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The New Rawls and Constitutional Theory: Does It Really Taste that Much Better?

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It used to be a major enterprise of philosophers to compete for the most striking way to describe the human differentia. Surely the most famous and long-lasting such effort was Aristotle's "the human being is the rational animal," but there have been other formulae of note put forward too: Plato's "the human being is the featherless biped" is memorable in its own way, as well as the definition I associate with Cicero, that the human being is the "beast with red cheeks," i.e., the only being that blushes, or has shame. Let me propose a new entry into the "human being is" . . . sweepstakes: "the human being is the anniversary celebrating animal." So far as I know, the zoologists have discovered no other animal which shares this peculiar propensity with us, as, for example, the beaver and the bee share our technological proclivities.

We are now engaged in the celebration of a great anniversary—ten years of *Constitutional Commentary*—but at the same time we might note the coincidental fact of another relevant anniversary: just twenty years ago the Association of American Law Schools bestowed its highly prestigious Coif Award on a very thick, bright-green book that was only peripherally about law—John Rawls's *A Theory of Justice*.[1] These two coincident anniversaries mark events which turned out to be much intertwined. Despite the fact that Rawls's book has hardly anything in it that we would now call constitutional theory, it became, indirectly, a major force in the field. In retrospect this appears somewhat remarkable, for the book has little by way of the usual

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1. Richard B. Parker, *The Jurisprudential Uses of John Rawls*, in J. Roland Pennock and John W. Chapman, eds., *Nomos XX: Constitutionalism* 269 (N.Y.U. Press, 1979).

apparatus of such theory—its very complete index, for example, has no entry for constitutional or judicial review, none for Supreme Court, barely any for constitution, and in place of all these things has an elaborate theory of civil disobedience. Nonetheless, the two decades since Rawls's Coif Award have been decades of the dominance of constitutional theory, and Rawls's *Theory* has been a major part of the thinking of many of the chief figures in this field. One need go no further, say, than Ronald Dworkin, to note the indirect importance Rawls's *Theory* has had.

If the past two decades have been decades of constitutional theory, they have also been (and for much the same reasons) post-positivist decades. Roughly from World War II on, legal positivism and related views (legal realism, sociological jurisprudence) dominated American legal thinking, with but a few dissenting or questioning voices—Lon Fuller and Alexander Bickel are two who come to mind. Although legal positivism is not without implications for understanding constitutionalism, judicial review, and the like, these implications are relatively easily stated and did not yield a large or thriving constitutional theory industry. Our post-positivist age teems with constitutional theories, however, and these seem to be of two main types. On the one hand are the various post-modernist theories, for the most part oriented around issues of textual interpretation, meaning, and objectivity. Here we find theories heavily influenced by Hans-Georg Gadamer and his hermeneutical emphasis, or Jacques Derrida and his deconstructivist impulse. On the other hand is a type of theory I am tempted to call post-Rawlsean, for even though it does not always draw much in explicit detail from Rawls, it draws much in spirit and approach from him. Not only Dworkin, but David Richards, Michael Perry, Frank Michelman, Sotirios Barber, Stephen Macedo, and many others exemplify this post-Rawlsean strain of constitutional theory. The factor that differentiates post-Rawlsean from post-modernist theories is the former's greater concern with moral justification and appeal to principles of morality or justice in order to articulate a role for the Constitution and the Court.

These two chief types of constitutional theory move in quite different directions. The post-Rawlseans reject positivism's rigid separation of law and morality and instead describe or advocate a greater intermixture of the two, especially a greater role for morality in law, based in large part on a rejection of the positivists' frequent skepticism about the possibility of a firm or "ob-

jective" grounding for moral judgments. The renewed confidence in moral judgment betrayed by this group of theorists owes much, to understate the case, to Rawls. The post-modernists, on the other hand, challenge positivism's assumption that legal interpretation is (for the most part) a relatively straightforward enterprise: positivists believe it is the job of courts to say what the law is, and do not see that as a problematic task. As the post-Rawlseans challenge positivism by asserting the "objectivity" of moral judgment, so the post-modernists challenge positivism by denying the objectivity of interpretation. Nicely epitomizing the differences between the two approaches was the famous Ronald Dworkin-Stanley Fish face-off of some years ago, with Dworkin representing the post-Rawlsean and Fish the post-modern position.

Although the two types of theory move in quite different directions theoretically, they tend to converge practically, and thus the differences between them are not always clearly perceived. Their similarities can be seen in their common enemies—legal positivism, originalism—and in their common results—non-interpretivism, anti-originalism, and judicial activism. Thus constitutional theory in the post-positivist era has mostly been a series of briefs for a more active and more independent judicial role; by contrast, constitutional theory in the positivist era was, for the most part, an attempt to argue for the subordination of courts to democratic majorities.

