Articles   Colorado Law Faculty Scholarship

1994

Secular Fundamentalism

Paul F. Campos
University of Colorado Law School

HEINONLINE

ESSAYS

SECULAR FUNDAMENTALISM

Paul F. Campos*

Government is a true religion. It has its dogmas, its mysteries, its
priests. To submit it to the discussion of each individual is to
destroy it. It is given life only by the reason of the nation, that is
by a political faith, of which it is a *symbol*.

—Joseph de Maistre[1]

I. AFTER THEORY

Near the beginning of his influential book *After Virtue*, Alasdair
MacIntyre notes that "[t]he most striking feature of contemporary moral
utterance is that so much of it is used to express disagreements; and the
most striking feature of the debates in which these disagreements are ex-
pressed is their interminable character."[2] The interminable character of
modern moral dispute is a product of the fact that "[t]here seems to be no
rational way of securing moral agreement in our culture."[3] MacIntyre
proceeds to give several examples of such disputes, one of which, con-
cerning the legal and moral status of abortion, is particularly relevant to
some of the claims put forth in John Rawls's *Political Liberalism*.
MacIntyre asks us to consider the following "characteristic and well-
known rival moral arguments."

> (a) Everybody has certain rights over his or her own person, in-
> cluding his or her own body. It follows from the nature of these
> rights that at the stage when the embryo is essentially part of the
> mother's body, the mother has a right to make her own un-
> coerced decision on whether she will have an abortion or not.
> Therefore abortion is morally permissible and ought to be al-
> lowed by law.
> (b) I cannot will that my mother should have had an abortion
> when she was pregnant with me, except perhaps if it had been
> certain that the embryo was dead or gravely damaged. But if I
> cannot will this in my own case, how can I consistently deny to
> others the right to life that I claim for myself? I would break the
> so-called Golden Rule unless I denied that a mother has a gen-

    1. Joseph de Maistre, Oeuvres Completes de J. de Maistre 376 (1884–87), quoted in
Isaiah Berlin, Joseph de Maistre and the Origins of Fascism [hereinafter Berlin, Origins of
Fascism], *in* The Crooked Timber of Humanity 91, 125–26 (1990) [hereinafter The
Crooked Timber of Humanity].
    2. Alasdair MacIntyre, After Virtue 6 (2d ed. 1984).
    3. Id.

eral right to an abortion. I am not of course thereby committed
to the view that abortion ought to be legally prohibited.

(c) Murder is wrong. Murder is the taking of an innocent life.
An embryo is an identifiable individual, differing from a new-
born infant only in being at an earlier stage on the long road to
adult capacities and, if any life is innocent, that of an embryo is.
If infanticide is murder, as it is, abortion is murder. So abortion
is not only morally wrong, but ought to be legally prohibited.[4]

What characteristics do such arguments share that help make con-
temporary moral disputes in our culture so shrill and intractable?
MacIntyre concentrates on two in particular. First, the arguments display
what philosophers of science call "conceptual incommensurability." That
is, although each argument is logically valid in that its conclusions do
indeed flow from its premises, the rival premises themselves must at some
point be taken as axiomatic. This would seem to make it impossible to
measure the claims of each position against its rivals. In MacIntyre's hy-
pothetical discourse, premises that invoke rights collide with premises
that invoke moral universalizability; and, given the internal consistency of
the arguments, there appear to be no objective criteria available for
choosing between them.

MacIntyre's second point helps explain the significance of the first.
These arguments all "purport to be *impersonal* rational arguments and as
such are usually presented in a mode appropriate to that impersonality."[5]
Statements of value claim to be about something other than the prefer-
ences of those who make them: such propositions depend on our assent
to some moral imperative, the validity of which is supposedly indepen-
dent of the beliefs of the person who happens to be making the argu-
ment. The interminable character of modern moral argument is thus a
direct consequence of a kind of pragmatic contradiction. Moral claims at
least appear to be in some fundamental sense subjective. One cannot,
given the current epistemological obscurity of such claims, demonstrate
that a woman's "right" to procreative autonomy is superior to an em-
bryo's "right" not to be aborted; in the end, all such claims must have the
flavor of arbitrary assertions. The advocate's belief in any particular
moral position is therefore ultimately a matter of choosing to believe one
claim rather than another. Yet the moral claims themselves continue to
be made in language that appeals to objective standards of judgment.
Hence what might be explained away as a clash of antagonistic wills takes
place in a vocabulary that not only demands rational assent, but does so
precisely in those matters where we cannot adduce any grounds for com-
pelling such agreement.

