging, leaving us to wonder what role the Court should then play. Is it required to enforce an unjust constitution? Rawls is hopeful that we can one day overcome the shortcomings he believes we have, and as we will see, the real Court has a more ambitious role than the hypothetical judiciary in securing the conditions for an fair system of social cooperation. The Court, better than any other institution, can take our political traditions as they are—our Constitution, laws, and traditions—and use them to bring about something new.

CHAPTER FOUR

The Development of Rawlsian Constitutionalism: The Problem of the Chicken and the Egg

The idea of constitutionalism may seem as natural to Americans as apple pie or baseball, but it has not been without critics who fear it will numb rather than preserve liberty. Thomas Jefferson was one of the first to voice this sentiment after the drafting of the Constitution; he felt something more was owed to posterity than a set of procedures and rules, and believed each generation should decide for itself how it is to be governed in terms of both policies and institutional forms.[1] What right does the present generation have to bind the way of life of their children and grandchildren? Advocates of democracy, like Jefferson, have always been wary of written constitutions for this reason, preferring instead to rely on the good sense of citizens to freely arrive at decisions regarding governance and politics on their own. Whereas a constitutionalist is concerned with supplying institutional incentives for substantively beneficial decisions to be reached through the political process, democrats are more concerned with legitimizing political decisions by assuring popular control of the outcome irrespective of institutions. On this account of legitimacy, unless the people can affirm laws and policies for themselves as right, justice is absent.

The ambitiousness of John Rawls's work is apparent in his attempt to bridge this divide between constitutionalism and democracy, which he naturally calls *constitutional*

[1] See Jefferson's September 6, 1789 letter to James Madison as well as his July 12, 1816 letter to Samuel Kercheval, which can be found in *Jefferson's Writings*, Merrill Peterson, ed. (New York: Library of America, 1984), 963 and 1402.

democracy.[2] What he hopes to see in America is a just political system for us today and our posterity that, given our historical practices, includes the notion of a constitution. As he says in *Justice as Fairness*, the fundamental question of a constitutional democracy must include an idea of justice that, among other qualities, secures institutional advancements for future generations.[3] Yet to be democratically legitimate, those institutions have to be freely chosen by each generation. What Rawls hopes to provide is a route toward securing over the course of generations constitutional institutions that are consistent with the substantive principles he favors, but also ones that can be continuously embraced afresh by each generation coming of age as right and just. This is indeed a bold objective.

Some critics of Rawls have noted the ambition with which Rawls sets out to meld the practice of constitutionalism in America with a theory of democratic legitimacy, while allies of the Rawlsian tradition have attempted to advance the project. Among the critics, Michael Zuckert is not convinced that the proposed marriage between theory and practice that Rawls arranges has any real viability.[4] But Clifford Orwin, James Stoner, and Gary Jacobson believe Rawls's proposal will lead to an activist judiciary playing midwife in an attempt to deliver actual results from the alliance between

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[2] In general see John Rawls, *A Theory of Justice* (Cambridge: The Belknap Press, 1971; 1999) §§36-39. See also *Political Liberalism* (New York: Columbia University Press), 336-340 and *Justice as Fairness: A Restatement* (Cambridge: The Belknap Press, 2001), 28. For a comparison of Rawlsian constitutional democracy with procedural democracy see Amy Gutmann and Dennis Thompson *Democracy and Disagreement* (Cambridge: The Belknap Press, 1996), 27-39, 210.

[3] John Rawls, *Justice as Fairness*, 7-10. See also *Political Liberalism*, 1-5. Of course, a concern for bettering conditions for future generations was not absent from the early-Rawls, as is evident in *Theory*, 251-262.

[4] Michael P. Zuckert, "The New Rawls and Constitutional Theory: Does it Really Taste that much Better?" *Constitutional Commentary* 11, (1994-1995), 227-245.

constitutionalism and democracy.[5] While they fear these offspring, those partial to Rawlsian constitutional democracy have been busy preparing a place at the table for the new arrivals, the new laws and policies, in a polity sufficiently inspired by Rawlsian thought, and they would not oppose the Court playing the role of midwife.[6]

The problem, however, with the Court playing midwife in bringing about a new conception of constitutionalism is that it fails to adhere to the most basic constitutional imperative, that no political actor—not even a judge—is above the law.[7] As such, the Court cannot simply impose beneath the Constitution a novel basis of legitimacy that has not been consented to by the governed—doing so would violate the traditional understanding of legitimacy. Rawls, I argue, recognizes this difficulty and attempts to overcome it in the development of his work with the device of public reason.

What I offer here is an account of public reason's increasingly important constitutional role in the development of Rawls's thinking. In *Theory*, he wants to do more than speculate about abstract principles of justice; he hopes his theory can serve as

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[5] Clifford Orwin and James R. Stoner, Jr., "Neoconstitutionalsim? Rawls, Dworkin, and Nozick," *Confronting the Constitution*, Allen Bloom, ed., (Washington: AEI Press, 1990), 437-470; Gary J. Jacobson, "Modern Jurisprudence and the Transvaluation of Liberal Constitutionalism," *The Journal of Politics*, Vol. 47., No. 2 (June, 1985), 405-426.

[6] See for example Ronald C. Den Otter, *Judicial Review in an Age of Moral Pluralism* (New York: Cambridge University Press, 2009); James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* (Chicago: The University of Chicago Press, 2006); Samuel Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review," *Law and Philosophy*, Vol. 9, No. 4 (1990-1991), 327-270; David A. J. Richards, *Foundations of American Constitutionalism* (New York: Oxford University Press, 1989); and Frank Michelman, "Welfare Rights in a Constitutional Democracy," *Washington University Law Quarterly* (Summer 1979), 659-693.

[7] For Rawls's commitment to this traditional understanding of constitutional legitimacy, see *Theory* §54 where he says that even a majority-faction is not above the law, much less government actors, which would include judges. For a general overview of Rawls and constitutionalism see Frank I. Michelman, "Rawls on Constitutionalism and Constitutional Law" in *The Cambridge Companion to Rawls*, Samuel Freeman, ed. (New York: Cambridge University Press, 2003), 394-425. For Rawls's adherence to Michelman's conception of constitutionalism as the rule of law and not men see *Political Liberalism*, 407 n44.

a guiding light for bringing about a more just *and* democratic regime. In order for this light to indeed be guiding, the Constitution must embrace a substantive view of right and wrong that can be used as a standard for laws and policies. Political institutions, then, are to cohere to the conception of justice that emerges from the original position. If this is done, he suggests, people would have institutional incentives to develop a more reasonable disposition towards political life and in turn "advance" those institutions for their children, who will then do likewise for their children. In this way a just and stable order is brought about. But what comes first, the democratic person who advances just institutions or the constitutional institutions that properly incentivize individuals to adhere to democratic principles? Rawls's development of public reason is meant to solve this chicken-egg dilemma while simultaneously building a bridge between constitutionalism and democracy. Yet rather than saving judges from changing the Constitution's foundation of legitimacy, it provides them with a more effective tool for doing so, unconscious though they may be of their actions.

The chapter will begin with a look at Rawls's preference for a substantive constitution over procedural democracy, explicate the chicken-egg dilemma as it emerges in his initial thinking, highlight the remedy for the dilemma, and end with a description of the mature form of Rawlsian constitutionalism with an emphasis on the Court's institutional role.

Rawls's Substantive Constitutionalism

As mentioned above, Rawls is a consistent proponent of constitutional democracy. While he agrees with democrats that people ought to have sufficient participation in the formation of policies, he believes that the "fundamental criterion for

judging any procedure is the justice of its likely results."[8] Many democratic theorists, however, disagree that constraints need to be put on political bodies in order to assure a just result.[9] For them, authentic freedom can only be had in autonomously choosing for one's self the laws under which one lives. Enshrining this or that in a rigid constitution allows those doing the enshrining a freedom denied to later generations. This is captured in Jefferson's famous dictum that "the earth belongs in usufruct to the living."[10] For constitutionalists, Jefferson's sentiment is based on a theoretical understanding of freedom designed to keep a revolutionary passion alive rather than to kindle a sober sense of responsible government, which is the best means of preserving human liberty.[11] Rawls sees benefits to each side of the debate: he agrees with democrats that broad participation in government is imperative, but he likewise holds that constitutional forms are the best defense of those aspects of human life that are simply nonnegotiable.

While there are numerous democratic critics of Rawls, the most recognizable figure in the debate is Jürgen Habermas.[12] As some have noted, in the end Habermas and Rawls are not separated by much, particularly in their later years.[13] Rawls is sensitive to

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[8] *Theory*, 202.

[9] The contemporary iteration of this thought can be found in the work of deliberative democrats. See for example Christopher F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (New York: Cambridge University Press, 2007); John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (New York: Oxford University Press, 2000); as well as Guttmann and Thompson .

[10] *Thomas Jefferson*, 959.

[11] For a defense of constitutional government as the best protection of liberty see Herman Belz, *A Living Constitution or Fundamental Law?: American Constitutionalism in Historical Perspective* (Boulder: Rowman and Littlefield Publishers, 1998).

[12] Jürgen Habermas, "Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism," *Journal of Philosophy*, Vol. 92, No. 3 (March, 1995), 109-131.

[13] Dryzek, 25; Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004), 9, 26.

democratic critiques and tries to meet them while Habermas has accepted the necessity of constitutional forms.[14] Nonetheless, Habermas mounted a critical assessment of Rawls's constitutionalism that Rawls took pains to address, even reprinting his response in the paperback edition of *Political Liberalism*.[15] The debate between the two, which first appeared in the *Journal of Philosophy*, is well known; the primary reason for looking at it here is to better grasp Rawls's defense of constitutional democracy.

The essentials of Habermas's critique are as follows: first, the parties in the original position are "supposed both to understand and to take seriously the implications and consequences of an autonomy they themselves are denied."[16] Agreement is thereby based upon a narrowing of perspective rather than by enlarging one's views to better understand those of others.[17] And the narrowed perspective requires the "theoretician himself … to shoulder the burden of anticipating at least parts of the information of which he previously relieved the parties in the original position!"[18] This entails the risk of imposing particular values held by the one setting up the original position. And though the later-Rawls allows for plurality, it is seen as a result of the theory and not intrinsic to its design. Anyone in a Rawlsian republic who would disagree with the set up of the thought experiment is asked to do so in the terms of public reason that emerge from the

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[14] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: The MIT Press, 1998).

[15] John Rawls, "Political Liberalism: A Response to Habermas," *Journal of Philosophy*, Vol. 92, No. 3 (March, 1995),132-180. My references will be to the reprinted edition in *Political Liberalism*, 372-434.

[16] Habermas, "Reconciliation," 112.

[17] Ibid., 117.

[18] Ibid., 118.

original position itself.[19] Additionally, using the overlapping consensus as an agent of stability "compromises its epistemic status" and leaves Rawls dependent on substantive assumptions that prevent the use of a "strict proceduralist program" more open to the desires of the people.[20] Thus "the higher the veil of ignorance is raised and the more Rawls's citizens themselves take on real flesh and blood, the more deeply they find themselves subject to principles and norms that have been anticipated in theory and have already become institutionalized beyond their control" depriving them of "too many of the insights that they would have to assimilate anew in each generation" and making it impossible to "reignite the radical democratic embers of the original position in the civic life of their society" since "all of the *essential* discourses of legitimation have already taken place within the theory."[21]

From this perspective, one that is not uncommon among democratic theorists, the problem with a constitution containing substantive guarantees is that it denies the people of each generation the opportunity to positively accept, choose, and affirm moral values for themselves. Without this chance, "citizens cannot conceive of the constitution as a *project*" and public reason will "not actually have the significance of a present exercise of political autonomy but merely promotes the nonviolent *preservation of political stability*."[22] This, Habermas indicates, is seen in the rigid boundary between the public and private identities of citizens, which "contradicts the republican intuition that popular sovereignty and human rights are nourished by the same root" and "conflicts with

[19] Ibid., 121.

[20] Ibid., 126.

[21] Ibid., 128.

[22] Ibid., 128.

historical experience."[23] Rawls should thus be seen as doing something new, particularly using philosophy in a new way. Philosophy on Habermas' account should be limited to questions of legitimate process and leave "substantial questions that must be answered here and now to the more or less enlightened engagement of participants" in which philosophers participate as intellectual members but not elite experts.[24] He fears Rawls, despite his modesty, is needed to clarify the very idea of substantive justice and then hand it to the citizens who are then limited in their ability to act by the terms of the theory. Philosophy should, again according to Habermas, be critical or reconstructive—it should avoid constructing substantive theories of right. Doing so means handing down decisions on long-running and unresolved issues rather than allowing people to work out solutions for themselves and actually governing themselves.[25] Rawls therefore fails to reconcile the liberty of the ancients (democratic participation) with that of the moderns (protection of individual liberty through constitutional institutions). Habermas succinctly and powerfully articulates many democratic concerns with Rawls's embrace of constitutionalism.

Given the forceful critique of his German colleague, Rawls had to sharpen his defense of a constitutional government that goes beyond the mere protection of procedures to enshrine substantive ideas. But Rawls did not want to defend constitutionalism to the point of abandoning his basic democratic instincts. What he offers is a "framework of thought that citizens in civil society who accept justice as

[23] Ibid., 129.

[24] Ibid., 131.

[25] Ibid., 131.

fairness are to use in applying its concepts and principles."[26] The thought experiment is not real—the original position does not actually happen—but nor is it pure abstraction, because it does provide a way of thinking about politics that is particularly applicable to the legislative and judicial branches of government in addition to citizens more generally. Rawls is providing a way of imagining and thinking through political institutions and processes. From his perspective, it does no good to criticize the original position for not having "flesh and blood" representatives, since it is only meant to be a portion of the imaginative framework for thinking in terms of public reason.

By working through the famous thought experiment of the original position and subsequent imaginary convention, an ideal constitution can be construed under what Rawls calls reasonably favorable conditions. It is not to be expected that present constitutions actually live up to this ideal, yet the ideal can and should be the goal of reform. As Rawls explains, "After working out what that constitution is under what I call *reasonably favorable conditions*, it sets up the aim of long-term political reform once, from the point of view of civil society, it turns out that a just constitution cannot be fully realized." Using Habermas's language Rawls says it is a "project to be carried out."[27] The four-stage movement helps identify the hoped-for result, but also sets the terms for critiquing actual constitutions. The institutions we live under are not the product of political philosophy, but "the work of past generations who pass them on to us as we grow up under them. We assess them when we come of age and act accordingly."[28]

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[26] *Political Liberalism*, 397.

[27] Ibid., 398.

[28] Ibid., 399.

Rawlsian constitutionalism includes a conception of an ideal constitution and the desire to realize that ideal from where we stand moving forward.

But having an ideal requires Rawls to admit that Habermas is right to an extent, for he is indeed settling on principles of justice that are meant to remain stable and guide decisions. He is embracing substantive positions. But he denies that this is wrong. The whole exercise of working through the original position is to arrive at an idea of justice that is fixed: "we cannot change them to suit our rational interests and knowledge of circumstances as we please."[29] What divides the two on this question is the degree to which each is willing to trust democracy. A purely proceduralist approach favored by Habermas in general retains a faith in humanity that collective decision-making, freed from undue influence by interest groups or artificial representation through carefully-crafted congressional districts, will likely result in policies that are right and just. Furthermore, actually choosing or reaffirming the laws and policies under which one lives is the only appropriate course for people who view themselves as autonomous beings. Rawls has less faith in people's ability to overcome their self-interest in circumstances where they feel they have something at stake. Far better, he thinks, to settle principles of right ahead of time and allow them to be the guiding elements of all policies, the goal as it were.[30] If the principles can be seen upon reflection as ones that everyone can embrace autonomously, then authentic human freedom is maintained in all

[29] Ibid., 399.

[30] Rawls famously refers to the construction of this guide as ideal theory. For recent skepticism regarding ideal theory's ability to influence the world of changing circumstances see Raymond Geuss, *Philosophy and Real Politics* (Princeton: Princeton University Press, 2008); Amartya Sen, "What Do We Want From a Theory of Justice?" *The Journal of Philosophy* 103 (2006), 215-238; and Colin Farrelly, "Justice in Ideal Theory: A Refutation," *Political Studies* 77 (2007), 844-864. Rawls would likely insist that changing circumstances do not alter the ideal theory, but do affect its realization. I thank Peter Wicks for alerting me to this debate.

legislation and decisions guided by those principles. But Rawls insists his concern is strictly with *political* autonomy—one need not have a comprehensive doctrine committed to an autonomous account of the human person in order to embrace political liberalism. Some non-liberals and religious persons are not likely to embrace a liberal worldview, and this "fact of reasonable pluralism" makes settling on substantive political principles all the more imperative.[31]

In response to Habermas's critique that his conception will allow the embers of democracy to fizzle, Rawls points back to the project of realizing the ideal regime. It is unlikely, he says, that any regime will meet the ideal. Democratic zeal, then, is to be had in being a part of the project of bringing into existence a more just social order. Institutions will continuously need to be reformed until they are right, yet new circumstances are likely to require further tinkering. "The ideal of a just constitution," Rawls says, "is always something to be worked toward."[32] Constitutionalism as Rawls sees it can be democracy with a purpose other than democracy itself. He expects Habermas would agree that democracy itself is not simply an end, but a means of realizing justice, and therefore even the type of critical theory put forward by Habermas has a normative component.

In order to further show that his position on constitutionalism is not inconsistent with the deepest longings of democrats, Rawls adopts a qualified version of Ackerman's dualist constitutional democracy. He does this in the main body of *Political Liberalism*

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[31] In the "Introduction to the Paperback Edition" of *Political Liberalism*, Rawls makes plain that he is most interested in convincing non-liberals, particularly religious non-liberals, of accepting a political conception of justice. See especially xxxix.

[32] Ibid., 401.

and further clarifies his position in his reply to Habermas. The basic distinction is between constitutional and normal politics. The first entails people's constituent power to form a constitution while the second captures the powers created under the constitution, particularly legislative and executive, to legislate and regulate. Because the second is derivative of the first, it is limited. For Rawls this is the best means of capturing the idea of popular sovereignty, and is specifically superior to parliamentary orders where sovereignty is located in the legislative branch.[33] To be legitimate, changes in the constitution are to be based upon the people's constituent power to amend the constitution. Following Ackerman, Rawls sees the Founding, Reconstruction, and the New Deal as the three most innovative periods of people using their constituent power to reshape the constitution of America. Thus, although particular liberties of the moderns—negative rights—may be insulated in the Constitution, they are always subject to the people's constituent power to reconfigure or reform arrangements and thereby have effective control over their lives. In this way he hopes to account for popular sovereignty and the liberties of the ancients prized by Habermas.

Nonetheless, the difference between the two remains evident. Habermas and his followers prefer more of a constant questioning of constitutional arrangements whereas Rawls shows no concern for the infrequent use of constituent power. Under ordinary conditions, the constitution likely will not need to be formally changed if it can be reconceptualized. The key then for Rawls is to engage in the type of constitutional

[33] Bruce Ackerman, "Constitutional Politics/Constitutional Law," *Yale Law Journal* 99 (December 1989), 453-547; and *We the People, Volume I: Foundations* (Cambridge: Harvard University Press, 1991). For Rawls's reliance on Ackerman see *Political Liberalism*, 231-238, 405-406. I do not mean to suggest that Rawls agrees with Ackerman in every particular. They differ, for example, on whether the Court could hold as unconstitutional a formal amendment to the Constitution.

construction that will allow reconceptualization of a just regime. Rather than critiquing things as they are, Rawls accepts current arrangements as a starting point and then seeks out a means of deliberately bringing about what he would call more favorable conditions for a just and stable constitutional order. This will only work, Rawls insists, if we allow ourselves the ability to protect that which we believe is right.

Yet protecting normative assumptions held to be right while also accepting historical institutions as we find them are two different things. Regardless of whether democrats are persuaded by Rawls's defense of constitutionalism, we are still left with the question of how right principles are to guide the active institutions through which we currently are practicing political life in America. In other words, Rawls not only has to convince democrats to come along with him in working toward a constitutional democracy, he also has to bring this about without affronting the basic principle of constitutionalism that honors the rule of law. He cannot simply impose constitutional democracy upon America outside of existing institutional channels. To do so would completely undermine all expectations of constitutionalism. Having firmly defending constitutional democracy, Rawls is left with the question of implementing it.

The Chicken-Egg Dilemma

Though in the last section I primarily focus on Rawls's response to Habermas, which comes late in his career, Rawls's belief that a constitution should adhere to a moral standard was a consistent position held throughout his work. What changes is the relationship between the ideal and the historical institutions to which Rawls wants *political liberalism* to apply. What is remarkable about Rawls's presentation of constitutionalism in *Theory* is the degree to which it is taken for granted and mixes liberal

hopes with an almost conservative faith in established institutional forms. Though he assures his reader that the regime will have a democratic *ethos*, he willingly accepts constitutional forms such as judicial review, and prefers ideal procedure over majority-rule.[34]

The question that is begged in Rawls's initial attempt to describe the process of implementing constitutional democracy is that of legitimacy. What we see in *Theory* is Rawls working out a conception of justice consistent with democratic aspirations and protected by a constitutional order, yet these two aspirations—constitutionalism and democracy—are not necessarily unified in their position on legitimacy. One requires the consent of the governed to live under a constitution while the other looks to the degree of equal opportunity for all to participate in the formation of policies.[35] On one hand Rawls is comfortable with democratic desires, but he is also willing to protect democratic values with institutions beyond popular control. To support a democratic regime with counter-majoritarian institutions may be seen as illegitimate from a democratic point of view, unless the institutions that make up the regime can be continuously affirmed by the people as worthy of their adherence. That is, if a majority of people can always be found to approve of the constitutional forms, democratic legitimacy can be claimed. Finding a way to bring this about is a crucial aspect of Rawls's project, and receives increased attention in his later years.

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[34] See especially *Theory* §§ 10 and 54.

[35] Dryzek describes the discomfort between liberalism and democracy, they need not go together (9). Liberalism turns to a constitution in order to protect the liberty of individuals from majority factions and capricious government. As Dryzek points out, democrats are less likely to fear such things.

The topic of legitimacy as it arises in Rawls's work is often paired with a concern for stability. A system is stable, he says, when those taking part or living under just institutions acquire the governing sense of justice and form the desire to act accordingly. As he explains, "One conception of justice is more stable than another if the sense of justice that it tends to generate is stronger and more likely to override disruptive inclinations and if the institutions it allows foster weaker impulses and temptations to act unjustly."[36] The goal then in forming a theory of justice is not simply to work up precepts that are right and good, or that correspond with our deepest intuitions, but ones that also generate their own support and work to overcome competing claims on people's desires. Rawls's search for a self-sustaining democratic constitution marks the ambition of his work, and his concern with long-term legitimacy becomes his later-work's driving concern.

The audaciousness of his task becomes apparent when one considers the ancient account of cyclical patterns to regimes. Plato's *Republic* contains a famous account of regimes degenerating from higher to lower forms finally ending in tyranny. As Socrates there explains, each generation has a difficulty in forming their children to the current regime.[37] Similarly, Aristotle teaches that good regimes are unlikely to last as each tends to move towards particular vices: aristocracies will eventually become concerned more with wealth and liberty than honor, and democracies will become increasingly concerned with a passion for equality. Neither can generate its own support. Stability, then, is more

[36] *Theory*, 398.

[37] Plato, *The Republic*, trans. Allen Bloom (New York: Basic Books, 1968), 222-275.

likely to be found by combining elements of both in order to achieve a balance.[38] Neither Plato nor Aristotle claim to be offering a route toward lasting stability generated by the principles of a particular regime. But Rawls makes this very claim in *Theory*—that he has discovered a set of systematized principles that will generate their own support and provide lasting stability over time.

To see this, consider the organization of *Theory* as a whole, beginning with the first part in which Rawls constructs ideal principles worked up to "guide the course of social reform."[39] Rawls recognizes that such a change is not going to take place overnight; it is a long-term project in which "the ideal part presents a conception of a just society that we are to achieve if we can."[40] Rawls makes clear that priority is to be given to those aspects of life that conflict with the liberties of the first principle of justice. Change is to be undertaken in such a way that overcoming the restrictions on these freedoms will be the "inherent long-run tendency of a just system."[41] For this to happen, change cannot be indefinite. There is a goal. When it is reached stability should also be in place; indeed, the system should be such that it is self-reinforcing. For this to happen, reformative energies have to be pursued with stability in mind. The hot passion for justice must be cooled with the temperament of maintenance.

In bringing about this slow, patient reform, Rawls is clear that the institutions that make up the basic structure are his main subject. He believes institutions have an effect on the lives of people living under them. Furthermore, he recognizes that the realization

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[38] Aristotle, *The Politics*, trans. Carnes Lord (Chicago: University of Chicago Press), 155-181.

[39] *Theory*, 215.

[40] Ibid., 216.

[41] Ibid., 218, see also 132.

of *justice as fairness* requires specific civic virtues in the citizenry in order to maintain stability, and it is institutions that inculcate virtue. "The social," he says, "system shapes the wants and aspirations that its citizens come to have," and furthermore it "determines in part the sort of persons they want to be as well as the sort of persons they are."[42] It seems from this and related passages that it is necessary to reform institutions so that human beings themselves can be reformed. The arrangements in the basic structure "must not tend to generate propensities and attitudes contrary to the two principles of justice."[43] The end goal, it seems, is to craft human souls that will embrace the two principles of justice arrived at by the parties in the original position.

The third part of *Theory* contains a description of how the proper sense of justice can be cultivated in human individuals living in a just society. If their character is formed in such a way that it coheres with just institutions, then support for those institutions can be expected.[44] Formation of human character usually follows two possible means: supplying missing motives through rewards and punishments, or structuring society in such a way that one comes to sympathize with one's fellows and acquire social sentiments. Rawls here does not choose which is better but says a combination will be needed. He then goes on to lay out three stages to the formation of moral character. The first relies more on rewards and punishments; he calls it the morality of authority. Children are the subject of this stage, and they receive their lessons in the family home, thus making the family a part of the basic structure. As they grow

[42] Ibid., 229.

[43] Ibid., 28.

[44] Ibid., 399-401.

older, children become members of associations outside of the home, where values are further cultivated. This Rawls calls the morality of association. Here they may begin living under the principles of justice voluntarily, but without fully understanding why. Finally, as they grow into adulthood, individuals are further shaped by their institutions, but here they come to know and embrace the principles of justice that guide their society. At this point they possess a full sense of justice that has been shaped by the institutions that make up the basic structure.

But before institutions can properly shape individuals, the institutions themselves have to reflect the principles of justice. How is this reform to take place? Rawls's answer, quite naturally, is that people must deliberately do the reforming. Citizens, he says, have a natural duty to support and advance just institutions.[45] By implication, it would seem, the absence of just institutions, would require citizens to work towards their realization. This is confirmed by Rawls's rejection of a progressive view of history in which forces other than human volition would push institutions toward a just standard. He rejects such a view because of his commitment to the individual as an end and not an instrument, not even an instrument of History. Society, therefore, cannot be viewed as "an organic whole with a life of its own distinct from and superior to that of all its members."[46] The purpose of the original position is to make an argument appealing to human reason in order to support a particular view of justice and work toward its

[45] Ibid., 293.

[46] Ibid., 234. Here one may object that Rawls does seem to accept some idea of history's progressive movement, at least implicitly, in his unquestioning embrace of democratic aspirations. There is a sense in which Rawls does seem to accept a progression to history, as is evident in the introduction to his *Lectures on the History of Political Philosophy* (Cambridge: The Belknap Press, 2007). This objection has validity. Here I merely suggest that Rawls does not view history as a force irrespective of human agency; rather human decisions and thoughts build upon one another and produce better conditions. History does not have a goal for Rawls, but the development of ideas do occur within history.

establishment in institutional life. Rawls believes in human agency, and wants people to autonomously assent to the principles he is proposing as well as their help in making *justice as fairness* a part of the basic structure through their commitment to advance just institutions.

It seems individuals with democratic sensibilities are needed before just institutions can be advanced, but where are such individuals to come from? Because Rawls believes that humans are the product of their social institutions, it would seem that the institutions would need to be in place to craft citizens that could in turn work towards the realization of just institutions. He needs institutions prior to the type of citizen he desires, yet he needs these citizens before he can take steps to implement the principles of constitutional democracy institutionally.

In his search for principles that will generate their own stability, then, the early-Rawls works himself into a problem of origination. Citizens, he argues, acquire a sense of justice by living under a basic structure composed of institutions that educate them toward certain principles. Thus stability is gained through the establishment of particular types of institutions designed to foster the appropriate sense of justice. But who is to do the institutionalizing? Who establishes the components of the basic structure? Are individuals who have already acquired the Rawlsian sense of justice needed to bring about the institutions that are to form that sense of justice?

This is more than simply a practical problem within Rawls's early thought; it is also an embarrassing moral problem for him. As he later recognizes and tries to correct, the three-step education he describes in the third part of *Theory* severely restricts the individual liberty that he claims to be protecting. He envisions citizens formed in such a

way that they all end up having the same sense of justice that similarly molds their personal beliefs and commitments in a way consistent with that sense of justice. This process contradicts the first two parts; the book begins as a defense of autonomous self-governing and ends with everyone trained to make the same autonomous decisions.[47] Authentic freedom is gone, despite the priority of the first principle. Constitutionalism in the early Rawls amounts to the creation of an apparatus meant to produce like-minded citizens, leading more than one critic to declare *Theory* to be a road to the end of history.[48]

Rawls's early conception of constitutional democracy is thus both ambitious and highly problematic. He wants to bridge the divide between the cool-headed rule of law associated with constitutionalism and the hot embers of democratic participation. The task is far from an easy one given the different traditions of legitimacy associated with each; while one looks to the consent of those who established constitutional institutions, the other looks to the equal opportunity for participation in the law-making process today. Rawls's initial stab at bringing the two together is to require a life-long formation process in which all individuals are crafted, so to speak, to affirm the constitutional institutions under which they live, recognizing their adherence to principles of justice that would be chosen in a hypothetical original position. As Rawls himself comes to see, the rigorous process that would form everyone to embrace *justice as fairness* borders on tyranny and

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[47] For a similar explanation by a close friend of Rawls, see Burton Dreben, "On Rawls and Political Liberalism," *The Cambridge Companion to Rawls*, 317.

[48] Alan Bloom ends his critique of *Theory* by renaming it *The First Philosophy of the Last Man*. See Bloom, Allen, "Justice: John Rawls versus the Tradition of Political Philosophy," *American Political Science Review* 69 (2), 648-62; reprinted in *Giants and Dwarfs: Essays 1960-1990*, New York: Simon and Schuster, 1990, 315-345. David Lewis Schaefer concurs with this view in *Justice or Tyranny?: A critique of John Rawls's "Theory of Justice"* (Port Washington, NY: Kennikat Press, 1979).

conflicts with the early parts of *Theory*. For Rawls, this is reason enough to recast the theory. But the problem is that the formative process foreseen in the third part of *Theory* is subject to the chicken-egg problem that makes the project of melding theoretical principles of justice with existing institutions impractical. Thus the recasting will not only have to allow for greater liberty, but solve the practical problems of providing a new foundation for established institutions.

Public Reason (and Its Exemplar)

If the early Rawls was willing to utilize constitutionalism to impose egalitarian principles of justice on individuals over the course of time, one might think that a revision of his work might soften support for institutional forms and take on a more democratic stance. For example, a recasting of the theory to make institutionalization more consistent with the principles being advanced might no longer include support for such things as judicial review, which is the classic example of a counter-majoritarian institution.[49] Judicial review and constitutional government, after all, are rooted in an idea that conformity with forms is a better way of conducting government than trusting the people. Rather, a written constitution—which it seems Rawls implicitly endorses by supporting judicial review— allows the decisions of our ancestors to set the tone of our debates today. And since Rawls is sensitive of the degree to which institutions shape human aspirations, one would think a recasting of his theory would seek to move away from the historical practice of giving the Court an authority over constitutional matters in America.

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[49] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962).

But rather than tone down his defense of constitutional government, Rawls finds new reasons to support and extend it, as well as the Court's role in the system. In the original introduction to *Political Liberalism*, Rawls clarifies his purpose for writing as correcting the inconsistency of the first two parts of *Theory* with the third part, which entails a recasting of the stability portion of the project.[50] In a series of essays prior to *Political Liberalism*, Rawls begins working out a ground for stability that is consistent with the principles of the original position.[51] The inconsistency as Rawls comes to see it is that his earlier work assumed a particular view of liberalism could be accepted by a majority of citizens living under just institutions, yet those very principles require a liberty of conscience that largely precludes the possibility of such uniformity. The natural result of the liberty Rawls supports is a variety of viewpoints even about liberalism itself. His later work is characterized then by an attempt to provide a ground upon which liberals of various stripes can maintain their differences while uniting in the common purpose of reforming constitutional life so as to be more just. He wants to work out an overlapping consensus among liberal comprehensive doctrines that will allow all to maintain a certain amount of freedom while embracing the same political principles, even if not for the same reasons.[52]

The problem, however, is not convincing other liberals to sign on to this view, as Rawls acknowledges in his well-known introduction to the paperback edition of *Political Liberalism*. Millian and Kantean versions of liberalism really do not have that much

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[50] *Political Liberalism*, xvii-xviii.

[51] See for example, "Justice as Fairness: Political not Metaphysical," *Philosophy and Public Affairs* 14 (1985), 223-251; and "The Domain of the Political and Overlapping Consensus," *New York University Law Review* 64 (1989), 233-255.

[52] *Political Liberalism*, 131-168.

problem getting along. The problem comes when liberals try to convince non-liberals, particularly religious non-liberals, to join the overlapping consensus.[53] Just as *Theory* was ambitious in its aim, so too is *Political Liberalism*, for Rawls is offering those whose comprehensive doctrines are not liberal the opportunity to accept liberal principles for purely political reasons, using whatever justification they desire, while maintaining their religious or other personal beliefs independently. How one works the political principles into their overall system of beliefs and convictions is entirely up to the individual or group. Rawls indicates that any comprehensive doctrine that can accept *justice as fairness* as a political conception is reasonable, and he is confident most people can fit into this group, at least in time as various religious sects and philosophic schools have the opportunity to work the principles into their respective systems. He sees Vatican II's declaration of religious freedom as a paramount example of how a long-established church can be persuaded to become part of the consensus.[54]

Thus Rawls states as his question in *Political Liberalism*, "How is it possible that there may exist overtime a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?" Or, as he states in a slightly different way: "How is it possible that deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime?"[55] The attention to liberty throws constitutional democracy in a new light. Whereas *Theory* at least seemed to hope for a

[53] Ibid., xxxix.

[54] "The Idea of Public Reason Revisited," in *The Law of Peoples*, 154 n52. He quotes David Hollenbach, S.J. "Contexts of the Political Role of Religion: Civil Society and Culture," *San Diego Law Review* 30 (1993), 891.

[55] *Political Liberalism*, xx.

day when conflict would be over, *Political Liberalism*, and the later-Rawls in general, accepts the fact that political conflict is an enduring aspect of the human condition. Pluralism is a reality. The goal is to reduce it to a "reasonable pluralism" by convincing everyone—or nearly everyone—to accept liberal principles as the basis for recognizing political legitimacy.[56] Everyone can pursue their own understanding of the good so long as they are willing to adhere to particular principles of right in politics.

It is here that the novelty in Rawlsian constitutionalism becomes apparent. As Rawls explains, "our 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."[57] While this is reminiscent of his position in *Theory*, he now clarifies that agreement on principles is limited only to constitutional essentials and matters of basic justice. Furthermore he is less concerned with the cogency of people's more comprehensive doctrines. He expects them to embrace liberal principles in the political realm, but how those principles fit within a more comprehensive understanding of the good is now a matter for individuals to determine for themselves. What is new to constitutionalism in the late-Rawls is the idea that a diverse group of individuals and sects can agree to be governed by the same moral principles and weigh the legitimacy of laws and policies in terms that all can equally agree to be justifiable. The agreement is the *overlapping consensus* and the terms define *public reason*.

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[56] See for instance *Justice as Fairness,* 153-154.

[57] Ibid., 217.

The ambitious educative scheme of *Theory* is thus dropped (for the most part)[58] with the hope that individuals can come to understand the right reasons of legitimacy on their own. Attention to habits of governance—for instance how the arrangement of institutions will best allow efficient government while simultaneously protecting liberty—are replaced by a concern with the habits of the governed. Rather than depending upon formal institutions to craft human souls, Rawls turns instead to informal institutions—the overlapping consensus and public reason, both of which exist in the abstract—the principles agreed to in ideal theory with historical institutions as we find them. Not only is a degree of human freedom preserved in the revised edition of Rawlsian constitutionalism, but the chicken-egg dilemma is avoided. Public reason gives humans a way of discussing the justice of institutions as we find them—they do not have to be recrafted and therefore do not need a human agent to do the recrafting. The new foundation is brought about simply in the way we understand legitimacy and justify political power.

Yet when seen from this perspective, Rawls's recasting of constitutionalism does retain a commitment to shaping human aspirations to be in harmony with certain principles of justice. In *Theory*, legitimacy is based on a constitution's adherence to *justice as fairness*, and the formation of citizens who could recognize and accept that adherence. This remains the case in the new version, but now citizens can affirm the constitution's adherence to principle in any number of ways consistent with public reason. What is demanded of them now is that they recognize others' understandings of the constitution's legitimacy as reasonable so long as the other is willing to do likewise.

[58] As is evident in *Justice as Fairness*, 156-157, Rawls is not opposed to providing a proper civic education for all children that would include teaching the political principles of justice he advocates.

It is much like Locke' *Letter Concerning Toleration* applied to politics rather than religion—the mark of the true comprehensive doctrine, from a constitutional standpoint, is toleration of other comprehensive doctrines in the political arena—and each participating group in constitutional life ought to preach public reason to its members.[59] Of course not all comprehensive doctrines can be *true*, but they can each be *reasonable* if they accept the principles that make up the overlapping consensus even if for different reasons. Pluralism may be a reality, but Rawls hopes it can be restricted to a reasonable pluralism where a range of viewpoints can coexist and agree on the same political conception of justice for reasons of their own choosing. Freedom of conscience is saved, but it is not unbounded.[60]

It is here that the hallmark of Rawlsian constitutionalism comes into play. For all of the various groups to co-exist in more than a mere *modus vivendi*, citizens must have a common language for discussing matters of constitutional import and basic justice. Major decisions that affect anyone in any substantial way can only be legitimate if they are consistent with the principles of justice making up an overlapping consensus based upon *justice as fairness.* Citizens must be ready to defend such policies in terms mutually understood and accepted by all, although, again, they may accept them for different reasons. Only arguments based on the principles making up the overlapping

[59] Rawls himself compares the development of the overlapping consensus to the historical example of religious toleration; see *Justice as Fairness*, 192-193.

