Fordham Law Review

Volume 72 | Issue 5 Article 31

2004

# Constitutional Reductionism, Rawls, and the Religion Clauses

Abner S. Greene
*Fordham University School of Law*

# CONSTITUTIONAL REDUCTIONISM, RAWLS, AND THE RELIGION CLAUSES

*Abner S. Greene**

## INTRODUCTION

There is an important debate afoot: Should we treat the Constitution as positive law, to be respected and followed in its specifics? Or must we read the Constitution by reducing its specific textual markers to values that we then must discuss and elaborate through a more openly normative and less law-like method? I call the latter move one of "constitutional reductionism" and in my own work I am caught on the horns of this dilemma.

The two examples with which I am most familiar both involve the First Amendment. Take, first, the religion clauses. The First Amendment begins—the Bill of Rights begins—by marking out religion for two clauses all its own. (Well, that would actually be conceding the battle to the positivists, so let's make "all its own" a disputed issue.) "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] One might think it a simple task to figure out how we must proceed, interpretively. Of course it might sometimes be difficult to know what comes within the domain "religion" and it might be difficult to determine what counts as establishment and what counts as prohibition of free exercise. But we would be operating throughout by treating religion as distinctive: its establishment is prohibited, its free exercise is guaranteed, and not anything else. So, if your claim is that government is establishing a secular belief system or prohibiting the free exercise of some secular tenets, you had better look somewhere other than the religion clauses to ground your claim.

But, as it turns out, this is not the only view in town. The other view—the constitutional reductionist view—says that the religion clauses are mere markers of a deeper, or broader, value, or set of values. Despite the undisputed fact that the First Amendment's text treats religion as distinctive, the constitutional reductionists claim that we should treat those textual markers as placeholders. One argument is that they are placeholders for a general principle of equal regard:[2]

* Professor, Fordham University School of Law.

1. U.S. Const. amend. I.

2. *See* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of*

Government must regard equally all of our beliefs, all of our belief systems, and all of our methods of carrying out those beliefs and systems. On this view, there is no special barrier to government's erecting religious symbols on public property or grounding law in predominantly, expressly religious argumentation. Either all of this is fair game, as the erection of secular symbols would be, and as grounding law in predominantly, expressly secular argumentation would be, or we have to find a principle that would rule all of it out of bounds. Obviously that won't work for the "what arguments may ground law?" issue—we can't rule all arguments out of bounds—so all are in bounds. The issue of symbols is trickier, however. The equal regard theory supposes that there might be some instances of government erection of secular symbols that would violate the Establishment Clause, because government should not be putting its imprimatur on any contested comprehensive belief system.

To treat religion as distinctive—to see the Establishment and Free Exercise Clauses as setting up distinctive rules regarding government treatment of religion—is to violate a principle of equality that the reductionist theorists argue is the meta-principle we must respect. Textual markers that appear distinctive must thus be unpacked to reveal the broader, or deeper principles that they embody.

Now take the second example, the Free Speech Clause. The First Amendment prohibits Congress from "abridging the freedom of speech."[3] Of course we'd have to discuss what counts as abridging, and what counts as speech (not to mention what counts as the freedom of speech), but those are all tasks within the bounds of standard positive legal analysis. It is the freedom of speech that the First Amendment is protecting, and not the freedom of (for example) conduct. However, the constitutional reductionists look at the problem differently:[4] Speech can harm just as conduct can, and there is nothing distinctive about speech that warrants distinctive treatment. All of the standard arguments—speech as essential to democracy, speech as key to the search for truth, speech as at the core of autonomy, even speech as specially subject to partisan regulatory shenanigans—fail to distinguish speech from other action that harms. Thus, we must scrap the notion of speech as special and think about the Free Speech Clause more generally as a textual marker of some deeper, broader value, which value then must be protected whether or not it is embodied in a speech act.

---

*Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245 (1994); *cf.* Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 Colum. L. Rev. 2255 (1997).