After Virtue is perhaps the most celebrated of recent attempts to
grapple with what various modern thinkers have come to regard as the
disastrous consequences of enlightenment rationalism for all types of eth-

---

4. Id. at 6–7.
5. Id. at 8.

ical discourse. Yet *Political Liberalism* does not merely ignore MacIntyre's work: the book does not even acknowledge the existence of any counter-enlightenment tradition in Western political thought. Indeed, if a reader's knowledge of moral and political philosophy were limited to Professor Rawls's 400-page reply to the immense literature that has grown up around *A Theory of Justice*, that reader would conclude that the fundamental premises of liberal political theory were essentially incontestable. It should, I think, take us aback when we discover that a book written by one of the pre-eminent philosophers in the English-speaking world—a book, moreover, which attempts to describe definitively the proper place for comprehensive moral theories in modern life—does not refer to the work of Marx, Nietzsche, Kierkegaard, or Heidegger, or indeed to any major European social philosopher who postdates Kant and Hegel.[6] Even if such omissions can be credited to the institutional parochialism of Anglo-American analytical philosophy, what are we to make of the failure to engage directly with many of the powerful criticisms of liberal ideology in general, and of Rawls's work in particular, that have been made by MacIntyre, Michael Sandel, Charles Taylor and others, or to answer Robert Nozick's hyperliberal attack on the liberal welfare state?[7] Faced with such apparent complacency, certain critics have begun to ask a provocative question: what features of contemporary liberalism tend to make some of its academic champions so illiberal in their unwillingness to treat fundamental disagreement with their views seriously?[8]

In this Essay, I argue that *Political Liberalism*'s central concept of "public reason" is empty, and that Rawls's analysis of political issues amounts to little more than the shamanistic incantation of the word "reasonable." Specifically, as his discussion of abortion exemplifies, Rawls simply declares that some position is "reasonable" and then condemns

---

6. This statement is not quite true: Jurgen Habermas is mentioned in a footnote.

7. See MacIntyre, supra note 2; Alasdair MacIntyre, Whose Justice? Which Rationality? (1988); Michael J. Sandel, Liberalism and the Limits of Justice (1982) [hereinafter Sandel, Liberalism]; Charles Taylor, Sources of the Self (1989); Robert Nozick, Anarchy, State, and Utopia (1974). Rawls does respond to one of Sandel's basic criticisms by emphasizing that the original position as set forth in *A Theory of Justice* is only a representational device and should not be understood to imply "a particular metaphysical conception of the person; for example, that the essential nature of persons is independent of and prior to their contingent attributes" (p. 27). For Sandel's perspective on the evolution of Rawls's theory see Sandel's review of *Political Liberalism*, 107 Harv. L. Rev. 1765 (1994).

8. See, for example, Peter Berkowitz's excellent review of Stephen Holmes's *The Anatomy of Antiliberalism*:

> It is incumbent upon liberals and their friends to state that Holmes does liberalism no favors by flattering liberal vanities. Given the partiality and incompleteness of all things fashioned by human hands, it is doubtful that the principles of liberalism are secure when its champions are unable to discover anything of value about its weak points and unwise tendencies from [critics such as MacIntyre.]

Peter Berkowitz, Liberal Zealotry, 103 Yale L.J. 1363, 1382 (1994).

opposing views for being not merely wrong, but contrary to the dictates of reason. The term "reasonable" thus serves the same performative function in Rawls's theory as that served by the term "God" in dogmatic religious argument. I then attempt to place Rawls's style of liberal belief in historical context, and I suggest that the success of this particular creed is best understood in essentially sociological terms.

