

Chapter 1  
Rawls's Public Reason  
and American Society

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12 Rawls's doctrine of public reason is a central feature of political liberalism and 12  
13 one of the main contributions of his later political theory. As is often the case in 13  
14 his later works, Rawls spends more time explicating his view than providing a 14  
15 convincing defense of it. In spite of the importance of public reason, questions 15  
16 remain about his ability to defend his conception of the view according to the 16  
17 position on justification developed in *Political Liberalism*.<sup>1</sup> In particular, I do not 17  
18 believe a central component of public reason, to which I will refer to as "neutrality," 18  
19 can be defended. In response to Rawls's problems, I consider the kind of doctrine 19  
20 his view of justification could support, while noting how the difficulties troubling 20  
21 his argument call into question the justificatory strategy pursued in *Political* 21  
22 *Liberalism* and Rawls's other late works.<sup>2</sup> 22

23 Discussion in this chapter is presented in six sections. In Sections I and II, 23  
24 partly by way of background, I review basic features of public reason and 24  
25 discuss Rawls's method of establishing moral principles in *Political Liberalism*. 25  
26 Difficulties with Rawls's method are discussed in Section III, while in Sections 26  
27 IV and V, I examine criticisms of neutrality from strongly religious perspectives 27  
28 and the extent of these views in American society, through public opinion polls. 28  
29 Section VI is a conclusion in which I briefly discuss what I view as a preferable 29  
30 justificatory strategy for neutrality, and the alternative position to which, I believe, 30  
31 Rawls's strategy would actually give rise. 31

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34 <sup>1</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); 34  
35 paperback edition, with new Introduction, 1996. Rawls's works are cited, generally in 35  
36 parentheses in the text, as follows: *A Theory of Justice* (Cambridge, MA.: Harvard University 36  
37 Press, 1971) (*TJ*); "Kantian Constructivism in Moral Theory," *Journal of Philosophy* 77/9 37  
38 (1980): 515–72 (KC); "Justice as Fairness: Political Not Metaphysical," *Philosophy and* 38  
39 *Public Affairs* 14/3 (1985): 223–51 (JFPM); "The Idea of an Overlapping Consensus," *Oxford* 39  
40 *Journal of Legal Studies* 7/1 (1987): 1–25 (IOC); *Political Liberalism* (*PL*); "The Idea of 40  
41 Public Reason Revisited," *University of Chicago Law Review* 64/3 (1997): 765–807 (IPRR); 41  
42 *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001) (*JF*). 42

43 <sup>2</sup> For the alternative strategy I believe his standpoint actually supports and the basic 43  
44 principles to which it would give rise, for American society, see George Klosko, *Democratic* 44  
44 *Procedures and Liberal Consensus* (Oxford: Oxford University Press, 2000). 44

1 (I) Public Reason

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3 Rawls’s doctrine of public reason, as a component of political liberalism, is 3  
4 advanced in order to address the unavoidable pluralism of liberal societies. 4  
5 Believing that disagreement about comprehensive views is a permanent feature of 5  
6 liberal societies, rooted in basic characteristics of human reason, Rawls attempts 6  
7 to establish central moral principles and standards of argument to be employed in 7  
8 addressing political issues. In *Justice as Fairness: A Restatement*, Rawls describes 8  
9 the latter as arising through the process of reasoning that gives rise to the principles 9  
10 of justice. Agreement in the original position<sup>3</sup> has two parts. In addition to settling 10  
11 on principles of justice, the representative individuals must generate “a companion 11  
12 agreement” on epistemological principles. This is to delimit “the guidelines for 12  
13 public inquiry and ... the criteria as to what kinds of information and knowledge is 13  
14 relevant in discussing political questions” (*JF*, p. 89). Public reason, then, presents 14  
15 the “principles of reasoning” and “rules of evidence,” for determining what kinds 15  
16 of considerations are to be advanced in the relevant public inquiries (p. 89). 16

17 As the moral principles Rawls supports are to be “freestanding,” not rooted 17  
18 in any particular comprehensive view, Rawls argues that public reason should be 18  
19 similarly freestanding. Central to Rawls’s view are restrictions on the forms of 19  
20 argument that can be used in the political process. Acceptable forms are limited to 20  
21 those that should be unobjectionable to the entire range of reasonable citizens, in 21  
22 spite of differences over their comprehensive views. 22

23 For ease of reference, we can use the term “neutrality” to refer both to 23  
24 substantive doctrines and modes of argument that do not depend unavoidably 24  
25 on specific comprehensive views.<sup>4</sup> In a pluralistic society, commitment to 25  
26 neutrality is bound up with preference for modes of argument that are capable of 26  
27 being widely agreed upon. According to Rawls, acceptable modes of argument 27  
28 center on “presently accepted general beliefs and forms of reasoning found in 28  
29 common sense, and the methods and conclusions of science, when these are not 29  
30 controversial” (*PL*, p. 224). As Rawls’s examples indicate, neutral reasons are 30  
31 those that are demonstrable and replicable.<sup>5</sup> In a diverse society, many inhabitants 31  
32 could well prefer other grounds of justification, notably religious authority and 32  
33 interpretations of sacred texts. Neutrality, however, rules these out. Arguments 33  
34 from these perspectives are obviously bound up with particular comprehensive 34  
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36 \_\_\_\_\_ 36  
37 <sup>3</sup> The idea of the “original position” is explained below on page 5. 37

38 <sup>4</sup> For discussion of avoidable and unavoidable dependence, see Klosko, “Reasonable 38  
39 Rejection and Neutrality of Justification,” in George Klosko and Steven Wall (eds), 39  
40 *Perfectionism and Neutrality: Essays in Liberal Theory* (Lanham: Rowman and Littlefield, 40  
41 2003). In *PL*, Rawls says that justice as fairness satisfies neutrality of aim, though not of 41  
42 procedure or effect (pp. 191–4). In *JF*, he notes that his view favors liberal comprehensive 42  
43 views over others (p. 154). In both of these respects, Rawls’s position is neutral, as discussed 43  
44 throughout this chapter. 43

44 <sup>5</sup> Rawls, *PL*, Lecture 6, esp. pp. 223–7; *IPRR*, 773–80. 44

1 views and so will not be acceptable to citizens whose comprehensive views are 1  
 2 different. Restricting religious and other related modes of argument in this way is 2  
 3 an inescapably liberal idea, in keeping with the movement against arguments from 3  
 4 authority and intellectual obscurantism that has characterized liberal thought since 4  
 5 its inception.<sup>6</sup> 5

6 As with his position in *Political Liberalism* more generally, Rawls's commitment 6  
 7 to public reason is bound up with his concern for moral autonomy, that people be 7  
 8 ruled by principles they accept. In a diverse society, for views or values rooted in 8  
 9 the comprehensive views of a particular group to be coercively imposed on other 9  
 10 groups would be a significant injustice. Both the principles according to which the 10  
 11 basic structure of society is directed and the canons of argument and justification 11  
 12 through which they are supported should be common to all reasonable groups 12  
 13 – again, “freestanding” in Rawls's terms. The importance of this conception 13  
 14 of autonomy was central to Rawls's theory for almost four decades. In the first 14  
 15 formulation of his view, in “Justice as Fairness,” Rawls roots his conception of 15  
 16 fairness in the possibility of discovering moral principles that everyone can accept. 16  
 17 He describes this as “the possibility of mutual acknowledgement of principles 17  
 18 by free persons who have no authority over one another.”<sup>7</sup> When this condition 18  
 19 is satisfied, people should be able to “face one another openly and support their 19  
 20 respective positions, should they appear questionable, by reference to principle 20  
 21 which it is reasonable to expect each to accept.”<sup>8</sup> Similarly, in *Political Liberalism*, 21  
 22 Rawls appeals to the “liberal principle of legitimacy”: “our exercise of political 22  
 23 power is proper and hence justifiable only when it is exercised in accordance with 23  
 24 a constitution the essentials of which all citizens may reasonably be expected to 24  
 25 endorse in the light of principles and ideas acceptable to them as reasonable and 25  
 26 rational. This is the liberal principle of legitimacy” (*PL*, p. 217). 26