Now, almost concurrently with the dual anniversaries of his Coif Award and *Constitutional Commentary*'s birth, Rawls has issued a new and in important ways quite different version of his theory of justice, raising the question whether *Constitutional Commentary*'s second decade will be lived in the shadow of the new Rawls as its first decade was lived (partly) in the shadow of the old Rawls. The differences between the new and the old Rawls certainly bear on matters of constitutional theory. For one thing, the new book, *Political Liberalism*, contains an explicit constitutional theory. For another, Rawls gently, but explicitly, takes issue with the approach to judicial action presented by the leading post-Rawlsean constitutional theorist, Ronald Dworkin.[2] Given the fact that it is Rawls, and given the fact that he has now become so much more explicit, it is almost certain that the new Rawls will have a real impact on the continuing enterprise of constitutional theory. My goal in this essay is to explore New

2. John Rawls, *Political Liberalism* VI § 6.3 at 236-37 n.23 (Columbia U. Press, 1993).

Rawls and his approach to constitutional theory, and to ruminate a bit on how satisfactory this neo-Rawlsean constitutional theory is.

Constitutional theory looms larger in New Rawls than in old, because the themes of protection of liberty and limited government take on substantially greater importance in *Liberalism* than in *Theory*. This is signalled in part by the appearance in the later book of a concern which hardly surfaced before: Rawls now clearly conceives the state as a coercive apparatus. "[P]olitical power is always coercive power backed by the government's use of sanctions . . . ."[3] In *Theory* Rawls hardly noticed the problem of coercion, for the most part emphasizing instead society as a system of "social cooperation."[4] Thus Rawls now develops a new theory of legitimacy, emphasizing the boundaries of legitimate state coercion.[5] With the recognition of those boundaries comes a heightened dedication to constitutionalism.

Between *Theory* and *Liberalism* the problem of constitutionalism has become more urgent for Rawls. The most obvious or surface reason for this is a certain practical difficulty that Rawls claims inspired the shift from *Theory* to *Liberalism*: "A modern democratic society is characterized . . . by a pluralism of comprehensive religious, philosophical, and moral doctrines. . . . No one of those doctrines is affirmed by citizens generally."[6] Nor can we expect any one to be so affirmed. Yet *Theory* presented a doctrine of justice that Rawls expected to become the one accepted doctrine. "An essential feature of a well-ordered society associated with justice as fairness is that all its citizens endorse this conception . . . ."[7] *Theory* in a sense posited the public acceptance of *Theory* itself as the necessary and sufficient condition for the realization of justice. *Political Liberalism*, on the other hand, seeks the appropriate response to the fact of irremediable pluralism, which Rawls "assumes" is "the normal result of the exercise of human reason within the framework of free institutions."[8] Rawls is quite insistent that his acceptance of this pluralism of ultimate views does not bespeak skepticism on his part about the possibilities of genuine knowledge regarding justice, the good life, and morality, or their religious and philo-

3. Id. at 136; cf. II § 4.1 at 68.

4. John Rawls, *A Theory of Justice* 3 (Harv. U. Press, 1971).

5. Rawls, *Political Liberalism* I § 6.2 at 37, II § 3.2 at 60, § 3.4 at 62, III; § 8.1 at 125-26, IV § 1.4 at 138, § 1.6 at 140, VI § 2.1 at 217 (cited in note 2).

6. Id. at xvi.

7. Id.

8. Id. at 4.

sophical groundings. Rawls "does not question that many political and moral judgments . . . are correct . . . . Nor does [he] question the possible truth of affirmations of faith. Above all [he] does not argue that we should be hesitant and uncertain, much less skeptical, about our own beliefs."[9] Rawls pithily summarizes his point with the very strong claim that so far is his view from being skeptical that "it would be fatal" to it if it were "skeptical about . . . truth."[10] New Rawls is no positivist.

Inevitable pluralism rests not on skepticism but rather on "recogni[tion of] the practical impossibility of reaching reasonable and workable political agreement in judgment on the truth of comprehensive doctrines."[11] Pluralism is (mostly) not the consequence of epistemological failings, but of practical necessities. There are certain "burdens of judgment," unnecessary to detail here, which, while they do not disprove the possibility of knowledge of moral and political truth, yet strongly predispose freely thinking human beings to differ in their understandings of the large religious, philosophical, and moral questions that face humanity. It is, Rawls concludes, perfectly reasonable that there should be such disagreement, and it would be quite unreasonable to expect otherwise.[12] It is most unreasonable to expect others to conform to one's own comprehensive view of the good.