II. MORAL INCOMMENSURABILITY AND THE IDEA OF PUBLIC REASON

Although it is of course extremely complex in its details, the central argument of *Political Liberalism* is fairly straightforward. According to Rawls, liberal theory faces a conundrum: "How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines?" (p. xxv). The conundrum arises because Rawlsian liberalism posits that the supreme political value of social life is that people should have the freedom to make their own choices;[9] however, those very choices will inevitably prove incompatible with the choices of other persons who do not share the same reasonable religious, philosophical, and moral doctrines. How is the state to decide which of these conflicting choices will be rewarded or prohibited without at the same time illegitimately interfering with the overriding moral imperative of allowing all persons to have "an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all"[10]—that is, to enjoy a political regime that allows them the freedom to make autonomous moral choices based on their own comprehensive belief systems? To resolve such conflicts, political liberalism needs some criterion of choice that is not itself the product of what Rawls characterizes as a reasonable comprehensive doctrine, for such a criterion would necessitate privileging one reasonable comprehensive doctrine over all the others.[11]

Rawls's solution involves sharply distinguishing between the types of discourse which are appropriate to the public and nonpublic spheres in social life. When citizens decide really important questions—those involving "constitutional essentials" (p. 214)—they cannot invoke reasons drawn exclusively from their reasonable comprehensive doctrines, but only from what Rawls terms "public reason":

---

9. This value, which Rawls describes as "the priority of the right over the good" is the central moral assertion of Kantian ethics, and of Rawls's *A Theory of Justice.* See John Rawls, A Theory of Justice (1971) [hereinafter A Theory of Justice].

10. A Theory of Justice, supra note 9, at 302. *Political Liberalism* rephrases the principle so as to emphasize its political nature (p. 5).

11. [W]e try, so far as we can, neither to assert nor to deny any particular comprehensive religious, philosophical, or moral view, or its associated theory of truth and the status of values . . . we hope to make it possible for all to accept the political conception as true or reasonable from the standpoint of their own comprehensive view, whatever it may be. (P. 150.)

> [O]ur exercise of political power is fully proper only when it is
> exercised in accordance with a constitution the essentials of
> which all citizens as free and equal may reasonably be expected
> to endorse in the light of principles and ideals acceptable to
> their common human reason. This is the liberal principle of
> legitimacy. (P. 137.)

This idea, as Rawls acknowledges, draws from the tradition in democratic
theory that traces its roots to Rousseau's social contract, especially that
thinker's concept of the "general will."[12]   For Rawls, a well-ordered soci-
ety should never feature incorrigible political conflict between reasonable
persons, at least as regards constitutional essentials, because all reason-
able persons accept the requirements of public reason, and although
"there are many nonpublic reasons [there is] but one public reason" (p.
220). Therefore, the bewildering plurality of moral belief found in such
a culture should in principle give rise to a satisfyingly monistic note of
reasonable consensus on all truly fundamental political questions. The
liberal conundrum dissolves when we understand that citizens may "by
their vote properly exercise their coercive political power over one an-
other" (p. 217) only to force all reasonable citizens to accept what their
own reasonable comprehensive beliefs should have affirmed for them—
that is, if they would but see what their own beliefs actually require them
to affirm. And if people insist on being unreasonable, then the neo-
Rousseauian liberal can in good faith compel them to be otherwise.[13]

> Political liberalism also supposes that a reasonable comprehen-
> sive doctrine does not reject the essentials of a democratic re-
> gime. Of course, a society may also contain unreasonable and
> irrational, and even mad, comprehensive doctrines. In their
> case the problem is to contain them so that they do not under-
> mine the unity and justice of society. (P. xvi.)

Obviously the crucial question then becomes, how do we determine the
content of those essentials of a democratic regime that the idea of public
reason requires all adherents of reasonable comprehensive doctrines to
acknowledge? Here we can turn for guidance to Rawls's discussion of
public reason and its application to one of the very few discussions of an
actual political dispute found within the pages of *Political Liberalism.*

Rawls gives the following account of the requirements of public
reason:

---

12. "[P]ublic reason with its duty of civility gives a view about voting on fundamental
questions [that is] in some ways reminiscent of Rousseau's *Social Contract.* He saw voting as
ideally expressing our opinion as to which of the alternatives best advances the common
good" (pp. 219–20).

13. Joseph de Maistre argued that "the inevitable consequence of faith in the
principles of Rousseau is a situation in which the people is told by its masters ' "*You believe
that you don't want this law, but we assure you that you do. If you dare reject it, we shall shoot you
down in order to punish you for not wanting what you do want*" and they then do so.' " Berlin,
Origins of Fascism, supra note 1, at 150.