3. U.S. Const. amend. I.

4. *See generally* Frederick Schauer, Free Speech: A Philosophical Enquiry (1982); *cf.* Stanley Fish, There's No Such Thing as Free Speech: And It's a Good Thing, Too (1994).

I said at the outset that in my own work I am caught on the horns of this dilemma. On the one hand, I have advanced one version of the religion-as-distinctive argument. Religion, on my argument, is different because it is based in an extrahuman source of normative authority. That's what most religious people believe, and it makes religious arguments distinctively inaccessible to nonbelievers. Because of this, the Establishment Clause should be (and has been) construed to bar legislation from being based on predominantly, expressly religious arguments. But then we have imposed a distinctive gag rule on religious folk, and Free Exercise Clause exemptions—ordered by courts as of right, although legislatures may also act to accommodate religion—are the counterweight to the Establishment Clause gag rule. Just as we properly limit the role of religious arguments in the lawmaking process, so must we limit the sovereignty claims of law over religious practice.

This argument, which I call the political balance of the religion clauses, is a normative one, but it is a normative defense of positive law, of treating the First Amendment's text and its markers of religion as distinctive. However, in current work, I have begun questioning the very enterprise of constitutional obligation; questioning whether we as citizens have a moral duty to obey the law, in our constitutional order and more generally; questioning whether government officials have any special duty to follow what the Supreme Court says about the Constitution; and questioning whether anyone has a duty to follow what the framers of text thought text meant, or, indeed, to follow the plain meaning of text at all. My current project suggests that all-things-considered normative judgments, about what law means and about whether to follow purportedly canonical sources of law and sources of the meaning of law, are always appropriate. This view strongly suggests that constitutional reductionism is precisely the correct method of doing constitutional law.

There is one way of reconciling the two positions I have taken. My argument for the political balance of the religion clauses—for treating the Establishment Clause as imposing a distinctive burden on religion and the Free Exercise Clause as awarding distinctive exit options for religion—can be seen not as a positivist defense of text, but rather as what I believe to be the correct, all-things-considered normative elaboration of the religion clauses. On this view, I disagree with those who advance an equal regard theory of the Constitution not as a matter of meta-theory—I do not disagree that we must always seek an appealing normative understanding of constitutional text, even if that means scrapping text—but rather I claim that the equal regard theorists have gotten their normative analysis wrong. In this instance, the textual markers of religion as distinctive have captured something that is indeed normatively distinctive about religion.

Religion's distinctiveness requires us, either as a matter of First

Amendment interpretation or as a matter of political theory, to limit the role of religion in lawmaking but then, as compensation, to limit the sovereignty of law over religion. Although this view that there is a political balance of the religion clauses has some affinities with Rawls's view of public reason, there are significant differences as well. In explaining, I will first describe Rawls's treatment of public reason. Next I will lay out my conception of public reason and its consequences. Finally I will use this different notion of public reason and its consequences to critique Rawls's conception of public reason.[5]

## I. RAWLS'S TREATMENT OF PUBLIC REASON

In *A Theory of Justice*,[6] Rawls argued that in "a well-ordered society" citizens would accept certain basic principles of justice—what he calls justice as fairness—as a "comprehensive philosophical doctrine."[7] But "a political conception of justice" is different from a comprehensive philosophical doctrine.[8] People are unlikely to accept unanimously one comprehensive doctrine as foundational; the concept of a well-ordered society is "highly idealized."[9]

Rawls's project in *Political Liberalism*, therefore, was to elaborate how people who differ in their comprehensive doctrines can nonetheless accept common principles of justice. As he puts it, "the problem of political liberalism is: How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?"[10] According to Rawls, "the aim of political liberalism is to uncover the conditions of the possibility of a reasonable public basis of justification on fundamental political questions."[11]

Rawls stresses the difference between comprehensive philosophical liberalism and political liberalism throughout the book. The key point is that whereas a *comprehensive* liberalism would take the position that the moral order arises from human nature and society and that each reasonable, conscientious person has access to that moral order, *political* liberalism "does not take a general position on [these issues] but leaves [them] to be answered in their own way by different comprehensive views," merely affirming "[the liberal view] with

5. Much of the material that follows is drawn from Abner S. Greene, *Uncommon Ground—A Review of* Political Liberalism *by John Rawls and* Life's Dominion *by Ronald Dworkin*, 62 Geo. Wash. L. Rev. 646 (1994).

