

Obama's inaugural address was more inclusive; although he cited Scripture he also included Hindus and non-believers in the list of religions mentioned:

On this day, we gather because we have chosen hope over fear, unity of purpose over conflict and discord. On this day, we come to proclaim an end to the petty grievances and false promises, the recriminations and worn-out dogmas that for far too long have strangled our politics. We remain a young nation. But in the words of Scripture, the time has come to set aside childish things. The time has come to reaffirm our enduring spirit; to choose our better history; to carry forward that precious gift, that noble idea passed on from generation to generation: the God-given promise that all are equal, all are free, and all deserve a chance to pursue their full measure of happiness. . . .

For we know that our patchwork heritage is a strength, not a weakness. We are a nation of Christians and Muslims, Jews and Hindus, and non-believers. We are shaped by every language and culture, drawn from every end of this Earth; and because we have tasted the bitter swill of civil war and segregation, and emerged from that dark chapter stronger and more united, we cannot help but believe that the old hatreds shall someday pass; that the lines of tribe shall soon dissolve; that as the world grows smaller, our common humanity shall reveal itself; and that America must play its role in ushering in a new era of peace.

To the Muslim world, we seek a new way forward, based on mutual interest and mutual respect. To those leaders around the globe who seek to sow conflict, or blame their society's ills on the West, know that your people will judge you on what you can build, not what you destroy.

The first presidential prayer service included a Muslim, two Black ministers, two rabbis, an evangelical Christian and a Hindu. Roman Catholic, Episcopal and Greek Orthodox representatives were also present. According to *The New York Times*, the presence of a Hindu, women and African Americans "underscored the emphasis on diversity." Three rabbis represented the three major branches of Judaism. Must every prayer service be this inclusive in order to satisfy the Constitution? See Laurie Goodstein, A Diverse First Presidential Morning Prayer, N.Y. Times, Jan. 22, 2009, at A24. Or can no prayer service satisfy the Constitution?

C. POLITICAL MORALITY AND RELIGION

We began this chapter with John Kennedy's invocation of the constitutional ideal of separation of church and state. The Establishment Clause was also implicated in the civil religion issues of Part B, which address whether acts of ceremonial deism or civil religion violate the First Amendment. Despite this emphasis on separation, however, the Constitution also provides extensive protection of free speech and free exercise, and many

actions (especially presidential activities) that mix religion and politics are unlikely to warrant constitutional sanction. In this section we ask whether there are moral reasons for religious believers to rely on political and constitutional reasoning instead of their religious faith.

We begin with a specific question: How can religious believers like Kennedy, Bush or Obama—as well as Americans of very different faiths—support the democratic process when it reaches conclusions that differ from their Catholic or Methodist faith? Does morality demand that politicians follow their religious convictions instead of the law? Does morality require politicians to vote their religious convictions into law, even when their fellow citizens disagree with them about matters of religion? We explore these questions by examining the philosopher John Rawls's theory of political liberalism and responses to it by his critics. Rawls worded the moral question of political liberalism with these words: "How is it possible for those affirming a religious doctrine that is based on religious authority, for example, the Church or the Bible, also to hold a reasonable political conception that supports a just democratic regime?" John Rawls, *Political Liberalism* xxxix (paper ed. 1996). *Political Liberalism* provides one account of how diverse religious and philosophical commitments can be compatible with democracy. As you read the following materials, consider whether liberalism unfairly—or appropriately—asks religious believers to bracket their religious convictions from politics.

As background to the excerpts from Rawls's writings, which follow, keep in mind four concepts—namely, pluralism, the political conception of justice, the overlapping consensus and public reason—that are central to his theory.

Pluralism. The "pluralism of incompatible yet reasonable comprehensive doctrines" is the starting point of *Political Liberalism*, the central problem with which Rawls wrestles. A comprehensive doctrine is a religion, a philosophy or a worldview that provides the framework that gives guidance and meaning to an individual's entire life. Islam, Kantianism, Atheism, Christianity and Utilitarianism, for example, are comprehensive doctrines. In earlier eras, philosophers such as Plato or Aristotle, or religious traditions such as Christianity, assumed that there was one comprehensive doctrine that all citizens could share. Such unity cannot occur in a constitutional democratic regime; there is no comprehensive doctrine of justice that all citizens can support. Pluralism is a fact of our lives together; it is normal and is not going to disappear.

Political Conception of Justice. Because pluralism means that there is not one comprehensive doctrine of justice that all citizens can support, such unity of doctrine among citizens can occur only if the state enforces it. In a constitutional democracy, however, it is not appropriate to use force to impose one's comprehensive worldview on others who do not share that commitment. Therefore a political conception of justice must be found that does not impose a comprehensive worldview on others, and that is itself not comprehensive. Political justice is instead an independent "module" that can be plugged into numerous reasonable but competing comprehensive doctrines. Rawls does not derive or deduce the political conception of justice

from any comprehensive worldview. Instead, the derivation of the political conception of justice from the comprehensive doctrine of citizens occurs in the overlapping consensus.

Overlapping Consensus. In the presence of pluralism, the political conception of justice will be based on an overlapping consensus among the citizens of the democracy. The consensus is overlapping because citizens can agree on the political conception even though they possess a variety of comprehensive doctrines. Rawls insists that the overlapping consensus is not a *modus vivendi*; citizens in a *modus vivendi* compromise because they must. However, should circumstances change, they will renegotiate that compromise, usually in an attempt to improve their situation. Thus a *modus vivendi* lacks stability.

Citizens, however, require stability in their political lives, and so need a consensus that does not shift as power changes hands. Rawls argues that citizens have reasons within their own comprehensive doctrines to support the overlapping consensus, and that these reasons will persuade them to support the consensus even when their comprehensive group acquires enough votes to change the status quo. Citizens support the political conception of justice in the overlapping consensus—even when their comprehensive doctrine disagrees with the results—because the virtues of political cooperation and of stability are “very great virtues.” *Id.* at 139.