> [I] t is only in this way [by accepting the dictates of public reason],
> and by accepting that politics in a democratic society can never
> be guided by what we see as the whole truth, that we can realize
> the ideal expressed by the principle of legitimacy: to live politi-
> cally with others in the light of reasons all might reasonably be
> expected to endorse. What public reason asks is that citizens be
> able to explain their votes to one another in terms of a reason-
> able balance of public political values, it being understood by
> everyone that of course the plurality of reasonable comprehen-
> sive doctrines held by citizens is thought by them to provide fur-
> ther and often transcendent backing for those values. In each
> case, which doctrine is affirmed is a matter of conscience for the
> individual citizen. It is true that the balance of political values
> that a citizen holds must be reasonable, and one that can be
> seen to be reasonable by other citizens; but not all reasonable
> balances are the same. The only comprehensive doctrines that
> run afoul of public reason are those that cannot support a rea-
> sonable balance of political values. Yet given that the doctrines
> actually held support a reasonable balance, how could anyone
> complain? What would be the objection? (P. 243.)

This passage makes an extraordinary claim: those who hold compre-
hensive doctrines that cannot support a reasonable balance of political
values on a particular issue have no grounds to complain when public
reason rules against them because, after all, other comprehensive doc-
trines do manage to support a reasonable balance of political values; and
if a comprehensive doctrine is, as a general matter, truly reasonable, it
will recognize the need to give way in these circumstances. What is truly
extraordinary is the assumption that the answer to the question of
whether or not a comprehensive doctrine supports a reasonable balance
of political values on some particular question will itself be sufficiently
transparent so as to provide a satisfactory answer to those whose compre-
hensive doctrines do not, in the interpreter's opinion, support such a
reasonable balance.

The extraordinary nature of this assumption is magnified by Rawls's
vague definition of reasonableness. Rawls defines the reasonable as "the
willingness to propose and honor fair terms of cooperation" and the "will-
ingness to recognize the burdens of judgment and to accept their conse-
quences" for the use of public reason (p. 49). By the "burdens of judg-
ment" Rawls simply means that, given the epistemological problems
inherent in moral and political reasoning, we must acknowledge the va-
lidity of the disagreements that can arise among reasonable persons (pp.
54–58). The "willingness to propose and honor fair terms of coopera-
tion" is more problematic. Whether it has any substance beyond signal-
ling that the reasonable is not limited to rational choice means-ends anal-

ysis depends on how much content is given to the term "fair."[14] Yet even
if "fair" is read as Rawls defines it within the context of justice as fairness
in *A Theory of Justice*, this former definition is, as many critics have noted,
so indeterminate that it gives the reader almost no guidance as to what,
on any particular political question, a reasonable balance of political val-
ues might entail.[15] Just how remarkable Rawls's views are in regard to the
interpretation and resolution of profound political disagreement in a
pluralistic culture becomes clear when he elaborates with a rare concrete
example:

> As an illustration, consider the troubled question of abortion.
> . . . Suppose . . . that we consider the question in terms of 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, other important political
> 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 equality
> of women is overriding, and this right is required to give it substance
> and force.*[16] 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 sim-
> ply want to illustrate the point in the text by saying that *any com-
> prehensive doctrine that leads to a balance of political values excluding
> that duly qualified right in the first trimester is to that extent unreasona-
> ble . . . .* (P. 243 n.32) (emphasis added).

It seems that, for Rawls, "reason" and "reasonable" fill the lexical space
that in many other discourses would be filled by "God," or "the scrip-
tures," or "moral insight."[17] The concept of the reasonable becomes for

---

14. In *Political Liberalism*, Rawls describes how *A Theory of Justice* mischaracterized
justice as fairness as a theory of rational decision. He now insists on maintaining a material
distinction between "the reasonable" and "the rational" (pp. 48–54).

15. See, e.g., Benjamin R. Barber, Justifying Justice: Problems of Psychology,
Measurement and Politics in Rawls, 69 Am. Pol. Sci. Rev. 663 (1975).

> Rawls concedes that the precedence of liberty comes into play only after "a
> certain level of wealth has been attained," and that below this threshold, liberty
> may not only have to be weighted against but perhaps subordinated to other
> primary goods in whose absence freedom has no meaning. Depending on where
> the threshold is established, even Marx might be comfortable with such a
> viewpoint!