27 In this chapter, I do not question the attractiveness of Rawls's position. My 27  
 28 concern is with its justification. Given the deep concern with autonomy and other 28  
 29 elements of Kantian moral philosophy Rawls evinced throughout his career, one 29  
 30 could easily believe that his commitment to public reason stems from these sources. 30  
 31 But according to the argument of *Political Liberalism*, Rawls must provide a 31  
 32 justification that is freestanding, independent of comprehensive views, be they 32  
 33 his or those of other citizens. Our question, then, is how well his commitment to 33  
 34 public reason follows from the conception of justification articulated in *Political* 34  
 35 *Liberalism*. 35

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41 <sup>6</sup> See Jeremy Waldron, “Theoretical Foundations of Liberalism,” *Philosophical* 41  
 42 *Quarterly* 37/147 (1987): 127–50. 42

43 <sup>7</sup> Rawls, “Justice as Fairness,” *Philosophical Review* 67/2 (1958): 179. 43

44 <sup>8</sup> *Ibid.*, p. 178. 44

1 **(II) Rawls's Political Constructivism<sup>9</sup>** 1

2 2  
 3 In *Political Liberalism*, as in *A Theory of Justice*, Rawls's principles are intended 3  
 4 to be the outcome of a process of choice, conducted in the original position, behind 4  
 5 a veil of ignorance. The original position is a "device of representation," to help 5  
 6 focus our moral ideas. Because of the pluralism of liberal societies, Rawls holds 6  
 7 that argument must be from "intuitive ideas" that he believes are deeply rooted in 7  
 8 liberal culture, and so subscribed to by adherents of different comprehensive views, 8  
 9 in spite of their other differences. Rawls describes public culture as composed of 9  
 10 "the political institutions of a constitutional regime and the public traditions of 10  
 11 their interpretation (including those of the judiciary), as well as historic texts and 11  
 12 doctrines that are common knowledge" (*PL*, pp. 13–14). 12

13 The specific intuitive ideas on which Rawls focuses are a view of society as 13  
 14 a fair system of cooperation and a conception of the person as possessing two 14  
 15 moral powers, concerning abilities to form and revise her own conception of the 15  
 16 good and to live on fair terms of cooperation with others. Though Rawls does not 16  
 17 describe in detail how the intuitive ideas tie in with the choice of principles in 17  
 18 the original position, it is clear that they are represented by central features of the 18  
 19 original position and the deliberations of the representative individuals. Because 19  
 20 these particular conceptions of the person and of society are built into the structure 20  
 21 of the original position, principles of justice chosen under these conditions are 21  
 22 thereby identified as the most suitable principles for free and equal citizens who 22  
 23 seek to live on fair terms of cooperation with others. 23

24 Rawls divides the process of construction into two stages. In the first, because 24  
 25 of the existence of pluralism, the principles of justice (and canons of argument) are 25  
 26 constructed through the intuitive ideas, without reference to existing comprehensive 26  
 27 views. Once the principles of justice are chosen in the first stage, they are reviewed 27  
 28 in regard to whether they would be acceptable to proponents of society's different 28  
 29 comprehensive views, or as Rawls terms this, in regard to their contributions to 29  
 30 "stability." If the principles are lacking in this regard, suitable adjustments may be 30  
 31 necessary (*PL*, pp. 65–6). 31

32 Rawls's turn to intuitive ideas is necessary, because he believes that liberal 32  
 33 societies are torn by fundamental differences: the "public political culture may be 33  
 34 of two minds at a very deep level" (*PL*, p. 9). The intuitive ideas are fundamental 34  
 35 elements of the public culture, from which defensible moral principles may be 35  
 36 developed. We collect "such settled convictions as the belief in religious toleration 36  
 37 and the rejection of slavery and try to organize the basic ideas and principles 37  
 38 implicit in these convictions into a coherent political conception of justice" (*PL*, 38  
 39 p. 8). The intuitive ideas are intended to be generally subscribed to in ways that 39  
 40 principles of justice are not. Rawls describes them as "public and shared ideas" 40  
 41 (*PL*, p. 90). 41

42 \_\_\_\_\_ 42  
 43 <sup>9</sup> Exposition in this and the following sections draws on Klosko, *Democratic* 43  
 44 *Procedures*, Ch. 7. 44

### 1 (III) Problems with Rawls's Method 1

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3 Although to my knowledge Rawls never explains exactly how public reason is 3  
 4 established by political constructivism, his view can be surmised. Again, because 4  
 5 of the pluralism of liberal societies, public reason too must be freestanding and 5  
 6 constructed through the intuitive ideas, rather than directly from liberal culture. 6  
 7 Given this position, Rawls is committed to the claim that, through their acceptance 7  
 8 of the intuitive ideas on which he focuses, liberal citizens will be able to agree not 8  
 9 only about his principles of justice but about public reason as well. However, there 9  
 10 are numerous problems with his method and, in particular, with its employment to 10  
 11 derive public reason. 11

12 To begin with, Rawls never explains central aspects of his procedure, including 12  
 13 the precise nature of intuitive ideas. In different contexts, he describes these as 13  
 14 "certain fundamental ideas seen as implicit in the public political culture of a 14  
 15 democratic society" (*PL*, p. 13), and as "public and shared ideas" (*PL*, p. 90). More 15  
 16 fully: "the political culture of a democratic society, which has worked reasonably 16  
 17 well over a considerable period of time, normally contains, at least implicitly, 17  
 18 certain fundamental intuitive ideas from which it is possible to work up a political 18  
 19 conception of justice suitable for a constitutional regime" (*PL*, p. 38, n. 41).<sup>10</sup> 19

20 These and other formulations are so vague and abstract that it is difficult to 20  
 21 know what Rawls means by them. But he is apparently committed to the claim 21  
 22 that most liberal citizens would accept the relevant canons of argument, if they 22  
 23 were presented in a certain way. Rawls undoubtedly believes that intuitive ideas 23  
 24 correspond in some sense not only to what people believe and could recognize, 24  
 25 but constitute the basis for working out standards that they would also recognize 25  
 26 and accept, if the latter could be shown to be derived from the intuitive ideas. This 26  
 27 is confirmed by Rawls's view of how political principles can be justified to people 27  
 28 by proceeding from premises they "publicly recognize as true" (*JFPM*, 229). In 28  
 29 order for acceptance to be "free and willing" (*IOC*, 1987, 5, n. 8), there must be 29  
 30 a strong correspondence between the content of the principles and subjects' other 30  
 31 political beliefs: "No political conception of justice could have weight with us 31  
 32 unless it helped to put in order our considered convictions of justice at all levels of 32  
 33 generality, from the most general to the most particular" (*PL*, p. 45). 33

34 Rawls's appeal to *intuitive* ideas distinguishes these from the political views 34  
 35 that people consciously hold at a given time. Obviously, if there were a strong 35  
 36 correspondence between what people consciously believed and the contents of 36  
 37 justice as fairness, they would easily accept it. An intuitive idea, instead, appears 37  
 38 to be one that people are not necessarily aware of holding but to which they are 38  
 39 committed because of their other beliefs. In "Kantian Constructivism in Moral 39

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41 <sup>10</sup> For similar descriptions in the articles leading up to *PL*, see, e.g., *JFPM*, 225; *IOC*, 41  
 42 4, n.7; 6; "The Priority of Right and Ideas of the Good," *Philosophy and Public Affairs* 42  
 43 17/4 (1988), 252; "The Domain of the Political and Overlapping Consensus," *New York* 43  
 44 *University Law Review* 64/2 (1989), 235. 44