Public Reason. Decisions in the overlapping consensus are made only on the basis of reasons that appeal to all citizens; as part of their “duty of civility,” citizens in the overlapping consensus must employ “public reason.” Public reason is quite demanding, especially for adherents of comprehensive doctrines. It “means that in discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrines—to what we as individuals or members of associations see as the whole truth. . . .” Instead, “each of us must have, and be ready to explain, a criterion of what principles and guidelines we think other citizens (who are also free and equal) may *reasonably be expected to endorse* along with us.” *Id.* at 224–26 (emphasis added). A Muslim may understand why a Catholic politician would obey the pope, or an evangelical leader follow the Bible, but not be expected to endorse government by the pope’s or the Bible’s standards. Muslim, Catholic and Baptist may all endorse constitutional principles of free speech or equal protection, but for different comprehensive reasons.

Should presidents and other politicians live according to the ideal of public reason spelled out in following essay? Would you be able to vote according to its requirements?

The Idea of Public Reason Revisited

John Rawls.

64 *University of Chicago Law Review* 765, 765–68, 773–76, 784–86, 797–99, 805–06 (1997).

INTRODUCTION

The idea of public reason, as I understand it, belongs to a conception of a well ordered constitutional democratic society. The form and content of

this reason—the way it is understood by citizens and how it interprets their political relationship—is part of the idea of democracy itself. This is because a basic feature of democracy is the fact of reasonable pluralism—the fact that a plurality of conflicting reasonable comprehensive doctrines, religious, philosophical, and moral, is the normal result of its culture of free institutions. Citizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines. In view of this, they need to consider what kinds of reasons they may reasonably give one another when fundamental political questions are at stake. I propose that in public reason comprehensive doctrines of truth or right be replaced by an idea of the politically reasonable addressed to citizens as citizens.

Central to the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity. The basic requirement is that a reasonable doctrine accepts a constitutional democratic regime and its companion idea of legitimate law. While democratic societies will differ in the specific doctrines that are influential and active within them—as they differ in the western democracies of Europe and the United States, Israel, and India—finding a suitable idea of public reason is a concern that faces them all.

§ 1: THE IDEA OF PUBLIC REASON

... It is imperative to realize that the idea of public reason does not apply to all political discussions of fundamental questions, but only to discussions of those questions in what I refer to as the public political forum. This forum may be divided into three parts: the discourse of judges in their decisions, and especially of the judges of a supreme court; the discourse of government officials, especially chief executives and legislators; and finally, the discourse of candidates for public office and their campaign managers, especially in their public oratory, party platforms, and political statements. We need this three-part division because, as I note later, the idea of public reason does not apply in the same way in these three cases and elsewhere. In discussing what I call the wide view of public political culture, we shall see that the idea of public reason applies more strictly to judges than to others, but that the requirements of public justification for that reason are always the same.

Distinct and separate from this three-part public political forum is what I call the background culture. This is the culture of civil society. In a democracy, this culture is not, of course, guided by any one central idea or principle, whether political or religious. Its many and diverse agencies and associations with their internal life reside within a framework of law that ensures the familiar liberties of thought and speech, and the right of free association. The idea of public reason does not apply to the background culture with its many forms of nonpublic reason nor to media of any kind. Sometimes those who appear to reject the idea of public reason actually

mean to assert the need for full and open discussion in the background culture. With this political liberalism fully agrees. . . .

§ 2: THE CONTENT OF PUBLIC REASON

1. A citizen engages in public reason, then, when he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected reasonably to endorse. . . .

2. We must distinguish public reason from what is sometimes referred to as secular reason and secular values. These are not the same as public reason. For I define secular reason as reasoning in terms of comprehensive nonreligious doctrines. Such doctrines and values are much too broad to serve the purposes of public reason. Political values are not moral doctrines, however available or accessible these may be to our reason and common sense reflection. Moral doctrines are on a level with religion and first philosophy. By contrast, liberal political principles and values, although intrinsically moral values, are specified by liberal political conceptions of justice and fall under the category of the political. These political conceptions have three features:

First, their principles apply to basic political and social institutions (the basic structure of society);

Second, they can be presented independently from comprehensive doctrines of any kind (although they may, of course, be supported by a reasonable overlapping consensus of such doctrines); and

Finally, they can be worked out from fundamental ideas seen as implicit in the public political culture of a constitutional regime, such as the conceptions of citizens as free and equal persons, and of society as a fair system of cooperation.

Thus, the content of public reason is given by the principles and values of the family of liberal political conceptions of justice meeting these conditions. To engage in public reason is to appeal to one of these political conceptions—to their ideals and principles, standards and values—when debating fundamental political questions. This requirement still allows us to introduce into political discussion at any time our comprehensive doctrine, religious or nonreligious, provided that, in due course, we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support. I refer to this requirement as *the proviso*, and consider it in detail below. . . .

§ 4: THE WIDE VIEW OF PUBLIC POLITICAL CULTURE

1. Now we consider what I call the wide view of public political culture and discuss two aspects of it. The first is that reasonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, provided that in due course proper political reasons—and not reasons given solely by comprehensive doctrines—are

presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support. This injunction to present proper political reasons I refer to as *the proviso*, and it specifies public political culture as distinct from the background culture. The second aspect I consider is that there may be positive reasons for introducing comprehensive doctrines into public political discussion. I take up these two aspects in turn.

Obviously, many questions may be raised about how to satisfy the proviso. One is: when does it need to be satisfied? On the same day or some later day? Also, on whom does the obligation to honor it fall? It is important that it be clear and established that the proviso is to be appropriately satisfied in good faith. Yet the details about how to satisfy this proviso must be worked out in practice and cannot feasibly be governed by a clear family of rules given in advance. How they work out is determined by the nature of the public political culture and calls for good sense and understanding. It is important also to observe that the introduction into public political culture of religious and secular doctrines, provided the proviso is met, does not change the nature and content of justification in public reason itself. This justification is still given in terms of a family of reasonable political conceptions of justice. However, there are no restrictions or requirements on how religious or secular doctrines are themselves to be expressed; these doctrines need not, for example, be by some standards logically correct, or open to rational appraisal, or evidentially supportable. Whether they are or not is a matter to be decided by those presenting them, and how they want what they say to be taken. They will normally have practical reasons for wanting to make their views acceptable to a broader audience.