Id. at 667 n.9 (citation omitted).

16. Readers who are sympathetic to abortion rights might want to consider the
intellectual cogency of the following variation on Rawls's argument: The reason why
abortion must be prohibited is that at every stage of the pregnancy the political value of
the due respect for human life is overriding, and this prohibition is required to give that
value substance and force.

17. This cryptic invocation of the term "reasonable" has a distinguished pedigree in
legal academic circles. See 4 Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process 1415

Rawls what Kenneth Burke calls a "God term"; and the characteristics of this god remain, as perhaps befits its metaphysical status, somewhat mysterious.[18] That is, "reason" functions as the master concept that transcends the enumeration of particular reasons: *invoking* "reason" becomes equivalent to *giving* reasons. The breathtaking circularity of this argument illustrates how a discourse that presents itself as a model of rational explication is, rationally speaking, indistinguishable from the tautological or emotive language games upon which the coherence theorist and the moral intuitionist must more openly rely.

How then can we account for the startling disjunction between the obvious plasticity of Rawls's definitional structure, and the certainty with which he states what public reason requires in the case of such a divisive issue as abortion? Moreover, what is the source of the author's apparent belief that his Delphic utterance as to what a reasonable balance of political values requires regarding this "troubled question" will be accepted by those whose comprehensive doctrines would in his view support an "unreasonable" balance? The answer, I believe, can be found by historicizing the particular brand of political liberalism that has become the dominant ideology among much of the American intelligentsia.

III. TOLERANCE AND DOGMA

Rawls notes in his introduction that political liberalism developed in reaction to the Reformation and its aftermath. After the savage religious wars of the sixteenth and seventeenth centuries, European civilization discovered "a new social possibility: the possibility of a reasonably harmonious and stable pluralist society" (p. xxv). Before then, it seemed natural to believe that "social unity and concord require[d] agreement on a general and comprehensive religious, philosophical, or moral doctrine" (p. xxv). Rawls offers the plausible hypothesis that religious toleration developed because "it is difficult, if not impossible, to believe in the damnation of those with whom we have, with trust and confidence, long and fruitfully cooperated in maintaining a just society" (p. xxv). This is an important point: if a culture truly believes that the roads to both heavenly salvation and eternal perdition are known and are accessible through acts

---

(tentative ed. 1958) ("[The court] should assume . . . that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.")

18. [M]any of [our] 'observations' are but implications of the particular terminology in terms of which the observations are made . . . Perhaps the simplest illustration of this point is to be got by contrasting secular and theological terminologies of motives. If you want to operate, like a theologian, with a terminology that includes 'God' as its key term, the only sure way to do so is to put in the term, and that's that. The Bible solves the problem by putting 'God' into the first sentence—and from this initial move, many implications 'necessarily' follow . . . I have called metaphysics 'coy theology' because the metaphysician often introduces the term 'God' not outright, as with the Bible, but by beginning with a term that *ambiguously* contains such implications.

Kenneth Burke, Language As Symbolic Action 46 (1966).

of human will, then almost any measure to maintain individuals and na-
tions on the path of deliverance will not seem merely justifiable, but will
become a sacred duty. Liberalism, with its initial tolerance for many ver-
sions of truth, arises in part as a response to the decay of belief in a partic-
ular truth. It becomes, we might say, the faith of those who have lost
their faith.[19]

Liberalism appeared in Europe as both a symptom and a cause of the
collapse of various religious and sociopolitical orthodoxies. As liberalism
gradually established itself as the legitimate ideology of the Enlighten-
ment, various liberal theories adopted different justifications for rejecting
the older sources of dogmatic authority. Most versions of liberalism share
some set of methodological assumptions about truth being best served
through an exchange or clash of opinions.[20] Yet beyond this common
commitment to what might be termed tolerance as a methodological pre-
condition, different types of modern liberalism rely on quite disparate
justifications for allowing the propagation of what are believed to be false
religious, philosophical, and political claims. At the risk of speaking too
schematically, we can perhaps discern three general types of liberalism in
postindustrial societies. (These of course overlap with each other, and
produce many hybrids and variants.) *Political Liberalism* distinguishes it-
self from two of them, and exemplifies the third.