[60] Burton Dreben makes this clear when he implies that those unwilling to accept the overlapping consensus need not be engaged in discussion. See his "On Rawls and Political Liberalism," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (New York: Cambridge University Press, 2003), 328-329.

consensus are legitimate, at least when dealing with constitutional essentials and matters of basic justice, although Rawls encourages a broader application.[61]

While failing to use public reason is not against the law *per se*, or punishable in any punitive fashion, failing to do so means acting illegitimately, or unconstitutionally. This is significant, for something could be understood as unconstitutional not because it directly goes against anything in the constitution (although this could be considered unconstitutional as well) but simply for not being properly justified. The Supreme Court's role in justifying legislation, or conversely striking it down, is thus a crucial element of Rawlsian constitutionalism.[62] The Court is the exemplar of public reason and thereby is given an important task in the process of realizing a Rawlsian constitutionalism. Because public reason is limited, at least initially, to matters of constitutional essentials and matters of basic justice, it will primarily be the language used in talking about the meaning of the Constitution. One can make arguments based upon the Constitution's language, but only when that language is understood to be consistent with the conception of justice that informs it. Thus a method of constitutional interpretation is built-in to the constitutional system. Public reason, if accepted, makes debates over the method of interpreting the constitution less vigorous. Perhaps various understanding of the Constitution's text (or tradition) can be constructed, but only those consistent with the principles of justice making up the overlapping consensus are

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[61] Though Rawls limits public reason to constitutional essentials and matters of basic justice, he alludes to a hope that it will be used more widely. See *Political Liberalism*, 215. His final statement on the matter does allow for the use of nonpublic reasons in legislation that does not touch on constitutional essentials or matters of basic justice, but in such cases he requires the speaker to use nonpublic reason in terms all can understand. For this *proviso*, see "Public Reason Revisited" in *The Law of Peoples* (Cambridge: Harvard University Press, 1999), 144.

[62] *Political Liberalism*, 131-140.

legitimate. A legal argument in constitutional law that falls outside public reason is illegitimate, even if all the constitutional procedures are followed in practice. It is the argument used to support the decision that matters.

What becomes clear at this point is that the institutional particulars of the Constitution are not as important in the recasted version of constitutionalism. Rawls is less concerned with effective government than ensuring democratic legitimacy. This, of course, has institutional implications, as he explains:

> The depth of an overlapping consensus requires that its political principles and ideals be founded on a political conception of justice that uses fundamental ideas of society and the person as illustrated by justice as fairness. Its breadth goes beyond political principles instituting democratic procedures to include principles covering the basic structure as a whole; hence its principles also establish certain substantive rights.[63]

Built into the overlapping consensus, one should note, is a conception of society and the person, which entails ending debate over these matters when discussing constitutional questions. A society, we are told by Rawls, is a "fair system of cooperation over time, from one generation to the next."[64] This is more than a system of coordinated activity; it must include procedures and rules that all (who make up the overlapping consensus) can accept as rational and reasonable and expect others to do likewise. A person is said to be "someone who can be a citizen, that is, a normal and fully cooperating member of society over a complete life," and are considered free and equal persons with two moral powers: the capacity to form a sense of justice and conception of the good.[65] Debate over the question of the human person is settled from the start, which necessarily settles questions

[63] Ibid., 164.

[64] Ibid., 15

[65] Ibid., 19-20.

that turn on the answer to that question. It, along with the pre-determined definition of society, is the basis for the rights to be protected by the Constitution. The importance of constitutionalism, then, is to protect and insulate those substantive matters that result from the overlapping consensus, not institutional powers or even individual liberty. These may indeed be protected, but as a result of the moral theory and not due to the text of the document.

The significant point is this: all questions of constitutionality turn, not on the language of the Constitution, but the definition of the normative ideals making up the overlapping consensus. Understanding Rawls's overlapping consensus and public reason is vital to grasping his defense of constitutional democracy in its maturity. The overlapping concensus is prior to the Constitution and informs it. Public reason is the medium between the two, the glue that holds theory and institutional practice together. And in doing so, it avoids the chicken-egg dillema of *Theory*. It both provides a language for democratic deliberation while at the same time reinforces constitutional protection of substantive principles of justice.

Rawls's hope is that over time, as citizens gain confidence in the constitution's ability to regulate their lives under the overlapping consensus, and as their familiarity with the use of public reason increases, their loyalty to the principles themselves will grow and the self-sustaining stability foreseen in *Theory* found with less hostility to diversity of belief. The three-step process of moral education advocated in *Theory* is implicitly dropped and replaced by a confidence in public reason's ability to shape the way citizens think and behave insofar as it instructs their understanding of institutional legitimacy and provides them with terms for discussing constitutional life.

What remains is teaching citizens public reason. It is here where Rawls remains interested in existing institutional arrangments, particularly that of the Court. Whereas in general his later work is less concerned with deliberately crafting institutions, he has much more to say in *Political Liberalism* about the specific institution of the Court and its role in bringing about and maintaining a constitutional democracy. The Court is not alone in supporting the principles Rawls is proposing, but it is instrumental because of its institutional incentive to use public reason as a tool for deciding on the constitutionality of particular laws. And in so doing it offers an example, an education, for the public more generally.

Implications for the Court

As we have seen, Rawls's theory of constitutional democracy differs in an important way from the traditional understanding of constitutional government. Whereas the latter's legitimacy is based on consent, legitimacy for Rawls is based on adherence to pre-determined political principles of justice consistent with democratic norms. Whereas his first remarks on constitutional democracy relied heavily on institutions to cultivate a type of citizenship that would in turn support just institutions—thus creating a circular situation without a clear starting point—his recasting leans more heavily on informal mechanisms for bringing about change and establishing a just constitutional order. The idea of the overlapping consensus and the mechanism of public reason are informal institutions that are meant to play a formative part in bringing about change. It shapes the citizens who must present their arguments on constitutional matters in terms that conform to the principles making up the overlapping consensus.

We have also seen that these revisions found in the later-Rawls are not without critics from democrats who believe Rawls is settling too many matters of substance prior to democratic deliberation. Even if the substance of Rawlsian constitutionalism is consistent with democratic sensibilities, critics such as Habermas believe it is better to allow people to affirm these principles for themselves and not have them handed down to them. Rawls counters that all political deliberations necessarily take place through political processes connected to institutions, and as such substantive decisions in establishing procedures and institutions cannot be avoided. It is therefore better, he believes, to pay attention to the substance and get it right. He is not, however, indifferent to the desires of democrats, and public reason provides a particularly democratic means of establishing the legitimacy of a constitution. It is less formal than a typical political institution, yet it is an essential ingredient in justifying the legitimacy of any institution and, by extension, law—at least laws touching on constitutional essentials and matters of basic justice.

But if public reason goes any distance towards satisfying Rawls's democratic critics, it undeniably rests on an assumption that some matters of political life are settled ahead of time based upon the content of the overlapping consensus. As mentioned above, that consensus contains a *political* conception of the person as having two moral powers. Political though it may be, it is a conception of the person that places real limits on political decisions. Democratic debates become bounded by the language that is provided for it.

This raises a series of important questions. Where do those boundaries lie? What is a constitutional essential? What is a matter of basic justice? How extensive are these

categories? And most importantly, who is to answer these questions? Just as the practice of American constitutional government requires a final arbiter of constitutional interpretation, so too does Rawlsian constitutionalism require an institution to assure public reason is appropriately used in the appropriate situations. It seems natural, then, that Rawls turns to the Court and makes it the exemplar of public reason. This tool, public reason, avoids the circular movement between institution-crafting-citizen-crafting-institution, but because it gives an existing institution authority to bring about the new form of constitutional democracy envisioned.

Yet the logic of public reason is such that judges do not necessarily see themselves as the impetus for bringing about a new form of constitutional legitimacy. If they did, constitutionalism itself may be questioned if nine individuals can change the regime simply by locating legitimacy in a source other than the ratification process of 1789. Far better, Rawls might say, if judges went about this unwittingly, as though democratic principles have always been the standard of justice ensured by the Constitution. In doing so, the Court can both ensure the democratic legitimacy of institution and instruct citizens in political liberalism by demonstrating the use of public reason. These implications for the Court require further explication of Rawls's work; for now I only mean to show the connection between public reason and constitutionalism in Rawls's mature work and the Court's role in publicizing it. Like a magic glue, Rawls believes public reason can hold together ideal theory and historical institutions, and also provide a means for constitutionalism and democracy to find mutual support in one another. It is an indispensible tool for constitutional democracy.

CHAPTER FIVE

The Role of a Rawlsian Court: Judicial Review Now, Democracy Later

Having argued that Rawls is best thought of as a constitutional theorist and presented the maturing of his constitutional thought, I now turn to Rawls's treatment of the Supreme Court. What role does he see it playing and why? My concern in this chapter is with an element of consistency that runs throughout Rawls's writings; without fail he supports the practice of judicial review by the Supreme Court and insists that it is not an a counter-democratic device for securing substantive policies irrespective of majority wishes. Nor does he believe it stifles deliberate debate over constitutional issues, but rather refines and directs it. He thus sees judicial review as an appropriate mechanism for securing a constitutional democracy. But as we will see, this requires the Court to perform tasks in tension with one another, though Rawls hopes to make them compatible as part of a long-term project.

Rawls's position on the Court's use of judicial review is not one with many natural allies. Proponents of judicial review typically describe it as either defending constitutionalism or democracy. The first, the Court's role preserving the boundaries of the Constitution, I refer to as the traditional defense of judicial review. It is most famously articulated by Alexander Hamilton in Federalist 78 where he holds that "the courts of justice are to be considered as the bulwarks of a limited Constitution against

legislative encroachments."[1] Nominally, this is what judges understand themselves to be doing when reviewing laws.[2] Hamilton understood the Court's role here to be defending the people's will as expressed in the Constitution over heavy-handed legislatures, a sentiment that animates much of the libertarian argument in favor of an active Court that protects individual liberties.[3] But many democratic theorists see that the libertarian defense of the modern Court minimizes the importance of the people's will today and therefore out of step with popular legitimacy.[4] Some proponents of democracy, such as John Hart Ely, are willing to accept judicial review as a necessary evil for policing the procedural rights necessary for democracy.[5] Ely's view is particularly careful to avoid any suggestion that the Court should be used as an engine of change, a notion that Gerald

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[1] Federalist 78 in *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor Books, 1961). For a contemporary defense of this position see Leslie F. Goldstein, "Constitutionalism as Judicial Review: Historical Lessons from the U.S. Case," in *The Supreme Court and the Idea of Constitutionalism,* ed. M. Richard Zinman, Philadelphia: University of Pennsylvania Press, 2009; and "Judicial Review and Democratic Theory: Guardian Democracy vs. Representative Democracy," *The Western Political Quarterly*, Vol. 40, No. 3 (Sep., 1987), 391-412.

[2] Compare, for example, the very similar understanding of judicial review held by Antonin Scalia in *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1998) and Stephen Breyer in *Active Liberty: Interpreting Our Democratic Constitution* (New York: Vintage Books, 2005).

[3] See, for instance, Randy E. Barnett, *Restoring the Lost Constitution* (Princeton: Princeton University Press, 2003).

[4] This is a critique that can be found among thinkers on both sides of the political spectrum. Compare for instance Lino A. Graglia "Constitutional Law without the Constitution," in *A Country I Do Not Recognize: The Legal Assault on American Values*, ed. Robert H. Bork (Standford, CA: Hoover Institution Press, 2005); Larry D. Kramer, *The People Themselves: Popular Constitutional ism and Judicial Review* (New York: Oxford 2004); Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Washington: The AEI Press, 2003); Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 2001); Mark Tushnet *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999); Robert A. Dahl, *Democracy and its Critics* (New Haven: Yale University Press, 1991), 187-188.

[5] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

Rosenburg has argued is impossible anyway.[6] Adding to this perspective, institutional scholars have looked to history to show that judicial review validates rather than impedes innovations in policy that reflect popular attitudes.[7] What emerges in these various lines of thought are differences over what the Court should be protecting: the text of the Constitution, democratic principles, or the desires of the people either purely or through representatives.

Always the bridge builder, Rawls's position in the debate brings together a concern for the Constitution as it stands and the desires of a democratic people as they emerge. Early in his career, Rawls claimed judicial review was a stabilizing device that protected the higher law from capricious actions by transient majorities, but later he extended the Court's role to include being the exemplar of public reason, which entails a commitment to shining the light of political liberalism upon the text so as to provide an education for the people regarding *constitutional essentials and matters of basic justice*. Rawls then wants a Court that takes upon itself the tasks of stabilizing *and* changing. He wants to bring together the traditional Hamiltonian defense of judicial review while simultaneously reconciling the text with democratic principles not to be found in the text.

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[6] Gerald R. Rosenburg, *The Hollow Hope: Can the Court Bring about Social Change?* (Chicago: The University of Chicago Press, 1991; Second Edition, 2008).

[7] For a historical account of the Court that lays the foundation for this view, see Robert G. McCloskey, *The American Supreme Court* (Chicago: The University of Chicago Press, 1961 [Fifth Edition, Sandford Levison, ed., 2010]). Keith E. Whittington argues in his book *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton: Princeton University Press, 2007), that judicial supremacy is used to validate the current "regime" until an exceptional president can bring about substantive change. For similar views see Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy Maker" *Journal of Public Law* 6 (1957), 279-295; and Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891," *The American Political Science Review* 96 (2002), 511-524.

Judicial review makes constitutional democracy—in the Rawlsian, realistically-utopian sense—a possibility.

Building on the last chapter in which a constitutional government is considered legitimate by Rawls so long as its legislation and actions are based on principles all reasonable people could endorse, this chapter seeks to catalogue and understand Rawls's statements regarding the Court's use of judicial review. Rawls does not believe that America's current constitutional government measures up well to the ideal he proposes.[8] Getting from where we are to where we should be is a task that will not happen on its own but requires deliberate human action and time. Rawls is not a revolutionary calling for immediate change; he is a patient reformer willing to blaze a trail on which others can follow, and he hopes that one day everyone will follow him in thinking that *justice as fairness* contains principles that are good for regulating political life. Once accepted he believes they can be the basis for a self-maintaining regime. But getting there, as we saw in the last chapter, is difficult. What comes first: reasonable people creating reasonable institutions or reasonable institutions creating reasonable people? The Court helps solve the dilemma with its use of public reason when exercising judicial review.

What is striking about Rawls's support for judicial review is the lack of attention he gives to the text of the Constitution. Rather than making the Court the defender of the Constitution, Rawls gives it the task of defending a higher law based upon principles of justice that make up the overlapping consensus. This is not, however, to suggest that the

[8] A telling example of this comes in *The Law of Peoples* where Rawls explains his preference for *peoples* rather than *states*. A state, he says, is a sovereign body which seeks its own self-interest in the international realm to the exclusion of reasonable concerns for the justice and outsiders' good. This can be recognized, among other ways, in a desire to increasing its economic strength in the world. Rawls is relatively clear that America has not yet crossed the threshold of *peoplehood*. See pages 23-30, especially footnote 27 therein.

Constitution is unimportant to Rawls or that he believes the Court can disregard it completely. On the contrary, the Court needs the Constitution to serve as a medium between themselves and abstract principles. Judges do not need to be moral or political philosophers so long as they can learn to interpret the Constitution in a manner consistent with *justice as fairness*.

In this chapter I argue that Rawls's support of judicial review, though consistent, is also conditional on having an imperfect constitutional order. The more imperfect the regime—the further it is from the ideal conception imaginable in a thought experiment—the more judicial review is needed to assure that legislation and government action are indeed based on principles to which all reasonable people could agree upon reflection. Judicial review theoretically could become an unnecessary practice if the time comes in which a vast majority of those taking part in democratic government agree to be regulated according to the principles of justice that make up *justice as fairness* and the overlapping consensus, although even in this case Rawls would support it as a means of securing stability. This becomes all the more clear in the work being conducted in the spirit of Rawls.[9] Until that time, judicial review also plays a significant transformative role, helping to bring about an order increasingly consistent with the ideal.

Judicial Review as a Means of Stability: The Early Rawls

In *A Theory of Justice*, Rawls mentions judicial review as one of three *stabilizing devices*. The other two are frequent elections and civil disobedience, and it is the latter

[9] I will focus in particular upon Ronald C. Den Otter, *Judicial Review in an Age of Moral Pluralism* (New York: Cambridge University Press, 2009) and Samuel Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review," *Law and Philosophy*, Vol. 9, No. 4 (1990-1991), 327-270.

that commands the brunt of his early attention. Not until the recasting of his constitutional theory is judicial review given extended written attention by Rawls, again approvingly. To see the development of his support for what is commonly called the counter-majoritarian institution of judicial review, we must first ask what Rawls means when he talks of it in his early career as a stabilizing device.[10]

By stabilizing device Rawls has in mind a mechanism for ensuring that the constitution resulting from his famous thought experiment, if adopted, will continue to operate in a manner consistent with the principles agreed to by the parties in the original position. When used with "due restraint and sound judgment" these devices help "maintain and strengthen just institutions."[11] Because he is not concerned with any existing constitutions in *Theory* his primary task there is to explain how a constitution created by the parties who have just agreed to principles of justice can institute democratic forms without running the risk of compromising the principles. Should a majority of the people's representatives seek to institute policies that run counter to what reasonable people would find acceptable, checks need to be in place to correct the error and reconfirm the constitutional commitment to liberal principles of justice. By reassuring the people that the government is committed to operating within the boundaries of *justice as fairness*, Rawls believes that their commitment to the regime can

[10] The term counter-majoritarian is attributable to Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962 [second edition 1986]).

[11] John Rawls, *A Theory of Justice* (Cambridge: The Belknap Press, 1971[Revised, 1999]), 336. Rawls's wording here suggests there may be more than three stabilizing devises. I treat the three he mentions.

in turn be reaffirmed.[12] The more committed they are to the institutions under which they live, the more stable the constitutional system. Thus the stabilizing mechanisms provide a means of assuring formal democratic government and a substantive idea of justice can operate hand-in-hand, remaining stable over time.

Again, judicial review is only one of three stabilizing devices Rawls mentions in *Theory*. The other two are frequent elections and civil disobedience. Rawls never indicates how the three relate; nevertheless, a common logic is not hard to imagine when one recalls that Rawls seeks a political system guided by substantive principles. If elected representatives pass legislation or make decisions that reasonable people guided by *justice as fairness* would not accept, they can be removed from office at the next election cycle and replaced with someone thought to be more committed to justice. This is a political check that helps assure citizens that their representatives will act in accord with those principles that would be agreed to in the original position by parties under a veil of ignorance. If the political check should fail and an unprincipled law is passed that cannot easily be corrected through an election, appellate judges can rule the law or policy unconstitutional. This is a separation-of-powers check. Yet this too may fail. What is more, a law or policy may run counter to the principles of justice yet remain popular and supported by the majority of citizens and the judiciary. Rawls points out that in such a case formal justice may not be violated even if substantive justice is.[13] It is here that one of the more enlightened citizens, more sensitive to the principles of justice that should

[12] Ibid., 336-337. Stability is of increasing concern to the later-Rawls, perhaps even overcoming his concern for justice. See Ed Wingenbach, "Unjust Context: The Priority of Stability in Rawls's Contextualized Theory of Justice," *The American Journal of Political Science*, Vol. 43, No. 1 (Jan., 1999), 213-232.

[13] By formal justice, Rawls refers to the adherence to institutional forms and procedures. By substantive justice he means adherence to *justice as fairness*. See *Theory of Justice*, §10, 47-52.

regulate affairs, can engage in nonviolent acts of civil disobedience in order to prod the consciences of the majority. Each is a check on the governing institutions: frequent elections are a majoritarian-political check; judicial review is a legal-political check; and civil disobedience is a minority-political check.

Of the three stabilizing devices, Rawls devotes almost all of his attention in *Theory* to civil disobedience. And indeed, it is the one in most need of explanation; after all, Rawls is essentially claiming that stability can be gained through a deliberate decision to break a law. One could easily get diverted from the main discussion regarding the Court by taking up one of the many questions raised by Rawls's support for civil disobedience.[14] One should note, however, that the justification for disobeying the law must be made in terms of *justice as fairness*. He defines civil disobedience as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law of policies of government," and that in doing so "one addresses the sense of justice of the majority of the community and declares that in one's considered opinion the principles of social cooperation among free and equal men are not being respected."[15] The justification for such an act is by "the principles of justice which regulate the constitution and social institutions generally," not by "appeal to principles of

[14] In *Justice or Tyranny?: A critique of John Rawls's "Theory of Justice"* (Port Washington, NY: Kennikat Press, 1979), David Lewis Schaefer holds, "Rawls is less concerned that men may violate the law too frequently than that they may not violate it often enough; the doctrine of civil disobedience that he constructs in part 2 is intended to aver this danger" (40) and later adds that "Rawls fails to consider how the encouragement of disobedience to law may undermine that *reverence* for law that both ancient and modern political thinkers have held is essential to the maintenance of any regime, but most especially a free one" (62). While many of Schaefer's critiques of Rawls are sound, this one is a bit unfair. Rawls is not concerned that the law will not be broken often enough, and encourages civil disobedience only as a means of building reverence for the regime. Rawls wants citizens to revere the principles, not the laws, believing stability to be more likely in that case. The problem with Rawls's view here, I believe, is that he is undermining stability as he seeks it (which I take Schaefer's critique to be), but that he shifts the basis for stability from the Constitution to principles that have no basis in anything other than a thought experiment.

[15] *Theory*, 320.

personal morality or to religious doctrines, though these may coincide."[16] Interestingly, this understanding of civil disobedience parallels his later description of public reason; both are based on a shared conception of justice underlying the political order.

It should also be noted that civil disobedience, though a political act, is not to be used as a legal device. Those engaging in it are not to point to flaws in legal procedures unless they correspond to an undermining of the principles of justice. The aim of civil disobedience cannot be to tease out a test case for the courts, because those "who use civil disobedience to protest unjust laws are not prepared to desist should the courts eventually disagree with them, however pleased they might have been with the opposite decision."[17] The claim one makes when disobeying the law on these grounds is moral, not legal. The point is to draw attention to the essential question of justice. Rawls cautions that this should be done carefully, when there are clear violations of *justice as fairness*, and only after other methods have been exhausted. The hope cannot be to cause disorder, but rather better secure a just order for society.

Rawls adds that there "can be no legal or socially approved rendering of these principles that we are always morally bound to accept, not even when it is given by a supreme court or legislature."[18] Every citizen is responsible, Rawls claims, for coming to grips with the principles of justice and acting according to their interpretation of them. The principles shed light on what the government does, but they cannot be codified. Each branch and agency of government is responsible for understanding its constitutional

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[16] *Theory*, 321. Rawls draws a distinction between civil disobedience and conscientious refusal, allowing the latter to be based on personal or religious conviction.

[17] Ibid., 321.

[18] Ibid., 342.

role in light of the principles of justice. Rawls acknowledges that the Court holds a special status in this case but even "it is not immune from powerful political influence that may force a revision of its reading of the constitution … its conception of the constitution must, if it is to endure, persuade the major part of the citizens of its soundness," thus the "final court of appeal is not the court … but the electorate as a whole."[19] It is to this group that the civilly disobedient appeal. It is their way of resisting what they understand to be illegitimate policies or even institutions.

Based on these remarks, Rawls suggests that the Court and other governing bodies should not be dismissive of minority appeals to principles of justice when interpreting the constitution. Given the emphasis he places on civil disobedience in *Theory* we are left with the impression that the people's interpretation of the principles of justice and how those principles relate to the constitution ought to be of significant influence to governing institutions and actors. This seems to be his Jeffersonian-moment, where an appeal to principles by the people can justify disobedience with the ultimate aim of securing a more just form of government. Nowhere does Rawls say that civil disobedience can amount to militaristic revolution; in fact he makes clear a distinction between the two. Deliberately acting contrary to the law out of respect for *justice as fairness* is a resistance to illegitimacy on the part of those in power including those with judicial power.[20] In the early-Rawls, the Court is subject to education from the governed and is not presented as having an educative function. Its use of judicial review as a

[19] For distinction between civil disobedience and militant action see *Theory*, 342.

[20] Ibid., 322-323.

stabilizing device, as noted above, is only a legal tool for correcting other branches of government when laws fall short of *justice as fairness*.

What is assumed in these comments from *Theory* is that the principles of justice already inform the constitution, institutions of government, and the public conception of political right. He is assuming, in other words, a nearly just constitutional regime that fits his theory. Civil disobedience only makes sense as Rawls has described it among a people already consciously operating under a shared framework of justice as worked up in the original position. When they deliberately break the law they do so in recognition of those principles and others are to understand their actions as such. The same can be said of the other two stabilizing devices mentioned. Frequent elections help assure that representatives are being checked by their constituents; of course this, unlike civil disobedience, is possible prior to a shared conception of political justice. What differs in this case is the basis for checking representatives. Ideally Rawls hopes citizens will vote for an office holder based on the candidate's commitment to *justice as fairness* and not the advancement of partisan interests. Frequent elections present the electorate with the opportunity for examining their representatives' abilities to properly interpret the principles of justice, and not the chance to select the best person for getting what one wants.

Similarly, judicial review would appear to operate differently under ideal conditions than it would in less perfect regimes. As a stabilizing devise under a constitutional system informed by a shared conception of justice, the work of an independent judiciary with the power of interpreting the constitution would seem to serve the purpose of assuring the people who share a sense of justice that the actions of the

government are legitimate under the constitution interpreted in light of that sense of justice. This differs from reading a constitution as a *modus vivendi*, that is a text that has been agreed to for a variety of motives and cannot be consistently reduced to an interpretation based on abstract principles. If the principles are not commonly held, or if there is disagreement about which principles inform the constitution, or if it is not thought that the document is informed by *a priori* principles, then the text alone is to be the basis of interpretation and not an appeal to an abstract original position. Only when conditions are ideal can judicial review be the stabilizing device Rawls describes.

This helps make sense of other passing comments Rawls makes of the judiciary in *Theory*, all of which point to a support for a modest form of judicial review within a well-ordered regime with a common sense of justice. For instance, in a section entitled "Institutions and Formal Justice," he insists that institutional forms are important for securing justice, stating further that "one kind of injustice is the failure of judges and others in authority to adhere to the appropriate rules or interpretations thereof in deciding claims … even where laws and institutions are unjust, it is often better that they should be consistently applied" so that people know what is expected. Additionally, formal justice often is accompanied by substantive justice given a common motivation.[21] He later says a legal system is to provide the framework for legitimate expectations and social cooperation, and if "the judicial process lacks its essential integrity," liberty will be uncertain.[22] Within the context of a *justice-as-fairness* constitutional polity, the Court has a limited role to play in its exercise of judicial review. It is only to serve as a stabilizing

[21] Ibid., 51.

[22] Ibid., 210.

device, and not an impetus for constitutional change, development, or reform. It is to secure expectations based on the principles of justice commonly held, and interpret the constitution in light of those principles. While important, the early-Rawls prescribes a relatively modest role for the Court.

Judicial Review as a Means of Change: The Later Rawls

As Rawls himself eventually comes to see, his account of stability in *Theory* "is not consistent with the view as a whole;" sufficient room is not left for a plurality of what he calls "reasonable comprehensive doctrines.[23] Rawls's account of stability assumes the existence of a publicly shared conception of justice to which reference can be made when discussing laws, policies, and institutions. But how is it that an overwhelming proportion of a population can come to share this conception of justice? Rawls indicates it takes the crafting of institutions by citizens in such a way that those institutions can properly cultivate citizens. But which comes first? The more mature Rawls's task is to address this problem while leaving room for a reasonable pluralism, and in doing so he must call for a "family of ideas not needed before" such as the overlapping consensus and public reason.[24]

In the recasting of his theory, Rawls allows judicial review to take on more ambitious tasks than he previously assigned to it. No longer simply useful for securing stability, the newer version of judicial review possesses a transformative element in order to help overcome the chicken-egg dilemma by simultaneously assuring that laws and institutions are consistent with the principles of the overlapping consensus while at the

[23] *Political Liberalism*, xviii.

[24] Ibid., xix.

same time serving as an exemplar of public reason for the public to imitate.[25] The later-Rawls thus assigns three roles to the Court in its exercise of public reason: it is first to be the defender of "the higher law" as expressed through the people's constituent power in creating a constitution; second, in defending the higher law it is to do so with public reason, thereby setting an example for others; finally, in using public reason the Court is not only to serve as an example but to make authoritative judgments on fundamental political questions involving laws and institutions.[26] Here it is not simply modeling something for citizens; it is also doing something that cannot necessarily be imitated in the ordinary course of things. No longer is the Court's role modest, but quite ambitious. No longer is it to serve only as the defender of the people's higher law; it is to help shape their understanding of how the higher law should be understood, spoken about, and institutionalized.

Taking these three tasks in order, the first is nearly identical with the role Rawls describes for the Court in *Theory*; namely, to help secure stability by assuring the people that their exercise of constituent power in forming a government will be respected by that government in the exercise of its powers. In *Political Liberalism*, however, Rawls has more to say on the issue, relying heavily on Bruce Ackerman's work on American constitutionalism's two-fold nature.[27] In this view the people's constituent power to form

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[25] As explained in the previous chapter, the chicken-egg dilemma in the early-Rawls has to do with the implementation of his ideal theory in practical life. On one hand he indicates that institutions can be used to educate people toward *justice as fairness*, while on the other he calls for citizens to bring such institutions about. Which comes first: the just citizen or the institution that hatches him?

[26] For three roles see *Political Liberalism*, Lecture VI, §6, 231-240.

[27] Rawls cites Bruce Ackerman, "Constitutional Politics/Constitutional Law," *Yale Law Journal* 99 (December 1989); and *We The People: Foundations*, vol. I (Cambridge: Harvard University Press, 1991). See *Political Liberalism*, 231 n 12 and 406 n41.

a new regime is distinguished from the ordinary power of office holders within that regime. This is, of course, a traditional understanding of liberal constitutionalism; Rawls credits Locke with the idea, but this view was not particularly novel to Locke's thought.[28] It is, however, an understanding of government's origin that carries significant weight in America given its famous endorsement in the *Declaration of Independence*: governments are agreed upon by the people to do certain things, such as protect life, liberty, and the pursuit of happiness; when they continually fail to do so, the people retain the right to alter or abolish the government and establish another to better serve their purposes. The people thus create a higher law while the government promulgates ordinary law that must be in accord with that which is higher. The Framers of the Constitution understood that times would likely come where an alteration of the document they were crafting, the higher law, would prove necessary. They thus provided a formal process for doing so in a way that requires broad popular appeal.

Ackerman's thesis, which Rawls draws upon, is that the difficulty of the formal amendment process is too restricting on the people's ability to recreate higher law when they deem proper. In such times the populace transforms the higher law through a rearticulation of the principles thought to be at the foundation of the higher law, thereby forcing governing authorities to reinterpret the Constitution under new auspices. Once these transformations occur, formal amendments may follow—as in the wake of the Civil War—but not necessarily. The New Deal, for example, forced a "switch in time" upon

[28] Medieval scholastics, for example, understood this idea well and debated its merits. They referred to it as the translation theory of government. See for example Annabel Brett, "Scholastic Political Thought and the Modern Concept of the State," in *Rethinking the Foundations of Modern Political Thought*, Annabel Brett and James H. Tully, eds. (Cambridge: Cambridge University Press), 130-148.

the Court in its interpretation of the Constitution without need of a formal amendment.[29] Ackerman's position resembles that of Robert Dahl and others who have argued that the Court will tend to blow with the dominate political breeze so long as a lag time is allowed.[30] Where Ackerman and Rawls would disagree with those of Dahl's school is in the implications for the Court's role. For Dahl and others the Court will play the role of legitimizing the current political regime's policies, but Ackerman and Rawls see the Court's role as defender of the higher law against policies that conflict with the principles the people have come to accept as foundational for the Constitution. In practice these two roles may closely overlap, but the Ackerman version that Rawls draws upon appears as the more constitutional insofar as the Court is seen as an independent branch of government looking to a higher law rather than a mere rubber stamp for the political branches.

As in *Theory*, Rawls portrays the Court as a defender of the constitutional order, and again it is principles rather than the text that is ultimately defended. By implication he believes an independent judiciary is the best means of protecting the people's higher law, and explicitly rejects parliamentary supremacy.[31] He says:

> A supreme court fits into this idea of dualist constitutional democracy as one of the institutional devices to protect the higher law. By applying public reason the court is to prevent that law from being eroded by the legislation of transient majorities, or more likely, by organized and well-situated narrow interests skilled at getting their way. If the court assumes this role and effectively carries it out, it

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[29] In a more recent book, Ackerman argues that a similar switch in time occurred after the election of Jefferson, and is represented in the Court's opinion in *Marbury v. Madison*, in which a republican understanding of the presidency as a plebiscitarian institution with a popular mandate is tacitly acknowledged and accepted by the Court: *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (Cambridge: The Belknap Press, 2007).

[30] See *ante* note 7.

[31] *Political Liberalism*, 233.

> is incorrect to say that it is straightforwardly antidemocratic … the court is antimajoritarian with respect to higher law when its decisions reasonably accord with the constitution itself and with its amendments and politically mandated interpretations. [32]

The Court is the linchpin that holds democracy and constitutionalism together. It allows governing institutions the ability to carry out their business in accord with agreed-upon procedures the outcome of which all will accept, unless of course they conflict with the higher law in some way. The reason they fail in this case is that the people have exercised their constituent power in crafting the higher law, and as the people's law it takes precedence over ordinary laws passed by elected officials. The important check in the system is the Court. It is to defend the higher law.

Again, as was elaborated in the discussion of *Theory*, by higher law Rawls indicates that the principles of justice are to be the guiding light for interpreting the Constitution. This is what he alludes to when he says, "politically mandated interpretations." When exercising judicial review and deciding whether a particular act is in accord with the Constitution, judges must look to the principles that the people believe undergird the document. It can only legitimately be interpreted in that light. The fact that they are to use public reason in reaching their decision makes reliance upon principles a necessity. He believes, again following Ackerman, that the three most innovative periods in America's history are the Founding, Civil War, and New Deal. In all three cases "the political values of public reason provide the Court's basis for interpretation."[33] Clarifying this view in his "Response to Habermas," Rawls says, "In all these periods, fundamental political debates were widespread and they offer three

[32] Ibid., 233-234.

[33] Ibid., 234.

examples of when the electorate confirmed or motivated the constitutional changes that were proposed and finally accepted."[34] Once these changes or, as Ackerman calls them, transformations take place in the minds of the people generally, the Court's task is to interpret the Constitution in the newly projected light. They are essentially, then, defenders of constitutional principles and not the Constitution itself.[35] As the people change their understanding of the constitutional principles, the Court is to change its interpretation of the Constitution to better reflect the new higher law. Thus the higher law Rawls refers to is not the document called the Constitution, but the principles that are understood to unite a people, or as Rawls would say it, the principles that constitute an overlapping consensus.

Before looking at the other two tasks assigned to the Court by the more mature Rawls, it is worth pausing to recall the source of the principles Rawls hopes will become the basis for an overlapping consensus. They are the outcome of an extra-experiential thought experiment. They are the principles that would be chosen by parties to an original position, each covered with a veil of ignorance so as not to distort their collective decision with biased bargaining. These principles are to be agreed upon prior to any consideration of institutions or policies. Based on Rawls's defense of Ackerman's dualist constitutional democracy, the Court could only act upon these principles if real rather than fictional persons agree to accept them as a sound basis for the regulation of political life. In other words, constituent power cannot be exercised by parties to the original

[34] Ibid., 406.

[35] As noted by Gary Jacobson in "Modern Jurisprudence and the Transvaluation of Liberal Constitutionalism," *The Journal of Politics*, Vol. 47, No. 2 (Jun., 1985) 405-426.

position, nor can the Court legitimately act upon these principles until they are called upon by the people to do so.

The same question thus arises as was seen in *Theory*: What is to convince the people to accept *justice as fairness* or any other version of political liberalism? How does Rawls expect America to get to the point where it would be legitimate for the Court to interpret the Constitution in light of an overlapping consensus based upon principles all can accept as reasonable and fair? How are people to learn these principles and come to appreciate them as right in the political realm? Most simply: how is the overlapping consensus brought about—how is it constructed?

As was argued in the previous chapter, Rawls overcomes this problem by emphasizing a basis for constitutional legitimacy on principles of justice rather than consent. It is from this perspective that two additional roles for the Court are developed in *Political Liberalism* that differ in a significant way from this first role, which was based upon the idea of a dualist constitutional democracy. Rather than simply defending the outcomes of the people's constituent power, these newer roles allow the Court to play more of a leadership role in society as it transitions from the imperfect to the more ideal, from the unjust to the realistically utopian.

The first of these new roles calls upon the Court to be the exemplar of public reason. As he explains, "the court's role is not merely defensive but to give due and continuing effect to public reason by serving as its institutional exemplar."[36] He notes that other institutions are to use public reason as well, but finds it proper that citizens and legislators vote according to their more comprehensive doctrines when "constitutional

[36] Ibid., 235.

essentials or matters of basic justice" are not at stake. But justices on the Court are to avoid their personal biases in all cases, always explaining their decisions in terms of commonly accepted political values. The Court, Rawls says, is the creature of public reason, and its institutional spokesman. Justices are to interpret the law in a way that the Constitution and relevant precedents, are made justifiable "in terms of the public conception of justice or a reasonable variant thereof."[37] What is more, "it is expected that the justices may and do appeal to the political values of the public conception whenever the constitution itself expressly or implicitly invokes those values." In other words, justices are expected to articulate the foundational principles of the constitution. "The court's role here," Rawls says explaining the reason for this expectation, "is part of the publicity of reason and is an aspect of the wide, or educative, role of public reason." And as an educative task, the Court is not simply articulating the principles handed to them through the people's constituent power, but rather are the "values that they [the justices] believe in good faith, as the duty of civility requires, that all citizens as reasonable and rational might reasonably be expected to endorse."[38] The principles are thus handed down, not by the people, but the parties in the hypothetical original position.