2. Citizens' mutual knowledge of one another's religious and nonreligious doctrines expressed in the wide view of public political culture recognizes that the roots of democratic citizens' allegiance to their political conceptions lie in their respective comprehensive doctrines, both religious and nonreligious. In this way citizens' allegiance to the democratic ideal of public reason is strengthened for the right reasons. We may think of the reasonable comprehensive doctrines that support society's reasonable political conceptions as those conceptions' vital social basis, giving them enduring strength and vigor. When these doctrines accept the proviso and only then come into political debate, the commitment to constitutional democracy is publicly manifested. Made aware of this commitment, government officials and citizens are more willing to honor the duty of civility, and their following the ideal of public reason helps foster the kind of society that ideal exemplifies. These benefits of the mutual knowledge of citizens' recognizing one another's reasonable comprehensive doctrines bring out a positive ground for introducing such doctrines, which is not merely a defensive ground, as if their intrusion into public discussion were inevitable in any case.

Consider, for example, a highly contested political issue—the issue of public support for church schools. Those on different sides are likely to

come to doubt one another's allegiance to basic constitutional and political values. It is wise, then, for all sides to introduce their comprehensive doctrines, whether religious or secular, so as to open the way for them to explain to one another how their views do indeed support those basic political values. Consider also the Abolitionists and those in the Civil Rights Movement.⁵⁴ The proviso was fulfilled in their cases, however much they emphasized the religious roots of their doctrines, because these doctrines supported basic constitutional values—as they themselves asserted—and so supported reasonable conceptions of political justice. . . .

§ 6: QUESTIONS ABOUT PUBLIC REASON

I now turn to various questions and doubts about the idea of public reason and try to allay them. . . .

(b) Others may think that public reason is too restrictive because it may lead to a stand-off and fail to bring about decisions on disputed issues. A stand-off in some sense may indeed happen, not only in moral and political reasoning but in all forms of reasoning, including science and common sense. Nevertheless, this is irrelevant. The relevant comparison is to those situations in which legislators enacting laws and judges deciding cases must make decisions. Here some political rule of action must be laid down and all must be able reasonably to endorse the process by which a decision is reached. Recall that public reason sees the office of citizen with its duty of civility as analogous to that of judge with its duty of deciding cases. Just as judges are to decide cases by legal grounds of precedent, recognized canons of statutory interpretation, and other relevant grounds, so citizens are to reason by public reason and to be guided by the criterion of reciprocity, whenever constitutional essentials and matters of basic justice are at stake.

Thus, when there seems to be a stand-off, that is, when legal arguments seem evenly balanced on both sides, judges cannot resolve the case simply by appealing to their own political views. To do that is for judges to violate their duty. The same holds with public reason: if, when stand-offs occur, citizens simply invoke grounding reasons of their comprehensive views, the principle of reciprocity is violated. From the point of view of public reason, citizens must vote for the ordering of political values they sincerely think the most reasonable. Otherwise they fail to exercise political power in ways that satisfy the criterion of reciprocity.

In particular, when hotly disputed questions, such as that of abortion, arise which may lead to a stand-off between different political conceptions, citizens must vote on the question according to their complete ordering of political values.⁸⁰ Indeed, this is a normal case: unanimity of views is not to

⁵⁴. I do not know whether the Abolitionists and King thought of themselves as fulfilling the purpose of the proviso. But whether they did or not, they could have. And had they known and accepted the idea of public reason, they would have. I thank Paul Weithman for this point.

⁸⁰. Some have quite naturally read the footnote in Rawls, *Political Liberalism*, lecture VI, § 7.2 at 243–44, as an argument for the right to abortion in the first trimester. I do not intend it to be one. (It does express my opinion, but my opinion is not an argument.) I was in

be expected. Reasonable political conceptions of justice do not always lead to the same conclusion; nor do citizens holding the same conception always agree on particular issues. Yet the outcome of the vote, as I said before, is to be seen as legitimate provided all government officials, supported by other reasonable citizens, of a reasonably just constitutional regime sincerely vote in accordance with the idea of public reason. This doesn't mean the outcome is true or correct, but that it is reasonable and legitimate law, binding on citizens by the majority principle.

Some may, of course, reject a legitimate decision, as Roman Catholics may reject a decision to grant a right to abortion. They may present an argument in public reason for denying it and fail to win a majority. But they need not themselves exercise the right to abortion. They can recognize the right as belonging to legitimate law enacted in accordance with legitimate political institutions and public reason, and therefore not resist it with force. Forceful resistance is unreasonable: it would mean attempting to impose by force their own comprehensive doctrine that a majority of other citizens who follow public reason, not unreasonably, do not accept. Certainly Catholics may, in line with public reason, continue to argue against the right to abortion. Reasoning is not closed once and for all in public reason any more than it is closed in any form of reasoning. Moreover, that the Catholic Church's nonpublic reason requires its members to follow its doctrine is perfectly consistent with their also honoring public reason.

I do not discuss the question of abortion in itself since my concern is not with that question but rather to stress that political liberalism does not hold that the ideal of public reason should always lead to a general agreement of views, nor is it a fault that it does not. Citizens learn and profit from debate and argument, and when their arguments follow public reason, they instruct society's political culture and deepen their understanding of one another even when agreement cannot be reached...

error in leaving it in doubt whether the aim of the footnote was only to illustrate and confirm the following statement in the text to which the footnote is attached: "The only comprehensive doctrines that run afoul of public reason are those that cannot support a reasonable balance [or ordering] of political values [on the issue]." To try to explain what I meant, I used three political values (of course, there are more) for the troubled issue of the right to abortion to which it might seem improbable that political values could apply at all. I believe a more detailed interpretation of those values may, when properly developed in public reason, yield a reasonable argument. I don't say the most reasonable or decisive argument; I don't know what that would be, or even if it exists. (For an example of such a more detailed interpretation, see Judith Jarvis Thomson, *Abortion*, 20 *Boston Rev.* 11 (Summer 1995), though I would want to add several addenda to it.) Suppose now, for purposes of illustration, that there is a reasonable argument in public reason for the right to abortion but there is no equally reasonable balance, or ordering, of the political values in public reason that argues for the denial of that right. Then in this kind of case, but only in this kind of case, does a comprehensive doctrine denying the right to abortion run afoul of public reason. However, if it can satisfy the proviso of the wide public reason better, or at least as well as other views, it has made its case in public reason. Of course, a comprehensive doctrine can be unreasonable on one or several issues without being simply unreasonable.