One variety of liberalism finds its roots in a general skepticism about
the entire concept of "truth" as applied to all types of value statements.
Ontological skeptics doubt that statements of value are anything other

---

19. Isaiah Berlin describes the preliberal attitude toward dissent:

[W]hat Catholic in, let us say, the sixteenth century would say 'I abhor the heresies
of the reformers, but I am deeply moved by the sincerity and integrity with which
they hold and practice and sacrifice themselves for their abominable beliefs?' On
the contrary, the deeper the sincerity of such heretics . . . the more dangerous
they are, the more likely to lead souls to perdition, the more ruthlessly they
should be eliminated, since heresy—false beliefs about the ends of men—is
surely a poison more dangerous to the health of society than even hypocrisy or
dissimulation, which at least do not openly attack the true doctrine. Only truth
matters: to die in a false cause is wicked or pitiable.

See Isaiah Berlin, The Apotheosis of the Romantic Will, *in* The Crooked Timber of
Humanity, supra note 1, at 207, 208.

20. Despite the attraction that this belief holds for us as properly socialized liberal
subjects, we should note that as a methodological generalization, the heuristic value of the
"marketplace of ideas" has its limits. Almost everyone will admit that there are times when
truth is best served by suppressing the dissemination of patently false views, and all liberal
political systems acknowledge this in various ways. Libel law is an obvious case in point; the
permeable border between what First Amendment doctrine defines as "speech" or
"conduct" is perhaps a more interesting example. See Paul F. Campos, Advocacy and
Scholarship, 81 Cal. L. Rev. 817, 842–45 (1993) (arguing that for the purposes of First
Amendment doctrine the distinction between speech and conduct is essentially
manipulable and that the distinction is employed as a rhetorical device by courts when they
determine which speech acts will or will not be permitted). For a more general treatment
of this theme see Stanley Fish, There's No Such Thing As Free Speech, And It's a Good
Thing Too (1994).

than statements about subjective preferences. Epistemological skeptics, by contrast, believe that no way exists to determine adequately the objective status, if any, of such value claims. Both kinds of skeptics have good reasons—to the extent that this phrase means anything for a moral skeptic—for objecting to the social imposition of a particular "truth" on those who dissent from it. Given that moral skepticism is perhaps the most distinctive feature of modernity, it is only natural that it has come to be the basis for much of the support for liberalism in the modern world.

Political Liberalism refuses to rely on this justification, as indeed it must if it is to avoid imposing its own comprehensive doctrine on those whose comprehensive doctrines reject skepticism:

> Political liberalism does not question that many political and moral judgments of certain specified kinds are correct and it views many of them as reasonable. Nor does it question the possible truth of affirmations of faith. Above all, it does not argue that we should be hesitant and uncertain, much less skeptical, about our own beliefs. Rather, we are to recognize the practical impossibility of reaching reasonable and workable political agreement in judgment on the truth of comprehensive doctrines, especially an agreement that might serve the political purpose, say, of achieving peace and concord in a society characterized by religious and philosophical differences. (P. 63.)

This statement might be understood to imply another reason for tolerating what those who wield political power sincerely believe are deeply mistaken and perhaps socially pernicious views on matters of fundamental importance. If the nature of a pluralistic society makes reaching agreement on certain issues a practical impossibility, then prudence might well dictate that we not even attempt to create any sort of robust consensus on such questions. This brand of prudential or pragmatic liberalism argues that, given the morally fragmented quality of modern life, moral consensus on many questions could only be achieved through coercive measures that would inflict severe damage on the basic interests of the individuals and groups being coerced: a result which would be both bad in itself, and which would ultimately undermine the very consensus that the measures were designed to produce. On this view, liberalism operates as a kind of necessary modus vivendi within cultures that have lost the moral or religious coherence that would properly allow for the subordination of individual or group interests to the demands of a single comprehensive political doctrine.