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1 Theory,” Rawls speaks of “underlying notions and implicitly held principles”: 1  
 2 “[The] aim of political philosophy, when it presents itself in the public culture of 2  
 3 a democratic society, is to articulate and make explicit those shared notions and 3  
 4 principles thought to be already latent in common sense” (KC, 518). Confronted 4  
 5 with proper political principles, then, people will recognize them as expressing 5  
 6 ideas they implicitly hold. This construal is supported by the method of reflective 6  
 7 equilibrium discussed in *A Theory of Justice* and referred to in *Political Liberalism* 7  
 8 (*TJ*, pp. 19–21, 46–53, 577–86; *PL*, pp. 8, 28). 8

9 But even if we accept an account of intuitive ideas along these lines, we 9  
 10 must recognize that arguing from them is not without difficulties. Once again, 10  
 11 Rawls’s turn to intuitive ideas is necessitated by the pluralism of liberal societies. 11  
 12 The fact that people do not agree on fundamental matters of justice makes it 12  
 13 necessary to organize public culture around particular focal points: “[I]f we are to 13  
 14 succeed in finding a basis for public agreement, we must find a way of organizing 14  
 15 familiar ideas and principles into a conception of political justice that expresses 15  
 16 those ideas and principles in a somewhat different way than before” (*PL*, p. 9). 16  
 17 “[S]ince no political agreement on those disputed questions [concerning matters 17  
 18 of justice] can reasonably be expected, we turn instead to the fundamental ideas 18  
 19 we seem to share through the public political culture” (*PL*, p. 150). But Rawls 19  
 20 never presents evidence that people agree on the particular intuitive ideas that 20  
 21 he posits. In “Kantian Constructivism,” he describes them as “conjectured to be 21  
 22 implicit” in liberal culture (KC, 569). Rawls notes that the intuitive ideas chosen 22  
 23 must be the most central possible; justice as fairness must be based on “more 23  
 24 central fundamental ideas” than other conceptions (*PL*, pp. 167–8). But he does 24  
 25 not demonstrate that this is true of his two central ideas. He never explains exactly 25  
 26 how a given intuitive idea is derived from aspects of public culture, or shows how, 26  
 27 of a number of possible intuitive ideas, a particular one rather than others should 27  
 28 be the focus of theoretical attention. 28

29 Along similar lines, because of the burdens of judgment, it seems unlikely that 29  
 30 even if adherents of conflicting comprehensive views could be shown to agree on 30  
 31 the centrality of particular intuitive ideas, they would also agree on what these mean. 31  
 32 As we will see, among issues over which adherents of different views disagree are 32  
 33 the precise characteristics of free and equal persons. “Freedom” and “equality” are 33  
 34 “essentially contested” concepts.<sup>11</sup> The nature of “respect” also admits of different 34  
 35 construals, while, because of deep divisions in American society, articulation of 35  
 36 even fundamental aspects of the public culture such as the ones on which Rawls 36  
 37 focuses – rejection of slavery and history of religious toleration – would uncover 37  
 38 sharp differences in how these themes are understood. In the absence of strong 38  
 39 evidence to the contrary, there is little reason to believe that citizens of liberal 39  
 40 polities will agree more readily about these aspects of their moral views than about 40  
 41 others. 41

42 \_\_\_\_\_ 42  
 43 <sup>11</sup> W.B. Gallie, “Essentially Contested Concepts,” *Proceedings of the Aristotelian* 43  
 44 *Society* 56 (1955–56). 44

1 In *Political Liberalism* and his later writings, Rawls expresses some reservations 1  
2 about the centrality of the ideas on which he focuses. For instance: “It is inevitable 2  
3 and often desirable that citizens have different views as to the most appropriate 3  
4 political conception, for the public political culture is bound to contain different 4  
5 fundamental ideas that can be developed in different ways” (*PL*, p. 227). Rawls 5  
6 does not seem fully to recognize that such admissions make it more important 6  
7 for him to establish the centrality of his ideas. Widely different construals of the 7  
8 intuitive ideas – such as the different conceptions of “free and equal” citizens 8  
9 indicated below – could lead to significant differences in the moral positions they 9  
10 support, including, as we will see, differences over the acceptability of neutrality. 10  
11 Simply positing his own view as one possibility among others significantly 11  
12 undermines Rawls’s overall theory. It leaves justice as fairness as no more than 12  
13 one possible position, which we are free to take or leave, depending on how we 13  
14 view the intuitive ideas. 14

15 Should, then, Rawls be criticized for not demonstrating the centrality of his 15  
16 particular intuitive ideas? Given his justificatory strategy in *Political Liberalism*, this 16  
17 conclusion seems unavoidable. However, we should recognize that demonstrating 17  
18 how disparate elements in liberal culture can be reconciled into a single set of 18  
19 intuitive ideas would be extremely difficult. The method of reflective equilibrium 19  
20 would require moving back and forth between different possible accounts of the 20  
21 intuitive ideas and American culture, to try to show the centrality of certain ones 21  
22 rather than others, including exactly how the former should be construed, before 22  
23 beginning to construct political principles upon them. But Rawls bypasses this 23  
24 stage by stipulating that American culture is embodied in a small set of examples 24  
25 he presents concerning religious toleration and the rejection of slavery, and then 25  
26 that these examples yield the intuitive ideas he identifies. But once again, if liberal 26  
27 culture yields different accounts of the intuitive ideas, Rawls must justify focusing 27  
28 on these examples rather than others, although this part of his argument he does 28  
29 not pursue. 29

30 Although there is much to recommend in the conception of the person on which 30  
31 Rawls concentrates, the pluralism of liberal societies once again causes problems. 31  
32 A central component of his idea of the person is what he refers to as “the political 32  
33 conception of the person,” that in liberal societies, people’s public identities do not 33  
34 depend on their particular characteristics (*PL*, pp. 29–35). A person may change 34  
35 her hair color, her religion, even her sex, without this affecting her status as citizen 35  
36 and accompanying rights. I agree that these contentions may be accepted as 36  
37 generally recognized by American citizens – although empirical evidence to this 37  
38 effect would of course be highly desirable. But as I have indicated, other aspects 38  
39 of free and equal persons are more controversial. Rawls appears to believe that 39  
40 specific construals of fundamental intuitive ideas may be extracted from people’s 40  
41 very different comprehensive views, without themselves being affected by these 41  
42 differences. He apparently does not recognize that particular ways in which a given 42  
43 citizen understands people as free and equal and society as a cooperative endeavor 43  
44 will inevitably be influenced by the overall worldview from which the intuitive 44

1 ideas are extracted. As indicated in the above discussion, it is open to Rawls to 1  
 2 say that he is presenting only one construal of the intuitive ideas. However, to the 2  
 3 extent he wishes for this construal to be widely accepted, he is committed to his 3  
 4 view being “based on more central fundamental ideas” than others (*PL*, 168). But 4  
 5 as things stand, this last claim is largely unsupported. 5

6 Since it was first developed, Rawls’s political liberalism, including his account 6  
 7 of public reason, has been criticized for being inhospitable to strong religious 7  
 8 beliefs.<sup>12</sup> Given sharp differences between Rawls’s views and conclusions reached 8  
 9 by proponents of these criticisms, it would be surprising if they interpreted the 9  
 10 fundamental intuitive ideas as he does. Of course, the burden of proof is on Rawls 10  
 11 to establish that his interpretation is correct. He must present convincing arguments 11  
 12 that his view of the person actually bridges conflicting comprehensive views, that 12  
 13 it undergirds strongly religious comprehensive views as well as secular. 13