§ 7: CONCLUSION

1. Throughout, I have been concerned with a torturing question in the contemporary world, namely: Can democracy and comprehensive doctrines, religious or nonreligious, be compatible? And if so, how? At the moment a number of conflicts between religion and democracy raise this question. To answer it political liberalism makes the distinction between a self-standing political conception of justice and a comprehensive doctrine. A religious doctrine resting on the authority of the Church or the Bible is not, of course, a liberal comprehensive doctrine: its leading religious and moral values are not those, say, of Kant or Mill. Nevertheless, it may endorse a constitutional democratic society and recognize its public reason. Here it is basic that public reason is a political idea and belongs to the category of the political. Its content is given by the family of (liberal) political conceptions of justice satisfying the criterion of reciprocity. It does not trespass upon religious beliefs and injunctions insofar as these are consistent with the essential constitutional liberties, including the freedom of religion and liberty of conscience. There is, or need be, no war between religion and democracy. In this respect political liberalism is sharply different from and rejects Enlightenment Liberalism, which historically attacked orthodox Christianity

The idea of the politically reasonable is sufficient unto itself for the purposes of public reason when basic political questions are at stake. Of course, fundamentalist religious doctrines and autocratic and dictatorial rulers will reject the ideas of public reason and deliberative democracy. They will say that democracy leads to a culture contrary to their religion, or denies the values that only autocratic or dictatorial rule can secure. They assert that the religiously true, or the philosophically true, overrides the politically reasonable. We simply say that such a doctrine is politically unreasonable. Within political liberalism nothing more need be said.

Notes and Questions

1. Rawls has argued that judges are exemplars of public reason. Do you agree? Should politicians be held to that same standard, or should they be freer to express their religious convictions than are judges? Did the presidents and presidential candidates studied in Part A, including Kennedy, Bush and Obama, employ public reason? Is Rawls's ideal of public reason similar to the argument of Senator Kennedy in the Houston speech? According to President Obama,

What our deliberative, pluralistic democracy does demand is that the religiously motivated translate their concerns into universal, rather than religion-specific, values. It requires that their proposals must be subject to argument and amenable to reason. If I am opposed to abortion for religious reasons and seek to pass a law banning the practice, I cannot simply point to the teachings of my church or invoke God's will and expect that argument to carry the day. If I want others to listen to me, then I have to explain why abortion violates some

principle that is accessible to people of all faiths, including those with no faith at all.

Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* 219 (2006). Is Obama's reasoning the same as Rawls's public reason? See Leslie C. Griffin, *Political Reason*, 22 *St. John's J. Legal Comment.* 493, 502 (2007) ("Obama's translation model does not solve the problem; it merely hides it, leaving politicians to govern according to religious beliefs as long as they discover a secular rationale (or any reason?) for governmental action. For this reason, in Rawls's work, the key words are 'public reason,' not secular reason, and 'public reason' is best interpreted as political. The goal is not for the Mormon, or Baptist, or Church of Christ candidate to figure a secular way to lead others to his faith. This approach to politics undermines political stability and demonstrates disrespect for one's fellow citizens. Instead, politicians should employ political reason as the starting point for their decision-making on matters of law and politics.").

2. *Comprehensive Doctrines.* What does Rawls mean by a comprehensive doctrine? Do all the individual religious believers we met in Chapter I subscribe to a comprehensive doctrine? Do comprehensive doctrines such as utilitarianism and Kantianism, or the world's religions, interpret politics differently? Consider the following classification of the world's religions' attitudes toward politics by Professor Jacob Neusner: "Judaism and Christianity begin without the assumption of political power. Islam, Hinduism, and Confucianism, by contrast, appear to take such power for granted. Buddhism stakes out a middle position, in which it knows it can rule but is prepared not to do so." Jacob Neusner, ed., *God's Rule: The Politics of World Religions* 5 (2003). How can members of religious traditions with such different attitudes toward political power share a common government?

In the third century B.C.E., Ashoka, the Buddhist Emperor of India, was "committed to making sure that public discussion could take place without animosity or violence." Accordingly he formulated the following rules for public discussion. "He demanded, for example, 'restraint in regard to speech, so that there should be no extolment of one's own sect or disparagement of other sects on inappropriate occasions, and it should be moderate even on appropriate occasions'. Even when engaged in arguing, 'other sects should be duly honoured in every way on all occasions.'" Amartya Sen, *The Argumentative Indian: Writings on Indian History, Culture and Identity* 15–16 (2005). Professor Sen notes that "[i]n the history of public reasoning in India, considerable credit must be given to the early Indian Buddhists, who had a great commitment to discussion as a means of social progress." *Id.* at 15. Does Sen's work add support to Rawls's argument that political disputes can be resolved by public reason, and that comprehensive doctrines may provide their members with good reasons to employ public reason?

3. Did the readings about the presidents persuade you that a Rawlsian approach takes too much religion out of the politics? Professor Ste-

phen Carter has argued that American law and politics trivialize religion by excluding it from a dominant secular culture, and recommends the addition of more theological language to the public square, supporting what Rawls would call an “open view” of politics in which no religious arguments are off limits. Do you agree that politics should be open to all religious arguments? See Stephen L. Carter, *The Culture of Disbelief* (1993). In contrast to both Rawls and Carter, Professor Michael Perry recommended an “ecumenical political dialogue,” according to which religious participants in political discussions should maintain two attitudes (fallibilism and pluralism) and two virtues (public intelligibility and public accessibility). That is, religious argument may enter politics and law, and indeed should enter politics and law, but it must be fallible, pluralistic, intelligible and accessible. Michael J. Perry, *Love and Power: The Role of Religion and Morality in American Politics* 43 (1993); see also Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts—And Second Thoughts—On Love and Power*, 30 *San Diego L. Rev.* 703, 727 (1993). Would Perry’s theory exclude some religious groups from the public square (“namely theologically conservative theists, including various Protestant Christians (evangelicals, fundamentalists, and pentecostals) and traditionalists (Roman Catholics, Anglicans, and Lutherans)”) while allowing other groups to participate? See David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 *Iowa L. Rev.* 1067, 1076–77 (1992) (book review); Sanford Levinson, *Religious Language and the Public Square*, 105 *Harv. L. Rev.* 2061 (1992).