That the Supreme Court should play an educative role in America is not unique to Rawls. Others have recognized the special position that the justices on the Court occupy

[37] Rawls's later writings are increasingly open to the possibility that his version of political justice, *justice as fairness*, may not be the only theory that can fulfill the requirements for achieving an overlapping consensus. Indeed, an overlapping consensus requires the coming together of reasonable people who may each understand the public conception of justice differently, so long as they agree to justify their positions on constitutional essentials and matters of basic justice on the basis of these principles and not their personal beliefs about the good. Rawls's concession does not dismiss the underlying premises of the overlapping consensus or public reason. A freestanding conception of justice is still required, even if it is not Rawls's *justice as fairness*.

[38] All quotations in this paragraph are from *Political Liberalism*, 236.

and the opportunity they have to raise the caliber of political debate.[39] As unelected office holders within a coequal branch of the federal government who have the prerogative of holding their position for life, justices on the Court are not subject to the same types of pressures that members of Congress or the executive branch face. Many of the long-standing traditions practiced by the Court help reinforce a non-partisan atmosphere needed for the type of political authority it possess—judgment in particular cases. Furthermore, the fact that the Court provides public reasons in writing for its particular judgments lends credibility to its task, but it is also these opinions that have led many commentators to hope that the Court can add education of the public to its institutional responsibilities.

While written opinions by the highest judicial authorities in the land will no doubt have an educative function, why the Court should be teaching fundamental principles is not readily clear, because it is not always evident what those principles are. Hadley Arkes, to take an example of one from the opposite side of the political spectrum as Rawls, is confident that principles of natural law lie at the foundation of the Constitution and that the Court has a duty to educate the public of these principles.[40] Arkes sees James Wilson's opinion in the early Supreme Court case *Chisholm v. Georgia* as an example of a justice using the opportunity of a particular case to teach first principles of

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[39] For instance, see Walter Burns, "The Supreme Court as Republican Schoolmaster: Constitutional Interpretation and the 'Genius of the People'" in *The Supreme Court and American Constitutionalism*, Bradford Wilson and Ken Masugi, eds. (Boulder: Rowman and Littlefield Publishers, 1997), 3-16.

[40] See Hadley Arkes, "On the Grounds of Rights and Republican Government: What the Judges May Still Teach," in *The Supreme Court and Amerrican Constitutionalism*, 27-46. This argument is elaborated upon in Arkes's *Beyond the Constitution* (Princeton: Princeton University Press, 1990).

government.[41] Additionally, he suggests that a judge's role is to look to the essential justice of a particular law or policy when exercising judicial review, and that the Constitution should be interpreted in light of first principles of natural law. Arkes and Rawls would likely disagree on nearly everything about politics, but they ask the Court to do very similar errands in educating the public.

Where Rawls goes further than Arkes is in conflating *obiter dictum* and *ratio decidendi*. Arkes would like to see judges step back and articulate the principles upon which the legal decision is made, yet whether or not a principled justification is given in the written opinion has no effect on the legal precedent set. For Rawls, the opposite is the case, the written opinion must be given in terms of public reason which is fundamentally related to principle and not a legal text. The text of course will have to be referred to, but can only be talked about in terms of public reason. In other words, the reasons given for the decision must explicitly be principle-based, and not simply by implication. Where Arkes might say a justice commits a sin of omission by not offering a lesson in first principles as part of their opinion, Rawls would say the sin is one of commission since the decision's legitimacy is predicated upon justification in terms of public reason. Judges who fails to provide a public-reason argument are necessarily guilty of breaching the duty of their office. Legitimacy for Rawls, it should be remembered, is based upon consistency with principle, not consent.

By being the exemplar of public reason, Rawls requires the Court to take upon itself the task of educating the public about the legitimacy of government actions in its exercise of judicial review. It is to teach others what types of arguments are publicly

[41] *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

recognizable as legitimate. This goes beyond constitutional essentials and matters of basic justice; while Congress will likely fall short, initially anyway, of debating on all matters in terms mutually acceptable by all, the Court can set an example of how all legal-political issues can be treated in the light of *justice as fairness* or a close relative to Rawls's liberal theory able to garner an overlapping consensus. The Court thus provides both the arguments and the model for using those arguments in a civil fashion.

But as the third task Rawls assigns it makes plain, the Court is to do more than simply act as a model; it also settles the most fundamental political questions and gives "public reason vividness and vitality in the public forum."[42] When Rawls speaks of the Court as a model, he is not thinking of it as a mere mannequin advertising public reason's potential. While modeling public reason, it is also making important political decisions that affect institutions and people's lives. Not only are justices educating through written lectures, they are exercising judicial review to fundamentally shape the constitutional order, making it increasingly consistent with political liberalism. They are affecting the way people think and thereby helping to bring about the hoped-for overlapping consensus.

One should note that here Rawls is more concerned with the higher law as principle than Ackerman, as illustrated by a distinction Rawls draws between himself and his Yale colleague. In *We the People*, Ackerman speculates on what would happen if the people of American formally amended the Constitution in such a way that the First Amendment's guarantees of religious liberty were replaced by their opposites. His answer is that in a dualist constitutional democracy, such an amendment would be valid

[42] *Political Liberalism*, 237.

and would have to be respected by the Supreme Court. He therefore is open to entrenching the liberties in the Bill of Rights in a model similar to that of the German Constitution. Rawls recognizes that in doing so the dualist nature of the constitution would be circumvented, something he would rather avoid. At the same time, however, he does not want a situation in which the Court would have to uphold an Article V amendment that clearly violated the principles of *justice as fairness*. He therefore, unlike Ackerman, suggests that the "Court could say, then, that an amendment to repeal the First Amendment and replace it with its opposite fundamentally contradicts the constitutional tradition of the oldest democratic regime in the world. It is therefore invalid." Religious freedom is "entrenched in the sense of being validated by long historical practice," and the "successful practice of its ideas and principles over two centuries place restrictions on what can now count as an amendment, whatever was true at the beginning."[43] Ackerman is a disappointed duel-constitutionalist looking over the fence at Germany's entrenched green grass; Rawls, for his part, is positively perplexing in his confident stand for dual-constitutionalism yet willingness to toss aside procedurally valid amendments.

Rawls appears confused here. How could the Court strike down an amendment to the Constitution? Regardless of the amendment's ridiculousness, if the people consent to it, the Court would seem to be acting illegitimately by overriding an instance of what he himself refers to as the people's constituent power. If a vast majority of citizens within America were miraculously converted to some particular creed, seek to establish its success with support by the federal government, and pass an amendment allowing the establishment of religion, why would Rawls not allow for this to be an instance of the

[43] Ibid., 237-238.

people exercising their fundamental power to alter a constitution to better suit their needs? One would think Rawls the constitutional democrat would be open to the idea that the people could choose for themselves the laws by which they live.

Enigmatic as Rawls is in this discussion, he is not really confused. The strangeness of this passage is a good example of his understanding of the Court's role in the constitutional democracy he is proposing. As has been presented, legitimacy for him is not based on consent but on consistency with the principles of political liberalism. Though he indicates that constituent power can be exercised to recast the principled light under which we interpret the Constitution, his clear suggestion here is that people's principles and ideas matter. Not all political standards of justice are equal. Only those that would be chosen in an original position where people do not know their religion or any other particulars about their convictions are valid. And only laws, policies, and constitutional clauses—including new amendments—consistent with those valid principles are legitimate. And what is not legitimate can be struck down by the Court, even if it is an otherwise procedurally sound constitutional amendment.

The Tension between the Tasks

What becomes clear in tracking the various ways Rawls defends judicial review is that the three tasks he prescribes for the Court have a tension between them. The first task is that of defending the higher law as given by the people through their constituent power to constitute themselves. Here the Court plays a modest role defending something given to it—not the Constitution but the principled light needed for interpreting the Constitution. This role is associated with *Theory* but retained by and elaborated in *Political Liberalism*. The latter two roles are developments of the later-Rawls's thought

and are more ambitious in scope. Rather than defending the higher law, the Court is asked to both coach the people and adjudicate in a way that will help lead to the type of higher law Rawls argues is reasonably fair to all and would be acceptable by all if they would but learn.

Paradoxically, *Theory* offers a more humble role for the Court despite the ambitiousness of the book, while *Political Liberalism* assigns more ambitious tasks to the Court despite a reduction of the theory to the political realm. Recall that Rawls came to understand *Theory* to be flawed in its presentation of stability; he was persuaded that he was asking too much of people to fully embrace *justice as fairness* in order to bring about a stable constitutional democracy. Essentially he was asking them to accept a comprehensive doctrine, a request which ran counter to his theory's emphasis on liberty. To correct this error he downgrades the theory to the political realm, asking only that people accept liberal principles as part of an overlapping consensus on how they wish to be governed. Why they accept the principles is left to their own determination; they work the political principles into their more comprehensive understandings. The fact that most people have a collage of partial doctrines that hang together by delicate threads rather than a single comprehensive doctrine is a plus in his view, because they could simply add political liberalism to the array of ideas they have gathered.[44] Whether they are able to reconcile their other beliefs to that of political liberalism is no longer thought important to Rawls so long as they are willing to affirm the goodness of a shared political conception of justice. This he believes is a more practicable goal than he had offered in *Theory*, yet to bring it about requires a more active Court to help shape the principles of

[44] This point becomes clear in Rawls's final book, *Justice as Fairness: A Restatement* (Cambridge: The Belknap Press, 2001). See page 33, 192-194, 197-198.

the political consensus. The paradox makes one wonder just how humble *Political Liberalism* really is.

What is more, Rawls is not clear how the Court's tasks are to coexist. How can the Court be both the defender of the people's constituent power to constitute a higher law while also working toward the transformation of the people's ideas of justice? If all that is needed of the Court is to assure the people that the government will act according to the principles of justice, then why is an educative function needed from the Court? And why is the Court needed to make vital public reason in the institutions of political life? It seems as though Rawls is asking the Court to do two conflicting tasks at the same time: defend what the people have consciously done while shaping them to deliberately change what they want. He wants the Court to play both defensive and transformative roles simultaneously.

One way of reconciling the problem of contradictory tasks is to recall that for Rawls transformation is not something that happens all in an instant. It is a slow, gradual process that can only happen incrementally. He is not a violent revolutionary. Though he would like to see a different regime in America, he wants the transformation to appear to be an effortless transition. He wants it to appear natural, although deliberate. People have to consciously accept and affirm the principles he is proposing, but they need not make up their minds today. He allows time for formation to occur.

He also recognizes that time is needed for political philosophy to perform its four roles: conflict resolution, formation of ideas regarding political and social life, reconciling people to their history, and a realistically utopian goal.[45] Who is to use

[45] For the four roles of political philosophy see *Justice as Fairness* §1, 1-5; see also my discussion above, 35-42.

political philosophy in this way? In terms of those who possess a political office, justices on the Supreme Court can be a significant help to the political philosopher in giving these roles effect, in realizing them. In fact, the first three roles Rawls articulates for political philosophy correspond with the three tasks of the Court. The Court is to resolve political conflicts in a way consistent with a liberal conception of justice. It is also to help clarify the legitimacy of political institutions and laws through its use of public reason. And finally, it is to give vitality to public reason by shaping institutional arrangements in a way that both makes sense of their past and also directs them to their proper future.

It is noteworthy that there is no judicial task reflective of the fourth role of political philosophy, that of projecting a realistically utopian future. This is not for the Court to do. Its job is only to help bring it about and then assist in its maintenance. Judges are to be educated, and they in turn are to educate the public. Constitutional maintenance is carried out by way of the Court elaborating principles that are given to it, but it is not to come up with these principles on its own. Its participation in political philosophy is only to resolve disputes regarding constitutional essentials, articulate the ideas of the overlapping consensus while avoiding other ideas, and to reconcile the people to their historical condition so that the task of moving forward makes sense given a larger context. It may do this quite naturally in its citation of case law, which makes sense of particular decisions in light of what has come before. A logical development can be seen. And given the logic, a future can be mapped. This, as we have seen, is a long-term project.

And as a long-term project, we might expect to see the following: the Court's use of its more transformative roles in exercising judicial review would be more common

initially, but would subside as time went on and the institutions, laws, and people's commitment to the principles of justice are slowly realized. Once people learn to affirm for themselves the usefulness, soundness, and indeed the very goodness of a liberal conception of political justice, then the Court can step back into a more defensive position, protecting the people's mutually acknowledged overlapping consensus from laws and policies that are an affront to their agreed-upon higher law. In other words the more aggressive tasks of the Court can become increasingly less commonplace and potentially unnecessary. The defensive role would begin as something of a façade until people come to embrace some version of *justice as fairness*, at which point it would be both real and the predominate role of the Court.

Until the day came when the Court could primarily use its power of judicial review as a defensive mechanism protecting the higher law chosen by the people, something it would only do once the people affirm the principles Rawls proposes, the pretense of defense will have to be maintained in order to provide an illusion of transition rather than transformation. Even when the transformative roles of the Court are dominate, the common understanding of the Court—and even the judges' understanding of the Court—will have to be that the Court is defending what the people want. But because they are deciding cases, if they are acting as Rawls would hope, based upon their consistency with principles of justice, they are in fact shaping the way people think about the law and Constitution even if they maintain a defensive posture when doing so. In fact, the defensive posture may better camouflage their efforts, making their actions difficult to see even to themselves. Rawls recognizes that an openly transformative Court would be objectionable to both constitutionalists and democrats. But without the

transformative roles of the Court, overcoming what I have called the chicken-egg dilemma of *Theory* in the way he hopes—through a more robust version of constitutionalism in which legitimacy is based on democratic principles rather than democratic procedures—is highly doubtful if not impossible. The Court is a useful institution with its power of judicial review because it bridges the gap between ideal theory and the institutional reality, thus helping to bring about a vision of realistic utopia handed to it by theorists operating the roles of political philosophy.

Constitutional Democracy and the Role of the Court

Given that most of Rawls's work predates Rosenburg's thesis that the Court cannot affect change, one may wonder if Rawls would have deemphasized the Court in his later years. Indeed, *Justice as Fairness* only mentions the Court in passing. But even these passages reflect the view I have attributed to Rawls, and a similar affirmation of the Court's ability to point the populace toward a realistic utopia can be found in his posthumously published *Lectures on the History of Political Philosophy*.[46] What is more, those explicitly working in the spirit of Rawls offer a very similar argument to the one I have presented here.

To be clear, nowhere does Rawls say it is the exclusive duty of the Court to bring about change, but rather one of many institutions. I understand him, however, to be giving the Court a larger responsibility than any other institution, particularly after his revisions in *Political Liberalism.* The Court is uniquely situated to play the role of educator and stabilizer. His one mention of this in *Justice as Fairness* comes in a section

[46] John Rawls, *Lectures on the History of Political Philosophy* (Cambridge: The Belknap Press, 2007).

where he advocates constitutional over procedural democracy. He notes that some favor mere procedures because they allow for a more robust democratic spirit, but this "overlooks the possibility that certain features of a political conception importantly affect the political sociology of the basic institutions that realize it" and "we must consider how that sociology may be affected by the educative role of a political conception of justice such as *justice as fairness*."[47] When the conceptions of society and the person are made explicit in a constitution, they have an effect on the way citizens come to understand their basic rights and liberties—indeed, their very lives:

> Citizens acquire an understanding of the public political culture and its traditions of interpreting basic constitutional values. They do so by attending to how these values are interpreted by judges in important constitutional cases and reaffirmed by political parties.[48]

Note the important role Rawls gives to judges here, allowing them to interpret the charter that grants citizens certain rights and liberties. Others, such as political parties, take their cues from the Court. Even if a particular case is unpopular, Rawls says the Court has fulfilled its educative role by "drawing citizens into public debate."[49] One gets the impression here that the political culture is like a fountain that bubbles from a top bowl and slowly spills over into a series of lower bowls, and the Court is that top bowl.

A similar endorsement of judicial review can be found in the introduction to Rawls's *Lectures on the History of Political Philosophy*.[50] Here he discusses the role of political philosophy in affecting the outcome of democratic politics. He states plainly

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[47] *Justice as Fairness*, 146. The section is §44. Italics are mine for sake of consistency.

[48] Ibid., 146.

[49] Ibid., 146-148, especially note 19.

[50] *Lectures*, especially 4-5. All quotations in this paragraph and the next are from these two pages.

that he favors constitutional democracy over majoritiarian democracy, so as to put "fundamental rights and liberties beyond the reach of the legislative majorities of ordinary, as opposed to constitutional, politics." He denies the charge of Benjamin Barber that liberal political philosophy is "platonic" insofar as "it tries to provide basic truths and principles to answer or to resolve at least the main political questions, thus making ordinary politics unnecessary."[51] Rawls assures us he, as a liberal philosopher, "would not try to overrule the outcome of everyday democratic politics," but then adds that it is appropriate to try "to influence some legitimate constitutionally established political agent, and then persuade this agent to override the will of democratic majorities." He immediately names the institutional agent that would need to be persuaded:

> One way this can happen is for liberal writers in philosophy to influence the judges on a Supreme Court in a constitutional regime like ours. Liberal, academic writers, such as Bruce Ackerman, Ronald Dworkin, and Frank Michelman, may address the Supreme Court, but so do many conservatives and other non-liberal writers. They are engaged in constitutional politics, we might say. Given the role the Court in our constitutional system, what may look like an attempt to override democratic politics may actually be the acceptance of judicial review, and of the idea that the Constitution puts certain fundamental rights and liberties beyond the reach of ordinary legislative majorities. Thus, the discussion of academic writers is often about the scope and limits of majority rule and the proper role of the Court in specifying and protecting basic constitutional freedoms.

What Rawls reveals here is his belief that in a constitutional democracy, political philosophers—a group in which Rawls would surely include himself—can legitimately influence the political culture, the ideas that animate political life, and the regime itself if but nine judges—nay, five—can be persuaded of some idea. Ideas matter for Rawls; and the institutional agent most concerned with constitutional ideas is the Court. "In a regime

[51] Benjamin Barber, *The Conquest of Politics: Liberal Philosophy in Democratic Times* (Princeton: Princeton University Press, 1988).

with judicial review," Rawls adds, "political philosophy tends to have a larger public role, at least in constitutional cases; and political issues that are often discussed are constitutional issues concerning basic rights and liberties of democratic citizenship." A political philosopher can thus be on the front lines of political reform in a constitutional regime by addressing the Court.

With rhetoric reminiscent of Lincoln, Rawls continues saying, "It would seem that a constitutional regime may not long endure unless its citizens first enter democratic politics with fundamental conceptions and ideals that endorse and strengthen its basic political institutions." This a good statement showing the ambition of Rawls's work, to provide the basic ideas upon which a lasting stability can be secured. Democratic institutions, he believes, will not self-deteriorate when those who take part in decision making are properly educated citizens with certain basic assumptions regarding society and the person. What is needed is an institution that can help form these assumptions. From the remarks above it is clear Rawls favors the Court due to its institutional strength, concern for justice, and openness to ideas. But once the Court gives institutional support to the ideas Rawls advocates, and those ideas are generally absorbed into the political culture thus providing the formation needed for a stable constitutional democracy, then the Court can focus more on its task as defender of a higher law than on its educative task. This is not to say it switches tasks entirely, but that its emphasis can be redirected. Judicial review will not have to be exercised as often once citizens share common assumptions about political justice.

The validity of this thesis is corroborated in the work of some scholars who understand themselves to be working in the spirit of Rawls. Take for instance Ronald

Den Otter's *Judicial Review in an Age of Moral Pluralism*, which begins with the notion that "a Rawlsian ideal of public reason has important implications for fundamental debates in legal theory."[52] Den Otter wants to know how judicial review can be justified in a country committed to democratic self-government, which he says entails freedom and equality for all its members.[53] He explains that in adjudicating particular cases, judges must look beyond the text of the Constitution for normative guidance.[54] He does not fear that judges will misuse their authority and legislate, but rather is afraid "they may be sincerely relying on the wrong kinds of reasons when they decide constitutionals cases."[55] Den Otter is less concerned with the outcome of cases than with the reasoning to reach particular decisions. "A legitimate decision," he explains, "is one that crosses the threshold of public justification, and the best decision is the one that is most publicly justified, that is, the one based on the strongest public reasons."[56] This requires a society (and he unmistakably has America in mind) to justify its most important laws in terms that respect the freedom and equality of all.

Den Otter's emphasis on reasons rather than outcomes has important implications for judges. He explains that "judges may legitimately invalidate laws that have clearly

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[52] Ronald C. Den Otter, *Judicial Review in an Age of Moral Pluralism* (New York: Cambridge University Press, 2009), 7 n24, quoting Lawrence B. Solum, "Public Legal Reason," *Virginia Law Review* 92 (2006), 1474.

[53] A difference between Rawls and Den Otter is that Rawls speaks of citizens whereas Den Otter speaks of members so as to include resident non-citizens. In generally, I think Den Otter is going much further than Rawls in his advocacy of judicial supremacy. That said, he provides telling evidence of how one could read Rawls in order to encourage a more robust judicial system bent on bringing about a philosophically pleasing constitutional democracy.

[54] Ibid., 3. He cites Laurence H. Tribe's *The Invisible Constitution* (New York: Oxford, 2008) for support in his claim that judges must look outside the law when adjudicating.

[55] *Judicial Review in an Age of Moral Pluralism*, 5.

[56] Ibid., 6.

failed to meet the standard of public justification."[57] Thus an otherwise constitutional law may be overturned because it is not properly justified using public reason. But this also entails the Court appropriately using public reason in its opinions, which is Den Otter's main concern, for it is in this way that the Court instructs legislatures and members of society. And while he is mostly concerned that laws are appropriately justified in terms of freedom and equality, he adds that "in the spirit of John Rawls, I contend that judges must not allow voters and legislators to appeal to the "truth" of their conceptions of the good life or their visions of a good society when they enact laws that undermine freedom and equality."[58] Under this view, the Court would have ample authority to probe legislative intent, and even voter intent. The truth is out-of-bounds and the Court is the goalkeeper that keeps it on the margins. For Den Otter this means that some current laws, such as those restricting abortion or denying homosexuals the right to marry, are automatically illegitimate.[59] While giving the Court such authority may be questionable in a democracy, Den Otter assures us that "judicial supremacy turns out to be the lesser of two evils: it is a safer bet in an imperfect world where the vast majority of citizens are either incapable of making informed, reflective decisions on basic questions of public morality or unwilling to make the effort to do so."[60] So much for Den Otter's faith in democracy.

I do not want to go so far as to suggest that Rawls would approve of Den Otter's work, which unapologetically pushes for judicial supremacy, but there is no question that

[57] Ibid., 6.

[58] Ibid., 8.

[59] Ibid 7, 245-261.

[60] Ibid., 19; see also 311-316.

the latter is working in the spirit of the former. Den Otter lacks the genuine appreciation Rawls has for the rule-of-law, and the long time period that would be required to actually bring about the constitutional democracy that approaches a realistic utopia. What is more, Den Otter fails to see the role institutions play in providing an education for citizens; he instead sees the Court actively policing the motive of legislatures and even voters!

Perhaps a better example of one working under the influence of Rawls while dealing with questions of the Courts role in America is Samuel Freeman.[61] A student and close friend of Rawls, Freeman, much like Den Otter, wants to justify the use of judicial review in a democratic polity like America. He recognizes that there have been other defenses of judicial review, such as the traditional defense dating back to Hamilton, but these Freeman says are not sufficiently concerned with democratic legitimacy. Freeman goes on to explain that the lack of a democratic defense has affected the historical practice of adjudication, thus showing his sensitivity to the effect ideas have on institutions and our daily lives. He furthermore recognizes that how judicial review is defended will largely be based upon a definition of democracy. Some will emphasize a Lockean version of democracy while others are more satisfied with a Rousseau's account. Freeman thus seeks a defense that accommodates both. For him, equal individual liberty and the equal opportunity to participate politically each need to be protected.[62]

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[61] My focus here will be limited to Freeman's essay, "Constitutional Democracy and the Legitimacy of Judicial Review," *Law and Philosophy*, Vol. 9, No. 4 (1990-1991), 327-270.

[62] Ibid., 331-335.

In search of this defense, Freeman "assume[s] the framework specified by Rawls."[63] He goes on to speculate what a defense of judicial review might look like in the hypothetical constitutional convention in which parties would participate after having agreed upon principles in the original position. He imagines them agreeing it desirable to put a constraint on legislative change by taking certain rights off the legislative agenda with a Bill of Rights, thus making "judicial review is a kind of rational and shared precommitment among free and equal sovereign citizens at the level of constitutional choice."[64] This makes the Court the "conservator of the constitution," a function consistent with Rawls's thought.[65] But he also says that the decision to rely upon judicial review is a strategic one, and is most likely to be appropriate in cases where "legislative procedures are incapable of correcting themselves."[66] Until such a time comes, judicial review is consistent with democracy because it "can work to establish a public reading of the constitution and its moral foundations, and examine the laws in light of these principles."[67] In other words it can be the exemplar of public reason until what it models is sufficiently a part of the background culture.

Freeman's argument thus sees judicial review as a good tool for securing stability, but even more so a useful tool for educating the public to a proper sense of justice. He makes clear that he is not necessarily referring to the text of the Constitution, for he

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[63] Ibid., 343. Importantly, Rawls is acknowledged at the outset of the article for his comments on an earlier draft. While one cannot conclude that Rawls approves of everything Freeman says, it is at least clear Freeman is consciously trying to be consistent with his teacher and spoke to him about his ideas.

[64] Ibid., 353.

[65] Ibid., 359.

[66] Ibid., 361.

[67] Ibid., 365.

understands *our* constitution to be much broader.[68] The Court, as the exemplar of public reason, gives vitality to the principles that should bind us as a people. Once these concepts are made plain and citizens are properly formed by them through the institutions under which they live, the use of judicial review may no longer be necessary. Like Rawls, Freeman allows judicial review now, so that constitutional democracy can be established later.

To conclude, my argument in this chapter is that Rawls sees that the Court's use of judicial review is meant to be defensive, but that it has the potential to be transformative. He therefore hopes it can initially play more of a transformative role until an overlapping consensus can be established on the basis of liberal principles mutually acceptable to all reasonable people. Of course, the two additional tasks Rawls assigns to the Court in *Political Liberalism* will not simply disappear once the overlapping consensus is established. The Court will continue to be the exemplar of public reason and will continue to give it vitality in the public square. But at that point the task will be one of maintenance rather than transformation, and will be more consistent with the Court's then-primary role of defending the higher law. But at this point the instances of the Court's use of judicial review to strike down laws or other actions will be much less common. In a world where all acknowledge a common liberal conception of justice, violations of liberty, equality, and basic fairness will be in large part avoided. What may remain is reconciling tensions within these principles, or at least balancing them.

[68] Ibid., 370.

What Rawls is asking of the Court, then, is to intervene in the system now, shaping it toward a realistically utopian future, and then gradually backing off as that future is realized. It is to play an active role initially, and an increasingly defensive role as time goes on. Its unique institutional authority provides it with the opportunity to implement a different understanding of a constitution's legitimacy. Not subject to the pressures commonly associated with elected officials, judges can concern themselves more with principles of justice, and in using public reason they can both shape other institutions and act as instructor for citizens more broadly. But this means it is overlooking the democratic process, and tweaking its outcomes as needed in order to foster a future that might welcome *justice as fairness* or some closely related variant. In other words, he is asking the Court to confront democratic procedures now, and then defend them later.

It is worth highlighting that though Rawls sees the potential role the Court can play as a transformative institution, maintaining the posture of a defensive institution requires that the justices on the Court ought not to think of themselves as trailblazers to a realistic utopia. The best case scenario, it would seem, is for the justices to utilize the Court's transformative role unconsciously, thinking all the while that they are merely defending a higher law that all reasonable people would affirm, and making it viable through their use of public reason. There is no task for the Court that mirrors the fourth task of political philosophy, though the three previous tasks are consistent with the work of the Court as described by Rawls. The realistic utopia is provided for the Court, and they simply do the work of helping it come into being. Rather than thinking about the specifics of the future, their focus is on the present. And their primary work, in

defending an overlapping consensus, whether it exists or is coming-to-be, is to adjudicate cases in light of the principles making up that consensus. The tasks Rawls assigns to the Court are fulfilled in the justices' interpretations of the Constitution.

CHAPTER SIX

Public Reason and the Constitution: Interpretation as Aspiration

Among constitutionalism's attractions is the opportunity to know what can be expected of governmental authority and its limits. This is all the more true where a written constitution is in place. The great paradox, however, is that a written text requires interpretation, particularly where it is abstract, ambiguous, or even archaic, leading to a sense of uncertainty precisely where it is least expected. "We are under a Constitution," Charles Evans Hughes once said, "but the Constitution is what the judges say it is."[1] Nonetheless, there is a text there; and interpretations can stretch only so far before they must be called something else, like invention or lawgiving. This stability in expectations is an advantage, a chief virtue, of rule-of-law constitutionalism. Insofar as changes occur, they should, generally speaking, be undertaken with the aim of preserving those qualities inherent to constitutionalism.

In examining the implementing Rawlsian thought via the Court, attention must be paid to the implications on constitutional government. As we have seen, John Rawls's desire to help establish what he calls a constitutional democracy in America led him to see a role for the Supreme Court in defending principles of justice not yet commonly accepted by the people at large, and, in so doing, educating citizens through the use of public reason on how those principles can be the basis of a stable polity. By exercising

[1] Charles Evans Hughes, *Addresses* (New York: G. P. Putnam and Sons, 1908), 139. Quoted in Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (New York: Oxford University Press, 2007).

judicial review now, Rawls hopes that a more vibrant democratic community can be brought about in the future, though he admits this is to be a long-term project.

What I hope to accomplish here is a more detailed explanation of how the Court is to fulfill this role. By calling on the Court to be the exemplar of public reason, Rawls encourages it to interpret the Constitution according to principles that are at present merely aspirational. Rawls hopes they will one day be the basis for our way of life; for the mean time, however, they can be the basis for the Court's jurisprudence. As I hope to show here, the success of the Rawlsian project, now being undertaken by his students such as James Flemming, hinges on the way the Constitution is interpreted.[2]

To be fair, Rawls is mindful of the fact that in America we have a written Constitution, the text of which cannot simply be ignored. He does take serious the rule of law as a standard for governing, and he understands that in America this requires a privileged place for a framing document. In bringing about a just regime (in the Rawlsian sense) built upon the current Constitution, the text of that document must be read in such a way that the principles of justice agreed to in the hypothetical original position are looked to as a guide for interpretation. In other words, the Constitution must be read in light of public reason. Rawls's most sustained discussion on constitutional interpretation comes in a response he offers to H. L. A. Hart regarding the specification of constitutionally-protected individual liberties.[3] Hart thought the parties to Rawls's original position lacked reasons for wanting the type of liberty Rawls was offering them. Built into the experiment, it seemed, was an understanding of natural liberty that is

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[2] Fleming's debt to Rawls is evident in the title of his book, *Securing Constitutional Democracy: The Case of Autonomy* (Chicago: The University of Chicago Press, 2006).

[3] John Rawls, "The Basic Liberties and Their Priority," *Political Liberalism* (New York: Columbia University Press, 1993).

unexplained in *A Theory of Justice*. Furthermore, Hart thought the two principles of justice did not provide grounds for understanding the relationship between individual rights. Rawls responds to both critiques, both of which have implications for constitutional interpretation.

The importance of this topic cannot be understated; if Rawls's theory is to have any influence on American life, it is in the way the Court interprets the Constitution. Therefore, in this chapter I will take a close look at Rawls's two responses to Hart in order to gain a better understanding of how Rawls would have the Court interpret the Constitution. Ultimately public reason is to be a light and guide for getting it right. This becomes increasingly clear when one turns to students of Rawls, such as Fleming. I will also argue that Rawls offers public reason as more than just a means of interpreting a text—it is a way of approaching political problems in general. Yet there are real problems with interpreting the Constitution in accord with principles that lie outside the text, whether they are Rawlsian principles or otherwise. It can potentially undermine the benefits of constitutional government. I will therefore conclude this chapter with an alternative approach—one that I will argue in later chapters is generally embraced by Justice Anthony Kennedy—to dealing with questions of change within a regime with a written Constitution.

Rawls's First Response to Hart: Revisiting the Original Position

If judicial review provides an opportunity for unelected officials to interpret the text of the Constitution and if the ambiguities of the words making up the document allow for substantial debate over the meaning of the Constitution, and furthermore if that debate is healthy insofar as it promotes the continuity of the regime, then a method that

shifts the object of interpretation away from the text to some other basis is of greater threat to the continuity of a regime than one that simply expounds upon the text. Rawls recommends exactly this type of methods to the Court, one that would take its bearings not from the language making up the document called the Constitution, but from the principles that he assures us legitimize the text from a philosophic perspective. A text-based method of interpretation begins from the premise that the Constitution has been consented to through ratification and its continual operation since 1789. Rawls's method, however, understands legitimacy to be related to getting things right according to abstract principles of justice. Thus an examination of the reasoning behind ratification, legislation, executive action, and adjudication is highly relevant for Rawls in determining legitimacy. The Constitution, then, is legitimate not because it was ratified and Americans have at least tacitly consented to it ever since, but because it can be properly interpreted in accord with public reason. An interpretation, no matter how literally rooted in the text, may be illegitimate if its reasoning falls outside of the standard Rawls sets through the original position, overlapping consensus, and duties of civility and reciprocity that require the use of public reason.

Nowhere is this clearer than in the difference Rawls cites between himself and Bruce Ackerman highlighted in the previous chapter.[4] Recall that Rawls would allow and Ackerman would deny that a formal amendment to the Constitution could be ruled unconstitutional by the Supreme Court. Now, one may be willing to imagine a hypothetical situation in which a supposed amendment was claimed by a group of

[4] See also John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 231 n 12 and 406 n41; and Bruce Ackerman, *We The People: Foundations*, vol. I (Cambridge: Harvard University Press, 1991).

Americans to have been properly ratified, while another group disputed the constitutionality of the process used. Perhaps a handful of states held ratification conventions to combat their state legislatures' decisions in the matter (assuming Congress directed state legislatures to vote on the proposed amendment). Conceivably the Supreme Court could hear an appeal in the case and decide that an amendment—let us say to establish a religion to be consistent with Rawls and Ackerman's example, but it could be for something less imaginary and controversial such as changing the Twentieth Amendment so that the president's term ends at some time other than noon—was not constitutionally legitimate insofar as it failed to follow the procedures given in Article V. This, to be clear, is not what Rawls is saying when he insists the Court could strike down a new amendment that repeals the establishment clause and simultaneously establishes a Church of the United States. He argues that the Court could overturn this hypothetical amendment for being unconstitutional insofar as it runs counter to the principles constituting the overlapping consensus. Such an attempt could not justify itself with reasons that would be recognizably just to non-believers in the Church of the United States.

The Court would, of course, have to explain why such the attempt to establish a church is unconstitutional in America. Following Rawls's example, it could not base that explanation upon the Constitution's language since it is, after all, overturning that language. While it may appeal to the old language, it would still have to provide reasons why that old language is preferable, whereas the new language is unconstitutional. The Court would look to is the principles composing the overlapping consensus. Even if most people agree that the Church of the United States provides the best road to salvation,

imposing this belief upon everyone, even a small minority—even a single person—could not be legitimately justified because public reason excludes arguments that do not accept certain fundamental ideas of society and the person. It would be unreasonable to expect non-believers in the state sponsored religion to support beliefs they do not hold. For political purposes, people are to be understood as reasonably able to adhere to a public conception of justice and rationally able to pursue their own conception of the good. A state religion would violate the public conception of right and compete with the autonomy of a person to discover his or her own truth. It would be unreasonable, and therefore without a public reason to support it. As such, it would also be unconstitutional.

While this example is silly and implausible, it does show us what a Rawlsian Court would actually be doing. But because most cases are less extreme, seeing this is of greater difficulty, and can more closely reflect the Court's traditional role of interpreting the Constitution. Yet for the Court to fulfill its moral mission along with its legal responsibility, it must interpret the Constitution in the right way. He spells out his method of interpretation in a section of *Political Liberalism* in which he responds to H. L. A. Hart's critique of *Theory of Justice*.[5]

Hart was generally friendly to Rawls's proposals in *Theory*, however, he thought Rawls was too libertarian in his description of the first principle of justice agreed to by the parties in the original position. That principle, as initially stated, is as follows: "Each person is to have an equal right to *the most extensive total system* of equal basic liberties

[5] *Political Liberalism*, 289-371. H. L. A. Hart's critique: "Rawls on Liberty and Its Priority," *University of Chicago Law Review* 40(3) (Spring 1973), 551-555; reprinted in *Reading Rawls*, Norman Daniels, ed., (New York: Basic Books, 1975).

compatible with a similar system of liberty for all."[6] The emphasized words were later changed to "*a fully adequate scheme*" in response to Hart's argument that the parties in the original position lacked reasons for preferring liberty over other goods (presumably equality), and furthermore they lacked a criterion for ranking specific liberties at the hypothetical convention as well as the legislative and judicial stages of the thought experiment. According to Hart, the Rawls of *Theory* runs the risk of supporting a notion of natural liberty antecedent to the original position that the parties intuitively seek to protect in their examination of principles—something Rawls, Hart imagines, would want to deny.[7]

In response, Rawls says that the parties in the original position understand the first principle of justice to contain a list of individual liberties spelled out for them. By decree, Rawls says these include "freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law."[8] What is avoided in making this list is any misconception that the parties come to the original position with a common understanding of what abstract human liberty is, or any common belief that it can be known or appreciated through nature.

Before considering the source of these liberties or why the parties should find any value to them, it is worthy pointing out that this particular passage highlights the fact that the parties in original position are not really coming up with principles on their own, but

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[6] *Theory*, 266.

[7] See Hart in *Reading Rawls*, 234-237.