Despite what the passage quoted above might seem to suggest, Rawls does not endorse this understanding of liberalism any more than he endorses a conception of liberalism grounded in a morally skeptical view of the world. For him, the overlapping consensus that enables a well-ordered society to answer the most basic questions of political obligation through the use of public reason—rather than through recourse to any comprehensive doctrine—is not the product of any mere prudential or

pragmatic compromise. This overlapping consensus is itself the social instantiation of liberalism as a kind of fundamental moral view:

> A typical use of the phrase "modus vivendi" is to characterize a treaty between two states whose national aims and interests put them at odds. In negotiating a treaty each state would be wise and prudent to make sure that the agreement proposed represents an equilibrium point [between their respective interests].
> . . . That an overlapping consensus is quite different from a modus vivendi is clear . . . [for] the object of the consensus, the political conception of justice, is itself a moral conception. And . . . it is affirmed on moral grounds, that is, it includes conceptions of society and of citizens as persons, as well as principles of justice, and an account of the political virtues through which those principles are embodied in human character and expressed in public life. An overlapping consensus, therefore, is not merely a consensus on accepting certain authorities, or on complying with certain institutional arrangements, founded on a convergence of self or group interests. All those who affirm the political conception start from within their own comprehensive view and draw on the religious, philosophical, and moral grounds it provides. The fact that people affirm the same political conception on those grounds does not make their affirming it any less religious, philosophical, or moral, as the case may be, since the grounds sincerely held determine the nature of their affirmation. (P. 147–48.)

Rawls's vision of liberalism, then, is neither skeptical nor pragmatic; it is instead an example of what can be called secular fundamentalism. The secular fundamentalist asserts that the supreme political value is to produce a political system that accepts liberal principles of political morality as embodiments of the supreme political value. The exclusion of reasonable comprehensive doctrines from the idea of public reason is then justified on the grounds that those reasonable comprehensive doctrines *are* reasonable only to the extent that they acknowledge that the role of a just political system is "to enable all members of society to make mutually acceptable to one another their shared institutions and basic arrangements, by citing what are publicly recognized as sufficient reasons."[21] This variety of liberalism is properly understood as fundamen-

---

21. John Rawls, Kantian Constructivism in Moral Theory, 77 J. Phil. 515, 561 (1980). A significant ambiguity in Rawls's account concerns who should, as a practical matter, have the power to determine what counts as "run[ning] afoul of public reason," and what consequences, if any, should flow from such a determination. That is, if his prescriptions are merely precatory, we might want to ask what relevance they have to the political realities of "actually existing liberalism." On the other hand, if—as his comments on judicial review as an embodiment of public reason suggest—the account entails that some anti-democratic institution have the ultimate power to determine what public reason in fact requires, then we have reason to worry that the author's supreme confidence concerning his ability to discern what he believes are the right answers to such questions will be replicated in the opinions of those appointed to safeguard the exercise of "public reason" (pp. 231–40).

talist in the sense that it denies the possible legitimacy of deep political conflict in what it considers a just social order. The overlapping consensus of reasonable comprehensive doctrines is held to produce the authoritative (and authoritarian) voice of a public reason that speaks *ex cathedra*, thereby eliminating the possibility of true conceptual incommensurability and its discursive offspring, interminable moral disagreement.

The irony, of course, is that in this triumphalist incarnation liberalism can begin to resemble the very dogmatic systems that it once rebelled against.[22] 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.

IV. THE LEISURE OF THE THEORY CLASS

In his *Philosophy of Right*, Hegel argues that Plato's *Republic*, which is usually taken as the very model of an *empty ideal*, did nothing more than conceptualize the nature of Greek mores at the time.[23] Hegel's point is that Plato's utopian vision of the ideal political community was a product of the philosopher's struggle to come to terms with the actual conditions of the contemporary Greek state. The polis ruled by philosopher kings represents Plato's imaginative attempt to resolve what was perhaps the fundamental cultural crisis of fourth century Hellenic society: the conflict between a longing for the traditional organic community of an idealized past, and what social conservatives such as Plato saw as the chaotic individualism and impiety of the Greek present.

Perhaps the most common criticism of Rawls's work has been that the stripped-down subjects of the original position are themselves "the very model of an empty ideal"—that such an asocial conception of persons as radically distinct from their ends is both metaphysically incoherent and sociologically absurd.[24] These criticisms have much force. What they overlook is the extent to which the antiskeptical and nonpragmatic strains of liberal ideology actually *produce* the sorts of stripped-down sub-

---

22. If this resemblance seems implausible, consider how two other recent books by prominent liberal intellectuals have gone about addressing the abortion controversy. Like Rawls, Laurence Tribe and Ronald Dworkin emphasize the great and apparently intractable moral and political struggles that the Supreme Court's decisions in this area have occasioned. Yet all three writers reach the conclusion that a principled policy which adequately addresses the legitimate concerns of all parties is not merely available: in their view, such an ideal outcome is actually instantiated by the extant constitutional orthodoxy. See Ronald Dworkin, Life's Dominion 168–72 (1993); Laurence Tribe, Abortion: The Clash of Absolutes 204–08 (1990). The moral hubris of an established faith could hardly go further than this.