4. Is Rawls’s theory of public reason a good idea, or does it unfairly ask religious believers to put aside or bracket their religious beliefs from their political lives? Would a person “annihilate herself” and her personal identity by following public reason? Do you agree with Professor Perry?

If it is the case (as I believe it is) that a person—a “self”—is partly constituted by her moral convictions, then, in choosing principles of justice, the partisan cannot bracket her membership in her moral community, her particular moral convictions, for that membership, those convictions, are constitutive of her very self. To bracket them would be to bracket—indeed, to annihilate—herself.

See Michael J. Perry, *Morality, Politics, and Law* 72–73 (1988).

Is the division of religious and political reasoning *psychologically* harmful because it divides the individual’s comprehensive doctrine from her public life? See Susan Moller Okin, *Political Liberalism*, 87 *Am. Pol. Sci. Rev.* 1010 (1993) (book review). Or does *moral* harm arise from the demand that the individual publicly support positions that violate her deepest convictions? Is *integrity* threatened by public reason? See Timothy P. Jackson, *To Bedlam and Part Way Back: John Rawls and Christian Justice*, 8.1 *Faith and Phil.* 423 (1991). Does the requirement to use public reason produce individuals who lack *sincerity* because they publicly advocate reasonable positions not based on their personal commitments to comprehensive doctrines? See Daniel J. Gifford, *Interpersonal Distrust in the Modified Rawlsian Society*, 48 *SMU L. Rev.* 217, 218 (1994). See

Michael J. Perry, *Morality, Politics, and Law* 61 (1988) (A Rawlsian does not reason as “the *particular* person she is”; “it is, rather, for her to play the role of *someone else* reasoning towards principles of justice.”). Is it even possible for individuals to distinguish their religious or philosophical commitments from their political views? Compare Gerald F. Gaus, *Reason, Justification, and Consensus: Why Democracy Can’t Have It All*, in James Bohman & William Rehg, eds., *Deliberative Democracy: Essays on Reason and Politics* 209 (1997) (“As Kant said, to reason publicly is to ‘think from the standpoint of everyone else.’”) with Rawls, *supra* (“the roots of democratic citizens’ allegiance to their political conceptions lie in their respective comprehensive doctrines, both religious and nonreligious”).

Do you think that public reason *discriminates* against religion by allowing secular voices to dominate political discussion? See Gary C. Leedes, *Rawls’s Excessively Secular Political Conception*, 27 U. Rich. L. Rev. 1083 (1993) (book review); Kent Greenawalt, *On Public Reason*, 69 Chi.-Kent L. Rev. 688 (1994). Is Rawls himself intolerant toward religious believers, indeed a “secular fundamentalist”? See Paul F. Campos, *Secular Fundamentalism*, 9 Colum. L. Rev. 1814, 1816, 1825 (1994) (“Despite its highly abstract endorsement of moral and religious pluralism, *Political Liberalism* is ultimately a paean to a secular creed that has within it the potential to become every bit as monistic, compulsory, and intolerant of any significant deviation from social verities as the traditional modes of belief it derided and displaced.”). Does Rawls discriminate not against religion but among religions by favoring those doctrines that are willing to translate their convictions into public reason? As mentioned above, the Catholic Church upheld its ecumenical or catholic mission (i.e., as the one true religion that should be everywhere recognized as such) until Vatican II. Does this mean that, according to Rawls, prior to Vatican II, President Kennedy could be *either* a good Catholic *or* a good American, but not both? See Leslie Griffin, *Good Catholics Should Be Rawlsian Liberals*, 5 S. Cal. Interdisc. L.J. 217 (1997). Is it reasonable for Rawls to label all comprehensive doctrines that cannot support political liberalism “unreasonable”? Is political liberalism only persuasive to those who are already political liberals? Is that the meaning of the last sentence of the Rawls excerpt *supra*, p. 534?

Do you agree with the argument that public discourse is impoverished if we remove biblical narratives, religious imagery or theological arguments from politics? Is “secular” language “chaste, sober, and thin,” and therefore “unable to evoke the rich, polyvalent power of religious symbolism, a power which can command commitments of emotional depth”? See John A. Coleman, *A Possible Role for Biblical Religion in Public Life*, 40 Theological Stud. 700, 706 (1979); Miriam Galston, *Rawlsian Dualism and the Autonomy of Political Thought*, 94 Colum. L. Rev. 1842, 1844 (1994); Michael J. Sandel, *Political Liberalism*, 107 Harv. L. Rev. 1765, 1776 (1994) (book review). Does the Rawlsian approach take passion and commitment out of political argument? See Elizabeth H. Wolgast, *The Demands of Public Reason*, 94 Colum. L. Rev. 1936, 1943 (1994).

5. *Islam and Public Reason.* Is Islam a comprehensive doctrine that can adopt Rawlsian public reason? Discussions of that question begin against the background that Islam traditionally did not allow Muslims to live as minorities in non-Muslim countries. Andrew March identifies aspects of Islam that could keep Muslims from being minority citizens in a liberal democracy, and then explains what an Islamic affirmation of liberal citizenship entails. See *Liberal Citizenship and the Search for an Overlapping Consensus: The Case of Muslim Minorities*, 34 *Phil. & Pub. Aff.* 4 (Fall 2006); *Islamic and Liberal Citizenship: The Search for an Overlapping Consensus* (2009). March addresses the question “May I without great contradiction regard the terms of citizenship in a pluralist liberal democracy as reasonable from an Islamic standpoint?”, and finds grounds in classical Islam for affirming Muslims’ residence in, political obligation to, and loyalty toward a non-Muslim state. In addressing whether Islam can provide resources for Muslims to be citizens in non-Muslim liberal democracies, March concludes: “Political liberalism’s public commitment to neutrality does in fact appeal to adherents of a non-liberal comprehensive doctrine.” *Islamic Foundations for a Social Contract in Non-Muslim Liberal Democracies*, *American Political Science Review*, Vol. 101, No. 2 (May), pp. 235–52.