14 It is open to Rawls to dismiss criticisms from strongly religious perspectives. 14  
 15 Adherents of such views, notably religious fundamentalists, may not be 15  
 16 “reasonable” in his sense as, in order to be reasonable, one must recognize the 16  
 17 burdens of judgment (*PL*, pp. 54–66). Rawls argues that he is justified in excluding 17  
 18 unreasonable doctrines from consideration because his theory is intended to produce 18  
 19 an overlapping consensus of reasonable doctrines (*PL*, pp. 36, 63–4). For the sake 19  
 20 of argument we may grant that the views of many religious fundamentalists are not 20  
 21 “reasonable” in Rawls’s sense. However, one could object to Rawls’s conception of 21  
 22 “reasonableness” as unduly narrow.<sup>13</sup> Given his concerns in *Political Liberalism*, 22  
 23 there are powerful normative and practical considerations in favor of including 23  
 24 as many inhabitants of society as possible in a liberal consensus. At one point, 24  
 25 Rawls notes that he is optimistic in assuming that, aside from certain forms of 25  
 26 fundamentalism, all the main historical religions are reasonable comprehensive 26  
 27 views (*PL*, p. 170). The problem, however, is the likelihood that views Rawls 27  
 28 would classify as fundamentalism are adhered to by a high a percentage of the 28  
 29 American population. A plausible estimate is somewhere between one fifth and 29  
 30 one third of Americans – that is, between roughly 60,000,000 and 100,000,000 30  
 31 people.<sup>14</sup> A conception of “reasonable” principles that immediately excludes this 31  
 32 number of people requires strong justification.<sup>15</sup> If we require a broad consensus, 32  
 33 encompassing as many citizens as possible, we will have good reasons to be 33  
 34 34

35 \_\_\_\_\_ 35  
 36 <sup>12</sup> William Galston “Pluralism and Social Unity,” *Ethics* 99/4 (1989): 714; *Liberal* 36  
 37 *Purposes* (Cambridge: Cambridge University Press, 1992), pp. 130–31; Leif Wenar, 37  
 38 “*Political Liberalism: An Internal Critique*,” *Ethics* 106/1 (1995): 32–67; John Exdell, 38  
 39 “Feminism, Fundamentalism, and Liberal Legitimacy,” *Canadian Journal of Philosophy* 39  
 24/3 (1994): 447.

40 <sup>13</sup> Klosko, *Democratic Procedures*, Ch. 2. 40

41 <sup>14</sup> For these figures, see *ibid.*, Ch. 4. 41

42 <sup>15</sup> Moreover, as Wenar points out, Rawls’s conception of the person could well be 42  
 43 rejected by adherents of many non-religious comprehensive views: e.g., followers of 43  
 44 Bentham, Hume, and Hobbes (Wenar, “*Political Liberalism*,” 50). 44



1 leery of employing a restrictive conception of reason and so disqualifying large 1  
 2 numbers of citizens.<sup>16</sup> The unsettling implication, however, is that if adherents of 2  
 3 fundamentalist religions cannot be dismissed as unreasonable, then they too must 3  
 4 recognize the intuitive ideas from which Rawls argues. However, there is strong 4  
 5 evidence that this is not the case. 5

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#### 8 (IV) Disagreements over Neutrality 8

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10 As we have seen, in order to defend neutrality, Rawls must demonstrate that it is 10  
 11 part of an overlapping consensus of reasonable comprehensive views, derived from 11  
 12 fundamental intuitive ideas rooted in the public culture of liberal societies. For 12  
 13 ease of discussion, I will focus on American democracy. Unfortunately, Rawls's 13  
 14 position is suspect immediately. A conception of neutrality like the one he upholds 14  
 15 is widely rejected by scholars, while survey evidence strongly indicates that large 15  
 16 percentages of American citizens, probably a majority, would support neutrality's 16  
 17 critics. I will briefly review these criticisms, before turning to the question of the 17  
 18 extent to which they could be countered by appeal to intuitive ideas. 18

19 Probably the most common criticism of neutrality is that it is unfair. Because it 19  
 20 restricts public expression by religious citizens while not constraining neutrality's 20  
 21 proponents, it relegates the former to inferior status. According to Christopher 21  
 22 Eberle, "that doctrine is *gratuitously burdensome* to religious citizens: it 22  
 23 requires of them a willingness to disobey God and thereby imposes on them a 23  
 24 substantial burden for which there is no compelling rationale."<sup>17</sup> Moreover, the 24  
 25 charge continues, under the guise of fairness to competing comprehensive views, 25  
 26 neutrality is biased towards the secular worldviews of the liberal theorists who 26  
 27 uphold it and contributes to policy outcomes they prefer. 27

28 To a certain extent, liberal theorists have a ready response to the first part 28  
 29 of this objection. They believe it misses the point. The focus of Rawls's liberal 29  
 30 principle of legitimacy is not free speech but coercion. In concentrating on 30  
 31 what the doctrine means for religious citizens' abilities to express their beliefs, 31  
 32 neutrality's opponents fail to recognize violations of liberty to which their view 32  
 33 could contribute. Ever looming is the prospect of majority tyranny. If citizens who 33  
 34 reject neutrality constitute a majority in a given society, policies justifiable only 34  
 35 by their comprehensive views may be coercively imposed on minorities, on the 35  
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38 <sup>16</sup> On different kinds of consensus, see Klosko, *Democratic Procedures*, Ch. 2, Sec. 3. 38

39 <sup>17</sup> Christopher Eberle, *Religious Conviction in Liberal Politics* (Cambridge, MA: 39  
 40 Cambridge University Press, 2002), p. 332, his emphasis. Similarly, Nicholas Wolterstorff, 40  
 41 in Robert Audi and Wolterstorff, *Religion in the Public Square* (Lanham: Rowman and 41  
 42 Littlefield, 1997), p. 94; Jeffrey Stout, *Democracy and Tradition* (Princeton: Princeton 42  
 43 University Press, 2004), pp. 68, 75–7. Eberle's position requires that there be no clear 43  
 44 justification for neutrality at all, a position he defends throughout the book. I cannot examine 44  
 45 that issue here. His main criticism of Rawls's view is found in Ch. 7. 45

1 basis of grounds the latter do not accept. For example, citizens of community X 1  
 2 could vote for mandatory recitation of the Lord's Prayer in school every morning 2  
 3 (on which, see below, p. 23). Though they lack convincing neutral reasons for 3  
 4 this policy, if they are not constrained by neutrality the X-ites could freely admit 4  
 5 that their rationale was a desire to promote Christianity and so help convert and 5  
 6 save the souls of non-Christians. For non-Christians, such a policy would seem 6  
 7 tyrannical. 7

8 But does this justify relegating religious citizens to inferior status? Once again, 8  
 9 opponents of neutrality believe that restricting non-neutral reasons limits their 9  
 10 freedom, while in liberal societies, significant threats to minorities are actually 10  
 11 remote. 11

12 For ease of reference, I will refer to opponents of public reason as supporting 12  
 13 "open advocacy." A sophisticated defense of their position is presented by Michael 13  
 14 McConnell. As well as contending that neutrality restricts the rights of its opponents, 14  
 15 McConnell is interested in consequences. Rather than viewing neutrality as a 15  
 16 way of accommodating differences between comprehensive views, he believes 16  
 17 it is itself in effect a comprehensive view. What he refers to as "liberalism" is an 17  
 18 ideology, "advocacy of a particular way of life."<sup>18</sup> If religious citizens subscribe to 18  
 19 particular "worldview[s]," the same could be said of "feminists, gay-rights activists, 19  
 20 Afro-centrists, or even secular conservatives."<sup>19</sup> From McConnell's perspective, 20  
 21 neutrality and open advocacy are competing orientations. He denies that any law 21  
 22 or policy could be based on premises that are actually neutral: "all are based on 22  
 23 ideological or philosophical positions."<sup>20</sup> So-called neutral reasons are actually 23  
 24 biased towards particular comprehensive views: "what passes for 'neutrality,' 24  
 25 according to pluralist thinkers, is actually a deeply embedded ideological preference 25  
 26 for some modes of reasoning and ways of life over others – rationalism and choice 26  
 27 over tradition and conscience."<sup>21</sup> Not surprisingly, if policies are made on the 27  
 28 basis of neutral reasons, they will favor secularism. In other words, in the guise of 28  
 29 protecting citizens from one another's comprehensive views, neutralists use their 29  
 30 position to insure that their own views wins. This is seen in many Supreme Court 30  
 31 cases.<sup>22</sup> A particularly blatant, non-American example is the French decision to 31  
 32 32