If pluralism is the inevitable result of the exercise of human reason under conditions of freedom, then the only means whereby pluralism can be overcome is the use of power of some sort to overcome freedom. Since the existence of such pluralism is reasonable, and the acceptance of it is therefore also reasonable, impositions of authority to overcome pluralism are illegitimate. "[T]hose who insist, when fundamental political questions are at stake, on what they take as true but others do not, seem to others simply to insist on their own beliefs when they have the political power to do so."[13] Inspired by his insight into inevitable pluralism, Rawls recasts the aim or purpose of his theory. The aim of *Theory* was to present a philosophic doctrine of justice, built upon the contractarian tradition, as a position superior to the then-dominant approach, utilitarianism. The aim of *Political Liberalism*, however, "is to resolve the impasse in the democratic

9. Id. II § 3.5 at 63.
10. Id. IV § 4.1 at 150.
11. Id. II § 3.5 at 63.
12. Id. II § 2 at 54-58.
13. Id. II § 3.3 at 61; cf. I § 6.2 at 37.

tradition"[14] or "in our recent political history."[15] The aim is more immediately practical, and relates to his perception of irredeemable disagreement. The impasse cannot be broken by following the strategy of *Theory*, that is, by adumbrating a doctrine of justice at the same level as those doctrines that have produced the impasse. He must proceed on the basis of accepting the pluralism and thus, in a way, accepting the impasse. His solution to this paradoxical task is the distinction between two types of conceptions of justice—political and comprehensive.

Comprehensive doctrines are more familiar to us, for they are the types of which utilitarianism and Rawls's own justice as fairness were taken as instances in *A Theory of Justice*.[16] Comprehensive doctrines, apparently, are the kind of "religious, philosophical, and moral doctrines" that citizens normally hold. They are comprehensive in that they relate typically to a very wide range of moral and political phenomena.[17] "Religious and philosophical doctrines express views of the world and of our life with one another, severally and collectively, as a whole."[18] Comprehensive doctrines appeal for their validity to what Rawls loosely calls "metaphysics," a notion which he unfortunately leaves very vague, but which seems to include appeals to such disparate things as "specific metaphysical or epistemological doctrine[s]" and to the kind of deep faith commitments one finds in religious believers.[19] Comprehensive conceptions appeal to what we might be tempted to call the ultimate truths of philosophy or religion.

The political conception of justice differs from the comprehensive on all these matters. Its subject matter is limited in scope to the political realm—to what Rawls calls "the 'basic structure' of society," defined as "a society's main political, social, and economic institutions."[20] Many important moral matters thus lie outside its coverage. It is also "free-standing" in that "it is neither presented as, nor as derived from, . . . comprehensive doctrine[s]."[21] It is "presented independently of any wider comprehensive religious or philosophical doctrine."[22] It thus "offers no specific metaphysical or epistemological doctrine beyond

14. Id. VIII § 9 at 338.
15. Id. VIII § 14 at 368.
16. Id. at xvi.
17. Id. I § 2.2 at 13.
18. Id. II § 2.4 at 58.
19. Id. I § 1.4 at 10; cf. I § 5.1 at 29 n.31.
20. Id. I § 2.1 at 11; cf. VI § 4.1 at 223.
21. Id. I § 2.2 at 11.
22. Id. VI § 4.1 at 223.

what is implied by the political conception itself."[23] It aims to be more or less neutral in its derivation between all the various comprehensive doctrines to which citizens adhere in society. This is the quality which promises a way beyond the "impasse"; neither originating in, nor making any judgments about, the truth or value of any comprehensive conception of justice, the political conception aims to find its ground completely independently of the various conflicting comprehensive doctrines, and thus would in principle seem capable of achieving widespread (universal?) support despite inevitable pluralism and our contemporary impasse. This aspect of the political conception tempts me to call it a second order doctrine, as opposed to the comprehensive first order doctrines. Like the theory of religious toleration, which takes as its point of departure an analogous impasse of religious doctrines, the political conception is not a set of commitments at the same level as the competing comprehensive doctrines. Also like religious toleration, accepting the political conception does not require one to eschew continuing to hold one or another of the competing doctrines, so far, that is, as it is compatible with the principles of justice as developed via the political conception.[24]

If the political conception is foreclosed from appealing to any comprehensive doctrine, or from being itself a comprehensive doctrine, to what can it appeal? Can we generate a conception of justice merely from the fact of impasse (or inevitable pluralism) and the resultant resolve to avoid appeals to all such comprehensive doctrines? Is it enough to "agree to disagree"? Rawls thinks not, for he seeks a theory of a genuinely moral character, which a mere Hobbesian *modus vivendi* does not provide.[25] Moreover, he still seeks the same sort of "thick theory of justice" he had presented in *Theory*, and an "agreement to disagree" is not substantive enough to produce such a theory.