[8] Ibid., 291.

simply choosing principles from a list of possibilities. They are rationally self-interested, but their decision is constrained by the veil of ignorance—they choose the principles that make the most logical sense given what they know they do not know (the social, economic, or religious interests of those they represent). They are like the National Education Minister in *La Vita e Bella* who decides what to order at a restaurant based upon the waiter's descriptions of certain foods, unaware that the waiter is pushing him to order the only prepared entre.[9] Rawls is like the waiter, allowing a menu of options to be presented, yet knowing what will be ordered ahead of time based upon presentation. It is as though he were saying to the parties in the original position, "Would you rather have sumptuously delicious liberalism topped with basic liberties; the greasy, greasy utilitarian principles dipped in self-interested trans-fatty sauce; or the bland perfectionist principles served on cold, stale Greek bread? … The principles of liberalism? A fine choice." In short, the one who sets up the original position can do so with an end in mind, and slowly lead those supposedly deciding to an inevitable conclusion.

Rawls claims not to be concocting the list of liberties *ex nihilo*, but rather, like the waiter in *La Vita e Bella*, to simply be working with that which happens to be available. The list of liberties is one, he says, that could be arrived at by surveying the constitutions of democratic states and considering which liberties among a list are essential for "the adequate development and full exercise of the two powers of moral personality over a complete life."[10] One difficulty with this is that nowhere does Rawls actually perform the exercise of surveying the world's democratic constitutions to compile a list of potential

[9] *La Vita e Bella*, directed by Roberto Benigni, 1997. Released in the United States in 1998 as *Life is Beautiful* by Miramax Films.

[10] *Political Liberalism*, 293.

basic liberties. Unlike the waiter, it is unclear that he *knows* what dishes to suggest to his customer, but rather sniffs the air and takes a guess at what is in the kitchen. He wants to sell something to the parties in the original position without getting too specific as to what it is. Specificity will come in the later stages of the thought experiment—the constitutional convention, the legislative stage, and finally the judicial stage.

So what is Rawls up to? How can he be a waiter trying to sell something that is already prepared without saying anything specific? The reason why some list of basic liberties has to be included within the first principle of justice is that the idea of human liberty is to be disassociated entirely from nature; it is instead to be seen for political purposes as emanating from the list of principles agreed upon by the parties to the original position. In other words, the conception of liberty that is to be authoritative in the political sphere is that which would be chosen by "unreal, purposeless, lifeless ciphers" who know nothing about themselves and therefore nothing about what it means to be human or enjoy liberty.[11] In order to avoid a public disagreement over the nature of liberty's origin, we are asked by Rawls to accept a notion that would be chosen by the most slavish race of beings ever imagined, not even free to think for themselves but to carry on under the weight of an imposed veil of ignorance—they are no more free than the imaginary prisoners of the cave as described by Socrates in *The Republic*, fully confident that mere shadows are reality.[12]

But of course the parties to the original position are not really choosing anything. They have no more choice in what makes it on the menu presented to them than the

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[11] David Lewis Schaefer, *Justice or Tyranny?: A critique of John Rawls's "Theory of Justice"* (Port Washington, NY: Kennikat Press, 1979), 36.

[12] Plato's *Republic*, Book VII.

restaurant patron in *La Vita e Bella*. Indeed, they have no more choice in what is presented to them than those slaves in the cave have say in which shadows appear upon their wall. What is important in Rawls's list of basic liberties is not that they have some historical precedence in the world's democratic constitutions, but that they are consistent with the political conception of the person that Rawls favors. The terms used to describe human liberty must contribute to the development of particular virtues or, as Rawls prefers to say, the two powers of moral personality that society is meant to cultivate in citizens. The powers are a capacity to *reasonably* act from a public conception of justice (i.e. the overlapping consensus) and the capacity to form, revise, and *rationally* pursue one's own conception of the good.[13] The basic liberties that have been inserted into the first principle of justice, then, are based upon a conception of personhood that is not arrived at by the parties in the original position, but one that they will find compelling because of the veil of ignorance.

Yet it is a vision of personhood that is wrapped together with an ideal for citizenship, and the liberties that make the cut are those that contribute to this coupling of personhood and citizenship. A person is understood to be someone whose public actions can spring from a shared conception of political liberalism while their private conceptions of the good are completely their own. Yet if they are to act from a public conception of justice in the way Rawls hopes—out of sincere regard for the overlapping consensus and not in response to a *modus vivendi*—then one's private beliefs have to be integrated with the public conception of justice. As such, it is difficult to imagine that a good citizen of a Rawlsian regime can have a personal conception of the good compatible with a notion of

[13] *Political Liberalism*, 19.

liberty other than that said to be integral to the first principle of justice. Natural liberty has vanished in the process of choosing principles of justice. Even insofar as liberty is allowed to the person in the cultivation of the second moral power, the pursuit of one's own conception of the good, is constrained by the public conception of justice and, furthermore, justified in light of a political—rather than natural or pre-political—conception of humanity. In other words, liberty is not the natural condition of mankind, but the result of beneficent constitutional designer, or better yet, beneficent original-position designer.

It is further important to note that the list of basic liberties shown to the parties in the original position is not to be any more specific than needed to gain their approval. It is intentionally abstract and, what is more, relatively short. "It is wise," Rawls tells us:

> to limit the basic liberties to those that are truly essential in the expectation that the liberties which are not basic are satisfactorily allowed for … The reason for this limit on the list of basic liberties is the special status of these liberties. Whenever we enlarge the list of basic liberties we risk weakening the protection of the most essential ones and recreating within the scheme of liberties the indeterminate and unguided balancing problems we had hoped to avoid by suitably circumscribed notion of priority.[14]

Rawls's reason for limiting the list of liberties is reminiscent of the debates over ratification in the late 1780s as to whether a Bill of Rights ought to be attached to the Constitution. In Federalist 84, Hamilton argues that listing liberties will unintentionally give the implication that the government has powers not specifically listed.[15] The Constitution itself is a Bill of Rights, Hamilton argued, and there is no need to list

[14] Ibid., 296.

[15] *The Federalist Papers*, 480-481.

specific rights protected.[16] One wonders, on this view, if Rawls runs some risk in limiting what he calls *liberty as such* by specifying a basic list in the most abstract portion of his theory. "There is," he assures us, "a general presumption against imposing legal and other restrictions on conduct without sufficient reason. But this presumption creates no special priority for any particular liberty."[17] While this sounds somewhat Hamiltonian, the two have different ends when speaking about constitutional design. Hamilton is more concerned with human liberty's protection from undue government interference. Rawls, however, is concerned with protecting certain liberties that serve the purpose of promoting individuals' two moral powers.

Thus in this first response to Hart we see the ambitiousness of Rawlsian constitutional democracy. His goal, as he says, is to "see whether we can resolve the impasse in our recent political history; namely, that there is not agreement on the way basic social institutions should be arranged if they are to conform to the freedom and equality of citizens as person."[18] Is such agreement possible? Finding it is what Rawls hopes to do. And in so doing, he sees himself building upon the idea of toleration that came out of the religious conflicts of the sixteenth and seventeenth centuries.[19] Modern democratic societies could aspire to be likened to an orchestra where differences come together to produce a harmony that is impossible without diversity.[20] And we are

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[16] Ibid., 483.

[17] *Political Liberalism*, 292. We later learn that these other liberties are articulated in the legislative stage. See 338.

[18] Ibid., 302.

[19] Ibid., 303.

[20] Ibid., 321-322.

fortunate, he tells us, that we live at such a time when a move toward harmony is possible. Social conditions exist that are "reasonably favorable" for the basic liberties to be accepted at least in the abstract. What is needed, however, is the will to realize them in practice. "While this will exists by definition in a well-ordered society," Rawls tells us, "in our society part of the political task is to help fashion it."[21] This, I say, is precisely what Rawls intends for the Court to do, that is, so long as it follows the lead of Rawlsian constitutional theory.

The Second Response to Hart: Public Reason and Getting the Constitution Right

Rawls's second response to Hart moves in the direction of fashioning the political will to bring about a well-ordered society ready to embrace *justice as fairness*. He shifts his attention from the original position to the latter stages of the four-step process of the thought experiment, particularly that of the constitutional convention, in order to show Hart and us how basic liberties will be specified after the adoption of principles in the original position. In doing so, he is not so much giving advice to would-be delegates at an actual constitutional convention, but is rather quite plainly laying out a method for judges to use in interpreting the present U.S. Constitution. As he says, he does not want to state how specific cases should be decided but rather provide jurists with a "guiding framework, which … may orient their reflections, complement their knowledge, and assist their judgment."[22] It is here that he is most forthright in showing how the public reason springing from a hypothetical original position is to guide actual adjudication.

[21] Ibid., 297.

[22] Ibid., 368.

Here we have occasion to consider the purpose of Rawls's four-step thought experiment. Most evidently, the purpose is to move from abstract principles to their manifestation in particular cases. At each stage, we are to imagine the veil of ignorance being gradually lifted. Thus the parties in the original position know nothing particular about themselves or the people they represent, including their history and culture. These latter facts become relevant as the process moves into the constitutional convention. It is here, for example, that specific decisions must be made—such as whether the constitution should be for a people accustomed to a capitalistic or socialist state—and thus more specific information is required. Additional facts are necessary for legislation, and finally the full removal of the veil of ignorance is possible in adjudication.

As the veil is gradually lifted, however, the capacity to act reasonably from a shared public conception of justice becomes more manifest. No such constraints are present in the original position, and are at their thickest in the Courtroom. Whereas the parties in the original position are expected to act from the standpoint of rational self-interest, ideally judges do not adjudicate based upon self-interest or their own conception of the good, but rather on the basis of a shared conception of justice. Only rationality exists in the original position; only reasonableness exists in the Court. This reinforces Rawls's statement that the Court is the exemplar of public reason—its decisions are to be based on reasons rooted in a shared understanding of public justice, which is the overlapping consensus—not a written constitution.

What Rawls hopes to demonstrate in his second response to Hart is the way the basic liberties within the first principle—assuming the parties have indeed made the rational decision and selected *justice as fairness* from their menu of alternatives—can be

further specified at later stages. More to the point, he wants to show how the abstract list of basic liberties can be made more specific when deciding upon a constitution.[23] These liberties are to limit the powers of the legislature, which in turn empowers the Court to protect individuals. What is unclear is whether those who take part in this second stage of the Rawlsian thought-experiment are to design a constitution themselves or again choose among a list of possible alternatives. At times he indicates that the "[d]elegates to a convention (still regarded as representatives of citizens as free and equal persons but now assigned a different task) are to adopt, from among the just constitutions that are both just and workable the one that seems most likely to lead to just and effective legislation," while at other times he speaks as though the delegates are working out a "just political procedure which incorporates the equal political liberties and seeks to assure their fair value so that the processes of political decision are open to all on a roughly equal basis."[24] What is clear is that only the first principle of justice is to be explicitly incorporated into the Constitution, while the implications of the second principle are to be allowed to the legislature. This is tricky. If the legislature is allowed to realize the implications of the second principle of justice, then surely the adopted constitution is to empower it to do so. What Rawls means when he says only the first principle is incorporated is that a list of liberties is to be included that are to take priority over any laws passed by the legislature. Showing how those liberties can be specified in the constitution is the object of Rawls's second response to Hart.

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[23] As Rawls says, "It is enough that the general form and content of the basic liberties can be outlined and the grounds of their priority understood. The further specification of the liberties is left to the constitutional, legislative, and judicial stages." See *Political Liberalism*, 298.

[24] Ibid., 336-337.

In order to show how liberties are specified in the hypothetical constitutional convention, Rawls reminds his reader that the purpose of the basic liberties agreed upon by the parties in the original position is to allow individuals the opportunity to form and pursue their conception of the good. The basic liberties are thus one of five kinds of primary goods that are to be guaranteed in a just society.[25] Yet to be sure that certain *reasonable comprehensive doctrines* are not inadvertently favored, the list of basic liberties cannot be rooted in even a broadly defined conception of the good. Instead it is to be based upon the political conception of the person as one capable of rationally and reasonably participating in the social life of the polity. Rawls is sure that such a person would be willing to accept a list of basic liberties that provides both stability and the means for pursuing one's own conception of the good.[26] Furthermore this person would recognize that participating in such a society would allow them to better enjoy their good than they would have been able to do otherwise.[27] When everyone actively participates in society, a harmonious social union is established.[28]

In specifying liberties, then, delegates at the imaginary constitutional convention must see to it that fair opportunities are available for all to actively participate in the regime. They must, in other words, be concerned with equality as much as with liberty; in fact, they must bring the two together. Rawls thus has the delegates aim not at

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[25] *Political Liberalism*, 308. The other four kinds of primary goods are freedom of movement and free choice of occupation, powers and prerogatives of offices and positions of responsibility, income and wealth, and the social bases of self respect. Rawls lists basic liberties first among the five kinds of primary goods.

[26] Ibid., 317.

[27] Ibid., 32-321. He illustrates this idea by comparing society to an orchestra in which all the parts come together to form a greater whole. He calls society the social union of social unions.

[28] Ibid., 326.

securing liberty as such, but ensuring what he calls the *worth of liberty*—those liberties are to be protected that contribute to the fair distribution of the primary goods. Thus, liberties are to be specified through articulation of their *fair value*, which is to say that "the worth of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal." He goes on to add that "guaranteeing the fair value of the political liberties is of equal if not greater importance than making sure that the markets are workably competitive."[29] This argument rests on the view that legislation can only be just if all have an equal opportunity to influence it, which, as we know, must be done in terms of public reason. If a group is excluded or not given adequately public reasons for being adversely affected by a law, then the law is unjust. Specifying liberty in this way allows the political process to mirror the restraints present in the original position.[30]

Now in specifying the fair value of the basic liberties, attention must be paid to the relationship between the liberties so that the moral powers of citizens as free and equal persons can be developed. Delegates are thus to pay attention as to whether a liberty is related to the political process (what Rawls calls the first fundamental case) or the individual's pursuit of the good (the second fundamental case).[31] Once this framework is established, a particular liberty can be ranked as "more or less significant depending on whether it is more or less essentially involved in, or is a more or less necessary institutional means to protect, the full and informed and effective exercise of

[29] Ibid., 327.

[30] Ibid., 330.

[31] Ibid., 332.

the moral powers in one (or both) of the two fundamental cases."[32] What this means is that distinctions can be made between the more abstract conceptions of basic liberties. Freedom of speech, for example, is more *significant* when it is associated with the political process or the pursuit of one's conception of the good.

What is essential here is to see that individual liberties are not to be protected without regard to the effect of their protection on the citizenry generally. In order for the two moral powers to be adequately supported, liberties are to encourage the fair opportunity to participate in social and political life. Restrictions on laws are to be made so as to guarantee equal access to a fair scheme of cooperative liberties. All liberty is to be weighed within this scheme of fairness. And it is the constraints placed upon the delegates to the imaginary constitutional convention that assure us that the proper liberties will be protected by the constitution. According to Rawls, protecting the *fair value* of these basic liberties is a duty based upon the definition of persons as free and equal and capable of accepting a public conception of justice and forming a private comprehensive doctrine. For an exercise of government power to be legitimate, at least where constitutional questions are at stake, it must provide reasons consistent with this understanding of personhood. Supplying arguments in terms of public reason fulfills this duty, and legitimizes government action.

Strangely, Rawls offers this description of the hypothetical constitutional convention's specification of liberties as a framework for judges. I say this is strange because Rawls's four-stage thought experiment includes a judicial stage; however, it seems as though the real Supreme Court is to take its bearings not from that fourth stage

[32] Ibid., 335.

of the thought experiment, but rather the second. Once the actual Constitution is made coherent with that which would be chosen in the make-believe constitutional convention with delegates partially covered with a veil of ignorance, then the real Supreme Court can begin to imitate the hypothetical adjudicative stage of Rawls's theory. Until that time comes to pass, the Court is to begin the process of interpreting the real Constitution with subtle reference to the hypothetical constitution by way of public reason. This may require more uses of judicial review initially until a citizenry is formed that can check the legislative branch itself.

Rawls is thus encouraging the Court to strike down laws that fail to properly justify the use of power according to public reason. Unless a law can be said to recognize all citizens as free and equal participants in society, each of whom is willing to accept political liberalism and capable of pursuing a conception of the good compatible with liberal principles of justice, then the law is unconstitutional. It really boils down to a simple formula for the Court: are those who are adversely affected by law *x* being treated as free and equal members of society, and has the law been justified in terms consistent with principles fair to all? Once most laws more-or-less conform to this standard, Rawls would say a constitutional democracy is in place.

James Fleming, a student and admirer of Rawls, helps clarify the Rawlsian interpretation of the Constitution.[33] Fleming encourages the Court to adopt a "Constitution-perfecting theory, one that aspires to interpret the American Constitution so

[33] James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* (Chicago: The University of Chicago Press, 2006); "Constructing the Substantive Constitution," *Texas Law Review*, Vol. 72 (Dec., 1993), 211-304. Rawls approvingly cites Fleming in *Political Liberalism*, 405 n40.

as to make it the best it can be."[34] Ultimately he wants to follow John Hart Ely in reinforcing procedural liberties needed for deliberative democracy while also supporting the substantive liberties related to what he calls deliberative autonomy, which entails above all the right to privacy. The Court is to fulfill this role by interpreting the document not based upon the principles it contains, but those it should aspire to contain. Following his teacher, Fleming wishes to "reconcile equality and liberty by combining the liberties of both traditions [liberalism and republicanism] into a single coherent scheme of equal basic liberties that is grounded on a conception of citizens as free and equal persons."[35] Fleming thus sees himself following Rawls with two themes: a republican theme that secures the preconditions for deliberative democracy, and a liberal theme that secures the preconditions for deliberative autonomy, guaranteeing everyone a status as free and equal citizens in our constitutional democracy. He thus calls upon courts to "exercise stringent review to strike down political decisions that do not respect the two types of basic liberties," which will be recognizable when something other than public reason is used to justify the law, such as self-interest.[36]

Fleming's work is basically an elaboration of Rawls's method of interpretation as hinted at in *Political Liberalism*. So long as our Constitution is imperfect, the Court's use of public reason—and its status as the exemplar of public reason—allow it to apply principles that, for now, are aspirational rather than actual. He wants the Court to interpret the Constitution not as it is, but as he wishes it were. And by condensing the

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[34] *Securing Constitutional Democracy*, ix. This type of language is prevalent throughout the book: "Our Constitution is indeed imperfect in many ways. But we should strive to interpret it so as to mitigate its imperfections and to avoid interpretive tragedies or stupidities" (211).

[35] Ibid., 45-46. See also 67.

[36] Ibid., 71.

aspirational principles to the simple statement that citizens are to be viewed as free and equal, as both Rawls and Fleming do, a formula is handed to the Court to innocuously present America with something new that seems familiar and constitutional. After all, it is not outlandish to suggest that the Bill of Rights protects liberty and the Fourteenth Amendment assures us equal protection. Why should a notion of the persons as free and equal be considered novel?

But as the proceeding remarks hopefully make clear, Rawls and his students like Fleming pack a whole theory of justice into the simple idea that persons are to be regarded as free and equal. It entails the specification of liberties derived from, and not antecedent to, the original position. It furthermore requires elevation of those liberties that contribute to the development of what Rawls calls the two moral powers of the person: their ability to accept his theory of political liberalism and to form a compatible conception of the good. Plus the idea of a constitution is reduced in this framework to the very thing Hamilton feared in Federalist 84, the protection of liberties by way of a list rather than by way of empowering government to perform specific tasks. What is striking about Rawls's list of basic liberties is that its coherence with those liberties actually listed in the Constitution is largely by chance. Yet even where parallels exist, Rawlsian rights are subject to limitation based upon their *fair value*. They can potentially be limited if their benefits are not proportional for all citizens.

Aspirational interpretation, though it claims to respect constitutionalism and the rule of law, cannot be said to regard the text of the Constitution as itself authoritative law. Instead what principles are authoritative and serve as the ideal, the goal. Rawls's support for a constitutional democracy hopes to one day be fully constitutional, but until the

incongruities between the text and the hope are smoothed over, talk of constitutionalism is no more than lip-service. Rawls's attempt to implement a constitutional democracy is neither constitutional nor democratic; it requires a body of judges that look to aspirational principles rather than the text and is willing to disregard the people in the name of substantive principles not yet affirmed by the governed. The words of the Constitution may leave room for Rawls to pursue his preferred policies through ordinary channels in which he could interpret the Constitution they way he thinks best. Instead, he is attempting to dissolve the traditional debate over constitutional interpretation with a single authoritative interpretation through public reason.

How Constitutional Interpretation Can Provide Continuity While Allowing Change

The above discussion is meant to bring to light advantages that would be lost and disadvantages that would be gained with an interpretation of the Constitution based upon public reason. As cautious as Rawls is, there are real dangers with a deliberate attempt to bring about change by way of constitutional interpretation. Yet this does not necessarily mean that the Court must embrace a rigid reading of the text. This chapter will thus end with an alternative to the Rawlsian approach. This is one that I think is characteristic of Anthony Kennedy's jurisprudence, which will be a topic of later chapters.

While there are many proposed methods of reading the document that shapes American government—originalism, textualism, interpretivism, pragmatism, consensualism, etc.—it is in the end the same words that are being interpreted.[37] While certain words or clauses may be understood in different ways over time, those differences

[37] For a recent overview of the methods of constitutional interpretation that are common today, see Barber and Fleming's *Constitutional Interpretation*.

cannot be wider than the text allows. Interpretation requires making an argument, and the stronger argument will generally be the one with deeper roots in the document. Interpretations may change from time-to-time, but they are to take their cues from the Constitution itself.

This becomes recognizable when one turns to the beginning. The founding generation understood that a written constitution of the sort proposed in 1787 was meant to be enduring and foster continuity and stability. Not everyone, however, thought doing so was a good idea, Thomas Jefferson being the paradigmatic example of a democrat uncomfortable with a perpetual frame of government. He was unconvinced a written constitution could provide justice from one generation to the next; instead, he believed choosing for oneself the forms of government was essential to a just political order.[38] Famously, in *Federalist 49* James Madison takes issue with Jefferson's position that each new generation ought to have its own constitutional convention. Rather than institutionalize an expectation for changing political arrangements each generation, Madison argues that Jefferson's plan would deprive the Constitution of the reverence needed to supply stability and therefore greatly reduce the possibility for a lasting happiness. Frequent conventions would likely stir up passions and disturb the public tranquility, potentially dividing the people and undermining the system as a whole.[39]

Of course, Madison and the other Framers were not indifferent to change. They provided a formal mechanism for it in Article V of the Constitution. The idea was

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[38] See Jefferson's September 6, 1789 letter to James Madison in *Jefferson's Writings*, Merrill Peterson, ed. (New York: Library of America, 1984), 963.

[39] James Madison, "Federalist 49," *The Federalist Papers*, Clinton Rossiter, ed. (New York: Signet, 1999), 311. It is worth noting the similarity between Madison's thoughts in Federalist 49 and the idea of path dependency in the American Political Development literature. See for instance Paul Pierson, *Politics in Time* (Princeton: Princeton University Press, 2004).

included in the Virginia Plan proposed at the Constitutional Convention in order to provide, as Elbridge Gerry explained, "stability to the Government."[40] What was needed, the delegates agreed, was a "Constitutional way" of correcting the system as circumstances dictated.[41] Alexander Hamilton reminded the convention how difficult it was to amend the Articles of Confederation, which required the unanimous consent of the states, and urged an easier process for correcting flaws in the general government.[42] Differences remained between the men of Philadelphia as to whether proposed amendments should come from Congress or the states. After deliberating, language was adopted allowing both origins.[43] The importance of Article V is that it provides a formal means of changing the Constitution so that our current frame of government may avoid the fate of the Articles of Confederation. By providing a mechanism that allows defects to be corrected and new conditions to be accounted for, the Constitution provides for its own longevity.

But one could go further by suggesting that the nature of the written document provides a more efficient means of accommodating changes when needed. It is quite plain, for example, that discretion is left to political actors in forming and enforcing laws and policies within the boundaries of the Constitution's language. This discretion allows

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[40] James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: W. W. Norton and Company, 1987), 33, 69.

[41] Ibid., quoting George Mason, 104.

[42] Ibid., 609. This comment from Hamilton is an interesting response to Gerry's concern over Congress's role in the amendment process. It should be noted that neither Gerry nor Mason ended up signing their names to the Constitution, yet they both contributed to Article V. Hamilton and the more national-minded delegates were successful in giving Congress a role in the amendment process, but not without recognizing, perhaps to a greater degree than the state-oriented delegates, that an amendment's legitimacy rests on the consent of the people.

[43] Ibid., 626. See also Richard Beeman, *Plain, Honest Men: The Making of the American Constitution* (New York: Random House, 2009), 338.

flexibility as circumstances require, whether it be through congressional legislation or executive action. These types of changes are—to stick to the language used by Rawls—at the level of ordinary politics as opposed to constitutional politics; they take place under, and are therefore limited by, the Constitution's language. The degree of flexibility allowed in ordinary politics provides an outlet for many if not most agendas of change. If you are upset about, say, cost-of-living adjustments for Social Security, you need not propose a constitutional amendment, which would thereby elevate the debate to a higher level and increase the stakes. Though that option remains open, it is less likely to succeed than simply seeking to influence the legislative or administrative processes. Plus, should future circumstances require additional adjustments, it is much easier to amend a piece of legislation than the Constitution.

If congressional and executive activities are within the purview of ordinary politics—the politics that exist by way of the Constitution's formal procedures—the judiciary's role is more complicated, though highly relevant to the present discussion of Rawlsian constitutionalism. Judicial review requires that the Court more often and more publicly interpret the Constitution in fulfilling its duty. Indeed, interpreting the Constitution is not antecedent to the Court's adjudication, but an integral part of making judgments in particular cases. The line between ordinary and constitutional politics is thus blurred when the Court exercises judicial review, making constitutional interpretation a high-stakes practice that can allow and prevent certain decisions from being made by the other branches at the level of ordinary politics. And whereas the Founders left us with a Constitution, they left us without instructions for interpreting it.

Taking for granted that any interpretation of the Constitution's language has to be based on the meaning of the words used, it must be admitted that language can only be so precise and that disputes over ambiguities are unavoidable. This should not be lamented, for the ambiguities allow for a further degree of inherent flexibility without complete abandonment of the boundaries. Within the limits of this flexibility lies the possibility for less formal changes to take place, for a change in how the Constitution is interpreted is indeed a change to the Constitution itself. But the elasticity is not indefinite; it will only go as far as the words and clauses can be stretched. Through interpretation, marginal changes occur, as it were, in a way that incorporates them into the system as a whole.

Here an example might prove useful. When one turns to Article I, Section 8 of the Constitution, the section that lists those powers granted to Congress, it is apparent that the content of the legislation is based on a need to form or reform policies as needed to contend with changing circumstances. Among the most important of these powers is that of regulating interstate commerce. A major defect of the Articles of Confederation was not granting this power to Congress. But the Constitution leaves the question of commerce's definition open, giving Congress the potential to regulate future commercial relationships that may not be foreseeable.

Now consider Congress's commerce power with another from Article I, Section 8—that of promoting the "Progress of Science and useful Arts" by providing for patents and copyrights. Congress is not only given the flexibility to respond to changes, but also the power to encourage certain changes by promoting entrepreneurial efforts. But in so doing, they could be encouraging the invention of things that will then call for

commercial regulations. The internet comes to mind. If *commerce* is saddled with too stringent a definition within the Constitution, Congress may not be able to respond to unforeseeable areas of human interaction that could plausibly be considered interstate commerce.

At the same time, *commerce* is a word that cannot simply mean anything Congress wishes it to mean. If it was an open-ended vase to be filled with any convenient definition, the whole purpose of a written constitution would fall apart. As is plain, Congress cannot be left with the ability to define for itself the meaning of the words making up Article I, Section 8. Some other authority is needed as a check. The president could do so with his veto power, but this would require muddying an elected official in the business of constitutional interpretation. While the Constitution allows and even requires that the president to interpret the Constitution, there are institutional advantages to leaving the brunt of the work to unelected officials with life-tenure. The chances of unbiased interpretations, while never certain, are at least better from those whose jobs are not on the line.

Interstate commerce is but one example of a clause in the Constitution with an ambiguous meaning that requires interpretation and others readily could be examined such as due process, equal protection, full faith and credit, the relationship between the two religion clauses, the right to bear arms, unreasonable search and seizure, and many others. Heated debates over the interpretation of these words have been a part of American politics since their ratification. Various methods have been proposed and the results are quite diverse. Some point to a single principle that they claim underlies the Constitution and should inform judicial decisions. For example, John Hart Ely looks to a

procedural democratic principle; Stephen Breyer points to a civic responsibility to actively participate in the regime; Randy Barnett believes the underlying themes are liberty and limited government; while Sotirios Barber advocates general welfare as being the primary principle at stake.[44] Others look to more general frames of reference in their interpretations, like intention of the Framers or modern philosophy.[45] Additionally, some are skeptical that a coherent constitutional interpretation is at all possible, preferring instead a pragmatic approach that avoids any "foundational" basis.[46] The list could go on.

So as not to be misunderstood, I do not mean to imply that all interpretations are of equal merit. There are better and worse interpretations of the Constitution, and indeed I believe there is an interpretation that is better than all others. Whatever that best interpretation is requires persuasive arguments, ones I am not prepared to deliver at the present. For now I mean only to suggest that the debates of interpretation should not be artificially silenced or stifled. Debating the Constitution's interpretation is a political activity and has been practiced in America since the debate over its ratification in the late 1870's. It is a venerable tradition. Implicit in the debate is an understanding that we agree and generally support what the Constitution says, but we disagree on what it means. This is one of the important ways continuity is brought together with change in America. For it is in this debate that we find both a commitment to our constitutional regime and a

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[44] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980); Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Vintage Books, 2005); Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: Princeton University Press, 2004); Sotirios A. Barber, *Welfare and the Constitution* (Princeton: Princeton University Press, 2003).

[45] Robert Bork, *The Tempting of America* (New York: The Free Press, 1990); Ronald Dworkin, *Freedom's Law: The Moral Reading of the America Constitution* (Cambridge: Harvard University Press, 1996).

[46] Daniel A. Farber and Suzanna Sherry, De*sperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (Chicago: University of Chicago Press: 2002).

passionate pursuit for getting things right, even where we disagree on what is right. By engaging in these debates over constitutional interpretation, a passion for change reinforces the continuity of constitutional government in America.

CHAPTER SEVEN

Rawls on Freedom of Speech and the Court: A Tale of Happy Endings and Dismay

To illustrate how the delegates would specify the basic liberties for the purpose of constitutional design, Rawls turns to the issue of freedom of speech, which is a manifestation of the liberty of conscience agreed upon in the original position. He begins by pointing out "what the history of constitutional doctrine shows to be some of the fixed points within the central range of the freedom of political speech."[1] These fixed points include the lawfulness of seditious libel, the invalidity of prior restraints on the freedom of the press ("except for special cases"),[2] and the practice of protecting revolutionary and subversive doctrines. These fixed points are the result of judicial interpretation of the Constitution over the course of American history. The fixed points are not themselves in the Constitution, but have been given constitutional authority as the result of the deliberative jurisprudence over time. Yet, as we will see, not all judicial trends are of equal value, even in the area of free speech.

The fixed points Rawls is willing to accept are represented by *New York Times v. Sullivan*, *New York Times v. United States*, and *Brandenburg v. Ohio*.[3] These are cases that Rawls believes specify the Constitution's protection of the speech and press in accord with principles consistent with an overlapping consensus. As such, they—

[1] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 342.

[2] One wonders what Rawls has in mind here, he does not explain. Ibid., 342.

[3] *New York Times v. Sullivan*, 376 U.S. 254 (1964); *New York Times v. United States*, 403 U.S. 713 (1971); and *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

especially *Brandenburg*—have a happy ending to long interpretive saga of constitutional meaning. Political speech is finally given adequate protection. But the Court goes too far in protecting political speech in *Buckley v. Valeo* when it overturns legislation that places limits on the amount of money that can be spent in support of a candidate for office.[4] This, Rawls says, is dismaying and requires a change in the Court's reading of the First Amendment. In all, Rawls's reading of these cases is a rare dabbling for him in constitutional law, and is worth reflection.

Recall from the last chapter that Rawls suggests a method of constitutional interpretation to the Court that would allow it to foster changes toward the realistic utopia of constitutional democracy without simply declaring the Constitution itself void. That method begins by viewing the document as one primarily devoted to the protection of individual rights rather than a charter empowering institutions to perform certain tasks. Due to this Bill-of-Rights emphasis, individual rights have to be rooted in something, but the whole cast of political liberalism denies the possibility that rights can be based upon a specific, or even general, comprehensive doctrine. As such, the notion of liberty is to be derived from the principles that compose the overlapping consensus, and furthermore requires an understanding of the person in terms consistent with that consensus. Rawls tells us that this political conception sees all citizens as free and equal. This sounds benign enough, but built into these few words—free and equal—are a theoretical account of justice that potentially requires and prevents the government from doing certain things that are not necessarily in the Constitution *per se*. What is equal in each person, for instance, is that they can all develop the two moral powers, those of affirming a public conception of justice and forming a compatible yet private conception of the good. Basic

[4] *Buckley v. Valeo*, 242 U.S. 1 (1976).

liberties are those that contribute to the development of the two moral powers, and are to be given full constitutional protection even if they are not spelled out in the Constitution itself. In turn, those rights that are seemingly protected by the text can be curtailed if they interfere too severely with the basic liberties or are not easily justified by public reason.

In this chapter I will examine Rawls's treatment of the cases he points to in *Political Liberalism*, all of which deal with the First Amendment's protection of speech and the press. I will deal with each case in separate sections beginning each with a description of the case's facts and the precise legal question facing the Court. Rawls, to his credit, is concerned with the arguments made by justices in their written opinions. I will thus look at Rawls's analysis of the opinions in each of the four cases and compare this to what the Court in fact says. When one compares Rawls's analysis with the actual written opinions, even in those cases where Rawls is happy with the outcome it is not clearly evident that the Court is actually using Rawlsian public reason. Instead it appears that the Constitution, rather than abstract moral principles, guide judicial opinions. I also argue that Rawls's references to fixed-points obscures more than helps clarify how the Constitution should be interpreted.

The Judiciary's Role Stemming from the Thought Experiment

It should be remembered that Rawls deals with these cases in a very complex and confusing way. He is quite clearly trying to address members of the judiciary, and is offering them a suggested way of interpreting the Constitution.[5] He wants to illuminate

[5] See ibid., 368 where he says he is offer a "guiding framework, which if jurists find it convincing, may orient their reflections, complement their knowledge, and assist their judgment."

their path for the future establishment of legitimate constitutional democracy. He makes this suggestion, however, by turning his audience's attention to the four-stage thought experiment beginning with the original position and ending with adjudication.

One would think that the advice for the judiciary would come in the fourth part of the thought experiment, in which a hypothetical court proceeds with full knowledge of particulars in order to make a fair and just decision in a specific case. The institutional structure in which judges operate and the fact that they have nothing personally at stake in the case allows them to judge without the veil of ignorance obscuring their vision. They are the most human participants in the thought experiment, but their decisions are relatively unimportant. It is hard to compete with those more inhuman members of the original position that get to decide which principles will govern political affairs, or with those taking part in a constitutional convention deciding how the principles are to be manifested in institutional forms and protected by a Bill of Rights. The hypothetical judges are even less glorious than the hypothetical legislatures charged with further specifying the principles and protecting rights in the form of legislation. The Court of the thought experiment seems to only be administering the law at the individual level, although having the potentiality to exercise judicial review as a check on the legislature. But if all has gone right, such instances will be rare. Does Rawls see the actual flesh and blood Court performing the same function, merely administering?

As we have seen in previous chapters, particularly the last, Rawls recognizes that the Court has to interpret the Constitution in fulfilling its responsibilities. And interpreting the Constitution is a more dynamic, more important task than merely administering the law as though it were black and white. Indeed, Rawls sees in this duty

not something to be lamented, but an opportunity to re-imagine the foundational principles of the document that frames American political life.

As such, Rawls does not address the Court with a suggestion of interpretation by pointing to the fourth stage of the thought experiment; instead, he relates what the Court does now to the second stage, to the constitutional convention. It is here after all that the process of bringing together principles and constitutional decisions takes place, which as we have seen is a task Rawls gives to the judiciary. Not only is it to administer the law in specific cases, it is to help shape the path of the law and fashion the future.

This is not to say that the fourth stage of the thought experiment is not to be of some relevance to the Court. If all goes as Rawls hopes, the Court can one day function as more of an administrator of law, trusting to legislatures and the people generally to act upon principles of an overlapping consensus, justifying themselves in terms of public reason. Once this happens the actual Court can play the more humble role of the theoretical Court in its daily proceedings. Insofar as this is a portion of the real Court's role today, it appears in Rawls's work to be secondary to the more educative function of checking legislation in terms of public reason. The democratic ethos that is to be permeated in the background culture and society receives its initial impetus from the anti-majoritarian use of judicial review.

But of course this only will work if the judiciary is taught how to appropriately interpret the Constitution in accord with the principles of the hoped-for realistic utopia. Judges must be taught to deal in subtleties. Never may they stray too far from the text, but it must always be read through a certain lens (political liberalism) in a particular light (public reason). It is a constitution that is being expounded, but exposition takes place

through guiding principles exterior to the text, completely foreign to its design. Judges must learn to play the role of both administrators of justice as well as constitutional framers. Absent an actual constitutional convention in which a new document is drafted, the process of thinking about how the current document can be read in the right way has to serve as the best alternative, and it is the Court who is called upon to do the thinking.