6. John Rawls, A Theory of Justice (rev. ed. 1999).

7. John Rawls, Political Liberalism xviii (1996) (discussing arguments put forth previously in *A Theory of Justice*).

8. *Id.*

9. *Id.* at 35.

10. *Id.* at xx.

11. *Id.* at xxi.

respect to a political conception of justice for a constitutional democratic regime."[12] Thus, Rawls reserves the terms "religious," "philosophical," and "moral" for sectarian views of the good; he uses the term "political" for conceptions that citizens might share even though they differ in their comprehensive religious, philosophical, or moral doctrines.

The centerpieces of the book are Rawls's discussions of overlapping consensus and public reason. The solution to the problem of political liberalism, says Rawls, is the development of an overlapping consensus of various comprehensive doctrines through the practice of public reason.[13] An overlapping consensus of divergent doctrines does not depend, stresses Rawls, on balancing among the doctrines or taking bits and pieces from each.[14] Rather, an overlapping consensus can develop because "the reasonable doctrines endorse the political conception, *each from its own point of view*."[15] If an overlapping consensus exists, consisting of the intersection of the reasonable comprehensive doctrines in society, then citizens can accept this shared political conception of justice as correct from the viewpoint of their own comprehensive doctrines, recognize other comprehensive views as reasonable (even if they think them mistaken), and accept the absence of coercion to support their own comprehensive doctrines.[16]

The overlapping consensus must come about through public reason—that is, through terms shared as citizens and not through terms based in conceptions of the good grounded in comprehensive philosophical, moral, or religious doctrines. Public reason involves "following the usual guidelines of public inquiry and rules for assessing evidence .... [T]hose guidelines and rules must be specified by reference to forms of reasoning and argument available to citizens generally, and so in terms of common sense, and by the procedures and conclusions of science when not controversial."[17]

The requirement of public reason applies most strongly to the fundamental questions of justice, and perhaps more weakly to more mundane political matters.[18] The limits of public reason do not apply to personal deliberations or private associational matters, but they do apply when we act as citizens in a public forum or when voting. And they apply to public officials, and "in a special way to the judiciary."[19]

Public reason is a necessary condition for legitimate governmental

12. *Id.* at xxix; *see also id.* at 9-10, 95, 125-26, 144, 150-54, 176, 194-95, 209.
13. *See id.* at 10.
14. *See id.* at 39.
15. *Id.* at 134 (emphasis added); *see also id.* at 95, 147.
16. *See id.* at 127-28.
17. *Id.* at 162; *see also id.* at 224-25.
18. *See id.* at 214; *see also id.* at 227-30.
19. *Id.* at 216. Rawls refers to the Supreme Court as an "Exemplar of Public Reason." *Id.* at 231.

power because "our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."[20] In other words:

> [I]n recognizing others' comprehensive views as reasonable, citizens also recognize that, in the absence of a public basis of establishing the truth of their beliefs, to insist on their comprehensive view must be seen by others as their insisting on their own beliefs. If we do so insist, others in self-defense can oppose us as using upon them unreasonable force.[21]

Rawls states two exceptions to the requirement of public reason. First, in a somewhat (but not completely) well-ordered society, it might be appropriate on some hotly contested issues to refer in politics to comprehensive doctrines, not to justify the outcome we want but rather to assure others of the sincerity of our political position.[22] Second, in a not-well-ordered society that is fundamentally unjust, the requirement of public reason may be suspended "as the best way to bring about a well-ordered and just society in which the ideal of public reason could eventually be honored."[23] Rawls refers to the requirement of public reason, as modified by these two exceptions, as the "'inclusive view.'"[24]