23. See Hegel's Philosophy of Right 10 (T.M. Knox trans., 1952).

24. See Sandel, Liberalism, supra note 7, and Michael Walzer, Spheres of Justice (1983) for representative criticisms of the assumptions concerning the nature of personhood and of society that *A Theory of Justice* seemed to imply.

jects who find the remarkably impoverished vision of a pluralistic political community presented in *Political Liberalism* both plausible and attractive. What can one say to the modern liberal intellectual who writes that abortion cannot be prohibited in the first trimester because "any reasonable balance" of political values requires recognizing such a right, and then "explains" this conclusion by pointing out that "at this early stage of pregnancy the political value of the equality of women is overriding, and this right is required to give it substance and force?" Such persons can no more be argued with than those who simply declare that a particular result is required because "God says so."[25] Yet at least the religious fundamentalist is alluding to a rich cultural and intellectual tradition that might give some warrant for believing that statements about "rights" and "values" have some kind of metaphysical significance. Liberal ideologues, who celebrate tolerance and pluralism while at the same time condemning any meaningful dissent from their own thin idea of the good as not merely wrong, but contrary to the dictates of reason itself, cannot invoke even this meager excuse.

It involves a considerable oversimplification to say that the academic deployment of empty signifiers such as "the reasonable" in ways that gratify the moral prejudices of upper-class liberal intellectuals should be understood in sociological terms. Still, consider the following passage from the Introduction to *Political Liberalism*:

> I acknowledge a special debt . . . [t]o Ronald Dworkin and Thomas Nagel for many conversations while taking part in seminars at New York University during 1987–1991; and in connection with the idea of justice as fairness as a freestanding view, a rare illuminating midnight conversation in the deserted bar of the Santa Lucia Hotel in Napoli in June 1988. (P. xxxi.)

No one with any interest in contemporary jurisprudence can have failed to notice how Ronald Dworkin's work has both drawn upon and influenced Rawls's own writings. The similarities between *Law's Empire* and the essays that are now collected in *Political Liberalism* are especially striking. Indeed, Dworkin's central claim that "law as integrity" consists of making the relevant materials congruent with the best public values[26] is echoed by Rawls's belief that "in a constitutional regime with judicial review, public reason is the reason of its supreme court" and that "the supreme court is the branch of government that serves as the exemplar of public reason" (p. 231). Law as integrity parallels the idea of public reason legitimating the exercise of coercive state power "in accordance with

---

25. Cf. Pierre Schlag, Clerks in the Maze, 91 Mich. L. Rev. 2053, 2069–70 (1993):
In this discursive world, the *identity* and the *ontological status* of the main terms and the main grammar are at once almost always beyond question, and yet almost always dramatically underspecified. . . . Among the appropriate legal academic audience, the invocation of these terms, in accordance with their usual accompanying grammar, will, with surprising frequency, *simply arrest thought upon impact.*

26. See Ronald Dworkin, Law's Empire 225–27, 254–58 (1986).

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" (p. 137). As a formal matter, these concepts can accommodate any imaginable substantive outcome;[27] in practice, both ideas are understood by their authors as requiring essentially the same narrow range of politically controversial results.

    This convergence is not particularly shocking if we consider the social factors that in the end give content to such otherwise infinitely pliable concepts as "integrity," "reason," and "principle." The academic subjects who benefit from illuminating midnight conversations in the bars of fancy European hotels work at the same institutions, attend the same conferences, read the same newspapers, live in the same suburbs, and send their children to the same schools as their eminently reasonable interlocutors. Is it then so surprising that the servants of Law's Empire end up replicating the considered moral judgments handed down within the hermetic confines of Law's Reading Group?

---

27. See Pierre Schlag, Contradiction and Denial, 87 Mich. L. Rev. 1216, 1221 (1989) ("[T]ry as one may, it still remains a mystery exactly what it is that is *really* ruled out by Dworkin's invitation to try and make of the legal materials, the best they can be.").