New York Times v. Sullivan

Decided in 1964, *New York Times v. Sullivan* involved Alabama Commissioner of Public Affairs in Montgomery L. B. Sullivan, who had oversight of, among other things, the local police and fire departments. On March 29, 1960, the New York Times printed a full-page advertisement paid for by black Alabama Clergymen and Civil Rights leaders seeking support in their fight against racism in the South. The advertisement reported several incidents that had occurred in Montgomery, such as the following:

> In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to reregister, their dining hall was padlocked in an attempt to starve them into submission.[6]

The ad went on to state that Martin Luther King had been the particular target of intimidation: his house had been bombed and he had been arrested seven times on obscure charges, such as speeding and loitering. Nowhere does the add mention Sullivan by name, yet Sullivan claimed the references to the police "armed with shotguns and tear-gas" ringing the campus of Alabama State College and padlocking the cafeteria, in addition to the mentioning of King's multiple arrests, amounted to an unjustified attack upon his work as Commissioner and his personal character. As evidence of libel he

[6] Ibid., 257.

pointed to several minor factual errors printed in the ad: the students were singing the National Anthem, not 'My Country, 'Tis of Thee.' And King had only been arrested four times, not seven. Though no evidence of any direct pecuniary damages existed, Sullivan claimed his good name had been tarnished and was awarded $500,000 in damages by an Alabama jury pursuant to the state law. Similar liability suits were emerging in state courts, amounting to a threat on the freedom of the press by way of the pocketbook.

The question faced by the Supreme Court in 1964, then, was whether the Alabama law allowing libel suits on the basis of factual errors without evidence of personal harm was a violation of the Constitution's protection of speech and the press. A unanimous Court agreed that the law did violate the Constitution. Brennan's opinion held that the publication of all statements regarding public officials are protected unless the publisher knows them to be false and proceeds with actual malice in utter disregard for the truth. Actual malice has since been the test for libel suits brought but public officials, an extremely difficult bar to cross. The official must have proof of the publisher's intentions and knowledge.

Rawls sees this case as a good example of how liberal principles of justice can lead to a proper interpretation of the Constitution. He tells us that in *Sullivan* "The Supreme Court not only rejected the crime of seditious libel but declared the Sedition Act of 1798 unconstitutional now, whether or not it was unconstitutional at the time it was enacted. It has been tried, so to speak, by the court of history and found wanting."[7] In

[7] *Political Liberalism*, 343. Rawls leans heavily here on Vincent Blasi's essay "The Checking Value in First Amendment Theory," *Weaver Constitutional Law Series*, no. 3 (Chicago: American Bar Foundation, 1977), which argues for the "checking value" of the First Amendment liberties to control the misconduct of government. The importance of protecting seditious libel for Rawls may be compared to his defense of civil disobedience earlier in his career as a way of stabilizing the regime and checking the government. See his *A Theory of Justice* (Cambridge: The Belknap Press, 1971), §59.

this way, apparently, the Court exemplified our public reason today, regardless of what public reason was for Americans nearly two-hundred years ago. Whatever theirs was based upon, it surely was not the overlapping consensus of political liberalism.

But Rawls's description of *Sullivan* is not exactly correct. The Court did not actually strike down the Sedition Act of 1798—it is an Alabama libel statute that is at issue—though Justice William Brennan does make mention of it in his majority opinion:

> Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional … A broad consensus has developed that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.[8]

Brennan's point here is that the Sedition Act *was* unconstitutional at the time of its enactment, and that Congress soon realized this and made reparations to those affected without any prompting from the judiciary. There is absolutely no need for the Court to declare the 1798 Act unconstitutional; aside from not being actual law anymore, everyone generally agrees it violated the First Amendment. Rawls's description of the case is thus somewhat baffling if not outright incorrect.

Rawls strange statement would hardly be worth dwelling upon if it only was mistaken about the Brennan's reference to the Sedition Act, but he indicates that the Court made a categorical statement regarding the constitutional invalidity of *all* seditious libel laws. He tells us it simply cannot be a crime. But again, this is a misleading statement considering the law at issue technically did not make seditious libel a crime for which one could be prosecuted, but rather allowed civil remedies for those harmed by slanderous speech if the words "tend to injure a person … in his reputation" or "bring

[8] *Sullivan*, 276 U.S. 376.

[him] into public contempt."[9] It is true that Brennan says civil remedies cannot be used in name only to do in effect what a criminal statute cannot legally do; nonetheless, he recognizes that the case is about a civil and not a criminal statute. There is an important distinction that Rawls seems to overlook. We are left wondering why.

One reason for the perplexing initial statements made by Rawls regarding this case may have to do with the context in which he makes them. It should be remembered that he offers his reflections on *Sullivan* and other free speech cases in a section of *Political Liberalism* where he is explaining how the abstract liberties of the original position are to be further specified in a constitutional convention, and that he suggests a similar logic should be used by the Supreme Court. He thus begins with the question, "what more particular liberties, or rules of law, are essential to secure the free, full, and informed exercise of this moral power?"[10] The moral power he is referring to is the application of principles to the basic structure of society by free and equal citizens of a democratic regime using their sense of justice, namely, the first moral power. The way to specify a liberty, again, is to think about the arrangement that will, in the end, maximize liberty for all.

In terms of specifying liberties in the case of *Sullivan*, Rawls approvingly quotes Harry Kalven's argument that seditious libel cannot be a crime in regime that wants to protect liberty. The quote is telling of Rawls's own position, and reads:

> The absence of seditious libel as a crime is the true pragmatic test of freedom of speech. This I would argue is what free speech is about. Any society in which seditious libel is a crime is, no matter what its other features, not a free society. A society can, for example, either treat obscenity as a crime or not a crime without

[9] Ibid., 267.

[10] Ibid., 342.

> thereby altering its basic nature as a society. It seems to me it cannot do so with seditious libel. Here the response to this crime defines the society.[11]

The basic idea here, it seems, is that a free society requires a press with the freedom to publish on government activities regardless of the embarrassment it may cause office holders. Without such a guarantee, one cannot boast of living in a free country. For his part, Rawls adds that this is the first fixed point that needs to be "securely won" so that the others may follow: "The history of the use by governments of the crime of seditious libel to suppress criticism and dissent and to maintain their power demonstrates the great significance of this particular liberty to any fully adequate scheme of basic liberties."[12] Here he means something very particular by *significance*. A liberty for Rawls is more or less significant based upon its importance to the "full and informed and effective exercise of the moral powers."[13] As long as seditious libel is a crime, citizens cannot depend upon the press to fully inform them of the government's decisions or actions, much less the character of public officials.

Rawls's praise of the *Sullivan* decisions is thus based upon the Court coming to the recognition that a fully informed electorate is essential to democratic life in a free society. Until such a hurdle can be crossed, the full development of the moral powers is impossible. The first moral power, again, is the ability and willingness to accept a public conception of justice, which can only happen if one is assured that others will do likewise. Judges, then, must look to the political conceptions of the person and society in order to interpret the meaning of the Constitution's protection of free speech; it is meant

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[11] *Political Liberalism*, 342. Quoting Harry Kalven, Jr., *The Negro and the First Amendment* (Chicago: University of Chicago Press, 1966), 16.

[12] Ibid. 343.

[13] Ibid. 335.

to assure citizens that their society is indeed free, and the media is given the institutional security to know it has liberty to fully inform the public regarding public affairs. A fully adequate scheme of basic liberties would therefore necessarily guarantee citizens freedom from the crime of seditious libel.

Being able to criticize the government, one should note, is an important component of a project to remake political life according to a new understanding of constitutional democracy founded on a notion of justice as fairness. This may explain why Rawls says that this fixed point of constitutional law needs to be in place before others can in turn be fixed. And if people can ever take up the responsibility of checking the legislative branch themselves—if they ever are to get to the point where they rather than the Court makes sure laws regarding constitutional essentials and matters of basic justice conform to the limits of public reason—they first have to learn with certainty that the government can indeed be criticized without fear of prosecution, jail, fines, or civil liability. In this light it is not surprising Rawls reads *Sullivan* the way he does.

Yet Rawls's understanding of the case is not fully consistent with Brennan's opinion for the Court. What the Court decides in *Sullivan* is not, as Rawls says, that "there is no such thing as the crime of seditious libel," but that state civil statutes like that of Alabama cannot be used to circumvent the Constitution's protection of the press. This is not to say that all civil laws regarding libel are *ipso fact* unconstitutional, but that public officials have to shoulder the proof that a publisher maliciously intends defamation with reckless abandon. Civil remedies can, after all, impose a far greater threat to the freedom of the press than criminal statutes because of the damages being sought—"one thousand times greater than the maximum fine provided by the Alabama criminal

statute"—and therefore the burden of proving malicious intent must be far higher, particularly for public officials, than assigned by Alabama. Granted, this is an extremely high standard and effectively makes succeeding in a libel suit next to impossible for a public official, but the Court's phrasing is important and different from that of Rawls. The Court does not say that freedom of speech and the press requires that all laws against seditious libel are unconstitutional. The Court is less absolutist here than Rawls claims.

Or at least six members of the Court in 1964 were less absolutist than Rawls. It is true that Justices Black, Goldberg, and Douglas endorsed a more absolutist position in which all civil libel statutes were unconstitutional even when actual malice was evident. They feared that Brennan was leaving too much room for public officials to discourage the press from printing critiques of the government out of fear of lengthy and expensive litigation. Of course this has not been the case. Such litigation would be expensive for public officials as well, and with the burden of proof on their shoulders with a high bar to cross, the motivation for taking action is extremely slim. Brennan's opinion thus has the virtue of adequately protecting freedom of press without leaving public officials completely at the mercy of editors.

What is strange is that Rawls had previously insisted that no individual right could be absolute, but rather had to be balanced against other rights in order to form a fully adequate yet coherent list of basic liberties.[14] Then the very first right he looks at, the freedom of the press, is held to be completely sacrosanct, an unbendable fixed point, the very foundation for other liberties. Perhaps he thinks it highly unlikely that another basic liberty would clash with the freedom of the press, but here Brennan seems to be

[14] *Political Liberalism*, 295.

more imaginative. After all, one would think that even public officials would be deserving of the basic liberties in a Rawlsian constitutional democracy, which would include the protection of self-respect. Suppose a publication maliciously reported untruths about a candidate days before a close election with such reckless abandonment that the person's reputation became irreparable. Or what if the press orchestrated an organized attack upon an office holder to the extent that that person was unable to perform his or her official duties, perhaps out of legitimate fear of encountering a murderous mob of misled citizens agree about things that did not happen. What recourse would such an official have to clear his or her name? Anything said publicly may be ignored or taken out of context by the press. Why should a citizen be barred from a redress of their grievances just because they happen to hold a public office? Who then would run for office? Perhaps these are outlandish examples of things that would never happen. I state them only to show that by Rawls's own logic the right for the press to criticize the government ought to have some constraints where competing rights might be at issue. Why he does not allow for this is puzzling given his earlier statements.

More importantly, however, Rawls's understanding of the Court's reading of the Constitution in *Sullivan* is based more upon his own theoretical method of how the Constitution ought to be interpreted in light of public reason. In reality, however, Brennan's opinion takes its bearings more from the Constitution's language protecting the freedom of the press than Rawls wants to allow. The difference between what Rawls is suggesting and what Brennan actually does may seem small, but they are important. Nowhere does the latter indicate that freedom from seditious libel is an absolute guarantee in the Constitution, nor that such a guarantee is necessary for free society to

flourish. Much less does Brennan say about the need for such a right in order for citizens to develop their moral capacities or to work out a public conception of justice upon which the government may be judged. Instead he takes notice that the First Amendment protects the press's right to publish criticisms of the government and public officials, and that such protection must include security against state civil statutes that award people large sums of money on the faintest of evidence.

New York Times v. United States

After addressing *Sullivan* and the issue of libel, Rawls turns his attention to those other fixed points of law that would be accepted at a hypothetical constitutional convention. He has very little to say, as it turns out, regarding *New York Times v. United States* other than mentioning that prior restraint is always and everywhere wrong. "Within our tradition," he says, "there has been a consensus that the discussion of general political, religious, and philosophical doctrines can never be censored."[15] The reasoning here, we can infer, is very similar to that offered in defense of *Sullivan*, that citizens in a well-ordered constitutional democracy need full access to information and arguments as a prerequisite for fully forming their two moral powers. Without such a freedom, confidence in the regime's justice will be wanting, and a gap between the people and their government will be left with tenuous bridges connecting them.

But Rawls is clearly not as absolutist in this interpretation of freedom of the press as he was in his explanation of seditious libel. He holds out the possibility that there may be "special cases" where prior restraint may be justifiable, but he does not elaborate as to

[15] Ibid. 343.

what this means. Here, then, he comes closer to what the Court actually says in its opinion and what some of the justices say in their concurrences.

The case, to briefly recall the facts, dealt with the government's attempt to prevent the Washington Post and New York Times from publishing the *Pentagon Papers*, which had been leaked from a government employee and detailed events and decisions regarding the Vietnam War. The opinion for the unanimous Court is brief, and merely says that the government bears a heavy burden in proving that the information contained in the leaked papers needs to remain classified. In this case the Court was not satisfied that the Court had in fact met that burden, but nothing in the language of the opinion suggests that the burden is insurmountable. Granted, Black's and Douglass's concurring opinions would go the absolutist route, but others including Brennan and White do not want to foreclose the possibility that there may be legitimate reasons for restraining information from being published. They admit that the burden is indeed heavy, and in most if not nearly all cases prior restraint by the executive branch is unjustifiable, it is not constitutionally impossible.

Though Rawls comes closer here to what is actually said in this case, it is not clear that the Court is in fact providing an example of the sort of reasoning that would characterize the constitutional convention, nor is it exemplifying the sort of public reason Rawls advocates. Nowhere in the opinions is there language to suggest that the restriction on prior restraint is necessary to ensure the adequate development of citizen's civic or personal duties. In fact, the case is more about the limits to executive power than the fulfillment of a democratic polity. What exactly are the constitutional proscriptions on executive power during a time of war? No one disputed that the president's power

was indeed legitimate to take steps necessary for success in Vietnam, but such steps are not unbounded. In most cases they do not supersede the press's constitutional right to report matters of general concern even during a military conflict. This is a relatively easy boundary to discern because it is among the clearest rights listed in the Constitution. The freedom of the press requires a general presumption against prior restraint.

Rawls says nothing about executive power here and very little about the case of the pentagon papers all together, despite it being the manifestation of a fixed point of free speech. As the discussion highlights below, I think his primary interest in the case is its clarification of the doctrine regarding subversive advocacy associated with *Brandenburg*. Regardless of the little he says about it, he comes closer here than anywhere else to correctly interpreting the Court's decision. The bar against prior restraint is left high, but an absolutist position prohibiting all executive action to stop the publication of potentially harmful information is avoided.

Brandenburg v. Ohio

The brief reflections made by Rawls regarding *New York Times v. United States* are supplemented by a lengthier analysis of *Brandenburg v. Ohio*. He turns to the issue of subversive advocacy of imminent lawless action in order to again show how the basic liberties agreed to in the original position can be further specified. He does so by looking at *Brandenburg*, which he says "is better constitutional doctrine than what preceded it," though not fully perfect.[16] He has in mind here a line of cases from *Schenck v. United States* to *Dennis v. United States* in which the famous clear and present danger test was used to justify the prosecutions of several radical groups, mostly associated with

[16] Ibid., 345.

communism, advocating the violent overthrow of the American government. Why *Brandenburg* does not provide a sufficient guarantee of free speech is not clarified by Rawls. It could be that the case does not go far enough for him in its protection of subversive speech, which as we will see is closely associated for Rawls with the right of revolution against an unjust regime, and harkens back to his defense of civil disobedience in *Theory*.

In *Brandenburg* the Court had to decide whether an Ohio criminal syndicalism statute violated the First Amendment's protection of free speech and assembly. The law made it a punishable crime to advocate "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."[17] A leader of the Ku Klux Klan in Ohio, Clarence Brandenburg, invited a reported to attend and video a cross-burning at a private barn. Though most of the video is inaudible, the hooded Brandenburg can be heard saying, "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[18] The film was shown on both local and national television, prompting Ohio authorities to prosecute Brandenburg for violating the criminal syndicalism statute. The Court argued in another unanimous *per curium* opinion that a law that fails to distinguish between the abstract teaching of a duty to resort to violence

[17] *Brandenburg v. Ohio*, 395 U. S. 444-445.

[18] Ibid., 446.

under certain conditions is not the same as physically equipping the group for the engagement. Mere advocacy, the Court argued, is different from incitement to imminent lawless action.[19] This standard thus replaced the more ambiguous clear-and-present-danger rule first articulated by Justice Oliver Wendell Holmes in *Schenk*.

According to Rawls, once there is general agreement that discussions related to political doctrines and the justice of the basic structure of society should be fully protected, the remaining issue is where to draw the line between mere advocacy of force and imminent lawless action. He fears that drawing the line too rigidly may allow the government to punish citizens protesting an unjust law or even an unjust regime. "It is tempting," he says:

> to think of political speech which advocates revolution as similar to incitement of to an ordinary crime such as arson or assault, or even to causing a dangerous stampede, as in Holmes's utterly trivial example of someone falsely shouting "Fire!" in a crowded theater … But revolution is a very special crime; while even a constitutional regime must have the legal right to punish violations of its laws, these laws even when enacted by due process may be more or less unjust, or may appear to be so to significant groups in society who find them oppressive … Thus, although there is agreement that arson, murder, and lynching are crimes, this is not the case with resistance and revolution … Or more accurately, they are agreed to be crimes only in the legal sense of being contrary to law, but to a law that in the eyes of many has lost its legitimacy… [R]evolutionaries don't simply shout: "Revolt! Revolt!" They give reasons. To repress subversive advocacy is to suppress the discussion of these reasons.[20]

A government that seeks to punish revolutionary speech, Rawls goes on to tell us, has a Hobbesian view of politics, believing governments to be inherently fragile and easily toppled at the mere suggestion of charismatic leaders. This he doubts is the case. The mark of a well-governed regime, or one that at least aspires to be well-ordered, is its

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[19] Ibid., 449.

[20] *Political Liberalism,* 345-346. Rawls refers to Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* (New York: Harper and Row, 1987).

tolerance of ideas antithetical to the established law. Until a realistic utopia is in place, laws even in a regime moving in the direction of a constitutional democracy may be illegitimate in the eyes of the people. They need an institutional outlet to voice their opposition; they need a formal mechanism to exercise their right to revolution. There is no fear that the words will bring about violent action on a mass scale, or if they do, such action may be necessary, "and what changes are required is known in part from the more comprehensive political view used to explain and justify the advocacy of resistance and revolution."[21] In critiquing the law or government, they are to call upon principles that could make up an overlapping consensus—not laws of nature or tradition. And if ever a stable constitutional democracy is put in place and society is well-ordered, the problem of revolution is, by definition solved.[22] Until that time comes, a channel for civil unrest is to be left open for those who would help push the nation toward the goals of political liberalism.

There is something ironic, however, in Rawls's use of *Brandenburg* to argue for an institutionalized outlet for the revolutionary heat that is to help propel America toward a stable constitutional democracy. He never clarifies the fact that *Brandenburg* upholds the freedom of speech for a small band of the Ku Klux Klan to violently enforce the dominance of whites in American politics—hardly the sorts of folks interested in a liberal perspective of justice. While this may point to Rawls's own commitment to free speech principles even where he fully disagrees with the ideas in the speech, it is not clear a Rawlsian interpretation of the First Amendment would have actually supported the right

[21] *Political Liberalism*, 348.

[22] Rawls says as much. See ibid., 346.

of Ku Klux Klan members publicly advocating white supremacy in places of political power. Recall that constitutional protection of the freedom of conscience is part of a scheme of workable basic liberties meant to further the two moral powers of the individual to reasonably embrace a public conception of justice and to form, revise, and rationally pursue a private conception of the good. This understanding of the person is one in which the right is prior to the good—in which the public conception of justice takes precedence over the formation and pursuit of an understanding of the good. While Rawlsian basic liberties do allow the pursuit of a private conception of the good—a comprehensive doctrine as it is often called—this follows the prerequisite acceptance of a public understanding of justice. Only then are such persons citizens: "The social union is no longer founded on a conception of the good as given by a common religious faith or philosophical doctrine, but on a shared public conception of justice appropriate to the conception of citizens in a democratic state as free and equal persons."[23] Obviously the speech of the Ku Klux Klan does not fit in this formula; its foundation is built upon inequality of races. It is not clear why they are counted as citizen in a Rawlsian realistic utopia, or why their speech would be protected given its inconsistency with the principles making up the overlapping consensus or public conception of justice. What seems potentially likely is that the speech prosecuted in *Brandenburg* could only be legislatively protected under Rawls's scheme, and not constitutionally protected since the reasoning of the Ku Klux Klan falls outside of the public conception of justice and therefore public reason. It is unjustifiable since its compass is something other than the understanding of justice contained in the pre-political overlapping consensus.

[23] Ibid., 304.

My point here is simply that Rawls's demonstration of how liberty of conscience is to be specified in the constitutional convention points as much to a potential for restricting speech as allowing it. If constitutional protections of speech are rooted in a pre-constitutional agreement on principles of basic liberty that are commensurate with *justice as fairness*, then it is not entirely clear why public speech rooted in alternative understandings of justice are to be allowed to advocate the violent overthrow of government. Does *justice as fairness* provide ample reason for standing up to challengers? Can it really succeed in saying to the Ku Klux Klan, "You know, you have the right to pursue your own comprehensive doctrine, but could you please explain it to us in terms we can all reasonably affirm?"[24]

And what is true in the extreme case of radical groups is likewise true in less drastic cases of comprehensive doctrines that refuse to take second place to an overlapping consensus. It seems that Rawls's scheme will only work once a sufficient portion of the population agrees to embrace his teaching. In lieu of a general embrace of an overlapping consensus, Rawlsian judges would not be compelled by their interpretation of the Constitution to protect all political speech touching on matters of constitutional essentials and basic justice—and surely speech advocating the violent overthrow of government touches on constitutional essentials and basic justice. But even more—particularly given the fact that Rawls says America's history is without example of a time when a constitutional crisis would allow for the restriction of speech—Brandenburg's speech might be restricted in a Rawlsian regime not because it advocates

[24] Burton Dreben, for instance, would answer that there is no need to enter into conversation with KKK, just ignore them.

violence, but because it undermines the two moral powers of the person. It presents a moral rather than political crisis.

As further evidence, consider Rawls's confidence that those who resist the law likely have something to teach us. He tells us that "the theory of how democratic institutions work must agree with Locke that persons are capable of certain natural political virtue and do not engage in resistance and revolution unless their social position in the basic structure is seriously unjust and this condition has persisted over some period of time and seems to be removable by no other means." Do the clansmen fit this description? Only if one accepts their understanding of justice, which Rawls rightly rejects. Why then should their speech be protected for Rawls? This is a basic question that goes unresolved in his silence regarding the specific facts present in the case. Instead he discusses revolution and change saying, "A wise political leadership … takes this advocacy as a warning that fundamental changes may be necessary; and what changes are required is known in part from the more comprehensive political view used to explain and justify the advocacy of resistance and revolution."[25] On one hand Rawls makes clear here that even language springing from some source other than the overlapping consensus is to be protected, on the other it is plain that he clearly does not have the sort of language used at a cross burning in mind. Indeed, he would probably agree with me in saying that wise political leader would ignore the hateful sophistry of racists.

Yet the question remains why such speech is to be ignored but not prosecuted. For what reason is speech protected in *Brandenburg*? It is certainly not protected because the Court agrees with it, or thinks wise leaders ought to consider the

[25] Ibid., 348.

comprehensive doctrines animating the behavior of the Ku Klux Klan. Rather, the Court bases its reasoning upon the text of the Constitution, which clearly restricts the government from infringing upon citizens' ability to express opinions and disapproval regarding policies and laws. Whether the reasoning of citizens is proper or convincing is not a prerequisite for speaking one's mind about politics. This may include discussions related to rebellion and violence, but we need not pretend that these activities are not crimes. But so long as only speech is involved and not rebellion or violence (or arson or lynching), the Constitution protects it regardless of who says it or why. This no doubt allows citizens the ability to criticize policies, laws, the government, and even the Constitution itself, but there is no reason to tie subversive advocacy to a theory of constitutional democracy's advancement. As *Brandenburg* makes clear, not all speech does so. Rather, it allows people to debate relevant political matters without fear of government suppression.

Buckley v. Veleo and First National Bank v. Bellotti

The development of the *Brandenburg* doctrine is compared by Rawls to cases involving campaign finance that show the extent to which Rawls *is* willing to regulate political speech when it is inconsistent with the right principles. The cases are *Buckley v. Valeo* and *First National Bank v. Bellotti*, and they involve a debate that the Court has recently revisited.[26] They involve congressional and state laws that cap the amount of money individuals and groups can contribute to campaigns and set limits on the money spent promoting a candidate independently, outside of the official campaign. *Buckley* is

[26] *Buckley v. Valeo*, 242 U.S. 1 (1976); *First National Bank v. Bellotti*, 435 U.S. 765 (1978). The Court has most recently revisited campaign finance in *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).

by far the more familiar case, and the Court's approach to handling Congress's method of regulating election spending was to allow a ceiling on campaign contributions ($1000) but to strike down that portion of the Federal Election Campaign Act that limits the amount of resources individuals and groups can invest in promoting or discouraging the election of a candidate. To allow the later, the Court maintains, is to hinder free political speech, and thus is a violation of the First Amendment. Over the years this attitude has largely been upheld by the Court.[27]

Nonetheless, Rawls claims that here, unlike in *Brandenburg*, we do not have a "happy ending" but rather something "profoundly dismaying."[28] He explains:

> What is dismaying is that the present Court seems to reject altogether the idea that Congress may try to establish the fair value of the political liberties … The court fails to recognize the essential point that the fair value of the political liberties is required for a just political procedure, and that to insure their fair value it is necessary to prevent those with great property and wealth, and the greater skills of organization which accompany them, from controlling the electoral process to their advantage.[29]

He goes on to say that the Court in *Buckley* views democracy as "a kind of regulated rivalry between economic classes and interest groups in which the outcome should properly depend on the ability and willingness of each to use its financial resources and

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[27] See, for example, *Federal Election Commission v. National Conservative Political Action Committee* and *Democratic Party of the United States v. National Conservative Political Action Committee*, 470 U.S. 480, 105 S.Ct. 1459 (1985). In *McConnell v. Federal Election Commission*, 540 U.S. 93, 124 S.Ct. 619 (2003), the Court did allow certain restrictions on the spending of soft money by candidates as well as advertisements by corporations and unions, but the restrictions on individual spending (the millionaire provision and the seventeen years and younger provision) are held unconstitutional. More recently, the Court has overturned that portion of *McConnell* that prohibits private corporations and unions from advocating for or against a candidate in *Citizens United*.

[28] *Political Liberalism*, 359.

[29] Ibid., 360. Rawls's cites Lawrence Tribe's *American Constitutional Law* Vol.1, 2d ed. (Foundation Press, 1988), 806, as influencing his understanding of these cases.

skills, admittedly very unequal, to make its desires felt."[30] Rawls hints here at class warfare as an inevitable result of the current election process, but the fact that certain individuals or groups have more resources to use towards the election of their preferred candidate hardly amounts to class warfare unless the rich congregate to one party and the poor to another. Political victory is the result of getting more votes, not more dollars. Despite his emphasis on *reasons* elsewhere, on this issue Rawls ignores the fact that one must persuade voters with arguments and not money. So long as people are not denied the right to vote on equal terms, it is not clear why Rawls so adamantly adheres to the idea that people's political liberties are denied because some people spend more of their money than others on elections. Now, a constitutional basis for regulating campaign spending may exist; my point here is that Rawls does not provide an adequate one for restricting political speech. His reasons are not rooted in the Constitution, but his theory of justice.

The closest Rawls does come to finding a constitutional basis for capping the amount of money individuals can spend in a campaign is to look to a different line of cases, those that adhere to a principle of one person, one vote. The cases Rawls mentions in this line are *Wesberry v. Sanders* and *Reynolds v. Sims*.[31] These cases dealt with state apportionment of election districts: *Wesberry* involves Georgia's apportionment of U.S. Districts for the purpose of election U.S. Representatives, and *Reynolds* looks Alabama's apportionment for state legislative seats. Writing for the Court in *Wesberry*, Justice Black argues on the basis of the Constitutional Convention, the purpose of allowing states

[30] *Political Liberalism*, 361.

[31] *Wesberry v. Sanders*, 376 U.S. 1 (1964) and *Reynolds v. Sims*, 377 U.S. 533 (1964).

a number of Representatives for the U.S. House is to assure the people a say in the legislative process, and a lopsided apportionment plan obscures this purpose. Justice Warren applies this reasoning to state legislatures on the basis of the Equal Protection Clause in *Reynolds*. The basic idea that is upheld in these cases is that everyone's vote ought to be, as much as possible, of equal weight. If one lives in a district with twice the population of another, one has half the influence on one's representative.

Rawls wants to apply this reasoning to campaign finance. He recognizes that these cases, unlike *Buckley*, do not involve freedom of speech, but he believes the general principle of one person, one vote can be applied in the area of campaign spending: "Not to do so is to fail to see the constitution as a whole and to fail to recognize how its provisions are to be taken together in specifying a just political procedure as an essential part of a fully adequate scheme of basic liberties."[32] Again, it is not clear why allowing people to spend money advertising their political views would detract from the principle being advocated, that each person only get one vote. Yet Rawls assures us that if campaign spending regulations do not put everyone on an equal playing field in promoting candidates, we risk "repeating the mistake of the Lochner era, this time in the political sphere where … the mistake could be much more grievous."[33] Of course, Holmes's famous dissent in *Lockner* holds that a theory cannot replace the Constitution's proscriptions, the very thing Rawls is willing to do here by supporting the principles of political liberalism *contra* the First Amendment's prohibition on Congress to restrict free political discourse.

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[32] *Political Liberalism*, 362.

[33] Ibid., 363.

What is more, in comparing Rawls's praise of *Brandenburg* to his denunciation of *Buckley*, one is struck by an inconsistency in the support of free speech. The former allows the broadest liberty to those who would advocate the overthrow of American government while the latter gravely restricts what one can do in promoting a particular candidate for public office. The first is a so-called "fixed point" while the latter is subject to legislative regulation. From the perspective of the Constitution, the distinction is difficult to understand. Only when one considers the Rawlsian purview, once one thinks through the matter with public reason based on an aspirational overlapping consensus, are the two positions held together coherently. But this requires approaching the Constitution through the lens of *justice as fairness*.

To be clear, Rawls does not say that the Court ought to mandate arrangements for what he calls the fair value of political liberties, but it is to interpret the Constitution in such a way that Congress's efforts to do so are upheld. In addition to campaign finance, the Court is to allow Congress the ability to implement those liberties connected with the second principle of justice. These liberties are not basic in the sense that they are not necessary to ensure the development of the two moral powers, but they are nonetheless important as part of a Rawlsian constitutional scheme. Thus the Court's interpretation of the Constitution is to allow Congress the prerogative of implementing those liberties it thinks essential to ensure the fair equality of opportunity among citizens and to enact regulations that assure the proper distribution of social and economic goods. The examples he gives, consistent with his focus on speech, deal with advertisements. He explicitly connects this discussion with that of political advertisements—they can be regulated. The same is true of job advertisements and product advertisements. The first

assures that jobs are held available to all on an equal basis; the second maintains just and efficient markets. Speech in these instances can be restricted and regulated as Congress thinks fit in order to promote the second principle's emphasis upon equality or near-equality.

Rawls's position, then, is that the Constitution protects basic liberties connected with the first principle of justice and *allows* Congress to regulate those liberties associated with the second principle. But if Congress is allowed to do something, the Constitution necessarily empowers it to accomplish that end. And, in fact, this is closer to the original understanding of what a Constitution does: not protect individual liberty through proscriptions on institutions, but through the empowerment of governmental institutions so that liberty can in fact be secure. The limit on specific tasks is what ultimately was thought to protect liberty, not a short list of things government cannot do. If Congress can regulate campaign finance, this has to have some connection with the constitutional convention's empowerment of Congress to fulfill that some closely related end.

Thus when Rawls says the Constitution only protects those rights associated with the first principle, he misspeaks. If Congress can protect the liberties associated with the second principle, the Constitution under which they act must give them the authority to do so, and thereby such a Constitution *would* in fact protect, in an arguably more fundamental way, the liberties of the second principle, those liberties associated with the equality of opportunity. Rawls finds dismay in the Court's reaction to the Federal Election Campaign Act in *Buckley*, because he believes the Constitution should and does empower Congress to establish conditions of fairness and equality both politically and

economically. Where this is in the text is unclear and never elaborated upon by Rawls. What is clear is that he would have the Court uphold Congress's attempts to implement policies consistent with the second principle of justice, which in effect would give the rights associated with that principle constitutional status. The Court did not do this in *Buckley*, and has largely stuck by its opinion there, because it is not evident in Article I, Section 8, that Congress has the authority to overcome the freedom of speech by regulating how much money a person can spend on behalf a specific candidate. Regardless of the Court's wisdom in *Buckley*, Rawls's dismay over the case is based upon public rather than constitutional reasoning.

Public Reason and Constitutional Interpretation

Thus far I have described and criticized Rawls's most sustained discussion of public law and constitutional interpretation. As explained above, he draws a distinction that would be recognized at a hypothetical constitutional convention between rights that are "basic" and therefore fundamental and those that are important but not basic. Basic rights are to be protected by the Court in its ability to exercise judicial review and strike down legislation that prohibits such rights. His examples are seditious libel and subversive advocacy, which he arrives at through a reading of the historical Supreme Court's development of doctrine. Here historical doctrine can be accepted as the basis for the hypothetical constitutional convention's reasoning. Yet in another instance the actual Supreme Court is a negative example for those delegates in the constitutional convention, because it treats individual expenditures of money for a candidate in an election as a basic liberty. To correct this view, the delegates to the convention are to make clear—somehow—that Congress has the regulative authority to limit this and other

non-basic forms of speech. I say *somehow* because it is left unclear how. Are amendments to the actual Constitution being proposed by Rawls? He never says so. Rather, it seems he is suggesting that the actual Court reconsider its interpretation of the actual Constitution to be more consistent with what he tells us would be agreed upon in a hypothetical constitutional convention.

Rawls's presentation of how the Court ought to interpret the Constitution is confusing. He tells us he is demonstrating how delegates to a constitutional convention will specify the basic liberties handed down from the original position. But the demonstration does not point to the historical experience of delegates to a constitutional convention—say the one in Philadelphia in 1787—but rather to the historical examples of the Court's interpretation of the First Amendment. What is confusing is that the fourth stage of Rawls's thought experiment is the judicial stage; one wonders why the historical practice of the Court serves as a good example for the theoretical constitutional convention. It seems as though Rawls is advocating the inclusion of Court doctrine—when it suits his purpose—into the framing of a hypothetical constitution. One wonders what is left for the theoretical judiciary in the thought experiment other than applying those rules in specific cases. The imaginary parties to the theoretical Supreme Court would have little need of interpreting the text of the Constitution; they would simply ensure that the legislative acts were indeed consistent with the Constitution which in turn must be read in light of *justice as fairness*, or the constitution that would be accepted in the imaginary constitutional convention. What is confusing is whether the actual Supreme Court should serve as a model for the reasoning that takes place in the

constitutional convention, or the constitutional convention models the reasoning that the actual Supreme Court should adopt.

The answer to the enigma is that Rawls wants the current Court to adopt the reasoning of the constitutional convention for now, and slowly blend the constitution that would be chosen under a partial veil of ignorance with the actual Constitution that governs America. Once this blending is complete and the actual and ideal are more closely related, then and only then can the actual Supreme Court primarily pursue its role as mere administrator, just as the hypothetical court does in the thought experiment. To start the transition to that place, the Court is encouraged to adopt those precedents that can be translated into public reason and abandon those that do not.

This all highlights the necessity for Rawls's advocacy of public reason as the basis for the Supreme Court's decisions in matters of constitutional law. The arguments for or against a certain liberty being basic is made on the basis of its essentiality for the development of the two fundamental powers—the capacities to embrace a public conception of justice and form or reform a personal conception of the good. Legally the Court must make its decisions in terms not inconsistent with the Constitution, yet public reason gives it the ability to interpret the text in a way that coheres with the political understanding of personhood Rawls proposes and the two principles of justice that comprise the overlapping consensus.

To clarify, Rawls's position is that whenever constitutional essentials or matters of basic justice are at stake, public reason is the only legitimate reason that can be offered. The terms of public reason, however, are not derived from the Constitution, but from the overlapping consensus. This means constitutional questions are not argued on a

common ground found in the text, but on a common ground prior to the text. Now, one might use the words in the document as part of one's argument, but doing so would only be legitimate and could only be justified if those words are used in such a way that they are animated by the overlapping consensus.

This, then, is the extent to which Rawls muddies his hands in debates over constitutional law and specific Court doctrines. Yet his suggestion to the Court is clear enough. It can, if it would but so choose, be instrumental in a reinterpretation of the Constitution so as to guide it towards an authentic constitutional democracy in a well-ordered society, which is to say into a realistic utopia. The Court is not the lone institution in bringing about this change, but its role is seen by Rawls as crucial, the first domino to fall, so to speak. What he offers to the Court is a model of reasoning that it can adopt and adapt to its jurisprudence. When it comes to specifics, however, he has very little to say and only offers free speech as an illustration. To see more of an elaboration, we have to go beyond Rawls.

CHAPTER EIGHT

Everyone's Favorite Example: *Lawrence v. Texas* and Historical Reconciliation

What is evident in the last chapter's discussion of free speech cases is that Rawls sees the Court as an institutionalized mechanism connecting philosophy and American law via constitutional interpretation. Of the first four roles of political philosophy outlined in *Justice as Fairness*, the Court can actively participate in the first three. If the Court were to attempt to fulfill the fourth role—the articulation of a realistic utopia—it would necessarily be in the business of changing "political and social institutions, and much else," on its own initiative, and would thereby run the risk of undermining the primary tenant of constitutionalism that the law is superior to any individual's, group's, or institution's conception of how things should be.[1] The Court cannot legitimately take on the task of bringing about constitutional changes that it thinks are reasonable. But for Rawls and his followers, this does not preclude the possibility of the Court actively working toward an aspirational future, the realistic utopia of a fair constitutional democracy, as envisioned by political philosophers in academia. In other words, the Court cannot come up with its own vision for the future, but it can be the forum in which philosophy and politics meet, the place where the ideal and the actual interact.