33  
 34 <sup>18</sup> Michael McConnell, "'God is Dead and We Have Killed Him!': Freedom of 33  
 35 Religion in the Post-Modern Age," *Brigham Young University Law Review*, 172. 34

35  
 36 <sup>19</sup> *Ibid.*, 166. 35

36  
 37 <sup>20</sup> Michael McConnell, "Believers as Equal Citizens," in Nancy Rosenblum (ed.), 36  
 38 *Obligations of Citizenship and Demands of Faith* (Princeton: Princeton University Press, 37  
 38 2000), p. 104. Similar arguments abound in the literature; in regard to issues of abortion 38  
 39 and homosexuality, see Robert George, "Public Reason and Political Conflict: Abortion and 39  
 40 Homosexuality," *Yale Law Journal* 106/8 (1997): 2475–2504. 40

40  
 41 <sup>21</sup> McConnell, "Believers," p. 104. 41

41  
 42 <sup>22</sup> Michael McConnell, "Religious Participation in Public Programs," *University of* 42  
 43 *Chicago Law Review* 59 (1992). In this connection, I should note that for Rawls, the US 43  
 44 Supreme Court is the exemplar of public reason (*PL*, pp. 231–40). 44

1 ban headscarves in schools.<sup>23</sup> McConnell finds parallels to this “enforced denial  
2 of difference” in American public policy, supported by Supreme Court’s standards  
3 for assessing possible establishment of religion.<sup>24</sup>

4 To what extent can McConnell’s views be countered by Rawls’s justificatory  
5 strategy? In responding to this question we must recognize that McConnell’s  
6 position involves more than complaints about neutrality. Like Rawls, he believes  
7 his ideas are rooted in fundamental aspects of public culture. He presents a  
8 different conception of free and equal citizens. McConnell contends that there are  
9 “two models of religious citizenship.” While neutralists believe in taking religion  
10 out of politics, and so insist on the secular character of the state, according to  
11 what McConnell calls “religious pluralism,” religion is allowed in the public  
12 as well as the private sphere. Citizens are allowed to express their religious  
13 identities by advocating policies that support their views. McConnell quotes  
14 William Sampson, an Irish lawyer: “Every citizen here is in his own country. To  
15 the protestant it is a protestant country; to the catholic a catholic country; and the  
16 Jew, if he pleases, may establish in it his New Jerusalem.”<sup>25</sup> Thus this religious  
17 pluralism grants all citizens freedom to advocate their comprehensive views. So  
18 construed, freedom is participatory, closer to Constant’s “freedom of the ancients”  
19 than “of the moderns.”<sup>26</sup> Because neutrality restricts this ability only for religious  
20 citizens, it denies them equal treatment in the political process. In McConnell’s  
21 words, in a democratic political system, citizens are treated equally when all are  
22 “equally free to adopt or reject arguments without any limitation arising from their  
23 metaphysical, philosophical, epistemological, or theological foundations. To tell  
24 religious citizens that their conceptions of justice or the common good must be  
25 ‘bracketed’ is to treat them as second-class citizens.”<sup>27</sup> McConnell supports his  
26 view with appeal to the long tradition of religious advocacy throughout American  
27 history, which includes such major political initiatives as support for the abolition  
28 of slavery, for Civil Rights, and for many other causes dear to neutralists as well  
29 as religious citizens.<sup>28</sup>

30 Along similar lines, critics of neutrality offer an alternative construal of respect.  
31 As Eberle notes, in the literature, arguments based on respect are especially  
32 important in defending neutrality.<sup>29</sup> In justifying public reason, Rawls generally  
33 refers to its contributions to “civility” or “civic friendship,” rather than respect,<sup>30</sup>

34  
35 <sup>23</sup> McConnell, “Believers,” pp. 101–2.

36 <sup>24</sup> Ibid., p. 101.

37 <sup>25</sup> Ibid., p. 103.

38 <sup>26</sup> Benjamin Constant, “The Liberty of the Ancients and the Liberty of the Moderns.”

39 <sup>27</sup> McConnell, “Believers,” p. 104.

40 <sup>28</sup> I should note that, because of “the proviso,” Rawls’s public reason does not rule  
41 these out; see IPRR, Sec. 4.

42 <sup>29</sup> Eberle, *Religious Conviction*, p. 81.

43 <sup>30</sup> Civility, *JF*, p. 92; IPRR, 769; “civic friendship,” IPRR, 771; *PL*, Introduction to  
44 new edition, p. li. “Respect” does not appear in the indexes of any of these three books;

1 although he does invoke respect in *Justice as Fairness: A Restatement*: “Clearly 1  
 2 one leading aim of public justification is to preserve conditions of effective and 2  
 3 democratic social cooperation on a footing of mutual respect between citizens 3  
 4 regarded as free and equal” (*JF*, p. 28). According to this line of argument, 4  
 5 coercively to inflict public policies on people on grounds they could not accept 5  
 6 is to treat them without respect. But “respect” may be construed differently. An 6  
 7 alternative conception is presented by William Galston: “we show others respect 7  
 8 when we offer them, as explanation, what we take to be our true and best reasons 8  
 9 for acting as we do.”<sup>31</sup> Galston’s view should be qualified to make explicit that 9  
 10 appeal to non-neutral reasons follows only after failure of sincere attempts to 10  
 11 provide justifications the minority could accept.<sup>32</sup> But on this view, when sincere 11  
 12 attempts have failed, appeal to non-neutral reasons is not disrespectful. 12

13 Accordingly, proponents of open advocacy could counter Rawls’s conception 13  
 14 of free and equal persons with one of their own. Even if they recognized the 14  
 15 centrality of the values of freedom and equality in the liberal tradition and liberal 15  
 16 culture, their alternative view would deny that this includes neutrality. On their 16  
 17 interpretation, free and equal persons are free to enter the public sphere armed 17  
 18 with the full contents of their comprehensive views. They accord other citizens the 18  
 19 same freedom and so recognize all as equal in this respect. They also recognize all 19  
 20 citizens as free and equal in being free to participate in the political process, with 20  
 21 equal rights in that regard. 21

22 Proponents of neutrality have a ready counter to this line of argument. Even if, 22  
 23 for the sake of argument, they were prepared to grant open advocacy a legitimate, 23  
 24 alternative conception of central values in public culture, they could ask if the 24  
 25 alternative position would adequately protect the rights of minorities. If citizens 25  
 26 were allowed to make policy on religious grounds, minorities could be forced to 26  
 27 go along. As indicated below, in American society, removing neutral constraints 27  
 28 could well result in reinstating prayer and teaching creationism in schools and 28  
 29 similar incursions. Are there limits here? Could similar reasoning justify extreme 29  
 30 measures, such as expelling atheists from the community or burning heretics at 30  
 31 the stake? Proponents of open advocacy have a response. Although the risks of 31  
 32 such outcomes are perhaps greater on their view than with neutrality, they place 32  
 33 their confidence for protection of rights in substantive considerations, rather than 33  
 34 restrictions on allowable arguments. As Eberle argues, although the past history of 34  
 35 many societies is fraught with religious wars and horrific episodes of persecution, 35  
 36 liberal citizens have learned from the past, and have taken steps to insure that 36  
 37 37

38 38  
 39 there is an entry for civility in *JF*, and one for civic friendship in *PL*, referring to the new 39  
 40 introduction. 40

41 <sup>31</sup> Galston, *Liberal Purposes*, p. 109. Similarly, Wolterstorff, *Religion*, pp. 110–11; 41  
 42 Stout, *Democracy*, pp. 72–3. 42