In a later essay, *The Idea of Public Reason Revisited*,[25] Rawls expands the inclusive view into what he deems "the wide view."[26] Here, he adds that "reasonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, provided that in due course proper political reasons—and not reasons given solely by comprehensive doctrines—are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support."[27] Rawls refers to this as "'the proviso.'"[28]

---

20. *Id.* at 217; *see also id.* at 243.
21. *Id.* at 247.
22. *See id.* at 248-49.
23. *Id.* at 250.
24. *Id.* at 247.
25. John Rawls, *The Idea of Public Reason Revisited* (1997), *reprinted in* John Rawls: Collected Papers 573 (Samuel Freeman ed., 1999).
26. *Id.* at 591.
27. *Id.*
28. *Id.* (emphasis omitted). He adds that by introducing comprehensive views into the discussion, we gain information benefits from "mutual knowledge of one another's religious and nonreligious doctrines." He also suggests that public reason is merely an "ideal" and not a "legal duty," "for in that case it would be incompatible with freedom of speech." *Id.* This seems wrong: We often limit speech in the name of other values or to avoid certain harms. If our Establishment Clause, or principles of political morality more generally, appropriately place a limit on reference to comprehensive doctrines in the lawmaking process, then it is appropriate to deem this

## II. PUBLIC REASON AND ITS CONSEQUENCES

Properly understood, the religion clauses of our Constitution instantiate the following principles of political morality: (1) Laws should not be based on references to sources of normative authority to which citizens might reasonably believe they lack access; (2) If we are to impose a gag rule of this sort, then we must compensate those gagged through relaxing law's dominion, most likely through a system of judicial exemptions and legislative accommodations.[29]

We should—and the Supreme Court has[30]—enforce principle (1) through the following rule: Laws may not be based on express, predominant religious argumentation. Religious reference is different in kind from any other type of reference, for it alone refers back to an extrahuman source of normative authority. (Here I bracket the possibility of nontheistic religion.) This is indeed what makes religion important to many religious believers, i.e., that power over both creation and the moral order rests outside human hands and minds. But precisely because such belief involves a "reference out," it is accessible in a different way from other forms of belief. Although many belief systems involve hard work to understand them and see their implications, they still involve reference to shared human observations, evidence, etc. Religious belief and its ensuing (claimed) moral and sometimes legal entailments can be understood by nonbelievers, but the animating source of value cannot be accessed in the way that other tenets can be. I am not claiming that "faith" has no role in nonreligious reasoning, nor that religion lacks reasoning to move from animating theistic belief to moral/legal demands. The point is, perhaps, simpler: that for religious people and nonreligious people alike, what is special about religion is precisely the extrahuman source of normative authority that underlies religion but not anything else.

The inaccessibility of such animating authority means that we should not base our laws on it. Express references to such religious authority in our lawmaking process exclude nonbelievers from full participation in the process. Note two things here: First, I focus on express reference and not underlying belief, because if one is willing to translate one's religious belief into secular terms, the problem of perceived exclusion from debate disappears. (I am assuming we can

---

limit a legal as well as moral duty.

29. For arguments fleshing out these points, see Abner S. Greene, *The Incommensurability of Religion*, *in* Law & Religion: A Critical Anthology 226 (Stephen M. Feldman ed., 2000); Abner S. Greene, *Is Religion Special? A Rejoinder to Scott Idleman*, 1994 U. Ill. L. Rev. 535; Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 Yale L.J. 1611 (1993).

30. *See* Edwards v. Aguillard, 482 U.S. 578 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980) (*per curiam*); Epperson v. Arkansas, 393 U.S. 97 (1968).

account for apparently pretextual translation.) Here, my view is similar to Rawls's "proviso." Second, our courts should invalidate laws that are based in expressly religious argumentation only if such argumentation dominated the legislative process. We should not be opposed to participants in that process voicing their religious arguments, so long as secular arguments become the dominant ones for the law.