The example of free speech previously examined highlights how the Court can accomplish the first three tasks of political philosophy. These include the practical role of settling conflicts and problems of order, orienting people towards their social order,

[1] John Rawls, *Justice as Fairness*: *A Restatement* (Cambridge: The Belknap Press, 2001), 5.

and reconciling them to a vision of history that explains their current situation in terms that make clear a just direction for the future.[2] My main object in the last chapter was to show that Rawls's reading of free speech cases point to the importance of written opinions, yet he fails to read those opinions on their own terms. Instead he reads them through the lens of *justice as fairness*, that is, through his vision of a just political order that can plausibly be arrived at in the future. His preference for the Court's reading of the First Amendment in *Brandenburg* as opposed to *Buckley* is not based so much on the words of the Constitution as the morally correct way of reading the text. According to Rawls's reading, *Brandenburg* settles a political dispute in such a way that citizens are reoriented toward their regime's institutions, all the while reconciling the historical interpretation of freedom of speech in the case of subversive advocacy. *Buckley*, however, settles a dispute in such a way that, as Rawls would have it, the poor continue to be outsiders to the political process without historical justification. *Buckley* thus remains part of a history yet to be reconciled toward the development of a just political order.

In this chapter I turn my attention squarely to this third task of political philosophy in which the Court is asked by Rawls to participate in the construction of historical narratives that explain the past in the way most conducive for moving toward a future of fairness. For him, the judiciary can help reconcile us to our social and political institutions so that the history of their development makes sense in such a way that we can positively accept and affirm them, and not simply be resigned to their imperfect forms. This allows judges to play historical interpreter in their constitutional

[2] Ibid., 1-4.

jurisprudence; they are to read the Constitution's history in light of the ethical ideals contained in the two principles of justice emerging from the original position. *Brandenburg* worked so well for Rawls's purposes because it seemed to be a point-in-case of the Court correcting its past precedence according to a more philosophically-sound understanding of the Constitution's protection of free speech.

But not all cases are as easy as *Brandenburg*, particularly when one ventures into the unchartered waters of substantive due process—something Rawls says very little about. Substantive due process is a jurisprudential doctrine holding that the Due Process Clause of the Fourteenth Amendment protects fundamental individual liberties that are not necessarily listed in the Constitution. The most famous of these are the rights to contract and privacy.[3] Rawls can claim no responsibility for the development of this doctrine, but it is nonetheless a useful device through which the Court can potentially secure the basic rights said to be implicit to the first principle of Rawlsian justice. Should the Court adopt Rawls's political conception of the person as its working basis for deciding whether a liberty is fundamental and accordingly deserving of constitutional protection, the hoped-for utopia may indeed be realistic. The problem with this strategy is that the Court has not traditionally understood the person according to the terms of a liberal overlapping consensus anymore than it has been in the business of exemplifying public reason. Thus, if the Court were to take on this task, it would have to reconcile its past opinions to the new standard, which would require some retelling, in some cases significant retelling, of history.

[3] The right to contract was established in *Lochner v. New York*, 198 U.S. 45 (1905); it was in effect overturned in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). The right to privacy was announced by the Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and reaffirmed in *Roe v. Wade*, 410 U.S. 113 (1973), as well as other cases.

Ultimately what it entails is securing public reason's monopoly in cases of constitutional law, especially in the area of substantive due process. In so doing, Rawls's highly moralistic theory can have an exclusive privilege in constitutional interpretation and, by extension, law and society. Competing moral claims can be ruled out-of-legal-bounds through a connection to a comprehensive doctrine while *justice as fairness* is allowed sanction in the realm of rhetoric for being "freestanding," disconnected from any single comprehensive doctrine.[4]

Rawls leaves the details of this work to others following after him, and in this chapter I will examine one such disciple who has gone quite far in his reinterpretations of history in order to support the Court's protection of the right to privacy via the Due Process Clause. David A. J. Richards is clearly interested in advancing a certain conception of morality, and reduces potential threats to his arguments as outside the realm of legitimate discussion over matters of constitutional essentials and basic justice.[5] His work on constitutional interpretation attempts to retell history so as to reconcile public reason's domain in constitutional law. I will describe Richards's reliance on Rawls to set up a rather elaborate theory of constitutional interpretation that assures outcomes in cases of substantive due process that match his flavor of ethics. To build his case, he offers complex stories of history that place his less-traditional understanding of morality at the helm of the Court's work. In addition to looking at Richards's versions of history, I will also examine his defense of *Lawrence v. Texas*, a case often claimed to be

[4] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 10.

[5] David A. J. Richards is a prolific writer. In addressing his arguments I will refer to his *Toleration and the Constitution* (New York: Oxford University Press, 1986); *Foundations of American Constitutionalism* (New York: Oxford University Press, 1989); *The Case for Gay Rights: From Bowers to Lawrence and Beyond* (University Press of Kansas, 2005); and *The Sodomy Cases: Bowers v. Hardwick and Lawrence v. Texas* (University Press of Kansas, 2009).

Rawlsian.[6] Here I will argue that *Lawrence* does not require us to relearn history or morality in the way Richards and others suggest, but rather is grounded in a logic that takes its bearings from the text of the Constitution.

Getting the Founders behind Political Liberalism

A major component of historical reconciliation is giving an account of the American founders that does not pin them against the trend toward a fully-realized constitutional democracy. If the founders cannot be viewed as beginning a project worth completing, then it is questionable why the Rawlsian strategy toward a realistic utopia is to be preferred to an outright revolution and a drafting of a new constitution. Richards understands that theories of originalism carry significant weight in the minds of Americans when it comes to constitutional law. In fulfilling what he views to be his own role as a political theorist, Richards suggest we re-imagine what it is the founders gave us in the Constitution. And what they gave us, it turns out, is a Rawlsian constitutional democracy.

Richards begins his *Foundations of American Constitutionalism* by making clear that there is no logical reason why we have to invoke the authority of the founders when interpreting the meaning of the Constitution; it is a peculiar component of the American character, the avoidance of which is politically irresponsible.[7] Yet it is political conservatives and strict constructionists that control the narrative of the historical

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[6] *Lawrence v. Texas*, 539 U.S. 558 (2003). In addition to Richards see for example Frank Michelman, "Rawls on Constitutionalism and Constitutional Law," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (New York: Cambridge University Press, 2003), 410-414.

[7] Richards, *Foundations*, 5.

founding of American and framing of the Constitution.[8] According to these scholars, the Constitution must be interpreted as close as possible to the text, and where the text is ambiguous to the intent of those who wrote and ratified it. He wants to offer an alternative to this view, and in doing so show how the Framers are in fact on his side of the debate.

The problem with taking the approach of strict constructionists for Richards is that it elevates the intentions of a past generation upon flesh and blood today. It makes their most authoritative interpretation of the Constitution our most authoritative interpretation. Yet this, Richards holds, cannot be what the founders intended for us to do. They were, after all, deeply influenced by Lockean political thought, and adopted his theory of contractual legitimacy. They did so, however, at the same time that they adopted the common law tradition of jurisprudence. Taken together—Lockean contractual legitimacy and the common law—the founders bequeathed to us a new tradition of legitimacy that takes seriously arguments, deliberation, and especially justification.[9] Strict constructionists go wrong, in this retelling, by focusing on the specific arguments and reasons put forward by the founding generation rather than looking at the method by which the Constitution was offered to and ratified by the people.

What the founders ultimately learned from Locke and we have forgotten, it would seem on Richards's telling, is the need to present arguments in a way that or fellow

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[8] Richards has in mind Raoul Berger *Government by Judiciary* (Cambridge: Harvard University Press, 1977); Edwin Meese III, "Construing the Constitution," *The University of California Davis Law Review*, Vol. 19 (1985), 22-30; and Robert H. Bork, *Tradition and Morality in Constitutional Law* (Washington: American Enterprise Instittute, 1984).

[9] *Foundations*, 82.

citizens can reasonably accept as binding. "Locke's political theory of legitimacy," Richards explains, "sought to define an alternative conception of free public reason as accessible to all, as free of factionalized sectarian distortion, as justifying political demands to the reasonable capacities of each and every person, whose inalienable rights to exercise those capacities were immune from political compromise or bargaining."[10] The founders, in other words, were ahead of their time, for Rawls had not yet spoken, in seeking a publically reasonable consensus by which the Constitution and its laws were to be given full justification.

In order for the document to maintain its legitimacy, each new generation is to justify anew the Constitution according to its own conception of public reason. They are to ratify it afresh, so to speak, by way of giving it the best interpretation they can in light of the public conception of justice that is predominate in their own time. They are not to simply accept the reasons of the founders as strict constructionists urge, but rather understand it in their own terms. The founders understood that this would be the case; they never imagined Robert Bork would show up and suggest that reasons offered two-hundred years ago are authoritative for us today. To simplistically accept their reasoning without scrutiny is to ignore their expectation that we look to their method of reasoning rather than the specific arguments. To fail in this regard is to empty the Constitution of any morally relevant content applicable in our own day and time. We would be living by the dead letter of the law rather than a living document.

The founders' project, again according to Richards, is best understood as interpreting the demands of constitutionalism as they understood it and institutionalizing

[10] Ibid., 89.

that conception in a publically acceptable manner. In designing a constitution they should be understood as creating "structures for the exercise of political power that would give the best interpretation to the constitutionalism for which they had fought a revolution."[11] Their task, like ours, was one of interpretation; and ours, like theirs, is one of creation. If we limit ourselves to simply interpreting the constitutionalism of the past without creating for ourselves a constitution to regulate our collective sense of right, we fail to carry forward the project of the American founding. Strict constructionists, then, lack the very thing they claim a monopoly over: having the founders on their side. For Richards, they try to save us from having to think for ourselves by appealing to the views of dead men, in effect downplaying the virtues of self-government that those dead men sought to protect.

Of course, this all has implications for the Court. As Richards explains, "The judiciary plays its great historical role as the forum of principle … when it articulates and elaborates with integrity the constitutional arguments of public reason against the self-blinding views of factionalized majorities."[12] This entails taking the founders' method of argument seriously, but not so much the arguments of the founders themselves. Rather, the Court is to make certain that the public reason that makes the Constitution legitimate higher law for us today is made real when *factionalized majorities* impose their will on others without proper justification based on our public reason's interpretation of the Constitution. Judicial supremacy is necessary and defensible in light of the requirement

[11] Ibid., 131.

[12] Ibid., 292.

for public reason to legitimize the law.[13] It is the Court that brings public reason and the Constitution together in its interpretations. He ends his treatment of the subject by calling on universities and law schools to properly educate students regarding the founding, that is, to teach the retelling of America's founding as he tells it.[14]

The problem with Richard's version of originalism is that there is little evidence that he is able to muster from the founders themselves in defense of principle-based, living document interpretation of the Constitution. It is one thing to point out incongruities between specific founders that may lead us to doubt the applicability of original intent in specific if not all areas of constitutional jurisprudence, and quite another to suggest that the preeminent intention of the founders is for us to reinterpret the Constitution anew each generation. To do so is to paint a Jeffersonian *ethos* on the founders as a whole. Richards may be right that the founders did not bequeath to us specific interpretations of the Constitution, although this is more debatable than he allows. What is problematic in Richards's account is the degree to which he renders the language of the Constitution an unnecessary starting ground for interpretation. Instead we are told to start from a public conception of justice that has no necessary linkage with the framing-document or the institutions springing from it. Then we are to look at the Constitution through this lens, and develop our own morally acceptable understanding of it that can be the basis for right rule in a constitutional democracy. This, as Richards is

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[13] As he says in *Toleration and the Constitution*, "Judicial supremacy is thus working correctly when overall it tends to vindicate the best arguments of principle essential to our constitutional tradition" (292). As we saw with Rawls, Richards defends judicial review as a necessary component for bringing about a more democratic government, paradoxical as that may seem. Judicial review is only legitimate for him if it gets the principle of democracy right. Again, once the people can more or less operate under the limitations of public reason, the role of judicial review is mitigated.

[14] *Foundations*, 294-299.

aware, gives political theory an increased stature in the development of American political life.

The Court as Exemplar of Public Morality

As we have seen in previous chapters, Rawls understands his project as a culmination of an effort to expand individual rights initiated by John Locke's *Letter Concerning Toleration* yet with a conscientious eye toward the egalitarian demands of Rousseau's work.[15] "Were *justice as fairness* to make an overlapping consensus possible," he tells us, "it would complete and extend the movement of thought that began three centuries ago with the gradual acceptance of the principle of toleration and led to the nonconfessional state and equal liberty of conscience," which would allow "citizens themselves to settle the questions of religion, philosophy, and morals in accordance with views they freely affirm."[16] All claims to truth are subject to the same privatization that Locke demands of religion. And just as Locke provides a baseline for discovering the "mark of the true church"—acceptance of the principle of toleration—Rawls gives a rubric for qualifying one's personal beliefs within the range of acceptability: to earn the title of *reasonable* for one's beliefs or, to use Rawls's wording, comprehensive doctrine, one has to embrace (not merely accept) the principles of the overlapping consensus, which are for Rawls the principles arising from the original position.

In taking up the project of Rawls, it is not surprising that Richards claims toleration is the underlying principle of the Constitution by which the Court should structure its interpretations. "The respect for our self-determining moral powers of

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[15] *Political Liberalism*, xxvi, 4-5, 150-154; *Justice as Fairness* 1, 192-193.

[16] Ibid., 154. Italics added.

conscience," he explains with unmistakably Rawlsian language, "gives meaning to the state neutrality demanded by the constitutional command of toleration."[17] Only if this principle is respected, not only in cases of religious freedom but in all the fundamental ways we shape our conceptions of reality and personal identity, is the dignity of the Constitution preserved. Richards does not deny that toleration is itself a moral ideal; indeed, he recognizes and elevates that ideal as the standard by which citizens are to judge the legitimacy of our politics. State neutrality, as he calls it, can only be gained through deliberately taking a moral position on personal autonomy and self-determination.

Taking toleration as the central paradigm of constitutional law requires reading our framing-document as a charter intended to preserve individual rights, a reading that Richards credits Rawls with justifying anew in our time.[18] *Theory of Justice* took on the utilitarian dominance of the academy, which had implications for studies of constitutional law that gave rise to scholars, to use a telling title, *Taking Rights Seriously*.[19] Prior to this rebirth, constitutional law had become a dry, stale discipline unconcerned with moral implications of particular decisions or doctrines. Post-Rawls, however, law is challenged by scholars to be philosophically and ethically satisfying. And in challenging the law to get it right, judges in particular were encouraged to be Herculean in fulfilling their roles in the constitutional system. This required, above all, recognizing the rights of citizens to

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[17] *Toleration and the Constitution*, x.

[18] *Toleration and the Constitution*, 12. See also H. L. A. Hart, "Between Utility and Rights," *The Idea of Freedom*, Alan Ryan, ed. (New York: Oxford University Press, 1979), 77-98.

[19] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977).

fully develop their moral powers of personhood, that is, the political freedom to develop self-determining identities so long as they respect one another's life decisions.

No doubt Richards recognizes that Rawls's theory goes beyond reviving a rights-based interpretation of the Constitution; it also necessarily opens the door for the development of a new basis of legitimacy in American politics. This is because Rawls's theory is not a return to past contractarian arguments for a liberal constitutionalism, but rather goes beyond them and thus "enables us to read past contractarian political theory in a more critical and truer way, to find a distinctive approach to political legitimacy, which is neither inevitably antiredistributive, antiegalitarian, illiberal, metaphysical, or proto-utilitarian."[20] In other words, Rawls's theory makes possible interpretations of the Constitution long held in anathema. And insofar as a new conception of legitimacy is accepted, the new interpretation is more than just possible, it is required.

As is evident in his *Toleration and the Constitution* where he begins his argument by critiquing two famous skeptics of judicial review, Richards finds the development of a new basis of legitimacy in American law attractive, because of the influence professional philosophers are able to have in clarifying basic underlying principles of public justice. He first finds fault with James B. Thayer, who as early as 1893 feared that overuse of judicial review may lead to a softening in the democratic zeal needed to maintain the American form of republican government.[21] Thayer believed that the legislature, as the branch closest to the people, should be left free to determine policy as much as possible and that judicial review ought to be left for clear instances of disregard for constitutional

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[20] *Toleration and the Constitution*, 58.

[21] *Toleration and the Constitution*, 4-6; James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review*, Vol. 7, No. 3 (Oct. 1893), 129-156.

limits. The basis for his reasoning was a theory of legitimacy based upon popular sovereignty, the clearest expression of which could be found in legislation. Richards refers to Thayer's position as court-skeptical theory, one that recognizes individual rights but refuses to give the Court authority to protect them.

On the other hand he finds fault with Learned Hands's rights-skeptical theory for equating individual rights, under the dual influences of Jeremy Bentham and emotivism, as "nonsense on stilts."[22] Hand sees rights, much like Richards and Rawls, as containing moral statements, but unlike the latter, he does not believe jurisprudence should be based upon the moral content of anachronistic conceptions of right. In support of a purely positivistic understanding of the law, Hand argues that the Court cannot act as a third legislative chamber. If it is to exercise judicial review, he holds that it can only legitimately do so upon the grounds of empty content, what would later be called neutral principles.[23] Like Thayer, Hand sees legitimacy in a form of populism best expressed through legislation, yet unlike him Hand refuses to explain his position on moral grounds.[24]

According to this account, both Thayer and Hand try to rest their positions on historical precedents, yet Richards argues they each rely more strongly on a theory than

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[22] *Toleration and the Constitution*, 6-7; Learned Hand, *Bill of Rights* (New York: Atheneum, 1968); Jeremy Bentham, "Anarchical Fallacies," *The Works of Jeremy Bentham*, Book II (Edinburgh: William Tait, 1843 [Adamant Media Corporation, 2005]), 489-530, quoting page 501.

[23] *Toleration and the Constitution*, 7-11; Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," *Columbia Law Review*, Vol. 54 (1954), 543-560; Alexander Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962).

[24] Richards does not say so, but Hands position is likely explained by a faith in the progress of History similar to that of Oliver Wendell Holmes. For an account of Holmes's position, see Bradley C. S. Watson, *Living Constitution, Dying Faith: Progressivism and the New Science of Jurisprudence* (Wilmington: ISI Books, 2009).

history in their arguments against judicial review. Their refusal to allow the Court a role in defending or elaborating upon the substance of the regime is built upon appeals to ideas that make plain the "primacy of political theory over constitutional theory" that neither takes seriously.[25] The greatest benefit of Rawls's work according to Richards is that it makes the case for political theory's legitimate function in Court-developed constitutional doctrines. It is not so much that theorists are finally given a role in educating judges as to how the Constitution ought to be approached and interpreted, but rather that that role is finally acknowledged as inevitable and necessary for the construction of a just political order to be maintained.

What we need according to Richards is an interpretation of the Constitution that "yields at once a fidelity to our history and a more critically defensible political theory."[26] He argues that toleration is the primary principle by which the Constitution should be interpreted, since it protects the right to conscience so eminent in Western thinking.[27] He identifies this right with the "Augustinian … vision of God as a supremely free, rational, and ethical person working in history," and moral and political respect are required for persons "made in this God's image." Furthermore, individuals only "achieve freedom through the dignifying construction of a way of life expressive of their integral moral powers of rationality and reasonableness."[28] This language is clearly more Rawlsian than Augustinian. Rather than praying to God with Augustine, "You have made us for yourself, O Lord, and our heart is restless until it rests in you," Richards describes people

[25] *Toleration and the Constitution*, 12.

[26] Ibid., 21.

[27] Ibid., 85-102.

[28] Ibid., 303.

as being restless so long as they are forced to conform to a morality outside their will.[29] In this view we are made by God exclusively for ourselves; we bear God's image only so we can be gods ourselves. If the right of conscience is made a moral objective and not just a legal protection guaranteed to each citizen, then thinking of each individual as a god unto himself is unavoidable. The only thing demanded of such divinities, and apparently God too, is the same toleration be extended to one another as one would expect in return. Rawls famously said, "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override."[30] Richards seeks a constitutional interpretation that takes this claim seriously in the defense of rights, particularly the right to create oneself.

It is no accident, then, that Richards is concerned above all with the rights of free exercise of religion, speech, and privacy. These rights come closest to protecting the right of conscience that he argues has guided Western thinking since at least Augustine. Religious freedom is necessary if personal beliefs are to have any meaning in the course of one's life. The protection of speech allows one to speak their mind without fear of punishment in political matters. Both of these are explicitly guaranteed by the First Amendment, but as such they point beyond the text to what Richards, following Dworkin, calls a background right; namely, they point to conscience, which, because it is, morally speaking, antecedent to the text, more fundamental, and therefore to be protected as a constitutional right. It is upon the basis of this background right that privacy is also to be protected as a necessary corollary of conscience. If someone in following his or her

[29] Augustine, *Confessions*, Book I, Chapter 1.

[30] *Theory of Justice*, 3.

conscience wants to live a lifestyle they perceive as good, the law cannot bar them from doing so without a justification unconnected to a difference in perspective as to what the good life entails. Citizens are accorded privacy in their personal, and especially their intimate, decisions. Such things as abortion and homosexual acts cannot be made illegal for being immoral; to do so would be to impose a view of morality upon citizens that they—as gods unto themselves—have not affirmed as their own.

Public reason, as we have seen in previous chapters, provides the only legitimate language for imposing laws that affect the ways of life people may want to live. It is meant to secure a public rhetoric that is devoid of references to personal beliefs, conceptions of the good, or comprehensive doctrines. Legitimacy, recall, is based upon the proper justification of law and policy; indeed, the regime itself must be justified upon such terms that all can accept from the perspective of an overlapping consensus. Only when this language is used genuinely and not as a shield covering true motives can we be certain that liberty is really constitutionally protected.

But as Richards makes clear, this language is not devoid of moral claims like the neutral principles desired by Hand and others. On the contrary, public reason contains within it a public morality given exclusive constitutional protection. In other words, a law to make something illegal cannot be argued for on the basis of anyone's comprehensive doctrine, but must be supported as morally justifiable in terms of the overlapping consensus. This, in many instances, will be a difficult threshold to cross even where a legislature has explicit power to regulate the issue at hand. This inevitably tilts the advantage to specific parties in areas of substantive disagreement.

To take an example, the morality we are encouraged to accept as part of a public consensus of right gives those who favor abortion a clear advantage over those who object to the killing of the unborn. Public reason's ready-response is, "You may be right, but even if you are you cannot impose that belief on those who have yet to recognize the truth." The opponent of abortion is thus limited to non-moral, purely practical arguments against that which they find objectionable. Those who favor abortion, on the other hand, have access to a moral argument: "In order for women to have equal opportunities as men to follow the career path of their choice, or, more generally, to live life as their conscience directs them, abortion must be given legal protection." This is not simply a legal argument, but one unmistakably rooted in a moral conception of the person as being free and equal in the Rawlsian sense.

Indeed, Richard goes further to suggest the morality of abortion when he argues in defense of its constitutional protection. In response to an ethical argument that abortion is wrong, Richards responds, "On examination, the prohibition of abortion services infringes essential moral powers of private life in the service of non-neutral values inconsistent with the constitutionally required equal respect for general goods" and therefore "not of the weight required to justify abridgments of the interests essentially protected by the constitutional right to privacy."[31] Stated more to the point, Richards says, "Moral persons [those who can exercise the two moral powers] are not hostage … to beliefs they do not reasonably entertain."[32] Those who would argue against abortion must find a neutral ground that does not require anyone to succumb to beliefs they do not

[31] *Toleration and the Constitution*, 262.

[32] Ibid., 265.

share as a moral person, yet Richards's arguments in favor of a right to abortion leave no doubt of the moral superiority with which he holds his own beliefs and the degree to which he is willing to take others hostage in imposing them. He tells us that "prohibitions on abortion encumber what many now reasonably regard as a highly conscientious choice by women regarding their bodies, their sexuality and gender, and the nature and place of pregnancy, birth, and child rearing in their personal and ethical lives." He goes on to explain that the "abortion choice is thus one of the choices essential to the just moral independence of women, centering their lives in a body image and aspirations expressive of their moral powers."[33] Richards acknowledges that this is a moral argument, but it is one that rests within the bounds of supposed neutrality demanded by public reason. In other words it is within the scope of public morality, and thus available to those who favor restrictions on abortion laws, while those supporting such laws are left without comparable grounds for arguing.

One should note that Richards is interested in more than simply providing theoretical argument for reading the Constitution's background rights. He seeks an historical one as well. In the case of abortion he supports his moral defense of the practice with a retelling of history. The traditional argument against abortion fails to take seriously women as free and rational moral persons capable of self-creativity. Laws banning women from terminating their pregnancies, according to Richards, are based upon "theological ideas of biological naturalness and gender hierarchy that degrade the constructive moral powers of women themselves to establish the meaning of their sexual and reproductive life histories." This view, he tells us, is rooted in a sexist understanding

[33] Ibid., 268.

of womanhood in which the female is the property of the male and a masculine God, and she is used to advance some conception of a greater good. Thus John Stuart Mill's "Harm Principe" applies more to her than the fetus in her womb. She is a living, breathing moral person whereas the other is at best a potential person, yet one that cannot currently develop the two moral powers and therefore cannot interfere with someone who can.[34] The history of abortion in the West is thus one in which women have been taken hostage by a theological account of the good life that relegates them to third-class citizen; their life-decisions are undermined by lustful men and the children conceived without intention.

This retelling of history is a common strategy of Richards, and one that is not unexpected given the role of political philosophy Rawls envisions. Both he and his disciple recognize that the development of a constitutional democracy worthy the title of realistic utopia requires an account of history that reconciles the political conception of the person advanced with the historical development of institutions as they are. Getting the past *right* is necessary before the dawning of a new America where all persons are afforded constitutional protection of basic rights such as the privacy to live fully a self-made life can be possible. Controlling the historical narrative also allows Rawlsians to include within public reason the moral implications they are happy to accept without having to address the moral arguments put forward by any opponents. Such adversaries can simply be ignored, or told they are not addressing the issue at hand with public reason. And when the Court engages in historical reconciliation using public reason, it

[34] Ibid., 266-268.

takes upon itself the burden of moral authority for the political sphere. For Rawls and Richards it is the exemplar of public morality.

The Rawlsian Reading of Lawrence v. Texas

To what extent, if any, has the Court taken upon itself the mantel of public moral authority in its interpretations of the Constitution? In seeking an answer, we should find the most auspicious example of the Court acting as Rawls and his followers suggest it should, particularly with regard to reconciling us to our history so as to advance a realistic utopia. Near the top of the list, particularly for Richards, has to be *Lawrence v. Texas*, a case in which a state statute forbidding homosexual sodomy is ruled unconstitutional. Richards praises the case as the most important legal landmark of gay rights because it acknowledges the right to intimate sexual love as a constitutionally protected principle of privacy.[35] He thinks the Court was right in recognizing an historical prejudice against same-sex relationships, and did the morally right thing by protecting the dignity of homosexual life-choices as fundamental rights protected by the Constitution.

Justice Scalia's dissenting opinion also points to the Court's decisions as giving moral sanction to a particular lifestyle by way of legal interpretation of the Constitution. "It is clear … that the Court has taken sides in the culture war," Scalia declares, adding that the Court is "departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed." The six-member majority has, Scalia explains, acquiesced to a "law-profession culture, that has largely signed on to the so-called homosexual agenda … directed at eliminating the moral opprobrium that has

[35] *The Sodomy Cases*, 184.

traditionally attached to homosexual conduct."[36] Scalia goes on to say that societal attitudes toward sexual behavior are not stagnate, and what is at one time considered inappropriate may later be seen as actable, or *vice versa*. Those who would like to advance an argument one way or another are welcome to do so within the regular channels of politics. What Scalia protests is giving one side the moral edge under the Constitution by way of an interpretation of the document that has very little to do with the actual text. Aside from the fundamental problem of misusing the Constitution, such interpretations have more far-reaching consequences than decisions by society to decriminalize certain sexual acts. Scalia holds that the "people, unlike judges, need not carry things to their logical conclusion," they can allow for the decriminalization of sodomy without requiring the acceptance of same-sex marriage.[37] The people, therefore, are better left with this decision than a "Court that is impatient of democratic change."[38]

Though Scalia says nothing about Rawls, it does seem as though he is suggesting the Court is acting exactly as Rawls would hope in this case. It appears as though it is resolving a legal issue consistent with the principles of *justice as fairness*, which could in time be the basis for an overlapping consensus. This consensus can only come about if the constitutional logic used by the Court is absorbed into the background culture of society, thus the Court must elaborate the principles of fairness implicit in the case's resolution with an eye toward constitutional doctrine. The judges can accomplish this by reading the Constitution with public reason as their guide, and announce the decisions in

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[36] *Lawrence*, 602.

[37] Ibid., 604.

[38] Ibid., 603.

tandem with a morally correct outcome that precludes opposition on moral grounds. The Court thereby intervenes in the democratic process to protect a basic liberty, all the while pointing toward a future constitutional democracy.

When one turns to the opinion of the Court authored by Justice Anthony Kennedy, one finds the opinion does, to some extent, carry with it the expected tone of a Rawlsian opinion. Kennedy begins, for instance, by saying, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[39] He goes on to say that consenting adults can enter into homosexual relationships without sacrificing their "dignity as free persons."[40] Kennedy's language here does evoke something like Rawls's political conception of the person as an autonomous individual capable of choosing and acting upon a conception of the good not inconsistent with a public conception of justice, which entails respecting others' understand and pursuit of a good. And most people would include a loving relationship among those basic goods they would want as part of their personal way of life.[41] That a right to such a relationship can be given constitutional protection under the due process clause is explained by Kennedy as follows:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[42]

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[39] Ibid., 562.

[40] Ibid., 567.

[41] Rawls, *Theory of Justice*, 78-81.

[42] *Lawrence*, 578-579.

Kennedy here seems to open the door for the Court to engage in the type of historical reconciliation recommended by Rawls in *Justice as Fairness* and practiced by scholars such as Richards.[43] What is more, Kennedy points to the principles of the Constitution rather than the text in much the same way Richards suggest we should understand the founders' intention in writing the Constitution; namely, that history and philosophically sound principles need to come together when we interpret the Constitution. Only then is it in fact legitimate.

It is not surprising that Richards is sympathetic to Kennedy's opinion in *Lawrence.* He praises the opinion for its "analytical power and moral force" rather than its adherence to the Constitution's language.[44] He notes Kennedy's attention to the motive behind laws condemning homosexual acts; they are not so much concerned with preventing certain actions as they are an "irrational prejudice" directed at a particular class of people. Furthermore, he praises the opinion for overturning the precedent set in *Bowers v. Hardwick* and taking Justice Byron White's opinion for the Court in that case to task on historical grounds. Richards is pleased that the Court, in overturning *Bowers*, includes within the Due Process Clause's protection of privacy the intimate relations between same-sex couples, rather than striking the law down on the more narrow equal protection grounds. Justice Sandra Day O'Connor preferred this alternative in her concurring opinion because the law in Texas only banned sodomy between homosexual and not heterosexual couples. Taking the equal protection route would allow the *Bowers*

[43] The epigraph to Richard's *The Sodomy Cases* is this quotation from Kennedy's opinion. For an argument that Kennedy is in fact opening the door here for the Court to play historical interpreter see Watson, *Living Constitution,* 3-6.

[44] *The Sodomy Cases*, 147.

precedent to stand and would fall short of including homosexual relationships within the Constitution's protection of privacy. Richards thus finds much to like in *Lawrence*: it attempts to implement what he believes to be a philosophically superior understanding of morality based upon a public conception of justice that is increasingly open to gay-rights issues, sets the historical record straight *contra* Justice White in *Bowers* regarding the basic human right of intimate love, and sets the stage for the continuing movement toward a more inclusive society where the lifestyles of homosexuals are granted equal respect under the law.[45]

Furthermore, *Lawrence* is an example for Richards of the Court legitimately using judicial review to appeal to the basic rights recognized by a democratic majority but not adequately extended to marginalized minorities.[46] The goal of judicial review, much like Rawls urges, is to be the paradigm of democratic deliberation, that is, democratic reasoning. In other words, *Lawrence* is an attractive case for Richards because, in addition to getting the outcome he would want on moral grounds, the Court undertakes the task of educating the people about democratic justice. What makes a democracy in his view is not the design of institutions to facilitate broad participation, but the rules by which particular deliberative arguments are recognized by all as legitimate. The Court's intervention here is not meant to disrupt the democratic process as Scalia suggests, but to correct the reasoning by which the people govern themselves.

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[45] Richards speculates that Americans may one day look back on the days of *Lawrence* the same way we look back on racial or religious discrimination. He believes, ironically with Scalia, that Kennedy's opinion makes same-sex marriage a constitutional requirement in America. See ibid., 167-176.

[46] Ibid., 182.

From this perspective, Richards's brand of originalism is clearly meant to justify the use of judicial review to bring about the substantive outcomes demanded by public reason. Recall from earlier in the chapter that Richards praises the founders not for giving us the details in the Constitution, but for establishing a precedent by which a constitution is created. We are to follow their example, Richards holds, by recreating the Constitution anew for ourselves, just as the founders did in their own day. The written Constitution, then, should be seen as an expression of the founders' interpretation of the conception known as constitutionalism as they had inherited it. We have inherited a concept that now includes the idea of a written constitution that they established; and just as they interpreted their inheritance to fit their peculiar needs, we are to do likewise—interpreting what we have been given to recreate something new for ourselves.

This, no doubt, is a different explanation of the founding than is usually given, and it is not the only instance of Richards retelling history to advance his preferred brand of morality. His praise of *Lawrence* is another telling example of how he sees professional political scholars, particularly those with theoretical orientations, aiding the Court in its reconciliation of history. The opening chapter of Richards book on *Lawrence* tells the story of gay rights in America and the world. "Ancient Greek culture," he tells us, "not only tolerated but idealized pederastic male homosexual relations as central elements in Greek pedagogy and artistic and political culture."[47] The dawn of Christianity marked the end of such idealization; whatever distaste there was among Greeks for homosexuality, it was taken to an unprecedented level of intolerance under the influence of Christians who saw the renunciation of sexuality as the ideal. Only procreative sex

[47] *The Sodomy Cases*, 5.

was given moral sanction and political protection. Penalties for deviating from this standard were severe; capital punishment was the norm for homosexuals. What is more, patriarchal men used homosexual men as scapegoats to secure their own dominance in society over women and children. A silent, underground culture was informally established for those with sexual orientations to members of the same gender. The remnants of this prejudice that grew up on the West under the auspices of Christian rulers is only now, two-thousand years after to birth of Christ, beginning to be seen for what it is, irrational hatred on par with racism and anti-Semitism. Americans adopted these prejudices with scrutiny, and are behind the trend of Europeans to recognize the injustice of their thinking. The Court thus does right, Richards believes, when it treats homophobia in the same manner it has dealt with other laws that deny suspect classes full and equal liberty.

Now, proponents for and against any issue are equally capable of constructing an historical narrative to justify their position. My purpose here is not to so much to challenge the story Richards tells (although to be clear I strongly disagree with it), but rather to make plain that he is not simply rehearsing an objective set of historical facts, but is rather building a case for a more wide-spread societal acceptance of gay rights. For millennia the moral argument concerning homosexual activity has been in the negative. He not only wants to show that past thinking has been wrong regarding the intrinsic evil of such acts, but that to continue believing those arguments is really what is intrinsically evil. If you want to be moral, Richards urges, then stop condemning and start embracing those who choose to live a homosexual lifestyle.

The reason he praises Kennedy's opinion in *Lawrence* is precisely because he believes it encourages Americans to do just that, fully accept the gay rights agenda. Unlike O'Connor who wants to strike the Texas statute down on the narrow grounds that it does not also criminalize heterosexual sodomy, Kennedy declares that the decision to engage in an intimate relationship with a member of the same sex is protected under the Constitution of the United States. From Richards's perspective O'Connor's option is less concerned with the liberty humans have to shape their conception of reality and live accordingly.[48] She seems willing to strike at the very heart of the same-sex relationship so long as the law is written in a non-discriminatory manner. He approves Kennedy's approach for its more implicit moral approval of the personal decision to act upon homosexual inclinations. This is truer to the Rawlsian goal of protecting those basic liberties needed for individuals to live in accord with their personal conceptions of the good.

From Richards's point of view, then, *Lawrence* is an example of the Court approximating if not fulfilling its mandate as an institutional herald of Rawlsian justice. Its exercise of judicial review in this instance advances the substantive requirements of a constitutional democracy that can boast of being realistically utopian in its conformity to principles of justice that would be chosen under the conditions set in a hypothetical original position. Furthermore, it resolves a live controversy with attention to normative principles of right and crafts an opinion that reconciles us to our past so that we may better understand the course of our future. In doing so, the Court exemplifies not only

[48] Richards argues that Kennedy is truer than O'Connor to the Court's opinion in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), co-authored by Kennedy, O'Connor, and David Souter, when it declares, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" (851). See *The Sodomy Cases*, 153.

public reason, but a public conception of morality consistent with the democratic project initiated by the American founders understood primarily as a method of deliberation seeking justice. Because democratic majorities still fall short of that standard, the Court's intervention here is necessary to maintain the founders' constitutional project and advance the cause of democracy for those who have been tragically left off the political table heretofore. From this perspective, one can hardly imagine the Court more adequately fulfilling its duties under a notion of Rawlsian constitutionalism.

The More Constitutional Reading of Lawrence v. Texas

A closer examination of Court's opinion in *Lawrence*, however, gives us reason to doubt the degree to which Kennedy is actually playing the part of a Rawlsian judge. To be sure, much of Kennedy's dictum does seem to cohere with the demands of public reason, and the outcome of the case likewise points to what seems to be a public morality given exclusive Constitutional protection. Scalia, as we saw, certainly reads the majority opinion in that way. That said, I believe Kennedy's opinion is better understood as an expression of constitutional rather than public reason. I say this with the admission that my own reading of the Constitution's Fourteenth Amendment is in disagreement with Kennedy's in this case, yet I can nonetheless recognize a constitutional logic in the opinion that is in sharp contrast to the Rawlsian model of judicial review supported by Richards.