Rawls thus includes a third element in his notion of a political conception. "The content . . . of a political conception of justice . . . is expressed in terms of certain fundamental ideas seen as implicit in the public political culture of a democratic society." Rather than looking to the kind of ultimate truths about "Humanity, God and Nature" proclaimed within one or another of the comprehensive doctrines, Rawls instead "starts from within a

23. Id. I § 1.4 at 10; I § 2.2 at 12; VI § 4.1 at 223.

24. Id. II § 3 at 58-66.

25. Id. IV § 3.4 at 147-49.

certain political tradition."[26] This way of generating content for a political conception coheres with the original inspiration for the turn to political conceptions:

> Justice as fairness aims at uncovering a public basis of justification on questions of political justice given the fact of reasonable pluralism. Since justification is addressed to others, it proceeds from what is, or can be, held in common; and so we begin from shared fundamental ideas implicit in the public political culture in the hope of developing from them a political conception that can gain free and reasoned agreement in judgment. . . .[27]

For present purposes it is not necessary to supply the details of how Rawls moves from his new approach to theory to his old conclusions. Purporting to draw from widespread and non-controversial ideas in the political culture, he reconstructs his famous Original Position and the deliberation there which is to produce agreement on his two principles of justice. Some of the details are significantly different from *Theory*, and, it must be said, are improvements over the latter. Where two decades of critics had shown that many key elements of the Rawlsean deductions in *Theory* were unsuccessful (for example, the derivation of the primacy of liberty) many of the same elements are much less vulnerable to criticism in *Liberalism*.

I pass over these many interesting matters, however, in order to come to the feature of Rawls's new theory which bears most directly on his development of a constitutional theory, his notion of public reason. The Supreme Court comes into Rawls's theory as "exemplar of public reason." Rawls generates the notion of public reason by pressing the question of legitimacy adverted to above: "when may citizens . . . properly exercise their coercive political power over one another?" Rawls's most general answer to that question is the "liberal principle of legitimacy": the "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."[28] This foundation is a rather complicated way of saying that legitimate coercion is coer-

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26. Id. I § 2.3 at 13-14; cf. VI § 4.1 at 223.

27. Id. III § 2.2 at 100-01.

28. Id. VI § 2.1 at 217. Another effort to develop this notion of public reason into a constitutional theory is Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 Phil. & Pub. Aff. 3, 20-37 (1992).

cion used according to the Rawlsean principles of justice understood as a political conception.

Almost the very definition of illegitimate coercion in the context of inevitable and reasonable pluralism is the use of power in the service of one or another comprehensive doctrine. "[O]n matters of constitutional essentials and basic justice, the basic structure [of society] and its public policies are to be justifiable to all citizens . . . . This means that in discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrines . . . ."[29] Legitimacy requires a special kind of justificatory discourse, that is, discourse based on a political conception. This special or even artificial discourse requires that citizens and officials set aside what they consider "the whole truth" about moral and political matters as expressed in their comprehensive conceptions, and instead deploy "public reason."

The artificiality of public reason may appear strange at first, but Rawls finds strong precedent for it in quite familiar practices. There are many "cases where we grant that we should not appeal to the whole truth as we see it, even when it might be readily available." Rawls finds the rules of evidence in criminal cases to be just such an instance—we place a number of "artificial" constraints on what may enter a trial as an acceptable fact and attempt to make decisions on the basis of this constrained information.[30]

Courts, even as they are now constructed, are already a good, if not perfectly consistent, model of what he means by the operation of public reason. "[P]ublic reason is the sole reason the court exercises. It is the only branch of government that is visibly on its face the creature of that reason and of that reason alone."[31] Rawls has a number of somewhat separate but clearly related points in mind. First, courts uniquely must "justify [in public] . . . why they vote as they do or make their grounds consistent and fit them into a coherent constitutional view over the whole range of their decisions."[32] In our ordinary thinking about judges and their task, we ascribe more or less the same kind of limitations to what judges may properly do as Rawls ascribes to public reason as such.

29. Id. VI § 4.3 at 224-25; cf. I § 1.4 at 10.

30. Id. VI § 2.3 at 218-19.

31. Id. VI § 6.3 at 235.

32. Id.

> The justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people's religious or philosophical views.[33]

As these last quotations might suggest, Rawls's theory is interesting and promising for constitutional studies because it points to a middle way between the polar positions of originalism and non-originalism, interpretivism and non-interpretivism, into which constitutional theory has unfortunately fallen. Rawls differs from the more conservative partisans in the present interpretation wars in that he (implicitly) rejects any strictly originalist or positivist approach to constitutional decision. As Rawls puts it, "[T]he political values of public reason provide the Court's basis for interpretation."[34] That is to say, the court is not limited to mere text or history for its principles of decision (as originalists would have it), but may or even ought to appeal to the set of not strictly legal principles contained in a political conception of justice.