If we deem it necessary, as I believe we should, to limit religious arguments in lawmaking in this way and for this reason, then those who want to offer such arguments expressly as the predominant ground for legislation have been disadvantaged compared to others who are happy to offer secular grounds. The political participation of religious folk has, accordingly, been muted to some degree. Since, in a liberal democracy, we deem it a necessary (though almost certainly not a sufficient) condition for legitimate political rule that citizens be afforded an equal opportunity to participate in the political process, it is not legitimate to demand full compliance from those to whom we have denied equal participation. If we are to impose even a limited gag rule on religious arguments, then we must offset that with a limited system of exit options. Since actual physical emigration is not reasonably available, we must instead provide representations of exit. This can come through either judicially awarded exemptions, if the cost of the exemption is not too high to other members of society, or through legislatively crafted accommodations. In either way, government can acknowledge its sovereignty as permeable rather than plenary, which is only fair given its partial silencing of those who would offer religious grounds for law.

## III. A CRITIQUE OF RAWLS'S CONCEPTION OF PUBLIC REASON

In my judgment, Rawls's treatment of public reason is deficient on three grounds: it excludes all comprehensive doctrines; it fails to attend to the legitimacy costs from even a partial gag rule; and its claim to be part of a theory of political rather than comprehensive liberalism falls short.

### A. *It Excludes All Comprehensive Doctrines*

Rawls seeks to exclude arguments based on any comprehensive doctrine from justifying fundamental political decisions.[31] He is

31. Rawls seems to claim that what matters is how political argumentation is actually expressed, rather than underlying beliefs. *See* Rawls, Political Liberalism, *supra* note 7, at 66-71, 242-43, 250 n.39. This focus is correct, because the reason for excluding certain types of argument from justifying law is the exclusionary and polarizing effect that a sectarian argument can have. If arguments are translated into commonly accepted terms, then it does not matter that those advancing them might believe in sectarian views of the good to back up those arguments. *See* Greene, *The Political Balance of the Religion Clauses*, *supra* note 29, at 1620-23.

unclear, though, about precisely why we might want to exclude *any* argument from political justificatory practice. He suggests that the liberal principle of legitimacy allows arguments that citizens "can reasonably be expected to endorse,"[32] but excludes as coercive laws seen as sectarian, which are based on contested theories of the good.[33] He consistently maintains, in a later work, that "the knowledge and ways of reasoning... that ground the parties' selection of the principles of justice must be accessible to citizens' common reason."[34] It is not clear, however, why the majority cannot enact laws by following, say, Milton Friedman over John Maynard Keynes, or Kant over Bentham, so long as the laws don't violate specific rights. In other words, Rawls never makes clear what he believes are the predicates to legitimate governmental coercion. Perhaps the Rawlsian principle of exclusion is this: Express references to controversial theories of the good may not justify law because citizens who do not themselves believe the winning theories will feel as though they are living under law that doesn't equally respect their theories of the good.

It is not clear, however, why this is so or why, if so, it should be considered problematic. So long as the laws do not restrict freedom of speech or belief or restrict political participation, the losing citizens on a particular issue have every opportunity to seek to persuade the winning group of its error. And even if the victory of, say, Friedman over Keynes signals (as all political victories do) that the law favors some citizens' views over others', why should this be a problem for political liberalism? Why isn't it simply another way of describing politics? Liberalism consistently can allow great space for all citizens to pursue their notions of the good while adopting laws that are grounded in particular comprehensive doctrines, so long as we have protections for certain rights that are necessary for the pluralistic pursuit of the good. In this way, a blend of liberalism and republicanism is possible.

A better rule of exclusion would allow as justifications for law arguments that are based in sources that all citizens have access to as citizens, but would exclude as justifications for law arguments based in authority to which only some citizens have access. Imagine, for a moment, a group of citizens that has access to a box that contains evidence supporting a certain argument for a particular law. Suppose that group relies in the political process on the contents of that box but denies other citizens access to the box and its contents. We should bar such shenanigans from justifying law because some citizens have access to the source of authority backing the law, while others are

32. John Rawls, Political Liberalism, *supra* note 7, at 225; *see id.* at xx, 134, 136-37, 216-17.

33. *See id.* at 136-37, 143-44, 217, 225, 243.