Along similar lines, Mohammad Fadel concludes that, from the perspective of classical Islamic sources, public reason is an appropriate style of argumentation. See *The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21 *Canadian J. of Law & Jurisprudence* 5 (2008). Abdullahi Ahmed An-Na’im is more critical of public reason, proposing in its place “civic reason”: “Muslims and other believers should be able to propose policy and legislative initiatives emanating from their religious beliefs, provided that they can support them in free and open public debate by reasons that are accessible and convincing to the generality of citizens regardless of their religious or other beliefs.” Abdullahi Ahmed An-Na’im, *Islam and the Secular State* 29–30 (2008). Is An-Na’im’s theory equivalent to Rawls’s? Is it more similar to Obama than Rawls? See *id.* at 97–101 (expressing “general agreement with Rawls’s thinking,” but observing the risks of trying to transplant it to Islamic societies because it is “so specific to the United States”). Does Rawls emphasize politics too much at the expense of public and nongovernmental spaces? See *id.* at 100.

6. *Slavery and the Civil Rights Movement.* Does the history of the Abolitionist Movement, which fought to abolish slavery, and the American Civil Rights Movement of the 1960s, which was led by Reverend Martin Luther King, Jr., support Rawls’s theory or contradict it? Recall that, according to Rawls, both the Abolitionists and King could meet the public reason proviso, which states that individuals may introduce their comprehensive discussions into political debate as long as, “in due course, we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support.” Or does Rawls misrepresent how religious the Civil Rights Movement was? See Paul J. Weithman, *Taking Rites Seriously*, 75 *Pac. Phil. Q.* 272, 284 (1994).

Do you think that Reverend King met the public reason proviso in the Letter from Birmingham Jail, in Chapter III? What about in the following speech, "Give Us the Ballot," which King gave on the third anniversary of *Brown v. Board of Education*? Is the speech an example of public reason, or civil religion, or both, or something else?

Three years ago the Supreme Court of this nation rendered in simple, eloquent, and unequivocal language a decision which will long be stenciled on the mental sheets of succeeding generations. For all men of goodwill, this May seventeenth decision came as a joyous daybreak to end the long night of human captivity. It came as a great beacon light of hope to millions of disinherited people throughout the world who had dared only to dream of freedom.

Unfortunately, this noble and sublime decision has not gone without opposition. This opposition has often risen to ominous proportions. Many states have risen up in open defiance. The legislative halls of the South ring loud with such words as "interposition" and "nullification."

But even more, all types of conniving methods are still being used to prevent Negroes from becoming registered voters. The denial of this sacred right is a tragic betrayal of the highest mandates of our democratic tradition. And so our most urgent request to the president of the United States and every member of Congress is to give us the right to vote.

Give us the ballot, and we will no longer have to worry the federal government about our basic rights. . . .

I cannot close without stressing the urgent need for strong, courageous and intelligent leadership from the Negro community. We need a leadership that is calm and yet positive. This is no day for the rabble-rouser, whether he be Negro or white. We must realize that we are grappling with the most weighty social problem of this nation, and in grappling with such a complex problem there is no place for misguided emotionalism. We must work passionately and unrelentingly for the goal of freedom, but we must be sure that our hands are clean in the struggle. We must never struggle with falsehood, hate, or malice. We must never become bitter. I know how we feel sometime. There is the danger that those of us who have been forced so long to stand amid the tragic midnight of oppression—those of us who have been trampled over, those of us who have been kicked about—there is the danger that we will become bitter. But if we will become bitter and indulge in hate campaigns, the old, the new order which is emerging will be nothing but a duplication of the old order.

We must meet hate with love. We must meet physical force with soul force. There is still a voice crying out through the vista of time, saying: "Love your enemies, bless them that curse you, pray for them that despitefully use you." Then, and only then, can you matriculate into the university of eternal life. That same voice cries out in terms lifted

to cosmic proportions: "He who lives by the sword will perish by the sword."

And history is replete with the bleached bones of nations that failed to follow this command. We must follow nonviolence and love.

Now, I'm not talking about a sentimental, shallow kind of love. I'm not talking about *eros*, which is a sort of aesthetic, romantic love. I'm not even talking about *philia* which is a sort of intimate affection between personal friends. But I'm talking about *agape*. I'm talking about the love of God in the hearts of men. I'm talking about a type of love which will cause you to love the person who does the evil deed while hating the deed that the person does. We've got to love. . . .

I conclude by saying that each of us must keep faith in the future. Let us not despair. Let us realize that as we struggle for justice and freedom, we have cosmic companionship. This is the long faith of the Hebraic-Christian tradition: that God is not some Aristotelian Unmoved Mover who merely contemplates upon Himself. He is not merely a self-knowing God, but an other-loving God forever working through history for the establishment of His kingdom.

And those of us who call the name of Jesus Christ find something of an event in our Christian faith that tells us this. There is something in our faith that says to us, "Never despair; never give up; never feel that the cause of righteousness and justice is doomed." There is something in our Christian faith, at the center of it, which says to us that Good Friday may occupy the throne for a day, but ultimately it must give way to the triumphant beat of the drums of Easter. There is something in our faith that says evil may so shape events that Caesar will occupy the palace and Christ the cross, but one day that same Christ will rise up and split history into A.D. and B.C., so that even the name, the life of Caesar must be dated by his name. There is something in this universe which justifies Carlyle in saying: "No lie can live forever."

There is something in this universe which justifies William Cullen Bryant in saying: "Truth crushed to earth will rise again." There is something in this universe which justifies James Russell Lowell in saying: Truth forever on the scaffold, Wrong forever on the throne. Yet that scaffold sways the future, And behind the dim unknown Stands God, within the shadow, Keeping watch above His own.

Go out with that faith today. Go back to your homes in the Southland to that faith, with that faith today. Go back to Philadelphia, to New York, to Detroit and Chicago with that faith today: that the universe is on our side in the struggle. Stand up for justice. Sometimes it gets hard, but it is always difficult to get out of Egypt, for the Red Sea always stands before you with discouraging dimensions. And even after you've crossed the Red Sea, you have to move through a wilderness with prodigious hilltops of evil and gigantic mountains of opposition. But I say to you this afternoon: Keep moving. Let nothing slow you up. Move on with dignity and honor and respectability.