Rawls equally opposes the other side, including those who seemed most inspired by his own earlier position. The Old Rawlseans, as opposed to New Rawls, do not distinguish between comprehensive and political conceptions, and thus have a much blurrier notion of the difference between public and non-public reason. When they reject the typical limitations on judicial action contained in the strictures of legal positivism and interpretive theories like originalism, they bring the judge into a situation of merging moral, or comprehensive, notions with the law. As an illustration, consider the following from the pen of the most important of the "old Rawlseans": "[e]ach judge's interpretive theories [and practices] are grounded in his own convictions about the 'point'—the justifying purpose or goal or principle—of legal practice as a whole, and these convictions will inevitably be different, at least in detail, from those of other judges."[35] In Dworkin's prescriptive theory of constitutional interpretation, appeal

33. Id. at 236. Rawls, interestingly, echoes a doctrine of Hobbes in his notion of public reason. Law is the expression of *public* not private reason, as for Hobbes it is the expression of *public* not private will. Already in *Leviathan* the artificial constitution of the legitimate principle of action looms into view, as it will continue to do in the thought of important Rawlsean predecessors, such as Rousseau with his theory of the general will and Kant with his categorical imperative. See Thomas Hobbes, *Leviathan* 183 (Richard Tuck ed., Cambridge U. Press, 1991). For discussion, see Michael P. Zuckert, *Hobbes, Locke, and the Problem of the Rule of Law*, in Ian Shapiro, ed., *Nomos XXXVIII: The Rule of Law* (N.Y.U. Press, forthcoming 1994).

34. Rawls, *Political Liberalism* VI § 6.2 at 234 (cited in note 2).

35. Ronald Dworkin, *Law's Empire* 87-88 (Belknap Press, 1986).

to the judge's own best moral understanding and to the judge's understanding of the community's moral understanding both play a part. For example, Dworkin describes his ideal judge Hercules's way of answering questions posed in hard cases:

> Hercules's answer will depend on his convictions about the two constituent virtues of political morality we have considered: justice and fairness. It will depend, that is, not only on his beliefs about which of these principles is superior as a matter of abstract justice but also about which should be followed, as a matter of political fairness, in a community whose members have the moral convictions his fellow citizens have.[36]

Rawls's theory is so promising because it appears in a certain specific sense to be more comprehensive than the partisans on both side of the old wars. In particular, New Rawls appears truly responsive to the important criticisms and objections each side had to the other. Perhaps most striking is his great distance from the old Rawlseans and his implicit sympathy with the chief worries conservative critics always had. Critics of the call for the blending of law and moral theory had been bothered by something rather like what New Rawls is bothered by—the blending of law and morality is always going to mean the imposition of somebody or other's morality. Robert Bork, one of the leading opponents of the old Rawlseans, insists courts should limit themselves to text and history; to stray beyond these into the sphere of morality is to promote a crisis of legitimacy. A doctrine of "moral and ethical values . . . has no objective or intrinsic validity of its own."[37] If the "values" to be embodied in law do not derive from the text or the history of the Constitution, they are an illegitimate imposition of somebody's—the judge's—moral values in place of those of the majority. Rawls does not share Bork's skepticism about the nature and cognitive status of moral knowledge, but he does share a central part of Bork's concern. Even if moral knowledge is genuinely available, the moral views of, say, Justice Brennan are unlikely to be persuasive to Bork;

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36. Id. at 249 (footnote omitted). It should be noted in passing that Dworkin is using "political" in the more standard sense and not in Rawls's specific way to distinguish political from comprehensive moral doctrines. Cf. id at 3, where Dworkin uses "political morality" and "morality" simpliciter interchangeably. Cf. the similar standard of Stephen Macedo: "Deciding which interpretation of the case law and history is *better* requires a judgment both about which interpretations adequately fit received legal materials and also about which interpretation shows that material in an honourable and morally worthy light." Stephen Macedo, *Liberal Virtues* 196 (Clarendon Press, 1990) (emphasis in the original).

37. As quoted in Macedo, *Liberal Virtues* at 164 (cited in note 36).

and, Rawls insists, Bork is quite correct not to want to have Justice Brennan's (or anyone's) comprehensive moral conception shoved down his and the country's throat when he, reasonably, does not agree with it. Rawls's insistence that the court is an exemplar of public reason and thus not of comprehensive conceptions means that the old Rawlseans, no matter how confident they are of the truth and indispensability of morally informed jurisprudence, are out of bounds in calling for their particular merger of law and morality.

On the other side, Rawls also implicitly endorses the anti-originalist claim that the originalists too suffer from a crisis of legitimacy. Rawls, like the old Rawlseans, insists that the principles of constitutional adjudication require a legitimating rationale just as much as other exercises of coercive political authority. As Stephen Macedo puts it, "[T]he Constitution, in order to be authoritative, must be capable of being read as a reasonable approximation to principles that pass the test of public justification. As supreme law the Constitution needs to be both vindicated and justified by interpreters."[38] That is to say, not merely must the Constitution be "capable of being read" in a legitimating way; it must be so read in practice. Such a rationale must be moral, which requirement the appeal to majority rule as such does not seem to satisfy. Wherein lies the authority of majorities? Or of the Founders? Or of the founding generation? Whatever legitimates the Constitution must infuse and legitimate decisions taken under it.[39] The retreat into a positivist or quasi-positivist textualism misses the point of legitimacy.