34. John Rawls, Justice as Fairness: A Restatement 90 (Erin Kelly ed., 2001).

excluded from that source of authority. The excluded group rightly feels that it has not been treated equally; its members reasonably feel that they are second-class citizens.

So we should ask: Are there any types of argument that are similar to the secret-box hypothetical? Rawls offers no reason to assume that all arguments based in comprehensive views of the good (philosophical, moral, or religious) are similarly exclusionary. I might not agree with Milton Friedman's economic theory, but when confronted with arguments based in that theory, I know I can participate as a full citizen in trying to argue that Friedman is wrong, that another theory is correct, and that a certain law does or does not follow from Friedman's theory. But express reference to religious doctrine—understanding religious reference to be to an extrahuman source of normative authority—is like the secret-box model and unlike the Friedman example. To be sure, religious reference might be similar to nonreligious philosophical or moral reference in many ways—all might be seen as to some degree nonrational or based in faith; all might be controversial or divisive; and all might invoke sources of authority that compete with that of the state. Only religious reference, however, relies on a source of normative authority that is claimed by its proponents to be beyond the scope of human experience and to be based in special relationships that the believers have with that source of authority and that other citizens might not have.

### B. *It Fails to Attend to the Legitimacy Costs from Even a Partial Gag Rule*

Rawls advances broad principles of political exclusion, sweeping gag rules that would limit in the lawmaking process reliance on sectarian theories of the good. But he fails to acknowledge that these rules of exclusion delegitimate the government's claim to the obedience of its citizens. Although theories of the good that some people hold at the core of their being have been barred from justifying law, Rawls apparently believes that these people nonetheless must obey law just as if they had participated fully in the political process—at least, there's no indication that he believes otherwise.

This view, however, is in tension with a cardinal principle of liberal democracy, namely that a necessary (although not a sufficient) condition for political legitimacy is the ability of citizens (who are sovereign) to participate equally in the political process. If we took away someone's voting rights, or speech or press or petition rights, and then demanded that she obey all laws, there would be an obvious and serious legitimacy problem (as there is with obligating aliens and prisoners, who lack some of these rights). Why should the legitimacy problem be any less severe if we bar people from advancing in politics

theories of the good that they hold to be true? Is such a gag rule not a serious hindrance to political participation?

One would need a normative theory to justify beginning from a baseline of common-ground politics rather than from a baseline of politics that is open to all theories of the good. As I shall explain, although I agree with Rawls that there are good reasons to create a kind of common-ground politics, I disagree that common-ground politics is the appropriate baseline, or starting point, for analyzing the legitimacy question. Rather, I argue that the better premise is one that acknowledges the capacity of all human beings to hold true theories of the good. If we establish a politics that bars some of those theories from justifying law, then to legitimate legal coercion of citizens whose arguments have been gagged, we must compensate, to some degree, for such exclusion, by relaxing the sweep of sovereignty over those citizens in certain instances. In this way, a system of permeable sovereignty can serve as the appropriate counterpoint to common-ground politics.

### C. *Its Claim to Be Part of a Theory of Political Rather than Comprehensive Liberalism Falls Short*

Examining how Rawls casts his argument for common-ground politics will reveal the way in which he fails to attend to the legitimacy problem that common-ground politics creates. To fix ideas, let us understand "political liberalism" as a political conception of justice that seeks to achieve an overlapping consensus of reasonable, varying comprehensive doctrines through the use of public reason. Importantly, political liberalism is agnostic as to the claims of the varying comprehensive doctrines about the good, including the claim that all citizens have access to the true moral order. Political liberalism is open to the possibility that all citizens do not have access to the true moral order—that, instead, a particular sectarian view of the good is correct. Let us understand "comprehensive liberalism" to be similar to political liberalism in seeking to establish the centrality of toleration for competing theories of the good, but as differing from political liberalism in claiming that such toleration is itself good—that is, that all citizens do have access to the true moral order, and that a sectarian view to the contrary is simply wrong. Rawls claims throughout *Political Liberalism* that he is describing a political rather than a comprehensive liberalism.[35] This claim, however, is in tension with other aspects of Rawls's argument and helps to show how Rawls ignores the legitimacy problem that follows from excluding certain arguments from the lawmaking process.