43 <sup>32</sup> See Eberle, *Religious Conviction*, Ch. 5; for similar attitudinal aspects of respect, 43  
 44 Wolterstorff, *Religion*, pp. 112–13. 44

1 similar things will not happen again.<sup>33</sup> The necessary remedy is freedom of 1  
 2 religion, protected by constitutional governments. In the United States, protection 2  
 3 is, of course, afforded by our long tradition of respect for the Bill of Rights. The 3  
 4 sort of evidence necessary to support dire scenarios probably does not exist.<sup>34</sup> 4  
 5 Accordingly, although policies of open advocacy could curtail rights in various 5  
 6 ways, this is only around the edges. There is little reason to fear it would usher in 6  
 7 a reign of persecution. 7

8 In the American case – although perhaps to a lesser extent in other liberal 8  
 9 countries – constitutional protections are further supported by the diversity 9  
 10 of society, in which a large number of different interests, including religious 10  
 11 interests, check and counter one another. In addition to standing in the way of an 11  
 12 overlapping consensus on moral and political principles, the pluralism of American 12  
 13 society makes it difficult for a majority oppressively to impose its will. The classic 13  
 14 articulation of this point of view is James Madison's argument for an extended 14  
 15 republic in *Federalist* 10. In *Federalist* 51, Madison classically contends that the 15  
 16 same kind of balance of forces that he believes is necessary to protect religious 16  
 17 liberty also protects other rights: 17

18  
 19 In a free government the security for civil rights must be the same as that for 19  
 20 religious rights. It consists in the one case in the multiplicity of interests, and 20  
 21 in the other in the multiplicity of sects. The degree of security in both cases 21  
 22 will depend on the number of interests and sects; and this may be presumed to 22  
 23 depend on the extent of country and number of people comprehended under the 23  
 24 same government (*Fed.* 51). 24  
 25 25

26 The presence of so many different interests in society makes it difficult for 26  
 27 majorities to form on grounds other than the public good.<sup>35</sup> 27

28 However, even if checks and balances between religious groups impedes 28  
 29 domination by one particular religion, it will do far less to preserve neutrality 29  
 30 between religion and non-religion. This appears to be an inherent problem 30  
 31 with McConnell's religious pluralism. While under present conditions extreme 31  
 32 violations of rights are unlikely, the possibility of limited incursions is very real. 32  
 33 Even if the Bill of Rights affords protection, it must be interpreted, and if the 33  
 34 Supreme Court takes sufficient liberties, abuses cannot be ruled out. Similarly, 34  
 35 even if the balance of competing religions in the US makes domination by a 35  
 36 single sect difficult, at the present time, religious citizens of different faiths and 36  
 37 denominations are combining forces to promote a particular religious agenda. 37  
 38 As noted above, central issues include school prayer and teaching creationism 38  
 39 39

40 <sup>33</sup> Eberle, *Religious Conviction*, p. 161. 40

41 <sup>34</sup> *Ibid.*, Ch. 6. 41

42 <sup>35</sup> "In the extended republic of the United States, and among the great variety of interests, 42  
 43 parties, and sects which it embraces, a coalition of a majority of the whole society could seldom 43  
 44 take place on any other principles than those of justice and the general good ..." (*Fed.* 51). 44  
 45 45

1 in schools. Additional areas of concern include possible further restrictions on 1  
 2 access to abortion, restrictions on homosexuals, and perhaps similar concerns. 2  
 3 With a loosening of restrictions on public advocacy, incursions in these areas are 3  
 4 probably more likely. But once again, such violations of rights, onerous as they 4  
 5 are, should be distinguished from wholesale religious persecution. Even were 5  
 6 the judiciary inclined to allow extreme measures, it is subject to checks from the 6  
 7 legislative and executive branches, while American federalism provides additional 7  
 8 protection. At the present time, there is little or no evidence that any significant 8  
 9 group in American society wishes to impose religious orthodoxy. Even though in 9  
 10 our largely religious country, religious beliefs and practices would likely insinuate 10  
 11 themselves to a greater extent into various areas of public life, if this is all that is 11  
 12 at stake, neutrality's opponents could contend that the violations of *their* rights 12  
 13 mandated by neutrality are at least equally serious. 13

14 14  
 15 15  
 16 **(V) The Extent of the Problem** 16  
 17 17

18 Under the assumption that this account of open advocacy represents a coherent 18  
 19 position, supported by an alternative interpretation of fundamental ideas in liberal 19  
 20 culture, we must discuss the implications for Rawls's justificatory strategy. 20  
 21 Obviously, what this means for Rawls's view depends in large part on how 21  
 22 extensively held alternative views are. In this section, I explore some evidence 22  
 23 concerning the depth of the problem. I will briefly examine survey evidence on 23  
 24 the religious views of Americans. In the concluding section, I discuss the extent to 24  
 25 which one possible way of addressing the problem could work. 25

26 Survey evidence indicates that many Americans, probably a majority, support 26  
 27 increasing religion's role in public life. For our purposes here, the main point in 27  
 28 the polls I am going to run through is their suggestion that large percentages of the 28  
 29 American public do not subscribe to neutral restrictions – or would not, were they 29  
 30 clearly aware of the issue. Because of limitations in the polls that are available, 30  
 31 I discuss only issues bearing directly on religion, although it should be borne in 31  
 32 mind that neutrality also restricts public advocacy by proponents of various non- 32  
 33 religious comprehensive views, and so that, in overlooking these, the evidence 33  
 34 here is incomplete. 34

35 Poll evidence shows that the US is a religious country. According to a Gallup 35  
 36 poll conducted in June 2007, 86% of respondents believe in God; only 6% do not.<sup>36</sup> 36  
 37 In each National Election Studies (NES) poll conducted between 1992 and 2004, 37  
 38 between 35% and 45% of Americans responded that “The Bible is the actual Word 38  
 39 of God and is to be taken literally, word for word.” In the same polls, between 39  
 40 another 41% and 49% responded that “The Bible is the Word of God but not 40

41 41  
 42 42  
 43 <sup>36</sup> <http://www.galluppoll.com/> (polls available on this website cited as Gallup; 43  
 44 downloaded June 2007). 44

1 everything in it should be taken literally, word for word.”<sup>37</sup> In response to Gallup 1  
 2 poll questions conducted every year between 1992 and 2006, the percentages 2  
 3 of respondents claiming to be “ ‘born-again’ or evangelical Christians” varied 3  
 4 between 36%, in 1992, and 43% in 2006.<sup>38</sup> 4

5 People’s religious views influence their opinions in regard to evolution vs 5  
 6 creationism. According to a June 2007 Gallup poll, only 18% of respondents 6  
 7 believe that evolution is “definitely true,” while 35% responded that it is “probably 7  
 8 true,” 28% that it is “definitely false,” and 16% “probably false.” Paradoxically, in 8  
 9 the same survey, responses to questions directly about creationism differed: 39% 9  
 10 “definitely true” and 27% “possibly true”; only 15% said it was “definitely false” 10  
 11 and 16% “probably false.” In surveys conducted both in November 2004 and 11  
 12 February 2001, about equal percentages responded that the theory of evolution was 12  
 13 and was not well supported by evidence, and only slightly fewer that the evidence 13  
 14 was not adequate to make this determination. Not surprisingly given these views, 14  
 15 there is considerable support for teaching creationism in schools. In a March 2005 15  
 16 survey, 34% of respondents did not want evolution taught. While 22% would be 16  
 17 upset at having creationism taught, 76% responded that they would not. This is as 17  
 18 opposed to 63% who would be upset at not having evolution taught. While 30% 18  
 19 said they would be upset at having evolution but not creationism taught, only 18% 19  
 20 would be upset at the teaching of creationism and not evolution. 20