I realize that it will cause restless nights sometime. It might cause losing a job; it will cause suffering and sacrifice. It might even cause physical death for some. But if physical death is the price that some must pay to free their children from a permanent life of psychological death, then nothing can be more Christian. Keep going today. Keep moving amid every obstacle. Keep moving amid every mountain of opposition. If you will do that with dignity, when the history books are written in the future, the historians will have to look back and say, "There lived a great people. A people with 'fleecy locks and black complexion,' but a people who injected new meaning into the veins of civilization; a people which stood up with dignity and honor and saved Western civilization in her darkest hour; a people that gave new integrity and a new dimension of love to our civilization." When that happens, "the morning stars will sing together, and the sons of God will shout for joy."

Martin Luther King, Jr., Address Delivered at the Prayer Pilgrimage for Freedom in Washington, D.C.: Give Us the Ballot (May 17, 1957).

Are King's addresses proof that religious and biblical imagery are necessary to the public square because they can inspire and motivate in a way that public reason cannot? See John A. Coleman, *An American Strategic Theology* 193 (1982). Do King's arguments demonstrate that religion leads people to understand justice and truth in a way that public reason cannot? See Michael J. Sandel, *Political Liberalism*, 107 *Harv. L. Rev.* 1765, 1776 (1994) (book review). How do you explain the fact that many Christians opposed the Civil Rights Movement? See David A.J. Richards, *Public Reason and Abolitionist Dissent*, 69 *Chi.-Kent L. Rev.* 787, 835 (1994) (The abolitionist dissent was not successful *because* it was religious, but due to its moral independence from both religious and political leaders).

7. *Abortion*. In the footnote to *Political Liberalism* referred to in footnote 80 of the reading, *supra* p. 532, Rawls made the following argument:

As an illustration, consider the troubled question of abortion. Suppose first that the society in question is well-ordered and that we are dealing with the normal case of mature adult women Suppose further that we consider the question in terms of these three important political values: the due respect for human life, the ordered reproduction of political society over time, including the family in some form, and finally the equality of women as equal citizens. (There are, of course, important values besides these.) Now I believe any reasonable balance of these three values will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester. The reason for this is that at this early stage of pregnancy the political value of the equality of women is overriding, and this right is required to give it substance and force. Other political values, if tallied in, would not, I think, affect this conclusion. A reasonable balance may allow her such a right beyond this, at least in certain circumstances. However, I

do not discuss the question in general here, as I simply want to illustrate the point of the text by saying that any comprehensive doctrine that leads to a balance of political values excluding that duly qualified right in the first trimester is to that extent unreasonable; and depending on the details of its formulation, it may also be cruel and oppressive; for example, if it denied the right altogether except in the case of rape and incest. Thus, assuming that this question is either a constitutional essential or a matter of basic justice, we would go against the ideal of public reason if we voted from a comprehensive doctrine that denied this right.

John Rawls, *Political Liberalism* 243–44 (1993). Does Rawls sneak in assumptions of his comprehensive doctrine and therefore demonstrate that public reason does not work? See Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 *Yale L.J.* 2475 (1997).

How does Rawls's approach to abortion compare with that of George W. Bush? Is one more faithful to the Constitution than the other? Many abortion activists believe that their public arguments about abortion, with their references to religion, are comparable to the arguments of the Civil Rights Movement's leaders for equality. See Thomas Frank, *What's the Matter with Kansas? How Conservatives Won the Heart of America* (2005). Do you agree? Consider the following comment by Professor Robert Bellah, author of the *Civil Religion* reading in Part B, *supra*, p. 515:

It may be a sobering thought, but most of what is good and most of what is bad in our history is rooted in our public theology. Every movement to make America more fully realize its professed values has grown out of some form of public theology, from the abolitionists to the social gospel and the early socialist party to the civil rights movement under Martin Luther King and the farm workers' movement under Caesar Chavez. But so has every expansionist war and every form of oppression of racial minorities and immigrant groups.

Robert Bellah, *The Robert Bellah Reader* 257 (2006). Would Professor Rawls agree with Professor Bellah?

8. *Gay Marriage*. After the California Supreme Court recognized a state constitutional right to gay marriage, see *In re Marriage Cases*, 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384 (2008), California voters passed Proposition 8, which banned gay marriage. Opponents complained about the undue influence of religious groups, especially Mormons, on the pro-Proposition 8 campaign. See, e.g., Jessica Garrison and Joanna Lin, *Prop. 8 Protesters Target Mormon Temple in Westwood*, *L.A. Times*, Nov. 7, 2008.

The following ad gives a flavor of the debate. On the TV screen “two actors portraying Mormon missionaries forced their way into the well-kept home of a married lesbian couple.

‘Hi, we’re here from the Church of Jesus Christ of Latter-day Saints,’ one says.

‘We’re here to take away your rights,’ says his partner.

The missionaries then rip the wedding rings from the women's fingers and ransack their house until they find the women's marriage license, which they destroy.

'Hey, we have rights,' one of the women says.

'Not if we can help it,' answers the missionary.'

Jessica Garrison & Joanna Lin, *Gay-rights Activists Criticize the Church for Helping to Collect Millions to Aid Passage of Ban on Gay Marriage*, L.A. Times, Nov. 7, 2008.

During the campaign, several Christian groups, led by the Church of Jesus Christ of Latter-day Saints, vocally supported the proposition and contributed large amounts of money to effectuate its passage, while gay rights groups criticized the numerous faith-based attempts to influence the vote. One anti-8 group created a website to keep track of Mormon contributions to the Yes-on-8 drive and estimated that Mormons had contributed \$20 million toward passage of the initiative. A pro-8 spokesman decried the website and the "despicable" ad:

"I am appalled at the level of Mormon-bashing that went on during the Proposition 8 campaign and continues to this day," he said. "If this activity were directed against any other church, if someone put up a website that targeted Jews or Catholics in a similar fashion for the mere act of participating in a political campaign, it would be widely and rightfully condemned."