To see that Rawls's argument is in fact more consistent with a

35. *See* Rawls, Political Liberalism, *supra* note 7, at xx, xxix, 9, 95, 99, 138, 150, 194-95.

version of comprehensive liberalism, consider two different premises from which one might approach the legitimacy problem. First, one could start from the premise that all arguments are fair game in politics. I will call this the "fair-game" premise. This does not mean that we would, in the end, allow all arguments into politics. As I have suggested above, certain arguments might rely on privileged access to a source of normative authority that would exclude other citizens if allowed to justify law. If certain arguments are excluded from politics, however, then under the fair-game premise a legitimacy problem would arise, because we would treat people as second-class citizens by coercing them through law after excluding their arguments from justifying law. Some form of compensation for such a harm would be required.

One could approach the legitimacy problem from a different premise, which I will call the "common-ground" premise. Here, one could exclude sectarian theories of the good from grounding law, without the concomitant need to attend to the harm done to those whose comprehensive views are so excluded, because unlike the fair-game premise, the common-ground premise assumes not that all arguments are prima facie fair game in politics, but rather that some arguments—those based on privileged, sectarian reference—are prima facie off limits in politics.

Rawls's theory of legitimacy is clearly the second one, based in the common-ground premise. He never claims that there's a legitimacy problem in excluding arguments from politics; he argues only that a legitimacy problem would arise if we failed to exclude certain arguments from politics. Although he claims that this theory of legitimacy is consistent with a political rather than a comprehensive liberalism, this seems questionable. The fair-game premise, rather than the common-ground premise, seems to fit better with political liberalism, because it takes seriously (by requiring compensation for the exclusion of arguments from politics) the possibility that one or more comprehensive doctrines might be true. A cogent political liberalism—acknowledging the possibility that common-ground politics might fail to bring about the best moral order, leaving open the theoretical chance that a sectarian theory of the good is in fact best—would recognize the legitimacy problem that flows from silencing certain theories of the good in politics.

It might be thought that because all comprehensive doctrines, in Rawls's view, should be excluded from political justificatory practice, such exclusion treats all citizens equally and no compensation is needed. That is, even if one adopts the fair-game premise of legitimacy, perhaps so long as all citizens are treated the same, none becomes a second-class citizen and no compensation is needed for the exclusion. On this view, only theories that selectively exclude certain comprehensive doctrines create two tiers of citizens. Perhaps this is a

point against selective exclusions, or perhaps it means that in a system of selective exclusions some form of compensation is necessary to ameliorate the legitimacy problem. That is not the issue here, however. Rather, by contrasting selective exclusions with Rawls's refusal to allow any comprehensive doctrine to serve as the express justification for law, perhaps we can see that Rawls has solved the legitimacy problem by attempting to treat all citizens alike.