Rawls's new constitutional theory thus stands athwart the warring camps via his notions of public reason and the political conception of justice: the court as exemplar of public reason means that the court is to act in light of direct and conscious appeal to the legitimating principles of the system as a whole, but not in terms of contentious, controversial comprehensive doctrines which Bork and other free and equal citizens have a right not to have imposed on them, even by well-meaning and progressive liberal judges. If it works, one would have to say New Rawls is unequivocally a better product than the Old Rawlseanism.

I believe that it is going to take some time for legal and political theorists to sort out all the issues involved in Rawls's new theory. It requires assessment at two places in particular.

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38. Id. at 171.

39. For an explicitly Rawlsean treatment of this issue, see Freeman, 21 Phil. & Pub. Aff. at 9-17 (cited in note 28).

The one is at its very heart: how valid is Rawls's new idea of a political conception of theory as distinguished from a comprehensive doctrine? Closely related is the question of how successful Rawls has been in giving us a version of such a political conception. These two questions require a kind of exposition and analysis I cannot supply here, but do attempt in another essay.[40] I believe there are a number of serious questions to be raised at this level, chief among which perhaps is this: is it not remarkable that Rawls has generated as a "political conception" more or less the same theory of justice he generated two decades earlier as a "comprehensive doctrine?" More than that, investigation shows, I think, that Rawls does in fact surreptitiously appeal to the old theory in order to get the content for his new theory. If this claim is correct, then the new theory is merely a more or less well concealed version of the sort of comprehensive doctrine Rawls himself has shown should not be the basis for constitutional adjudication.

Although this level of question is central to the assessment of New Rawls as a whole, I pass it by with only these few remarks to take up some narrower questions regarding Rawls's constitutional theory itself. While these are not so decisive for assessing the overall validity or value of *Political Liberalism*, they do help us judge whether it can indeed provide an adequate constitutional theory.

To begin an assessment of Rawls's constitutional theory requires recognizing that despite the sympathies it may have with constitutional conservatism it nonetheless sanctions a judicial approach with much activist bite. He endorses, for example, the fully libertarian and activist approach to First Amendment questions taken by the Warren and Burger Courts.[41] More significantly, he endorses as required by public reason the most controversial decision the recent court has made—*Roe v. Wade*. Under his political conception, a woman has "a duly qualified right to decide whether or not to end her pregnancy during the first trimester."[42] Rawls's constitutional theory thus goes further towards the non-interpretivist position than some other important mediatory doctrines, such as John Hart Ely's, which might also be called political conceptions for their attempt to avoid

40. Michael P. Zuckert, *Is Egalitarian Liberalism Compatible with Limited Government?* in Christopher Wolfe and Robert George, eds., *Liberalism and Natural Law* (forthcoming).

41. Rawls, *Political Liberalism* VIII §§ 10-13 at 340-68 (cited in note 2).

42. Id. VI § 7.2 at 243 n.32. There is some uncertainty over whether Rawls holds this to be a constitutional or merely a moral or political right, however.

committing Court and Constitution to one or another comprehensive moral doctrine.[43]

Because the Constitution must be read in the light of public reason, its authority as mere text is qualified and limited for Rawls. He does not hesitate to draw the conclusion that a duly enacted constitutional amendment clearly at odds with public reason so understood could rightfully be resisted by the Court. "The Court could say, then that an amendment to repeal the First Amendment [establishment clause] and replace it with its opposite fundamentally contradicts the constitutional tradition of the oldest democratic regime in the world. It is therefore invalid."[44] Under the New Rawlsean political theory, then, the Court is authorized to be pretty much as activist as under the Old Rawlsean comprehensive theory.

The boundaries of judicial activism under the New Rawlsean theory are uncertain, however, for there are significant ambiguities in his formulations that substantially diminish the value of his approach for constitutional theory. Two ambiguities in particular are troubling. One involves the relationship between text and related materials, on the one hand, and public reason as such, on the other, within the practice of constitutional adjudication. The other ambiguity concerns the relationship between Rawls's own justice as fairness as a political conception and other possible legitimate political conceptions of justice.

In order to understand the first ambiguity, let us conceive of three (in principle) separate grounds of decision on constitutional questions. First are the sort of traditional legal materials that originalists like Bork consider legitimate—text, history, precedent, recognized legal principles regarding legal construction, and so on. Second are those comprehensive moral doctrines that Old Rawlseans like Dworkin or Perry see as valid in addition to or as guiding the use of the first set of bases of decision. Finally, there is Rawls's specific contribution—the political conception of justice and its embodiment in justificatory public reason. Now these three may overlap considerably, but surely there are areas where they do not. The polemic against originalism explicitly carried on by Dworkin and others and implicitly accepted by Rawls shows that the first base is not identical to the other two. Likewise Rawls's retreat from a comprehensive to a political con-

43. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harv. U. Press, 1980).