21 Figures are similar on the issue of school prayer. GSS polled repeatedly 21  
 22 on this and related issues between 1972 and 1998.<sup>39</sup> In response to a question 22  
 23 concerning the Supreme Court’s ruling outlawing prayer in school, cumulatively, 23  
 24 7,735 respondents supported the ruling and 11,828 opposed it. On smaller polls 24  
 25 conducted between 1972 and 1982, 224 respondents favored mandatory prayer; 25  
 26 only 60 opposed it, while 420 said they would allow each community to decide. 26  
 27 On polls between 1983 and 1987, 209 respondents supported having “the Lord’s 27  
 28 prayer or some Bible verse” read daily; 382 supported silent prayer, and only 28  
 29 126 no prayer. In additional surveys conducted between 1988 and 1991, when 29  
 30 asked if they thought there should “be daily prayers in all public schools,” 466 30  
 31 respondents said “yes, definitely,” 300 “yes, probably,” 201 “no, probably,” and 31  
 32 236 “no definitely.” 32

33 In interpreting these figures, I assume that there are no defensible neutral reasons 33  
 34 in favor of either teaching creationism or requiring prayer in public schools. The 34  
 35 fact that majorities of the population appear to support these policies strongly 35  
 36 suggests that they do not support a principle of neutral justification.<sup>40</sup> Presumably, 36  
 37 if pressed on the issue, these people would respond along the lines of the views 37  
 38 discussed in the previous section. Even though, given the nature of available 38  
 39 39

40 <sup>37</sup> <http://www.electionstudies.org/> these cited as NES, downloaded June 2007. 40

41 <sup>38</sup> See, for example, the figures in Klosko, *Democratic Procedures*, Ch. 4. 41

42 <sup>39</sup> I refer to these as GSS; <http://webapp.icpsr.umich.edu/GSS/>; accessed June 2007. 42

43 <sup>40</sup> For extensive discussion of different belief systems in American public culture, see 43  
 44 Klosko, *Democratic Procedures*, esp. Chs 4 and 6. 44

1 data, these conclusions are somewhat speculative, it seems overwhelmingly clear 1  
 2 that American public opinion provides strong reasons to doubt that a principle of 2  
 3 neutrality would be supported by consensus levels of the American public.<sup>41</sup> 3  
 4 4  
 5 5

6 **(VI) Implications** 6  
 7 7

8 The argument of this chapter has established a disconnect between Rawls’s method 8  
 9 and his conclusions. I believe the idea of neutrality is a powerful moral idea, for 9  
 10 the reasons Rawls expresses, and that it would be embraced by many Americans. 10  
 11 However, I do not believe this idea – or other aspects of Rawls’s overlapping 11  
 12 consensus – can be established on the basis of fundamental intuitive ideas in the 12  
 13 public culture. In *Political Liberalism* and subsequent works, Rawls recognizes 13  
 14 that his method does not allow the difference principle to be firmly established. 14  
 15 Although Rawls believes it is the most reasonable principle of distributive justice 15  
 16 for liberal societies, he recognizes that this opinion is subject to disagreement and 16  
 17 so does not deny “that other conceptions also satisfy the definition of a liberal 17  
 18 consensus.”<sup>42</sup> However, given the centrality of the “liberal principle of legitimacy” 18  
 19 to his entire theory, I do not believe Rawls can allow similar disagreement in 19  
 20 regard to neutrality. Accordingly, if neutrality cannot be established through the 20  
 21 method Rawls employs, another method of justification is called for. 21

22 To my mind, the strategy Rawls should pursue is to provide an overtly normative 22  
 23 defense of neutrality – rooted in his particular comprehensive view – openly 23  
 24 acknowledged as such. In regard to this fundamental value (and other aspects 24  
 25 of the overlapping consensus), I do not believe appeal to intuitive ideas in the 25  
 26 public culture is a constructive way to proceed. Given the pluralism of American 26  
 27 society, neutrality so presented would likely be rejected by significant portions of 27  
 28 the population – presumably, along the lines of the arguments canvassed above. 28  
 29 But an overtly normative approach would have the considerable advantages of 29  
 30 avoiding vagueness and improbable claims about American society. The value 30  
 31 31

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32 32  
 33 <sup>41</sup> One could defend Rawls’s position by claiming that the subjects discussed in 33  
 34 this section do not represent constitutional essentials or matters of basic justice, and so 34  
 35 that constraints of neutrality need not apply. Although Rawls never describes the precise 35  
 36 limits of constitutional essentials and basic justice, I do not believe this response succeeds. 36  
 37 Mandatory prayer in school, especially something drawn from one denomination, seems 37  
 38 to me a significant imposition. Even if Rawls’s position excludes such matters from the 38  
 39 domain of neutrality, he should be criticized for this. I quote from Justice Jackson’s eloquent 39  
 40 opinion in the 1943 mandatory pledge of allegiance case, *West Virginia State Board of* 40  
 41 *Education v. Barnette*, 319 US 624 (1943): “If there is any fixed star in our constitutional 41  
 42 constellation it is that no official, high or petty, can prescribe what shall be orthodox in 42  
 43 politics, nationalism, religion, or other matters of opinion.” For discussion of this matter, I 43  
 44 am indebted to Jerry Gaus and Ernie Alleva. 43

44 <sup>42</sup> *PL*, p. xlix (Introduction to paperback edition); similarly, pp. 228–30. 44



1 of having people be governed by principles they are able to recognize and accept 1  
 2 would be widely seen as valuable, though once again, probably not accepted at 2  
 3 consensus levels. 3

4 This is not to say that a method of arguing from the public culture is entirely 4  
 5 without promise. In spite of the difficulties supporting Rawls's own conclusions 5  
 6 on the basis of public culture, I believe the evidence suggests that important 6  
 7 democratic principles can be justified by Rawls's method. As I have argued in 7  
 8 past work, although high percentages of Americans subscribe to weak conceptions 8  
 9 of rights and do not support extensive economic redistribution, virtually all are 9  
 10 strongly committed to democratic procedures, as embodied in the US system of 10  
 11 government.<sup>43</sup> Thus, even if Rawls's overlapping consensus is not justifiable on the 11  
 12 basis of consensus cultural values, something like the "constitutional consensus" 12  
 13 discussed in an important article by Kurt Baier may be.<sup>44</sup> However, what general 13  
 14 support of these procedures means for justifying Rawlsian public reason remains 14  
 15 to be discussed, while, as I have argued previously, this commitment to democratic 15  
 16 procedures would allow restrictions on various rights of citizens – along the lines 16  
 17 of those discussed in the last section. 17

18 First, in regard to democratic procedures, although in comparison to what 18  
 19 Rawls hoped for an outcome along these lines is disappointing,<sup>45</sup> we should 19  
 20 recognize that, in spite of their shortcomings, democratic procedures are able to 20  
 21 serve the central function of political liberalism. Their importance can be seen 21  
 22 if we look briefly at a discussion of liberal disagreements in Charles Larmore's 22  
 23 *Patterns of Moral Complexity*.<sup>46</sup> 23

24 Like other theorists, Larmore notes that political liberalism is necessitated by 24  
 25 pervasive disagreements in liberal societies. In the portion of his book that interests 25  
 26 us, he discusses connections between liberal disagreements and "a universal norm 26  
 27 of rational dialogue."<sup>47</sup> When people disagree about specific issues, he argues, 27  
 28 "those who wish to continue the conversation should retreat to *neutral ground*, 28  
 29 with the hope either of resolving the dispute or bypassing it."<sup>48</sup> 29

30 The question that interests us here is the nature of this neutral ground. Survey 30  
 31 evidence concerning the beliefs and values of American citizens leads one to doubt 31  
 32 the existence of substantive neutral moral grounds of the kind Larmore – or Rawls 32  
 33 – suggests. It seems unlikely that there is a set of premises waiting to be discovered 33  
 34 that would (a) be acceptable to proponents of widely different comprehensive 34  
 35 views, and (b) also sufficiently robust to allow disputants to proceed from them 35  
 36 36

37 <sup>43</sup> Klosko, *Democratic Procedures*, Ch. 5. 37

38 <sup>44</sup> Kurt Baier, "Justice and the Aims of Political Philosophy," *Ethics* 99/4 (1989): 771–90. 38