The complaints of Mormon-bashing were then rebutted with arguments that the gay rights supporters were debating politics, not religion, and were appropriately criticizing the political activity of the Mormon church. See *id.*

Although the Mormon support for Proposition 8 received much of the media's attention, the Mormons were only part of a broad coalition of religious groups who joined protectmarriage.com, and Catholics and Evangelicals contributed heavily to the campaign. The Campaign for 8 was "one of the most ambitious interfaith political organizing efforts ever attempted in the state," as Catholics and evangelical Christians participated in large numbers and members of the Protect Marriage Coalition also "reach[ed] out to Jews, Muslims, Sikhs and Hindus." "Moreover, political analysts say, the alliances across religious boundaries could herald new ways of building coalitions around political issues in California. 'Pan-religious, faith-based political action strategies . . . I think we are going to see a lot more of [this] in the future,'" predicted one professor. The religious left eventually responded to the religious right with videos showing priests and rabbis explaining their faiths' support for gay marriage. See Jessica Garrison, *California Churches Plan a Big Push against Same-Sex Marriage*, L.A. Times, Aug. 24, 2008. How would such a pan-religious coalition differ from a group of Rawlsian liberals?

Post-election news stories explained that Proposition 8 passed because of support from religious voters; "Californians voted their religion, not their political party, when they pushed Proposition 8 to victory and banned same-sex marriage in the state, . . . 'What the exit polls say is that religion

trumps party affiliation when it comes to social issues,' said Mark DiCamillo, director of the Field Poll." John Wildermuth, *The Voters: Majority of Blacks, Catholics, Who Supported Obama, Backed Measure*, San Fran. Chron., Nov. 6, 2008, at A18.

In response to Proposition 8's success, tens of thousands of protesters picketed Mormon institutions around the country, from California to New York. Prop 8 supporters then responded that free exercise allows them to support moral policies consistent with their faith. Prop 8 supporters took out a full-page ad in *The New York Times* criticizing the actions of the gay rights groups as a "mob veto," accusing the Prop 8 opponents of practicing "violence and intimidation" against the Church of Jesus Christ of Latter-day Saints and other religions in order to "cow [their] opponents into submission," and identifying the gays as "mobs, seeking not to persuade but to intimidate." Meanwhile, some gay activists chided themselves for not anticipating the strength of the religious pro-8 vote and confronting Mormons more directly and explicitly on the basis of their religious dogma.

What does the gay marriage dispute contribute to the discussion about political liberalism? That most citizens will not follow its requirements? That neither liberal nor conservative religion—no religion of any sort—is the appropriate basis of the law in a liberal society? That society works best when pan-religious alliances are formed? See Barack Obama, *The Audacity of Hope* 219 (2006) ("[w]hat our deliberative, pluralistic democracy does demand is that the religiously motivated *translate* their concerns into universal, rather than religion-specific, values."); Frederick Mark Gedicks, *Truth and Consequences: Mitt Romney, Proposition 8, and Public Reason*, available at <http://ssrn.com/abstract=1354175> ("Those who intervene in the political marketplace on the basis of religious truth cannot complain when they are attacked on the same basis. . . . A candidate cannot complain about attacks on the truth-claims of his or her religion when that religion [uses] those religious truth-claims to justify its own intervention in electoral debates.").

In April 2009, the Supreme Court of Iowa addressed the "religious undercurrent propelling the same-sex marriage debate" when it declared unconstitutional a provision of the Iowa Code limiting civil marriage to a union between a man and a woman. Polk County, Iowa had proposed five societal interests in support of the statute's definition of marriage: the first three relating to the advancement of child rearing; the fourth involving the conservation of state resources; the fifth promoting the traditional notion of marriage. However, the Court also made a point to consider "the reason left unspoken by the County: religious opposition to same-sex marriage" and cited a 2008 *Des Moines Register* study showing that opposition to same-sex marriage rose as high as eighty percent among people "with a high level of religious commitment." Ultimately, the Court held that all five proposed rationales failed under strict scrutiny equal protection analysis and that religious opposition, though a valid form of free exercise, does not represent a legal argument against same-sex marriage.

The Court noted that religious opposition to same-sex marriage is supported by tradition and biblical interpretation. However, the Court also

recognized that adherents to other religions, such as Buddhists, Quakers, Unitarians, and Reform and Reconstructionist Jews, hold equally sincere religious views that accept same sex marriage. The Iowa statute in question declares that marriage is a civil contract, and the court chose to decide the case “as civil judges, far removed from the theological debate of religious clerics, and [to] focus only on the concept of civil marriage and the state licensing system that identifies a . . . class of persons entitled to secular rights and benefits.” Ultimately, the Court decided that “people can continue to associate with the religion that best reflects their views . . . [but] *civil* marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law.” See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). Were the Iowa judges exemplars of public reason?

What does the debate about gay marriage teach you about the appropriate role of religion in setting public policy? As you read the next section, consider whether the LDS and other churches who participated in the Prop 8 campaign should lose their tax exemptions.

D. TAXES AND POLITICAL ACTIVITY

Branch Ministries v. Rossotti

United States Court of Appeals, District of Columbia Circuit, 2000.
211 F.3d 137.

■ BUCKLEY, SENIOR JUDGE:

Four days before the 1992 presidential election, Branch Ministries, a tax-exempt church, placed full-page advertisements in two newspapers in which it urged Christians not to vote for then-presidential candidate Bill Clinton because of his positions on certain moral issues. The Internal Revenue Service concluded that the placement of the advertisements violated the statutory restrictions on organizations exempt from taxation and, for the first time in its history, it revoked a bona fide church’s tax-exempt status because of its involvement in politics. Branch Ministries and its pastor, Dan Little, challenge the revocation on the grounds that (1) the Service acted beyond its statutory authority, (2) the revocation violated its right to the free exercise of religion guaranteed by the First Amendment and the Religious Freedom Restoration Act, and (3) it was the victim of selective prosecution in violation of the Fifth Amendment. Because these objections are without merit, we affirm the district court’s grant of summary judgment to the Service.

I. BACKGROUND

A. Taxation of Churches

The Internal Revenue Code (“Code”) exempts certain organizations from taxation, including those organized and operated for religious pur-