44. Rawls, *Political Liberalism* VI § 6.4 at 239 (cited in note 2).

ception shows that the second and third bases do not necessarily entirely coincide either.

Certain aspects of Rawls's position are tolerably clear. As we have seen, he rejects exclusive reliance on the first base and rejects any reliance on the second. Instead, he calls for some combination of the first and the third. The Court's decisions are to "reasonably accord with the constitution itself and with its amendments and politically mandated interpretations."[45] This formula and several others like it can be understood in at least three different ways, however. First, it might be that the "public conception of justice" serves as a regulative "principle of interpretation" for a task that is essentially one of constructing the relevant legal materials (Base 1) in the Dworkinian mode of finding the best (biggest) "fit" for all these materials. Perhaps along this line, Rawls says that "the best interpretation is the one that best fits the relevant body of these constitutional materials, and justifies it in terms of the public conception of justice . . . ."[46] Hence Rawls claims in a footnote to accept (more or less) the Dworkinian conception of fit.

However, in that same footnote, he explicitly takes issue with Dworkin's (occasional) view that the "requirement of fit alone" is sufficient. "I incline to require, in addition to fit, that in order for the court's decision to be a properly judicial decisions of law, that the interpretation fall within the public political conception of justice . . . ."[47] This does not necessarily contradict the interpretation put forward above, but it does point toward a different method of interpretation. Fit and political conception here seem to be in principle two separate ways of finding answers to constitutional questions. The acceptable answer is one that satisfies both: Rawls suggests that there is some range of alternative interpretations of the legal materials which satisfy the requirement of fit, but that only those interpretations which also fall within the political conception of justice are to be used by the Court.

These formulations may understate the problematic character of constitutional interpretation, for they assume what cannot be assumed—that there is at least one, and perhaps more, interpretations that "fit" in some strong sense of "make coherent the relevant legal materials," and also coincide with the political conception of justice. In many cases either or both of these assump-

45. Id. VI § 6.2 at 234.
46. Id. VI § 6.3 at 236.
47. Id. at 237 n.23.

tions may not be satisfiable. The example cited earlier, abortion, might be just such a case, for although the political conception affirms such a right, no argument has ever been put forward to my knowledge which persuasively shows that an interpretation "fitting" all the relevant legal materials comes to the same conclusion. Surely Justice Blackmun managed no such showing. Whatever one thinks of this particular example, it must be admitted in principle that instances of non-overlap are conceivable and even likely. What about these cases? What if the "fit" requirement points to one conclusion in a constitutional case and the political conception to another? What, for example, if the people adopt an amendment repealing the Establishment Clause of the First Amendment? We already have Rawls's answer: the political conception is to come into play and to have priority over the most obvious kind of "fit" arguments. Given Rawls's emphasis on the relation between the political conception and public reason on the one hand, and legitimacy on the other, this priority for the conclusions of public reason makes sense. Thus on occasion Rawls uses formulae which suggest a more independent role for public reason: "[T]he political values of public reason provide the Court's basis for interpretation."[48] Rawls thus identifies the "political conception of justice" with the "higher law" said to be embodied in or pointed toward by the Constitution.[49]

So far as Rawls leans to a more or less independent role for the political conception of justice, he of course retreats from the concern with fit and the sway of the legal materials as such. Perhaps for this reason, he hesitates to endorse unequivocally the notion of the independent power of the political conception, qualifying it with somewhat more moderate claims such as the following: "the justices may and do appeal to the political values of the public conception whenever the constitution itself expressly or implicitly invokes those values, as it does, for example, in a bill of rights guaranteeing the free exercise of religion or the equal protection of the laws."[50] Judges thus seem free to appeal to the political conception only when the Constitution "invokes those values," but it is difficult to know whether this is a real limitation or not, for, if the political conception has something to say on a given constitutional issue, presumably then the Constitution must "invoke those values" (raise the issue?) in some sense or other—not necessarily in the same sense as the political con-

48. Id. § 6.2 at 234.
49. Id.; cf. § 6.1 at 232.
50. Id. VI § 6.3 at 236.

ception, for if that were the case, then the appeal to the political conception would be quite superfluous. The Constitution's "invocation" would presumably be quite sufficient to settle matters. Thus Rawls does not say anything to the effect that the political conception can be used only when it leads to the same answer as the more traditional legal materials.