Rawls's theory, however, does not treat all citizens alike, and Rawls admits as much.[36] Some comprehensive doctrines will hold a view of the good that is consistent with a rule of excluding references to such doctrines from justifying law; other comprehensive doctrines will find it inconsistent with their views of the good to adopt such rules of exclusion. Rawls's across-the-board rule of exclusion would have a disparate impact on the latter group of comprehensive doctrines, thus effectively favoring the former group. Rawls acknowledges the disparate impact of his theory of locating an overlapping consensus through public reason.[37] He claims, however, that his theory neither asserts nor denies any truth claim.[38] He then gives the example of a group that holds a certain view to be true and worth fighting for and that believes salvation depends upon this. He responds: "At this point we may have no alternative but to deny this, or to imply its denial and hence to maintain the kind of thing we had hoped to avoid."[39] Our response, however, would really be only an implication of denial: "[W]e do not put forward more of our comprehensive view than we think needed or useful for the political aim of consensus."[40] Later, Rawls makes a similar point when responding to the question whether his conception of justice is fair to all conceptions of the good. He argues that "[t]he principles of any reasonable political conception must impose restrictions on permissible comprehensive views, and the basic institutions those principles require inevitably encourage some ways of life and discourage others, or even exclude them altogether."[41] Again, his point is that any political conception of justice produces a disparate impact on some comprehensive doctrines. I agree that the impact is incidental and not intentional, in the sense that Rawls is not intending to assert the truth of liberalism. Rawls implies that this absence of intentionality renders his theory a political rather than comprehensive liberalism; he contrasts disparate impact with "the state's advancing a particular comprehensive doctrine in its own name."[42]

36. *See id.* at 138, 152, 194-200.
37. *See id.*
38. *See id.* at 150.
39. *Id.* at 152; *see also id.* at 138.
40. *Id.* at 153.
41. *Id.* at 195.
42. *Id.*

It is unclear, however, why intent should be dispositive here; in either case, the effect of Rawls's theory is to favor certain comprehensive doctrines over others without compensation. Let us assume that we think foundational to political legitimacy a citizen's ability to advance what she believes to be good consistently throughout her life (including politics, if her view of the good so requires). Then a theory of justice that in effect limits in politics certain theories of the good (which, from the point of view of those theories, may not properly be limited in politics) while remaining consistent with other theories of the good (which, from the point of view of those other theories, may properly be limited in politics) creates a group of second-class citizens.

Rawls once again betrays that his (even post-*Theory of Justice*) liberalism is a comprehensive one in *Justice as Fairness: A Restatement.* In a section titled *Political and Comprehensive Liberalism: A Contrast*, he first reiterates his argument from *Political Liberalism* that a mere disparate impact on certain comprehensive doctrines is not enough to render the overlapping consensus/public reason conception of liberalism comprehensive.[43] I have responded to this above. He then gives an example of educating children whose parents are members of religious sects, who wish to live separately from the modern world. Rawls argues that political liberalism doesn't require fostering "the values of autonomy and individuality as ideals to govern much if not all of life."[44] Rather, political liberalism "will ask that children's education include such things as knowledge of their constitutional and civic rights, . . . to ensure that their continued religious membership when they come of age is not based simply on ignorance."[45] That such an educational requirement might have the effect of educating the children "to" a comprehensive liberal conception does not render the effort one of comprehensive liberalism, says Rawls. But Rawls does not address the more important objection, from the parents: that the mere introduction of certain values with which the parents disagree violates the parents' religious rights to educate their children as they see fit.[46] Now there might indeed be good reasons to strip parents of a monopoly over their children's education.[47] But the argument for doing so must be seen as an argument from a specific brand of comprehensive

43. Rawls, Justice as Fairness: A Restatement, *supra* note 34, at 154-56.

44. *Id.* at 156.

45. *Id.*

46. *See* Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937 (1996).

47. *See* Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 Chi.-Kent L. Rev. 477, 489-92 (2000) [hereinafter Greene, *Civil Society*]; Abner S. Greene, *Why Vouchers Are Unconstitutional and Why They're Not*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 397, 406-08 (1999).

liberalism.[48] My position, generally, is that this form of comprehensive liberalism is proper regarding children, for there are good arguments for insisting on multiple repositories of power over a child's education. To the contrary, when competent adults are the subject of discussion, I believe we should revert to a true political liberalism, which would acknowledge the possibility that they have seen the truth through their own comprehensive doctrines. The way to do this is through balancing a partial gag rule on religious arguments in lawmaking against offsetting exemptions and accommodations.

48. *See* Greene, *Civil Society*, *supra* note 47, at 487-89 (describing my exchange with Jim Fleming and Linda McClain).