As is evident, Supreme Court cases are not decided in a vacuum, but rather emerge from a complex set of contexts that include past precedents, legislative history, and social circumstances among other things. Case precedents are of particular importance for understanding Kennedy's opinion. *Bowers* of course is in the

background, but so are *Planned Parenthood v. Casey* and *Romer v. Evans*.[49] Kennedy wrote (or helped write) the Court opinions in each of these latter cases, the first dealing with Pennsylvania abortion regulations and the second with a state referendum that prevented the Colorado government from granting homosexuals remedies against discrimination. *Casey* made clear that there is no absolute right to an abortion, yet it also held that the individual liberty protected by the Constitution, particularly given the expectation of privacy inherent in the notion of liberty, places limits on abortion's regulation. *Romer* held that if the Equal Protection Clause means anything, unpopular groups cannot be barred from the protection of the law.

Lawrence makes most sense in light of these two precedents, which also came from Kennedy's hand. If the purpose of constitutional government is to protect liberty, then there must be some tolerance for those who choose to exercise their liberty in ways disagreeable even to the vast majority. This does not require anarchy, but laws have to refrain from unduly interfering with people's constitutionally protected liberty to make personal choices about the intimate aspects of their lives. "As a general rule," Kennedy says we "should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects." He then goes on to explain that it "suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[50] For

[49] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Romer v. Evans*, 517 U.S. 620 (1996).

[50] *Lawrence*, 567.

Kennedy, constitutional government and the Court's recent precedents require this type of toleration in order to preserve liberty.

Toleration, it should be noted, does not amount to moral approval, and Kennedy is careful to avoid giving the type of ethical sanction found in Richards's analysis of the case. On the contrary, the law should not sanction anymore than condemn homosexual relations. He recognizes, for instance, that the condemnation of sodomy and other homosexual acts have a deep history and, for many people, do not amount to "trivial concerns," but rather are essential beliefs to their understanding of the human person and the proper way to live one's life.[51] Authoritative as these concerns may be in some contexts, for purposes of constitutional law no moral tradition can claim to have a monopoly over the dictates of the Constitution.

The difference between Kennedy and Richards (or Rawls) here boils down to a conception of constitutionalism. For Richards, *Lawrence* is a victory for gay rights because he understands the case to give priority to his version of morality. Kennedy, however, gives priority to the Constitution's purpose of protecting individual liberty, not a specific morality. What is more, Kennedy does not hint at a coming realistic utopia, nor does he suggest that we are slowly moving toward a more just democratic order. He does say that each generation has the opportunity to articulate freedom in its manifold possibilities, but this does not necessarily require the adoption of *justice as fairness* as the regulative principles of constitutional law. Indeed, if Kennedy's concern is with securing

[51] Ibid., 571.

individual liberty even for unpopular groups, one could imagine him striking down laws that aim at fair outcomes as an interference with the Constitution's protection of liberty.[52]

Given this reading of the Court's opinion in *Lawrence*, which again holds that Kennedy is concerned with protecting individual liberty and not with advancing the principles of a realistic utopia, there is an irony to Richards's preference for Kennedy's opinion over that of O'Connor's. To recall the difference, Kennedy wants to overturn the Texas law banning same-sex sodomy on the basis of the Due Process Clause of the Fourteenth Amendment while O'Connor urges the Court to do so based upon the same amendment's Equal Protection Clause. Richards, as we saw, finds favor with Kennedy's opinion for the Court because it seems to give constitutional standing to a moral outlook he believes is consistent with public reason, while O'Connor's concurrence appears to be more concerned with legal nuances than advancing a specific moral outlook rooted in a public conception of justice. The paradox is that Kennedy's opinion, in being more concerned with liberty and therefore toleration, does not require that American's accept the homosexual lifestyle as a positive good, whereas O'Connor's opinion, in pointing to treating all on equal terms, does. "Texas' sodomy law," she argues, "brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else."[53] She is concerned less with liberty and more with homosexuals being treated as equals in society. She prefers striking the law down on narrow grounds because she is confident that sodomy laws that could pass equal-

[52] In fact, I will show that Kennedy has done so in the next chapter.

[53] Ibid., 581.

protection muster will not long be politically popular.[54] They Court's role, from her perspective, is to assure all groups that they will be treated on equal terms, and not simply tolerated. Her reading of the Constitution is actually closer to the egalitarian principles advanced by Rawls and upheld by Richards.

None of this is to say that I agree with Kennedy's interpretations of the Constitution in this instance. I simply mean to suggest that a closer reading of his opinion renders a view of constitutional government inconsistent with Richards's account in some important respects. Nothing in the opinion aspires to teach Americans that homosexual relationships are to be afforded the status of equality in our political discourse. Instead a much less stringent requirement is made that such relationships be tolerated under the law in order to uphold a broad understanding of liberty for all Americans. Homosexual couples are to be given the same protections under the Constitution, not so that they can gain societal equality, but to ensure those protections are not eroded through singling out people disliked by transient majorities. At the heart of this opinion is a clear conception of the rule-of-law integral to constitutionalism. We need not imagine Kennedy to be advancing principles of democracy where he is simply maintaining basic constitutional commitments.

Ultimately what Richards is doing in his interpretation of *Lawrence* is the same thing he does in his account of the founders—manipulating reality in order to fit his project, a project very much under the influence of John Rawls. He asked us to see the founders as establishing methods of deliberation based upon principles rather than concrete institutions for resolving disputes according to a written text. The originalism

[54] Ibid., 584-585.

he endorses is one that would allow for us today to interpret the Constitution in accord with our desires regardless of what the text actually says. Whereas I see within the text ambiguities that allow for some changes in interpretation over time, the boundaries are only so elastic. If stretched too far they will snap. It is not clear in Richards's account of the Constitution where the boundaries of legitimacy lie other than in conforming to Rawlsian public reason. But this substitutes public reason for the Constitution, undermining the very thing that is being interpreted. It is this type of interpretation at work in Richards's account of *Lawrence*; he is more concerned with getting the arguments *right*, offering reasons that match the flavor of his hoped-for future society, than taking the text of the Constitution seriously.

What we see then in Richards is a prime example of a political theorist performing the third task of political philosophy advanced by Rawls in conjunction with constitutional interpretation. His account of the founding and *Lawrence* amounts to a retelling of history that attempts to reconcile us to his brand of constitutional democracy. Richards, like Rawls, understands that control of the historical narrative is necessary before one can shape the future. Rawls never goes very far down the road of historical interpretation, but he does try to legitimize that role for others. And because the Court is an essential organ for bringing Rawlsian normative political theory to bear on actual politics via constitutional law, convincing the Court of the right historical narrative is essential. This is what Richards is attempting to do in his work on the Court.

CHAPTER NINE

Constitutionalism and Change: *Ricci v. DeStefano* as an Alternative Approach

The analysis of *Lawrence* offered in the last chapter argues that Kennedy's opinion is not as conducive to a Rawlsian reading of the Constitution as some may think. The reasoning Kennedy provides in defense of the Court's decision to strike down a state law prohibiting same-sex sodomy is not based on a public conception of justice akin to *justice as fairness* or any other democratic theory of right. Instead, it is based upon Kennedy's understanding of the purpose of constitutional government, which is to secure individual liberty under a rule of law that limits the legitimate ends of government. In the case of *Lawrence*, Kennedy holds that the denigration of an unpopular minority's lifestyle is not a legitimate *end* of government. Lifestyles may be curtailed or prohibited as means to some other legitimate end of government—to prevent harm, for instance—but not as the primary motivation of government. Whether we agree with Kennedy or not on this point, there is nothing in his opinion to suggest that he or the Court is interested in advancing the cause of a Rawlsian constitutional democracy where all people are to be treated on terms of fairness.

Further evidence of this can be found by looking at other opinions written by Kennedy that would be ideal cases for applying the principles of a fair overlapping consensus. Here I offer but a single example, that of *Ricci v. DeStefano*, a 2009 case

regarding promotions within the New Haven Fire Department in Connecticut.[1] When the city sought to promote firefighters in 2003 it followed a set procedure for ranking candidates, a procedure largely based on a written test. Whites were disproportionally favored over black and Hispanic candidates in the results of the set process. Wanting to avoid such an outcome, the city decided to throw-out the test results, prompting a law suit from the white firefighters who stood to be promoted. The city defended its actions saying it simply wanted to provide a fair opportunity for all parties involved, including the historically less-fortunate.

Under a Rawlsian constitutional democracy, it would seem the city was properly securing rights associated with the second principle of justice and therefore should allowed the authority to assure racially proportional hirings and promotions. As such, Rawls would call upon the Court to read into the Constitution an empowerment of Congress and states to secure the liberties of fairness and equality so long as no one's basic liberties (free speech, liberty of conscience, etc.) are compromised.[2] In this case, no liberties associated with the first principle would stand in the way of the Court allowing the New Haven city council from taking steps toward promoting members of disadvantaged groups in order to remedy past discrimination and build a more equal future for all regardless of race.

The Court, however, does not act as a Rawlsian would hope in this case. Rather than using public reason derived from a source beyond the Constitution, a hypothetical

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[1] *Ricci v. DeStefano*, 557 U.S. ____ (2009). Because this U.S. Reports volume has not yet been published, page references will be to the slip opinion available at: http://www.supremecourt.gov/opinions/08pdf/07-1428.pdf.

[2] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 363-371; and *Justice as Fairness: A Restatement* (Cambridge: The Belknap Press, 2001), 55-61.

overlapping consensus, Kennedy relies upon constitutional reasoning in what is a very complex case. Indeed, the complexity is one of the reasons I am focusing on it here; Kennedy is attentive to the need for change in a constitutional system and finds room to accommodate it without slipping a new philosophical foundation beneath the text. He acknowledges past failures within American society to live up to its constitutional ideals and the need to remedy those failures, but also recognizes that corrections have to take place within the boundaries of the Constitution.

Besides Kennedy's opinion for the Court, there are two concurring opinions and one dissenting opinion, all of which have slightly different resolutions to a tension that exists within U.S. law. As originally written in 1964, Title VII of the Civil Rights Act (CRA) prohibits any intentional act of employment discrimination based on race, color, religion, sex, or national origin. This is referred to in common legal jargon as *disparate treatment*. A 1991 amendment added a prohibition on employment policies and practices that have an unintended disproportionately adverse effect on minorities, commonly referred to as *disparate impact*. The tension between these two provisions caused a dilemma in New Haven. As mentioned above, the city's Civil Service Board (CSB) had to decide whether or not to certify the results of promotional exams for the local fire department that highly favored white candidates. They feared certification of the exams would lead to a disparate impact suit by the minority firefighters that did not score well, but by throwing the exams out they faced a disparate treatment suit.

Title VII of the Civil Rights Act (CRA) thus presents a tension between disparate treatment and disparate impact. Scalia's concurrence takes the most dramatic tone with regard to the opposite pulls in the law, calling it a war that eventually will have to be

dealt with by the Court in order to bring about peace. He would eliminate the tension altogether, and presumably soon. Alito's and Ginsburg's opinions, though drastically different in almost all other ways, are similar insofar as both want to ignore the so-called war and read the current law harmoniously as it stands. Kennedy's opinion, like Scalia's, takes note of the existing tension, but is less committed to bringing about peace, at least in the near future. Rather than reading the tension out of the law, he allows it to stand, and shows how it may even be useful for bringing about the end of discrimination in America. He recognizes the views of both sides of the Court, and shows that they are not necessarily inconsistent with one another. When put in the light of the Constitution, the legal tension in Title VII has a logic to it. But this means the law should be understood from the perspective of the Constitution, and not Rawlsian public reasoning.

Much of the scholarship on affirmative action as well as some of the immediate responses to *Ricci* has described the two sides of the debate and the conflicting provisions of Title VII to be completely irreconcilable. Scholars have argued that attitudes toward affirmative action are bound to clash because they are predicated upon competing ways of thinking. Some view life, it has been argued, through and individualist prism while others look at it from an egalitarian perspective, and there "is no magical bridge that can span the gulf separating these two cultures."[3] We should of course note that this is the very bridge Rawls hopes to build, but when it comes to concrete attempts to implement affirmative action, such as New Haven's in the case of *Ricci*, most agree a bridge cannot be built. Former Souter clerk Kermit Roosevelt argues that in cases where there is a tension in the law people, including judges, will decide the matter "largely [from] the

[3] Charles Lockhart, "Socially Constructed Conceptions of Distributive Justice: The Case of Affirmative Action," *The Review of Politics*, Vol. 56, No. 1 (Winter, 1994), 49.

perspective that informs their judgment ... not by logic or law but by their attitudes about the world… The facts of *Ricci* are an inkblot in which we all see the pictures life has drawn for us."[4] Stanley Fish echoed this view, saying that the contending provisions of Title VII "come from different conceptual universes."[5] For Fish, these different universes are not individualism and egalitarianism, but sheer racial preferences written into the law. Whatever the basis of the division, no one has taken note of the fact that Kennedy's opinion does attempt to make sense of the tension without eliminating it.

By allowing the tension in the law to remain, however, Kennedy does not necessarily build the bridge Rawls would want. It is more like a tightrope that highlights the space spanning two opposing ends rather than a bridge that accommodates easy travel between the two, eliminating any real differences other than location. By allowing this tension to remain, I believe Kennedy does more to accommodate change within constitutional system than his colleagues offer in their opinions. All the while, however, Kennedy is sensitive to the demands of the rule of law requirements that define constitutionalism. He therefore presents in this case a possible alternative to the Rawlsian view that a just regime requires overcoming the rigidity of a constitution by interpreting it through the lens of political philosophy.[6]

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[4] Kermit Roosevelt, "The *Ricci* riddle and the law's limits," *Christian Science Monitor*, June 30, 2009, 9.

[5] Stanley Fish, "Because of Race: *Ricci v. DeStefano*," Stanley Fish Blog, NYTimes.com, July 13, 2009, accessible at http://fish.blogs.nytimes.com/2009/07/13/because-of-race-ricci-v-destefano. The implications of Fish's piece is that the Court's ruling in this case was necessarily racist against the black firefighters.

[6] One should note that Kennedy has been the subject of many recent studies. I note two here: Frank J. Colucci, *Justice Kennedy's Jurisprudence: The Full and Necessary Meaning of Liberty* (Lawrence: The University of Kansas Press, 2009) and Helen J. Knowles, *The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty* (Boulder: Rowman and Littlefield Publishers, 2009). Colucci sees Kennedy as a justice that combines a Dworkinian (or perhaps Rawlsian) commitment to reading the Constitution philosophically with a libertarian rather than liberal understanding of justice. Knowles seeks to define

The Complexity of the Civil Rights Act and Ricci

In order to see the alternative that Kennedy presents to the philosophical reading of the Constitution, focus on the particular facts of the case will be helpful. What is striking in looking at the opinions of the case is the disagreement among the justices about what facts are important for the decision. In his opinion for the Court, Kennedy restricts himself to those that are necessary for deciding the case. Ginsberg accuses him of taking the facts out of context, reminding the Court that firefighting "is a profession in which the legacy of racial discrimination casts an especially long shadow."[7] Alito's stated reason for writing a concurring opinion is to contest the context Ginsburg urges, claiming that she herself leaves out important parts of the story. Interestingly, the national media was largely satisfied with the facts that Kennedy provided, but it is Ginsburg's and Alito's opinions that contain more of the drama in New Haven regarding the case. It is as though Kennedy says, "Let's stick to the essentials of the case," Ginsburg retorts, "But you can only decide race discrimination cases within a broader context," and Alito responds saying, "Okay, fine, let's put things in context. Let's talk about New Haven's political situation." Ginsburg and Alito both seem willing to highlight the facts that best make the case for their preferred outcomes.

For present purposes, I will primarily limit myself to the Kennedy version of the facts, which are as follows. In 2003, New Haven administered an exam to 118 firefighters seeking promotions to the ranks of lieutenant and captain. This was not

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exactly what Kennedy understands by liberty. As the last chapter demonstrates, Kennedy is certainly committed to protecting individual liberty, but as I hope to show here, he does so from a basic notion of constitutionalism and not as a philosophical commitment (contra Colucci) nor a personal preference (contra Knowles).

[7] *Ricci*, Ginsburg, 2.

something frequently done in New Haven, so "the stakes were high."[8] In accordance with a contract between the city and the firefighters' union, candidates for promotion were to be ranked based on a written and oral exam, the written portion receiving a 60 percent weighting with the remaining 40 percent designated for the oral portion. The city's charter provided that promotions were to be made based on the three highest ranking performers on the test, which they call the "rule of three." In this case, eight lieutenant and seven captain positions were available, meaning only 19 individuals would be considered for promotion based on the test results.

To ensure that the test would be unbiased yet relevant to New Haven, the City hired Industrial/Organizational Solutions, Inc. (IOS) to design the exam. Among other things, IOS interviewed incumbent captains and lieutenants from New Haven and rode along with on-duty firefighters in order to prepare the test. After doing so, it made available a list of source material from which the questions were drawn. The oral portion was to take place before a panel of three assessors superior in rank to the positions being tested, all of whom were from outside of the local fire department (because, as Kennedy says, of past controversies). Each panel was composed of one white, one Hispanic, and one black assessor.

The results of the exams, taken in November and December 2003, disproportionately favored white applicants. Of the 77 candidates who took the lieutenant exam, 43 were white, 19 black, and 15 Hispanic. Among those who passed were 34 white candidates, 6 blacks, and 3 Hispanics. The ten highest ranked candidates were all white, meaning all eight of the new lieutenants would be white. Results were

[8] Ibid., Kennedy, 1.

similar for the captain positions—41 applied including 25 whites, 8 blacks, and 8 Hispanics. Only 22 passed the captain exam—16 whites, 3 blacks, and 3 Hispanics. The top nine included seven whites and two Hispanics.[9]

The CSB had to certify the results of the exam in accord with the city's charter, and they met to discuss doing so in January of 2004. Various city officials urged scrapping the results due to the likelihood of a disparate impact suit by minority applicants. IOS testified before the CSB that the results had nothing to do with any inherent defects in the test. Others also testified, most notable a direct competitor of IOS who cast some doubts on IOS's method of creating the exam, although admitted that the city's contract with the firefighter's union might have also been the cause of the disparity insofar as it gave great weight to the written portion of the exam. He suggested certifying this particular exam, but working toward a better format in the future, something he said he would be willing to help the city do. Indeed, he now holds a contract with the city for that purpose, a fact that Kennedy subtly suggests casts doubt on his testimony.[10] Other witnesses included a fire program specialist for the Department of Homeland Security (a black man) who urged certification of the exam, and a Boston College professor who specializes in race and culture. The latter turned down the opportunity to review the exam itself, but nonetheless felt confident suggesting that it was unfair because it tested firefighting from the perspective of the white experience. Written tests, she inferred, were inherently unfair to blacks and Hispanics.[11]

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[9] Ibid., Kennedy, 5.

[10] Ibid., Kennedy, 32.

[11] Among Janet H. Helms's numerous publications are books such as *A Race Is a Nice Thing to Have: A Guide to Being A White Person or Understanding the White Persons in Your Life* (Topeka, KS:

The CSB's vote on whether or not to certify the results ended in a 2-2 tie resulting by a prearranged rule in throwing out the exams. Frank Ricci and 16 other firefighters, including one Hispanic, sued New Haven's mayor and several other city officials, including the two CSB members who voted against certification, and a local activist named Boise Kimber (who, as we learn from Alito's opinion, adds much flavor to the drama). Ricci and company alleged that the city and CSB had violated their rights under the disparate-treatment clause of Title VII and the Equal Protection Clause of the Fourteenth Amendment. The city responded with the claim that they acted in good-faith, believing that inaction on their part would have violated the disparate-impact clause and led to a lawsuit by minority applicants. Ricci's side countered that this amounted to a race conscious decision in violation of the other side of Title VII and the Equal Protection Clause. The District Court argued that efforts to avoid disparate impact is not evidence of discriminatory intent, and the fact that no one was promoted in the end meant that no one was treated disparagingly. A three-judge panel at the Second Circuit, including Sonia Sotomayor, agreed with the lower Court, adopting in full its reasoning with a one-paragraph *per curiam* opinion. Three days later the Second Circuit rejected a motion to hear the case *en banc* 7-6.

At her confirmation hearing, Judge Sotomayor explained why there was not a detailed opinion from her or any of the other members who sided with the city—the precedent, she said, was clear and needed little explaining.[12] Kennedy's opinion,

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Content Communications, 1992) and *Using Race in Counseling and Psychotherapy: Theory and Process* (Needham, MA: Allyn & Bacon, 1999).

[12] The *Ricci* case was a frequent topic at Sotomayor's confirmation hearings. Her exchange with Senator Patrick Leahy is a good representation of her justification for deciding the case the way she did. See James Oliphant, "Sotomayor hearings: Leahy plays defense out of the box," *Las Angeles Times*, July

however, claims that "few, if any, precedents" adequately address the relationship between the competing clauses of Title VII, or how they relate to Equal Protection.[13] But there are at least a few past cases of which to take note, such as *Griggs v. Duke Powder Company*, a 1971 case in which the Court unanimously read the disparate-treatment clause of Title VII to prohibit promotion policies that have the effect, even if unintended, of discriminating against a particular racial group.[14] In essence, disparate treatment was interpreted by the Court to include disparate impact. An employer could defend specific hiring or promotion policies by proving that they were related to some "business necessity." *Griggs* was narrowed in 1976 when a 7-2 Court ruled that Title VII did not apply to the District of Columbia in the case of *Washington v. Davis*.[15] Allegations of employment discrimination in the nation's capital had to be made under the Fifth rather than Fourteenth Amendment, meaning the broad interpretation of disparate treatment to include disparate impact was off the table; intent had to be proven.

An important component of *Davis*, however, was the Court's dicta suggesting that Congress could allow for disparate impact suits through direct legislation. But in light of more recent cases, the *Davis* dicta has become somewhat obscure.[16] As Richard Primus explains, "Pre-*Davis*, many courts and commentators believed that state actions *creating*

14, 2009, available at: http://latimesblogs.latimes.com/washington/2009/07/sotomayor-hearings-leahy-plays-defense-out-of-the-box.html.

[13] *Ricci*, Kennedy, 16.

[14] *Griggs v. Duke Powder Company* , 401 U.S. 424 (1971).

[15] *Washington v. Davis*, 426 U.S. 229 (1976).

[16] See for example *City of Richmond v. J.A. Croson Co*., 488 U.S. 469 (1989), which invalidates a city's affirmative action policy for subcontracting; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), which held that the Constitution protects persons, not groups; and *Gratz v. Bollinger*, 539 U.S. 244 (2003), in which the Court invalidates the University of Michigan's undergraduate race-conscious admissions standards.

disparate impacts violated equal protection; post-*Adarand*, one could well ask whether state actions *prohibiting* disparate impact violated equal protection."[17] Yet by the time the Court rules in *Adarand*, Congress had already added the disparate-impact clause to Title VII, which it did in 1991 in response to the case of *Wards Cove Packing Co. v. Atonio*.[18] Here the Court qualified its previous disparate-impact reading of the disparate-treatment clause, arguing that more than a statistical disparagement between minorities and non-minorities was needed to prove discrimination. In the absence of a clear intention to discriminate, minorities had to at least be able to point to some specific hiring or promotion policy that was inherently unfair to them and favorable to whites. The employer would have to defend that policy in terms of its relation to the job. The result of *Wards Cove*, it was feared by Congress, would have the effect of limiting the reach of the disparate-treatment provision. Accordingly, Congress amended the law.

This focus on the precedents behind *Ricci* puts some doubt on Sotomayor's explanation of why the Second Circuit upheld the District Court's ruling without a substantive opinion of its own. The precedents provide a legal history that sheds some light on the reason why New Haven found itself in the dilemma it did. Regardless of the decision that the CSB made, a lawsuit was likely to come. The question the CSB, along with the city, had to consider was this: *on what grounds do we think we have a better chance of winning?* But they might have also asked themselves, given the conflict in the law, *what is the constitutional thing to do?* If they had reason to believe that the test

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[17] Ricahrd A. Primus, "Equal Protection and Disparate Impact: Round Three," *Harvard Law Review*, Vol. 117, No. 2 (Dec., 2003), 496. *Adarand* is cited above.

[18] *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Congress also was responding to two other 1989 Court decisions: *Martin v. Wilks*, 490 U.S. 755 (1989) and *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

itself did discriminate and lacked a proper relation to the actual conditions in New Haven or the job, then they could argue they made the right decision. But what kind of proof was needed in order to make this claim? Based on the Court's precedent in *Wards Cove*, the city would have to provide something more than a statistical unbalance in the test results among racial groups. But if Congress's statutory expansion of Title VII went back to the *Griggs* standard, a lower burden of proof would be necessary to show disparate impact.

As is the case in politics, a governing decision had to be made. To certify or not to certify, that was the question. In deciding not to certify, the CSB and New Haven made the implicit claim that a disparate impact had occurred and they were taking a step to rectify it to avoid a law suit. By inference New Haven said that it felt it stood on better ground in fighting a disparate treatment suit, particularly given the fact that in discarding the exam all were being denied a chance for promotion. But the fact that it was already known that there were winners and losers as a result of the exam, the winners could argue that throwing everyone's exams out was disparate treatment insofar as it was motivated by racial considerations. The stage was thus set for an interesting court battle, one in which a Rawlsian influence may make a difference. Whether or not it did can only be found in looking at the details of the Court's opinion.

Disparate Treatment versus Disparate Impact – Kennedy's Opinion

The story of Title VII, as outlined above, is circular. As part of the CRA, Title VII is passed pursuant to Congress's power to regulate interstate commerce with the intention to ensure equal protection in the labor market. This seems the pure intent in 1964. The Court's interpretation of disparate treatment under Title VII recognizes that

sometimes policies that appear equal or facially neutral may be constructed in such a way that they are bound to have an unequal result, insofar as one group of people is affected differently than another. Thus, if it is known in a particular community that whites graduate from high school at a higher rate than blacks, mandating a high school diploma for promotion would have the intended or unintended effect of favoring white candidates. If having a high school education does not have a bearing on the job, such a policy may in fact treat people unequally based on race. But looking at such factors has the effect of reintroducing race into considerations of merit, and could put state governments in the uncomfortable position of have to satisfy a federal law without violating the Fourteenth Amendment's Equal Protection Clause. The Boston College professor's testimony before New Haven's CSB could be interpreted to suggest that the only equal way to test various races and ethnicities is to give each group a different test that relates to the life experiences each tends to have. This is like the separate-but-equal standard reintroduced, but now with the motive of helping minorities achieve a more prominent standing in society. The natural response to this argument is to move back in the other direction and say separate is not equal—not on train cars and not in placement exams. And in fact it is this type of thinking that the Equal Protection Clause is trying to avoid. We are reminded of Justice Harlan's dissent in *Plessy v. Ferguson* that the Constitution is color-blind.[19]

Are we then caught in a trap where the only way we can treat people equally, or provide them equal protection under the law, is to treat them on the basis of their race rather than their individual qualities? Are we caught in an unending battle between intolerable and acceptable discrimination? Can the Constitution provide us any guidance

[19] *Plessy v. Ferguson* 163 U.S. 537 (1896) ,Harlan dissenting at 559.

here? The Court has recognized that in some instances distinctions between groups of people may be unavoidable or proper, but race and ethnicity has been consistently seen by the Court as an improper distinction in nearly all cases. The Court has allowed states some leeway when seeking to remedy past wrongs or encouraging racial diversity, but on the whole race is seen as a red flag. Congress's effort to remedy disparate racial differences in employment outcomes through Title VII, though passed by Congress under its commerce power, may be best understood in light of the Equal Protection Clause, especially where the employer in question is a state entity. If the law requires states to disregard the Constitution's prescription of equal treatment, the Court may have grounds to call that portion of the law unconstitutional.

One of the striking aspects of Kennedy's opinion, then, is that he settles the question on statutory terms and does not consider arguments made directly under the Equal Protection Clause. Or does he? A close review of the argument may prove otherwise. He begins with the principle at stake: "our decision must be consistent with the important purpose of Title VII—that the workplace be an environment free of discrimination, where race is not a barrier to opportunity."[20] He goes on to reject Ricci's claim that this precludes disparate impact, which he says "ignores the fact that … Congress has expressly prohibited both" disparate-treatment and disparate-impact. New Haven, however, is at "the opposite end of the spectrum" asserting, "that an employer's good-faith belief that its actions are necessary to comply with Title VII's disparate-impact provision should be enough to justify race-conscious conduct."[21] Neither side gets

[20] *Ricci*, Kennedy, 20.

[21] Ibid., 21.

it right according to Kennedy, but there is a difference. Ricci's side ignores a portion of the law, but New Haven misunderstands the "foundational prohibition of Title VII," which prohibits adverse actions on account of race.[22] Disparate impact has to be read according to the larger purpose of the statute. If read otherwise, employers could discard promotional examinations at the "slightest hint" of disparate impact, or even if the preferred racial balance is not struck, setting up a "*de facto* quota system" or "the employer's preferred racial balance."[23] What is needed is "a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision." A strong-basis-in-evidence standard is thus adopted to resolve conflicts between the two provisions of the law. And in this case, the city fell short of that standard when it threw out the exams based on the fear of litigation, thus violating the disparate treatment provision. Because he could resolve the case at the statutory level, he declines the opportunity to take up Ricci's Equal Protection argument.[24]

What Kennedy does instead is show how his decision in this case is consistent with related cases that just happen to be Equal Protection cases. He explains, "Our cases discussing constitutional principles can provide helpful guidance in this statutory context." The cases he looks at are those that established the strong-basis-in-evidence standard adopted here: *Wygant v. Jackson Board of Education* and *Richmond v. J. A.*

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[22] Ibid., 21-22.

[23] Ibid., 22.

[24] Ibid., 25. As Kennedy explains, "because respondents have not met their burden under Title VII, we need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution."

Croson Co.[25] Writing for a plurality in *Wygant*, Justice Powell argued that racial classifications by states had to be justified in pursuit of a compelling government interest and narrowly tailored. In this case a Michigan school district decided to layoff white teachers with superior experience while keeping less-senior minorities in order to retain a racial balance among teachers overall in the district. Powell was willing to accept the state's testimony of a compelling government interest—remedying past discrimination and providing minority role models in schools—but voided the action as unconstitutional in not being narrowly tailored. As Kennedy explains, "Powell recognized the tension between eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other."[26] These two "constitutional duties" are not always compatible and often lead to tension. Remedial action could only be pursued when there is a strong-basis-in-evidence of past discrimination with lasting effects that can be remedied through action. But that action itself has to be tailored to fit the constitutional system, which puts a premium on individual merit, not group preference. As was made clear in *Croson*, racial quotas can never be a constitutional means of correcting past wrongs.

Powell's opinion in *Wygant* is consistent with his earlier opinion in *Bakke*.[27] Though not mentioned by Kennedy, the *Bakke* case is relevant here as well, at least for explaining Powell's reasoning and Kennedy's adoption of it. In the landmark affirmative action case, Powell argued that race could be taken into consideration by university

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[25] Ibid., 23. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

[26] Ibid., 23.

[27] *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

admission programs, but that one's race could not be a barrier to consideration. Seats could not be reserved for members of this or that race. All had to be considered under a merit system. Race could be considered as part of an individual's overall experience, but all seats had to be available for every candidate. In both *Wygant* and *Bakke*, Powell allows for the possibility that local decision makers could consider racial criteria if they had a compelling reason to do so, such as remedying past discrimination. What they could not do was deny all applicants equal consideration. Powell requires everyone to be treated as an individual and to be judged according to merit. Race could only be considered in the case of two or more candidates otherwise similar in other regards. A blanket bonus for some particular race was unconstitutional. Many have criticized these rulings as requiring future ad hoc decisions from the Court to inquire into the specifics of every university's admission program or every school board's layoff policy. But in fact this has not happened. While some have thought a bright-line rule would allow more certainty to local actors, what is overlooked is that Powell's approach actually allows more freedom for local governments to craft policies that are best suited for their communities so long as they stay within certain constitutional parameters.

Justice Kennedy tries to retain this sensitivity to local officials in his opinion in *Ricci*. This may seem paradoxical given the fact that he decides against the local decision makers, as did Powell in both cases cited above. But imagine if Powell had sided completely with either four-justice contingent in *Bakke*. Recall in that case no justice fully embraced Powell's opinion. Rather, three justices signed on to Stevens's opinion concurring in judgment and four others dissented. Those concurring in judgment would have disallowed race to play any consideration in the admissions process; those

dissenting thought it should play a larger role in the process. Powell, however, holds that racial considerations may be acceptable under certain conditions, and it is up to local authorities to prove their case when invoking race. What he makes clear is that any distinctions based on race cannot be to the exclusion of individual evaluations. The same logic holds in *Wygant*. Powell recognizes that some circumstances may call for remedial actions to correct past discrimination, but this is not an invitation to treat people as part of this or that group rather than as individuals. He maintains that the local governing body is the appropriate authority for determining if such action is necessary, but even then steps must be taken to protect people as individuals. He thus recognizes competing claims within the constitutional structure of the United States, and adapts affirmative action programs to the logic of constitutional rule. Efforts to promote diversity in colleges and the workplace must be done in accordance with Constitution, particularly its Equal Protection Clause. Though Powell's opinion was not fully embraced by the Court in the 1970s, it earned respect over time, and became the basis for the Court's *Bollinger* decisions.[28]

It also serves as the basis of Kennedy's opinion here in *Ricci*, for like Powell, Kennedy sees competing principles in play that are not necessarily in a zero-sum game. They are the same principles at issue in *Bakke, Wygant,* and *Croson*: eliminating segregation and discrimination, which may require occasional remedial action, and ending governmentally imposed discrimination, which defines remedial action. Kennedy's opinion, like Powell's, argues that local authorities need not have one or the

[28] *Gratz v. Bollinger*, 539 U.S. 244 (2003), University of Michigan's undergraduate admissions program ruled unconstitutional by the Court; *Grutter v. Bollinger*, 539 U.S. 306 (2003), University of Michigan's law school admissions program upheld by the Court.

other of these principles forced upon them by the Court. There is room for both under the Constitution so long as they are constitutionally understood. Congress's purpose, under Title VII, he reminds us quoting *Griggs*, is to "rid the workplace of practices that are fair in form, but discriminatory in operation."[29] That said, Kennedy is quick to point out that Congress has also prohibited employers from taking race-based actions. The strong-basis-in-evidence standard allows for both provisions to stand within a constitutional framework that honors the merits of people as individuals and not as member of this-or-that racial group, but at the same time allows local officials to apply remedies to correct past wrongs, as long as those remedies are narrowly tailored to fit within the constitutional schema as a whole. Local officials and employers are allowed discretion, but it is limited to those cases where there is strong evidence of a disparate impact. Statistical disparity is not sufficient; some cause must be shown, such as required criteria that is not consistent with business necessity.

All that said, despite the fact that Kennedy's opinion is consistent with past affirmative action cases, he repeatedly makes clear that he is not considering Ricci's Equal Protection claim. His reading of disparate impact is a statutory construction aimed at understanding it in light of the other provisions within the law itself, not the Constitution. In other words, he is taking Congress's purpose in passing Title VII under the Constitution, and not the Constitution itself, as his guide. This allows Kennedy to leave room between the joints of disparate treatment and impact (to borrow a phrase from Religion Clause jurisprudence)[30] without having to bring under constitutional scrutiny

[29] *Ricci*, Kennedy, 23. Internal quotations omitted.

[30] *Locke v. Davey*, 540 U.S. 712 (2004); *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

Title VII disparate-impact clause. He thus leaves open the possibility that that portion of Title VII may be unconstitutional without having to explicitly rule that it is.

Whether Kennedy thinks the disparate impact provision is unconstitutional is hard to say, but it is clear he raises the possibility. Why raise it and then leave it an open question? From Scalia's perspective Kennedy's opinion "merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions … consistent with the Constitution's guarantee of equal protection?"[31] Why does Kennedy put off this "evil day"? He quotes precedent saying that the Court will normally not decide a constitutional question if there is some other ground upon which to dispose of the case," but other, unstated reasons may exist as well.[32]

One possibility is that Kennedy sees good reason to preserve the disparate-impact provision of Title VII, so long as its scope is limited. He may be following scholars such as Richard Primus and Cass Sunstein in looking at the symbolic or expressive function of the law. Primus argues that "the growing tendency of equal protection jurisprudence to obscure the dynamics of group hierarchy and to truncate the memory of historical discrimination makes it all the more important to maintain, when possible, reminders within the law that historical discrimination continues to affect the status of racial groups. The more robust conceptions of disparate impact doctrine are one prominent locus of that idea."[33] Sunstein likewise argues that law has an expressive dimension that is intended to

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[31] *Ricci*, Scalia, 1.

[32] Quoting *Escambia County v. McMillan*, 466 U.S. 51 (1984).

[33] Primus, 499- 500.

shape the norms of society.[34] In the present case, retaining disparate impact would serve as a reminder of the difficult past, those days of employment discrimination and large-scale societal segregation. Affirmative action in general has been seen as more than policies to provide for equitable treatment, but as a symbol of commitment to end discriminatory practices in America.[35] Disparate impact could be thought of similarly. Whether intended or not, Kennedy's treatment of disparate impact does have a symbolic effect, but not necessarily the one hoped for by those who wish to retain the provision. If disparate impact serves as a reminder, a type of memorial in the law, of past discrimination it may imply that past injustice is in need of continuous correction—that would seem to be the symbolic implication of deciding the case in favor of the city. But Kennedy's opinion finds the law on the side of Ricci and those firefighters who performed well on the exam. Deciding the case in this way carries with it a different symbolic expression: discrimination was wrong then and it is wrong now. The Court has been fairly consistent in affirmative action cases to say or suggest that the goal of such policies is to bring about the day when affirmative action and disparate impact are no longer a concern. The symbol that the law should come to represent is not a reminder of past wrong to be lamented, but a monument in celebration of the end of discrimination, that we can overcome our worst habits. It is this attitude that the law must eventually express; it is to be a testament to the American character to work toward a better, not to say perfect, tomorrow.

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[34] Cass R. Sunstein, "On the Expressive Function of Law," *University of Pennsylvania Law Review*, Vol. 144, No. 5 (May 1996), 2021-2053.

[35] See for example Edward Kellough, "Affirmative Action in Government Employment," *Annals of the American Academy of Political and Social Science*, Vol. 523 (September 1992), 117-130.