Rawls thus has three distinguishable versions of the role of the political conception of justice in constitutional decisionmaking. The political conception can be (1) an interpretive principle, governing the effort to construe the legal materials, present from the outset in the interpretive process; (2) a conjunctive requirement to be deployed along with independently derived "fitting" interpretations; or (3) an independent force in interpretation, and in the final analysis a trump over other kinds of interpretation. No one of the above alternate versions of Rawls's interpretive theory is clearly correct. He seems genuinely unclear on the desirable or legitimate relationship between the legal materials and the political conception. But that, of course, is just where the drink needs its fizz. Rawls is more ambiguous than some of the old Rawlseans or the Borkeans precisely because he is so sensitive to the dual imperatives of constitutionalism, and the dual dangers any approach to constitutional interpretation must avoid. In a word, his focus on imposition points him in two quite different directions; it leads him to require a legitimating rationale for legal actions, but it also makes him chary of philosopher-judges imposing their conceptions of justice independently of law. The political conception, after all, is one that "all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational." That requirement does not exhaust itself in legitimating a democratic process, but it does point that way in part, and it leads Rawls to hesitate to arm judges with an altogether independent power to appeal to the political conception over and against law. The ambiguities in Rawls, in other words, reflect the fact that he has discovered in his own way the deep tension at the core of law as such. It has and requires a moral justification which always stands ready to judge it and correct it, and yet law as law is never just the same as its moral justification and requires some locus and mode of formulation and promulgation which claims validity for its products as such. There is, I suspect, no real solution to this problem. Our contemporary Borkeans and Old Rawlseans

each see but one side of the dilemma.[51] Rawls's major innovation, the notion of the political conception, shows greater sensitivity to both sides of the dilemma, but contributes nothing to its solution. That would be fine, if Rawls were aware of the dilemma he has uncovered. Instead, his solution either gives too much to the Old Rawlsean side, or wavers uncertainly between formulae which weigh in now on one and now on the other side.

That Rawls's notion of a political conception does not change the nature of the problem, or contribute to its solution, is indicated by the second major ambiguity in his theory—this one concerning the relation between justice as fairness and other possible political conceptions. The dilemma at the heart of law, and especially constitutional law, often emerges as the question of *whose* moral conceptions are to judge and justify positive law. The Rawlsean notion of a political conception at first appears to be an ingenious response to that question: nobody's moral conception is to judge and justify, if by that we mean a comprehensive doctrine, but everybody's is, if we look to a political conception which articulates, extends, and renders coherent ideas present in the public political culture and thus (somehow) accepted by all. Nonetheless, Rawls does not escape the problem of whose morality is to trump so easily as he assumes, for he concedes that there are an indefinite number of political conceptions, and there will be disagreement among these just as there is on comprehensive doctrines.[52] The problem of imposition thus recurs at the second order level of political conceptions. Indeed the problem is so severe that it is not clear that Rawls gives us any reason to suppose the broader "impasse" from which he begins can any more readily be broken by recourse to political conceptions than by the comprehensive conceptions themselves. Since Rawls provides little discussion of possible political conceptions other than his own, it is difficult to know how much variation he expects these to contain. He seems to anticipate less variety among political conceptions than among comprehensive conceptions. All the political conceptions will belong to a "family of liberal theories of justice," a family whose family resemblance will inhere, it appears, in their acceptance of the freedom and equality of citizens within a democratic constitutional system. Surely this is a narrower range of views than exists, say, between Robert Filmer and Karl Marx, but it still seems so broad

51. For fuller discussion, see Zuckert, *Hobbes, Locke, and the Problem of Rule of Law* (cited in note 33).

52. Cf. Rawls, *Political Liberalism* VI § 6.3 at 237 (cited in note 2).

as not to satisfy Rawls's initial desire to overcome the "impasse of our times" nor to provide a clear-cut and legitimate (non-imposing) basis for constitutional decision. It does not overcome the impasse of our time because, Rawls says, that impasse is precisely over the meaning and implications of free and equal citizenship in a liberal democracy. It does not provide a satisfactory basis for judicial action, because it provides no second order consensus, or even potential consensus, to replace first order dissensus. Recall Rawls's initial statement of his "hope of developing from . . . shared fundamental ideas . . . a political conception that can gain free and reasoned agreement in judgment." By the time he comes to the end of his exposition, Rawls seems to step way back from this hope, so central to the justification for his whole project.

In a word, New Rawls's constitutional theory is beset with so many uncertainties, ambiguities, and insufficiently settled questions, that even if the broader political philosophy to which it is attached is viable, the constitutional theory does not appear to be so. So far as New Rawls does taste better, it is because his theory now better captures the competing considerations that make the enterprise of constitutional theory so difficult and satisfactory answers so elusive: New Rawls shows sympathy now with the legitimate concerns of Robert Bork, as well as with those of Ronald Dworkin. But, I think it fair to say, New Rawls will nonetheless not play so large a role during *Constitutional Commentary*'s second decade as his earlier incarnation did during *Constitutional Commentary*'s first decade. New Rawls is a little sweeter but it just hasn't got enough fizz.