39 <sup>45</sup> I should note the poor quality of Rawls's arguments against constitutional consensus 39  
 40 in *PL*; see Klosko, *Democratic Procedures*, Ch. 7. 40

41 <sup>46</sup> *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987). 41  
 42 Exposition here draws on Klosko, *Democratic Procedures*, Ch. 5. 42

43 <sup>47</sup> *Ibid.*, p. 53. 43

44 <sup>48</sup> *Ibid.*, p. 53; his emphasis. 44  
 45 45

1 to generally accepted conclusions on disputed moral issues. Larmore does not 1  
 2 explain what the necessary neutral principles are, while, as we have seen, Rawls's 2  
 3 attempt to base them on intuitive ideas in the public culture is unconvincing. 3  
 4 Accordingly, one great advantage of adherence to democratic procedures is that 4  
 5 this constitutes an adequate neutral ground in Larmore's sense. By adverting to 5  
 6 them, disputants could resolve their disagreements through means that would be 6  
 7 mutually acceptable. Although the principles can be viewed as lacking in terms of 7  
 8 normative content, they are still (a) likely to be widely accepted in liberal society, 8  
 9 and (b) able to fulfill the main function that the principles of political liberalism 9  
 10 are supposed to fulfill. 10

11 However, discussion in this chapter has turned up a problem with liberal 11  
 12 procedures. Do they require neutral restrictions on comprehensive views or not? 12  
 13 On this issue, there is apparently wholesale disagreement in American culture, 13  
 14 while appeal to intuitive ideas will be of little help. We could say that, since 14  
 15 support of democratic procedures is a value almost universally held, the proper 15  
 16 approach is to allow resort to procedures to settle the matter. This could be viewed 16  
 17 as a kind of least common denominator. However, this does not settle anything. 17  
 18 Although procedures could produce a resolution of the issue, the practical question 18  
 19 remains: do the procedures in question restrict comprehensive views or do they 19  
 20 not? Perhaps we could allow this issue itself to be settled procedurally, i.e., by 20  
 21 allowing the political process to decide. But such reflexivity raises the spectre of 21  
 22 an infinite regress: do we require neutral constraints on the procedural mechanisms 22  
 23 that decide the issue of neutral constraints? Still, as it seems to me, in practical 23  
 24 terms, the entire issue may – and most likely, must – be addressed through the 24  
 25 political process, which is necessary to give substance to First Amendment rights 25  
 26 to free speech and freedom of religion. If we simply allow the political process to 26  
 27 decide – accepting its existing position on permitting comprehensive views or not 27  
 28 – we will get a solution. Even if not ideal, it is a solution that could be generally 28  
 29 accepted and provide a basis for continuing political cooperation, as each side 29  
 30 attempts to move the political process in the direction of its favored view. 30

31 Although, from the standpoint of neutral liberalism, this is not an ideal solution, 31  
 32 and if the Supreme Court continues its recent lurch to the right, it may become 32  
 33 increasingly distasteful to many liberal citizens in future years, it is, once again, a 33  
 34 solution. In political life, there must be a way of settling disputes, and resort to the 34  
 35 political process provides a way to do this, and a way that is generally accepted 35  
 36 by almost all Americans.<sup>49</sup> Although appeal to such mechanisms threatens some 36  
 37 measure of the rights that neutral liberals would like to protect, at least at the 37  
 38 present time, this is mainly at the margins. As long as Rawlsian public reason is to 38  
 39 be justified on political rather than metaphysical grounds, its proponents would be 39  
 40 unrealistic to hope for more. 40

41 Given the subject of this volume, I should conclude by commenting briefly 41  
 42 on implications of the above argument for Rawls's legacy. As it seems to me, one 42  
 43

---

44 <sup>49</sup> Klosko, *Democratic Procedures*, Ch. 5. 44

1 lesson we may draw concerns tensions between the methodological and substantive 1  
 2 sides of Rawls's system. Rawls has of course made enormous contributions in both 2  
 3 areas. *A Theory of Justice* is a great work because of both the principles of justice 3  
 4 Rawls defends and the resuscitated social contract through which he defends 4  
 5 them. His late works make their own important methodological contribution, the 5  
 6 idea of overlapping consensus, which in regard to substance, leads again to his two 6  
 7 principles, supplemented by his view of public reason. But in spite of the magnitude 7  
 8 of Rawls's contributions in both areas, for many decades his system was plagued 8  
 9 by inability of his designated method to establish the desired substantive view. 9  
 10 Over the course of his career, Rawls ran through at least three different methods: 10  
 11 the relatively simple contract in "Justice as Fairness," which gave way to the far 11  
 12 more sophisticated contract featuring the veil of ignorance in *A Theory of Justice*,<sup>50</sup> 12  
 13 which in turn gave way to political liberalism and its overlapping consensus. In 13  
 14 spite of these shifts, throughout the forty years Rawls worked on justice as fairness 14  
 15 his conclusions of course remained essentially the same. However, while Rawls 15  
 16 himself moved beyond and so essentially repudiated his two earlier methods, I 16  
 17 believe his final method also has significant problems. 17

18 In my own work, intrigued by the empirical side of political liberalism, I 18  
 19 have attempted to determine the moral principles that a method like the one he 19  
 20 propounded would actually yield, if they were based on more careful empirical 20  
 21 examination of American society. Whatever one thinks of the results, as the 21  
 22 argument of this chapter attempts to show, these principles are less robustly liberal 22  
 23 than Rawls's own.<sup>51</sup> Reasons for this are not difficult to make out. American 23  
 24 society – though to a lesser extent other liberal democracies – is less liberal, less 24  
 25 progressive than Rawls would prefer. Establishing moral principles on the basis 25  
 26 of its public culture must give rise to principles that are circumscribed by the only 26  
 27 quasi-liberal tenor of existing public culture. Although Rawls did not address this 27  
 28 problem directly, I believe his awareness of it shows through his interest in the 28  
 29 utopian role of political theory in his last works. In the "Introduction" to *Law* 29  
 30 *of Peoples (LP)*, Rawls says that he begins and ends "with the idea of a realistic 30  
 31 utopia" (*LP*, p. 6). In *Justice as Fairness: A Restatement*, he writes: "We view 31  
 32 political philosophy as realistically utopian: that is, as probing the limits of practical 32  
 33 political possibility" (*JF*, p. 4). I believe Rawls's construction of his overlapping 33  
 34 consensus reflects a similar impulse. It is not possible to say how explicitly Rawls 34  
 35 intended this, but it seems that his concentration on what he viewed as a possible 35  
 36 ideal skewed his assessment of what he actually confronted. American society 36  
 37 does contain elements that embodied his favored moral ideals, most notably the 37  
 38 traditions of free speech jurisprudence analyzed in "The Basic Liberties and their 38  
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42 <sup>50</sup> For the need for the new contract, see Robert Paul Wolff, *Understanding Rawls* 42  
 43 (Princeton: Princeton University Press, 1977), Ch. 5. 43

44 <sup>51</sup> See Klosko, *Democratic Procedures*. 44

1 Priority.”<sup>52</sup> But whether because of factors noted here or others, in focusing on 1  
 2 what supported his favored moral principles, Rawls overlooked other factors with 2  
 3 which they were in conflict. Reasonable people may disagree about how realistic 3  
 4 the idea of an overlapping consensus – including commitment to neutrality in 4  
 5 public reason – actually is. But I believe this idea should also be recognized as 5  
 6 utopian, at least when assessed against how things presently stand.<sup>53</sup> 6

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 40 <sup>52</sup> “The Basic Liberties and Their Priority,” in Sterling MacMurrin (ed.), *The Tanner* 40  
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 43 <sup>53</sup> I am grateful to Ernie Alleva, Ryan Pevnick, Micah Schwartzman, and participants 43  
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 45 of this chapter. 45

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