Kennedy's opinion takes a step in the direction of future victory rather than in the step of past failure, but he does not go so far as to suggest we have reached total victory. He recognizes that the possibility of disparate impact still exists and that local lawmakers are best suited for determining whether their particular circumstances call for extra care. At the same time, these local lawmakers are not given so much leeway that they can use disparate impact to the detriment of individual rights and equal protection. The purpose of Title VII, he frequently reminds us, is to ensure that every candidate for a job or promotion is treated as an individual and not as a member of any particular group. Even though he does not evaluate disparate impact in terms of Equal Protection, he does show how the Court's decision in this case is consistent with its Equal Protection precedents. The Constitution is ultimately his guide.

Disparate Treatment versus Disparate Impact – Contending Opinions

Kennedy's opinion in *Ricci* ultimately preserves the tension between disparate treatment and disparate impact, though within the bounds of Title VII's purpose which ultimately is linked to the Equal Protection Clause of the Fourteenth Amendment. Scalia signs Kennedy's opinion signaling agreement, though his concurrence hints at a readiness to settle the disparate impact question at the constitutional level, a step he is convinced will greatly reduce if not eliminate disparate impact's reach. Ginsburg's dissent is equally confident that the Court's decision in *Ricci* "will not have staying power."[36] Her opinion, longer than Kennedy's and Scalia's combined, argues that the disparate impact provision sets the tone of Title VII, not disparate treatment. Rather than turning to a particular constitutional clause, she argues that the Court should give Congress's Act "the

[36] *Ricci*, Ginsburg, 2.

most harmonious, comprehensive meaning possible in light of the legislative policy and purpose." Justice Alito joins the Court in full, but his concurring opinion, though chiefly a response to Ginsburg, provides a different rational for the Court's decision than that given by Kennedy, one less concerned for retaining the tension in the law. I will examine each of these alternatives in turn.

As has been mentioned above, Scalia colorfully refers to the tension within Title VII as a war, one in which disparate treatment has a useful ally, the Equal Protection Clause. That said, he does not go so far as to say that disparate impact is a doomed concept that will not withstand the Court's scrutiny under the Constitution. He admits that the question is complex, but that it cannot be avoided for long. The Court's opinion here only makes clear that the lack of a clear disparate impact forbids remedial race-based action, but he worries a strong-basis-of-evidence of disparate impact requires such race-based actions, potentially in violation of the Constitution's equal protection guarantee. What he foresees happening is the use of disparate impact laws by employers to justify intentionally designing hiring practices to achieve preferred racial balances, practices that in effect have the same end as quotas. He explains that with such hiring practices, "Intentional discrimination is still occurring, just one step up the chain," and "the purportedly benign motive for disparate-impact provisions cannot save the statute." The only thing that can save it would be to frame it as an evidentiary tool "to 'smoke out,' as it were, disparate treatment."[37] In other words, disparate impact may be okay if it is the handmaiden of disparate treatment—this looks as though intentionality would have

[37]*Ricci*, Scalia, 2.

to be shown, that is, intentionally treating people different because of race despite a facially neutral procedure.

Whereas Scalia would not allow the benign intention of Congress's 1991 amendment to the CRA to save the statue, Ginsburg would not allow the sympathy she says is due to Ricci and the other firefighters who performed well on the test to override the larger picture of hierarchical discrimination that have become embedded in the firefighting profession. In her view, Ricci and company "had no vested right to promotion." Rather than turning to the Equal Protection Clause of the Constitution to sort out the relationship between the two competing clauses of Title VII, she would have the Court follow Congress's purpose in amending the CRA in 1991; namely, to return the Court to its *Griggs* precedent, thereby broadening the notion of disparate treatment to include disparate impact. In fact, it is not clear that Ginsburg sees the conflict between the provisions. Even if she does notice it, she urges the Court to give the most harmonious reading to Title VII as a whole.

One way to consider the difference between Scalia and Ginsburg here is to notice the different roles each sees the Court playing in a democratic-republic. For Scalia, the Court upholds democratic rule by enforcing the provisions of the Constitution, the document that represents the majority will of the people as whole over time. Ginsburg sees the Congress as being the proper spokesman of majority will. Here she would follow Congress in uprooting entrenched "preexisting racial hierarchies."[38] Rather than reading disparate impact as a handmaiden for disparate treatment, she argues that "these twin pillars of Title VII advance the same objectives: ending workplace discrimination

[38] Ibid., Ginsburg, 3.

and promoting genuinely equal opportunity."[39] But by broadening the context in which the case is determined to include past discrimination, the disparate-treatment pillar appears dwarfed.

The priority she gives to disparate impact can be seen in her disagreement that the strong-basis-in-evidence test is the proper standard to be applied in this case; she would return to the business necessity rule of *Griggs*. Under the older *Griggs* standard, the employer must show that the hiring practices in question conform to some business necessity. Anything unnecessary for a given job is to be eliminated from process if it has a tendency to discriminate. This means that consequences alone and not intent is sufficient for showing disparate impact—it would only be justifiable if its cause was job related. Alternatively, the strong-basis-in-evidence standard prohibits employers from taking action to avoid disparate impact without a highly adequate reason for doing so—and statistical disparity is not an adequate justification. Thus the business necessity standard requires employers to be more sensitive to the possibility of discrimination being entrenched in society, whereas strong-basis-in-evidence narrows an employer's focus to the merits of particular individuals without as much regard for supposed societal hierarchies that put minorities at a disadvantage. What would these be? At least in this case, Ginsburg suggests that the study material caused a disparity. She does not refer to the content, but that fact that it was difficult to acquire and expensive. Because some of the white firefighters had older relatives who had served in the field of firefighting, they had an easier time coming by the material, whereas most of the minority firefighters were

[39] Ibid., 18.

"first-generation firefighters without such support networks."[40] That New Haven's hiring process was once more overtly discriminatory, she argues, is one of the reasons why few minority firefighters could depend on older relatives. Ginsburg thus suggests that more "subtle—and sometimes unconscious—forms of discrimination replaced once undisguised restrictions."[41] The very subtlety of this larger societal discrimination is what broadens disparate impact vis-à-vis disparate treatment. In fact, finding disparate impact could become fairly easy.

In response to Kennedy and especially Scalia's calling into question the constitutionality of disparate impact under the Equal Protection Clause, Ginsburg admits that the Constitution lacks a disparate-impact component, but argues that does not preclude the possibility of Congress passing such a provision into law. She states that "Title VII's disparate-impact provision calls for a race-neutral means to increase minority … participation—something this Court's equal protection precedents also encourage."[42] But at the same time she argues that the strong-basis-in-evidence standard is "inapt" because race "was not merely a relevant consideration in *Wygant* and *Croson*; it was the decisive factor."[43] The difference, she indicates, is that there was no racial preference in this case; it was merely a relevant consideration that the city had to take into account. Plus, she argues that the Court's ruling in the case "underplays a dominant Title VII theme," that of voluntary compliance: "Title VII surely does not compel the employer to

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[40] Ibid., 7.

[41] Ibid., 13-14.

[42] Ibid., 21. Internal quotation marks omitted. She cites *Adarand* and *Croson*.

[43] Ibid., 22.

hire or promote based on the test, however unreliable it may be."[44] Thus she claims that there is something that goes against the spirit of federalism in the Court's opinion—it does not allow ample freedom for acting upon apparent disparate impacts. Interestingly, though, she goes on to question New Haven's heavy reliance on a written test saying, "it is unsurprising that most municipal employers do not evaluate their fire-officer candidates as New Haven does … nearly two-thirds of surveyed municipalities used assessment centers."[45] The suggestion here is that written exams may be inherently unfair, and perhaps even used as a means of discriminating against minority candidates. New Haven is thus encouraged to turn to another procedure, one more in tune with the rest of the nation. Whereas Ginsburg would preserve freedom for determining the possibility of a disparate impact, she holds that there is less freedom for determining the type of hiring procedures that can be adopted to meet local circumstances.

Where Ginsburg can be characterized as wanting to look at *Ricci* from the broader context of entrenched societal discrimination, Alito turns to the more immediate context of New Haven's political situation. He suggests that the city's decision to throw-out the exams is largely based on the mayor's desire to placate a large minority constituency. He goes into detail describing the relationship between Mayor DeStefano and a local black activist Boise Kimbler. But he also offers an opinion on the relationship between the two clauses of Title VII that differs from the other three opinions. He suggests that the Court must ask two questions in these types of cases. The first is objective: "When an employer in a disparate-treatment case … claims that an employment decision, such as

[44] Ibid., 22-24.

[45] Ibid., 29.

the refusal to promote, was based on a legitimate reason," the Court must ask, "whether the reason given … is one that is legitimate under Title VII." Since the city's reason in this case was objectively illegitimate, there was no need to ask the second question, which he says would have been subjective and therefore presumably more difficult: "If an employer offers a facially legitimate reason for its decision but it turns out that this explanation was just a pretext for discrimination, the employer is again liable."[46] As phrased, this second question appears to be as objective as the first. Both can be boiled down to the question *is there any intentional discrimination going on here?* Whether an employer is intentionally discriminating, while it may require some judgment, is an objective question. If there is a subjective question, it would be in regard to definitions—Alito and Ginsburg, for example, would disagree on what counts for discrimination. Thus both of Alito's questions could be characterized as having objective and subjective components.

What Alito shares in common with both Scalia and Ginsburg is a desire to eliminate the tension that exists in Title VII. Alito is more like Ginsburg at least in terms of ignoring that tension altogether, but really he is just articulating the substantive position Scalia would likely endorse if the war he envisions between the clauses were to occur; given the Constitution's provision for equal protection, disparate impact could only legitimately be seen as a tool for disparate treatment. It is as though Alito is subtly settling the war in order to read Title VII as though it did not possess a tension. Ginsburg likewise proceeds as though the tension did not exist, or at least could be worked around. Scalia overemphasizes the tension by calling it a war in order to suggest that day must

[46]*Ricci*, Alito, 1-2.

come to settle the issue, to make the law harmonious. The only opinion which is willing to preserve the tension is Kennedy's.

Why a Tension is Better than a Bridge

Can anything be said in favor of preserving the tension between the liberty of merit and the equality of opportunity within the law? Are there any virtues to Kennedy's opinion? The other three opinions acknowledge the competition between competing views of discrimination, views linked more generally to the tension between liberty and equality. One side finds disparate treatment to be the better definition of discrimination, because it implies a devaluing of liberty, while the other side thinks disparate impact better represents discrimination, a view more closely linked with equality. Kennedy's opinion suggests that both sides are partly right, a position that may be shared with Rawls who wants to bridge the divide between liberty and equality. The two differ, however, in their understanding of constitutional government's relationship to societal change.

The first thing that should be pointed out is that Kennedy is not simply on the fence; he comes down on the side of equal protection and disparate treatment. He does, however, preserve a role for disparate impact beyond a mere handmaiden for equal protection designed to smoke out disparate treatment. He recognizes that there may be some basis for Ginsburg's concern about entrenched societal hierarchies that work to the disadvantage of certain groups even when intention is not present. But by the same token he understands that entrenched societal hierarchies are difficult to pinpoint, and takes precautions against allegations of societal discrimination that has the effect of a more immediate discrimination. The primary precaution is the strong-basis-in-evidence test, which requires a clear indication that disparate impact has occurred. This does in fact

provide guidance to municipalities and lower courts; what it does not do is provide a complete victory over the definition of discrimination to either faction on the Court.

Even though Kennedy declines the opportunity to review disparate impact under the Equal Protection Clause, a step that could have led to the voiding of that portion of Title VII, he does show how his statutory construction is consistent with equal protection precedent. The Constitution is not simply left out, and in fact it serves as a guide. The Constitution itself contains competing principles in tension with one another, something the Court has acknowledged, particularly in its religion cases. The most relevant portion of the Constitution for this case is the Fourteenth Amendment, the purpose of which was to move the nation toward equal protection of all regardless of race. Taking into consideration past discrimination is certainly a part of achieving that goal, but it should not be mistaken for the goal itself. The hope is to arrive at a time when all are considered for employment opportunities based on their merits and not their skin color. This is, after all, more to the point of the Constitution's language. Title VII gives the Equal Protection Clause meaning in the realm of employment; candidates are to be treated as individuals and not members of a group. Kennedy's opinion preserves this full constitutional sense.

Of course, Rawls is equally interested in getting to the point where citizens are considered for jobs on the basis of their merit and not irrelevant factors such as skin color. But unlike Kennedy, he suggests that the Constitution as written does not provide adequate protection for the least advantaged members of society and therefore needs to be bolstered with the philosophical conception of *justice as fairness*, the principles of which are to compose an overlapping consensus. Only those interpretations of the Constitution consistent with public reason would be seen as legitimate. Using Rawlsian

public reason in this case would have rendered the outcome preferred by the minority, in which equality of outcome is privileged over individual merit according to the second principle of justice. For Rawls, individual merit, or native endowment, is not a primary good protected by the list of basic liberties, but is instead seen as the outcome of an inherently unfair natural lottery and therefore to be treated as a societal—and not individual—good.[47] To be sure, Rawls wants people who work hard developing their talents to be rewarded, but in this case he would likely argue that those minority races were at a disadvantage from the outset and therefore need to be protected against disparate impacts of outcome. Failure to do so would allow the more well-off to benefit without corresponding benefits to the least advantaged, thus failing the difference principle or something like it.

It might be said that disparate impact is akin to Rawls's difference principle, and we may ask based on Kennedy's opinion whether disparate impacts should continue to be considered Constitutional. If the Court were to make this decision, it would in effect be saying that Congress's provision is not law under the Constitution. Would Kennedy be willing to do this? Congress's action to amend the CRA in 1991 is similar to its passage of the Religious Freedom Restoration Act (RFRA) in 1993. In both instances, Congress was responding to the Court's overturning of past precedents. In the case of RFRA, the Court was willing to respond in *Boerne v. Flores* denying that Congress could have the final say in constitutional interpretation. In that case the Court struck down the portion of the law dealing with state exemptions, which was really the heart of the law.

[47] John Rawls, *Justice as Fairness: A Restatement* (Cambridge: The Belknap Press, 2001), 72-77.

There is something of a threat in *Ricci* that the Court might be willing to do likewise to the portion of Title VII dealing with disparate impact, the heart of the 1991 amendment. It had the opportunity to do so here, but declined. And it seems unlikely that it will do so in the near future. The difference between *Ricci* and *Boerne* is that in the case of the CRA, Congress was responding to the Court's interpretation of a statute. The law was simply amended to reflect the older interpretation. Conversely, RFRA was in response to the Court's interpretation of the Free Exercise Clause of the Constitution in the wake of *Smith*. Congress cannot simply amend the Free Exercise Clause the way it can amend the CRA. The fact that Kennedy does not treat this case like *Boerne* shows that he is aware of a higher constitutional duty to defer to Congress in this case. Nonetheless, Congress's law is still subject to the provisions of the Constitution. Kennedy preserves Congress's law in substance, curtailing it only insofar as it remains consistent with the Court's decisions regarding Equal Protection.

If Kennedy is right, the need to have disparate impact cases will become less and less necessary as time goes on, for there will be a continuing decline in the possibility of deeply embedded hierarchies in society to be fought. Should the disparate impact provision remain law at that point, it will serve simply as a reminder that segregation, discrimination, racial biases, and stereotypes can be overcome. While it may be naïve to think this success is or can be complete, that great strides have been made is worth celebrating. Kennedy's opinion recognizes this success, but also admits that the striding may not yet be complete. All-in-all, the opinion is true the spirit of the Constitution; individuals are not to be punished for the acts of their fathers, they are to be treated as

individuals equal under the law. Employment considerations are to be considered primarily in terms of merit, and never in terms of race.

What we see then in Kennedy is a similar sensitivity to a constitutional system that needs to make room for change as we find in Rawls. But there is a major difference. As the past chapters illustrate, Rawls realizes that in bringing about a realistic utopia, he cannot simply disregard the current political structure, but rather must find a way to work within it. I have argued that he does so by encouraging multiple institutions but particularly the Court to interpret the Constitution from a philosophical perspective that elevates a liberal principles of justice, including conceptions of society and the person as well as a list of basic individual rights, as abstractly right and just. Though Rawls is concerned about individual liberty, his principles are highly egalitarian and democratic, and he hopes the Court can facilitate the absorption of these principles in the background culture of society by showing how they are consistent with the Constitution. This includes, as we saw in the last chapter, the Court engaging in historical narratives that make sense of trajectory of constitutional democracy. In other words, the Court is asked to use the Constitution to bring about change in society.

Kennedy's approach is altogether different. Rather than using judicial review as a means of pushing society toward certain attitudinal changes that are more egalitarian and democratic, Kennedy allows the Constitution to accommodate societal changes without having to interpret it from a "freestanding" theoretical position of fairness. The Constitution itself is concrete arena of fairness in which even unpopular groups are tolerated (as we saw in the case of *Lawrence*) and all people are judged according to their individual merit and not on the basis of their skin color (as in *Ricci*). He realizes that past

racial discrimination may have lasting effects and therefore needs to be remedied, but all efforts to correct past problems have to abide by the rule of law so as not to create new problems. Change in many cases may be needed, but the basic ideas of the Constitution are to guide the course of change, not sophisticated philosophical arguments unconnected from the text of our government's frame.

CHAPTER TEN

Conclusion:
A Constitutionalist Critique of Rawls

I have tried in the preceding pages to be both generous towards yet critical of Rawls's constitutional theory. His is the work of a truly ambitious mind. Where others perceive inevitable conflict between constitutionalism and democracy, Rawls looks forward to the dawning of a realistically utopian constitutional democracy in which not only the structures of democratic decision-making are upheld, but also the values of liberty and equality associated with self-rule. His hope for a new future of political liberalism where a public conception of justice can be shared by a reasonably pluralistic constituency of citizens with diverging private conceptions of the good life has inspired the thought of influential scholars, particularly amongst those in the fields of public law and philosophy of law.

Many of Rawls's critics are democratic theorists concerned with the abiding constitutionalism at the heart of Rawls's work, something they fear will temper democratic zeal. Rawls is confident that the work needed in bringing about a constitutional democracy in accord with the ideal set forth in the hypothetical thought experiment will be such that the fires of democracy will have plenty of fuel to keep its flames alive. His disagreement with them is, then, is very much a familial dispute—one over means towards an end. Rawls and democratic theorist pursue a common question: what is the best strategy for creating and maintaining a vigorous and healthy democratic polity? Some believe constitutional government's reliance on forms and defense of

substantive values prevents democracy from gaining its full potency. Rawls counters with the claim that democracy is best maintained when citizens are deliberately formed under stable institutions that promote predetermined democratic aspirations, specific principles of justice.

While these disputes raise many important questions for students of American politics to consider, a firm challenge to Rawls has not been mounted from the other perspective, that of constitutionalism. The purpose of this work is to supply such a critique with particular attention to the theme of continuity and change under a written Constitution. Rawls explicitly supports this means of framing a government over the British tradition of an unwritten constitution in which Parliament plays a significant role. Rawls believes a legislature should have limitations placed upon it that can be enforced by a Court with the power of judicial review. His advocacy of a strong judiciary thus gives the impression that Rawls is committed constitutionalist eager to uphold the forms of government not just inherited through a tradition, but spelled out in a legalistic document that can only be amended with difficulty. Rawls's underwhelming tone adds to this impression. Yet it is undisputable that he hopes very significant changes can be brought about in America that would favor a more robust democratic polity. He would rely on existing institutions insofar as they can be useful means of bringing a realistic utopia into being and then preserving it. His defense of constitutionalism, then, is not aimed so much at preserving an inheritance as it is motivated by a desire to change the world. From a constitutionalist perspective, I believe this does more to undermine the stability Rawls claims is so important.

Much of my argument here stems from my treatment of Rawls first and foremost as a constitutional theorist and not a political philosopher. This is not to say that Rawls has nothing to say about political philosophy; on the contrary, his reflections on the four roles of political philosophy as outlined in chapter two are a telling example of how he views his own work. He is attempting to offer us a theoretical basis for organizing our political life around freestanding principles of justice. By freestanding he means that the principles of justice are not derivative of any particular conception of the good. The right comes before the good. He believes political philosophy can help formulate a conception of justice that reasonable people would be willing to affirm as right for the regulation of the basic structure of society, encompassing our political and economic institutions.

To this end, Rawls would use political philosophy to orchestrate a major settlement to various struggles within contemporary political life. These deep-rooted disagreements are often intractable because each side argues from the basis of their own comprehensive doctrines or conception of the good life. Rawls hopes they can be convinced to engage in their ongoing discussion with a common set of terms based upon an overlapping consensus that would allow a resolution that both sides can accept as just. In this way political philosophy can fulfill its first role or task. Yet in order to accomplish this, it will also have take upon itself other tasks, including that of orienting citizens toward their regime and reconciling them to their past so that the path towards an overlapping consensus becomes the intuitively clear choice. But even before these can take place, political philosophy's role of articulating an ideal, or realistic utopia, is needed to properly direct and align the other three tasks.

Thus the way Rawls present the four roles of political philosophy at the outset of *Justice as Fairness* is backwards. The first task of Rawlsian political philosophy (or constitutional theory as I call his work) is to identify the basic outline or framework of a realistic utopia. What else can this mean but to identify the principles of justice to serve as the ideal standard in judging political life, and therefore the goal to fulfill? We are asked to believe as an initial starting point that a regime consistent with a freestanding conception of justice is achievable. Without this faith, the other three tasks of political philosophy mean very little. How can one reconcile us to our past without having an idea of where we are—or at least ought to be—going? And how can we be oriented toward our regime without first understanding our past? What is more, how can the disputes that will inevitably arise in a polity be resolved without confidence that our regime provides a fair basis for remedies?

Rawls makes this fairly clear at the end of the *Law of Peoples* when he says, "By showing how the social world may realize the features of a realistic utopia, political philosophy provides a long-term goal of political endeavor, and in working toward it gives meaning to what we can do today." If we are to claim that just political life is impossible, we might then wonder "whether it is worthwhile for human beings to live on the earth."[1] The first step is thus a kind of faith that we can, through our deliberate action, "change political and social institutions, and much else."[2] We have a freedom to determine how it is we would like to live under ideal conditions. The purpose of Rawls's work is to delineate a path towards realizing changes that would fulfill a vision of justice

[1] John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 128.

[2] John Rawls, *Justice as Fairness* (Cambridge, MA: The Belknap Press, 2001), 5.

that is worked out in the famous thought-experiment that begins with the original position.

As was argued in chapter four, Rawls did not initially envision the Court taking the lead institutional role in bringing about a new constitutional democracy for America. The plan as outlined in part three of *Theory* focused more on deliberate crafting of citizens through educative channels. The outcome of this educative scheme was the production of persons with indistinguishable conceptions of the good. They were all well-formed Rawlsian liberals. Recognizing the impropriety of this part of this presentation, Rawls spent the remainder of his career arguing for an alternative course of action for implementing his principles of justice. Though his primary motive may have been to allow for freedom and therefore *reasonable* pluralism, the threads of his argument amounted to the black robe of the judge. That is to say, the turn towards political rather than metaphysical liberalism lead Rawls to increasingly recognize the Court as an invaluable resource for bringing about change and then capping it once the goal was achieved.

For this reason, Rawls is willing to defend the practice of judicial review so long as it serves the ends of advancing institutions that are in conformity with the principles of justice. The Court is to work out the details of the constitutional democracy or realistic utopia in a slow and thoughtful way, case by case. This could mean frequent uses of judicial review initially, so as to build a non-foundational (freestanding) foundation beneath the already existing Constitution. Once citizens and legislators become more informed by the principles that should constitute an overlapping consensus, judicial

review will become less frequent and the Court can take something of a backseat in the car of democracy; the people will have earned their driver's license.

But before that license is issued to the people, they must be taught to drive. The Court as exemplar of public reason is to guide them in their studies. This necessarily involves the judiciary in more than case resolution. In order to teach the people how to properly read the Constitution, which is through the lens of *justice as fairness*, the Court will have to orient people to their regime including its newly-laid underlying principles, a task that is more easily accomplished if history can be portrayed in a favorable light. The common law tradition of the Court makes it an ideal institution for reconciling people to the past so as to clarify the route we are on as a people. This is not to say that Rawls would have judges engaged in the task of creating an ideal to be achieved. Rawls does this for them. What he would have them do is assist in the implementation of the ideal by way of adjudication that approximates the other roles of political philosophy.

He urges the Court to do this primarily through the protection of a scheme of equal basic rights derivative of the first principle of justice. While this may largely correspond with those liberties mentioned in the Bill of Rights, the way these enumerated liberties are to be understood, or interpreted, must be consistent with public reason. Free speech, for instance, can mean many different things, and it can be difficult to determine which types of speech are meant to be protected by the Constitution. Attention to the demands of the first principle of justice eases the difficulty, which the Court can do by using public reason to interpret the First Amendment. And there is nothing in Rawls that would limit judges to only focusing on liberties mentioned in the Constitution; in fact, the door to substantive due process is left wide open, and scholars like David A. J. Richards

have run right through in defense of homosexual rights. He in particular urges the Court to adopt a re-reading of history akin to the task of reconciliation Rawls assigns to political philosophy.

An important point that I hope to have made clear in this work is that Rawls's Court cannot avoid interpreting the Constitution in light of the second principle of justice as well. A legislature can only regulate those things they have power over, and in the American case this means the Constitution must empower Congress to pass certain types of laws. Rawls may want the legislature to work out the details of ensuring equal opportunity or implementing the difference principle, but they will have to do so based upon an interpretation of the Constitution that is upheld by the Court. Rawls's complaint regarding *Buckley* is that the Court did not interpret the Constitution in the right way by striking down a law that Congress could justify in terms of the second principle of justice.

This highlights the way Rawls would have us understand constitutional legitimacy. A law, regulation, or policy is legitimated based upon a proper justification using terms amicable to the overlapping consensus. Whether or not the legal forms and processes were applied consistently under the letter of the law is of little matter. Not only does Rawls's presentation recommend deliberation as the proper scope for judging the legitimacy of law, he supplies the reasoning that must be used. In other words, legitimacy is not based upon adherence to the law or the Constitution, it is based upon adherence to right principles.

In this regard, Rawls confuses a constitutional law with just law. A law can be constitutional without necessarily being just. This is true regardless of the standard one uses for deciding what is just, whether it be a revelation, natural law, or *justice as*

fairness. Likewise, a law may be just yet unconstitutional and therefore, in the traditional understanding, illegitimate. Table 3 demonstrates the various states of law and potential measures for bringing about change where we believe it is most needed.

Table 3. The Status of Law and Methods of Change

Law	Just	Unjust
Constitutional	(I) No Change Needed	(II) (a) Seek Change Through Channels of Ordinary Politics or (b) Amend Constitution (No Judicial Review)
Unconstitutional	(III) If Necessary and Prudent, Seek to Amend Constitution (Judicial Review Acceptable)	(IV) (a) Seek Change Through Ordinary Politics or (b) Appeal to the Court (Judicial Review Acceptable)

Self-evident though this may be, I will elaborate on the four categories listed above. I do this because of the attention that I have given to Rawls's treatment of continuity and change, one that I believe ultimately is disparaging to sound constitutional government. As a starting point, one should note that the two rows dealing with constitutionality are legal categories. Whether a law is constitutional is a question of positive law. This is particularly clear in America, where we are governed by a constitution that is a physical document that we can pick up and read. Nature did not write that document any more than God. It was written by men, and we have sound evidence of this. Of course, those men wrote a framing document that they believed was largely consistent with unwritten laws, both natural and divine; yet even here they

realized they fell short by allowing slavery. Yet because the Constitution was meant only as a frame of government, its signers were not necessarily condoning slavery as moral acceptable. They recognized that something could be legal and morally repugnant. The two columns thus represent the moral question.

Beginning with the easy case, a law may be both constitutional and just, in which case it would be in Box I. Our expectation is that most laws will fall into this category, at least in a decent regime. There may be some dispute over the constitutionality or justice of particular laws, particularly the latter where different understandings of justice are prevalent among citizens. A Thomist and Rawlsian will have their differences on the question of morality, but in most cases there will be sufficient—to use Rawls's word—overlap to avoid serious undermining of the regime. Different interpretations of the Constitution may also cause disputes over the legitimacy of particular laws, but again these will likely be marginal. As a category, those laws that are passed pursuant the accepted forms and processes of the government and are by-and-large consistent justice will cause little trouble for us.

The greater challenge is in dealing with laws that fall short of justice yet were duly passed through all the proper channels. Slavery is the clearest example in America's experience, particularly since the original Constitution implicitly allows for and protects slavery. Allowance for slavery in the South thus violated all unbiased conceptions of justice, yet was nevertheless a legally protected institution. This, of course, is an undesirable situation. Nothing is more natural than human beings wanting to overcome injustices through political reform, and in this category there are two means open for citizens of America eager to bring about change. The first is to seek to change the law

under the existing channels of government. When differing standards of justice are in play, this process gets a bit messy; the same law may be seen by some as existing in Box II while others think it is a Box I law. Should the law be replaced by its opposite, or merely repealed by law, some may perceive the change as unjust while others hail it as good. A healthy constitutional system will allow these disputes to occur and changes to take place that will, hopefully, lead to a more just polity.

There are those intractable cases where ordinary politics is not sufficient for correcting the problem, slavery again being the chief example. In these cases, a change to the Constitution may be the best alternative, as was the case with the Fifteenth Amendment. While this can be a perfectly acceptable option, the difficulty of it is justified by the hesitancy we should have for constitutionalizing moral questions. Ordinary political channels are typically the best vehicles for settling these questions both for upholding the Constitution's primary purpose of establishing a frame of government as well as allowing with greater ease corrections to misguided legislation. Our experience with prohibition is evidence that we should be slow to use the Constitution as a tool for imposing moral prescriptions, remembering of course that we need not be timid of exceptions, such as that of slavery.

What is to be avoided as a means of changing laws that fall into Box II is judicial review. The method would turn to the Court and ask it to interpret the Constitution in such a way that the law, which may indeed be unjust, will be made inapplicable. Even if the vast majority of citizens, including judges, agree that the law is unjust, using the Court to strike it down on manufactured grounds of unconstitutionality. This is disingenuous and harmful to constitutional government in the long term. Even if it

corrects specific instances of injustice, it gives judges an authority over the Constitution they were not meant to have. The issue is of course complicated by the fact that people disagree over the justice of certain laws, and the intervention of the Court in this regard leads to a perception that judges are engaged in a legislative rather than adjudicative activity. One of the risks of constitutional government is that unjust laws will from time to time arise and have to be tolerated until sufficient political strength exists to repeal or change them. Doing so within the bounds of the legal forms and processes is where democratic self-rule can take place. But in this case the fire of democracy is ultimately a contained fire, one given authority to burn yet prevented from consuming all things that lie in its path.

When judges interpret the Constitution so as to overturn a law perceived, even widely perceived, as unjust, or conversely to uphold a popular law seen as just, they weaken the structure that contains the fire. If too many stones are removed from the pit, a sudden wind may wreak havoc. This is the risk I see Rawls taking in giving the Court the authority that he does. He is asking judges to accommodate a particular moral theory by way of constitutional interpretation. They are to protect basic individual rights that are derivative of a consensus rather than the Constitution. And they are to allow the legislature to undertake tasks not necessarily given to them in Article I. For all the respect he shows towards the idea of constitutionalism, this strategy undermines the very institutions upon which Rawls hopes to build.

By no means am I suggestion that judicial review is to be avoided under all circumstances. On the contrary, there are times where the Court best fulfills its role by applying judicial review and striking down laws. Paradoxically, this may include times

when the laws are themselves just. This is the situation of Box III above. An example of this is *Fletcher v. Peck*, an 1810 Supreme Court case involving the repeal of an infamous and unjust law.[3] The state legislature of a Georgia approved the sale of the Yazoo Lands (Mississippi and Louisiana) to land speculators at a discounted price. It was later revealed that many of the state legislators accepted bribes in agreement to pass the law granting land to speculators, and this resulted in a sweeping election that brought to power an entirely new group of representatives. The new legislature repealed the land grant based upon its injustice. Parcels of the land had been bought and resold between the original land grant and the repeal, which resulted in a law suit that worked its way to the Supreme Court. John Marshall argued for a unanimous Court that the repeal, despite the soundness of its motives, was unconstitutional because the land grant was a valid contract that could not be invalidated under Article I, Section 10, Clause 1 of the Constitution. Thus even an unjust law may have to be tolerated if it fits within the bounds of the framing document.

Here, then, is another risk of constitutional government: laws that are motivated by a desire to do justice may violate the constitution, and thereby allow an injustice to remain. There may be laws that would be just but that we would not want to give government the authority to pass. Preventing hateful remarks at a Ku Klux Klan rally may be morally desirable, but constitutionally intolerable since it would put at jeopardy everyone's ability to engage in free speech. That said, there may be prudential reasons for wanting to implement a particular law that is just yet would be unconstitutional. In such cases the Article V process for amending the Constitution would be appropriate. A

[3] *Fletcher v. Peck*, 10 U.S. 87 (1810).

judicial interpretation of the Constitution that would allow for a just law to be passed that is clearly outside the boundaries of the document as it stands would not be justifiable for the same reasons as we saw above—it undermines the notion of constitutional governance and puts judges above the framing document of the people.

Other times an unjust law will also be unconstitutional. In such cases judicial review is again available as a correction, and may be the most efficient route towards changing an inadvisable or vicious law that violates an accepted standard of justice. This is the argument that Justice John Marshall Harlan used in his dissent in the case of *Plessy v. Ferguson*, a case that involved racial segregation on state railroad cars.[4] The law, he argued in his lone dissent, violated justice *and* the color-blind intention behind the Constitution's Fourteenth and Fifteenth Amendments. Had a majority of the Court seen it Harlan's way, fifty-eight years of national heartache could have been avoided, and respect for the Constitution could have been bolstered in the long-run.[5]

In addition to the potential for judicial review when dealing with a law that is both morally unjust and legally unconstitutional, engagement in ordinary politics is also an option for bringing about change. While judicial review is perfectly legitimate in such cases, it may be advisable to appeal first to the more popular channels of government both to exercise the vitality of the democratic elements of the regime and also to avoid laying such heavy responsibility on the Court when other options are available. As in so many instances of political action, circumstances are of essence.

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[4] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[5] *Plessy* was overturned by *Brown v. Board of Education*, 347 U.S. 483 (1954).

This lengthy reflection upon the categories of justice and constitutionality is meant to highlight one of the principles faults of Rawls's constitutional thought. He does not delineate between the moral and the constitutional. Instead, he encourages us—and especially judges—to interpret the Constitution in light of a particular standard of justice that he hopes can become the very fabric of our polity. We are asked to determine constitutionality on the basis of *justice as fairness*. Freestanding or not, Rawls's moral theory subsumes all other categories. The right is prior to the good; the moral is prior to the constitutional.

As I suggest in chapter nine, the Court may indeed have a role to play in facilitating change in America that avoids the downfalls of Rawls's strategy. Again, Rawls allows maintenance of existing institutions so long as doing so cultivates the changes he hopes to bring about. He conserves in order to legitimize innovation. The more traditional approach of linking continuity with change has a reverse formulation: change is a necessary component of continuity. Kennedy's opinion in *Ricci* provides an example of how the Court might allow for some changes to occur in such a way that the Constitution is respected and used as a guiding framework. The difference between this approach and the one that Rawls recommends is that Kennedy does not take upon himself the task of interpreting the Constitution in accord with a particular brand of moral theory, but rather uses the Constitution as a starting point for determining what is legally just in a very complicated case. He is not guiding the Constitution toward his desired end, but allows it, as a frame of government meant to secure justice, to guide his approach to deciding the case.

The example of Kennedy's opinion for the Court in *Ricci* is not meant simply to be a critique of Rawls. Though I present Kennedy's approach in that case as an alternative, it must be admitted that Rawls and Kennedy are wrestling with a similar problem, one that is too often neglected by scholars and judges alike. That problem is striking the appropriate balance between continuity and change. Both are right to recognize that the two go together, and that one can be used to strengthen the other. What is more, the Court has a role to play in striking an appropriate balance between the two. There are good reasons Rawls turns to the Court; institutional characteristics of the judiciary lead judges to be particularly reflective and deliberative. Generally, speaking, they are a more academic body than can be found in the other branches of government. They are more likely to take ideas seriously, and Rawls hopes he can influence them on this score. For him, if judges can come to understand continuity as stemming from an overlapping consensus and learn to refer to the Constitution in a language stemming from that consensus, changes can come about that, he believes, will provide a lasting stability.

Kennedy and Rawls differ, however, in the way they see continuity and change relating. For Rawls, again, continuity becomes the springboard for securing change. But this approach threatens to undermine the foundation it stands upon. It seeks a monopoly on constitutional interpretation that not only dampens democratic zeal, but also strikes at the heart of constitutional government. That heart is human liberty, including the liberty to influence one's political community regarding certain goods. Rawlsian constitutionalism based upon predetermined principles of justice would circumscribe the goods that could be advocated in the public arena, and gives an advantage to other goods. In other words, the Rawlsian approach rigs the system. Kennedy, however, sees change

as means of supporting continuity—the exact opposite as Rawls. His opinion in *Ricci*, while vindicating Rawls's concerns, provides an alternative means of interpreting the Constitution that supports constitutionalism, human liberty, and the possibility of a wider variety of human goods to have a say in the political sphere.

Approaching constitutionalism in this way requires greater defense than I can provide here. For present purposes I merely hope to have shown that Rawls's strategy for implanting his principles undermines American constitutionalism every bit as much as his theory cools the embers of democracy. Constitutional government at its best provides a realm for democracy to thrive. In general, although not without exception, matters of morality are best left to the more popular branches of government. This does not mean the Constitution is itself amoral or indifferent to morality. On the contrary, the reason for establishing constitutional institutions is to provide means of settling political disputes regarding the fundamental questions of human life in an orderly and peaceful fashion. Abiding by the forms that allow for meaningful deliberation has a justice unto itself. An undermining of the frame is a threat to the liberty that is requisite for authentic self-rule. This does not mean that the Constitution is starkly rigid; it has an inherent flexibility given the general nature of its language, which clearly requires interpretation. But any elasticity is limited to plausible interpretations—pulling too hard will cause it to snap. And Rawls, I think, encourages judges to pull too hard, and is therefore ultimately a threat to constitutional life as we know it.

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