



Volume 54 | Issue 4

Article 8

2009

Reply

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Recommended Citation

Martha Nussbaum, *Reply*, 54 Vill. L. Rev. 677 (2009).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol54/iss4/8>

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REPLY

MARTHA NUSSBAUM

IT is a pleasure to respond to the papers in this symposium. I am very grateful to all the participants for their thoughtful engagement with my book and for teaching me so much about Catholic traditions of ethical and political thought. In this brief and inadequate set of replies, I will confine myself to issues about my book and will try, for the most part, to avoid sorting out the differences of opinion that the papers manifest about the right way to interpret the works of Jacques Maritain and John Courtney Murray. I note that there are such differences, and it would be interesting for readers to ponder them. I now simply comment briefly on each paper.

I. REPLY TO GREENAWALT

I am extremely grateful to Greenawalt for his searching discussion. Greenawalt is a magnificent scholar whose two books on the Religion Clauses are an essential starting point for any further work on them. Unfortunately for me, the volume on Free Exercise came out just before the book went into copy edit, so I was unable to consult it as extensively as I would have liked; the volume on Establishment came out too late for consultation. But at least I can record my admiration for it here.

I begin with a few smaller points. First, I think we can show that the Pilgrims were motivated not only by a search for liberty but also by the awareness that liberty was unequally distributed in England. How, indeed, could they not be? They were subjected to brutal harassment, as the dominant majority was not. They were treated as a minority without civil rights equal to that of the majority. Insofar as they acted in response to that problem, they were looking for non-subordination, and that is what I mean by saying that they were concerned with equality. As for their subsequent conduct, they did not persecute as aggressively as did the later Puritans, but they were persecutory enough to be unable to live with Roger Williams, so I think my statement that they failed to investigate and consistently apply their own non-subordination idea is correct. I never say, however, that they had a “developed philosophy” of equality. I am sure they did not.

As for Williams: Greenawalt cannot refute my reading of his philosophical works simply by pointing out that he frequently alludes to his own religious views. Of course he does, and nobody who reads them could be unaware of that fact. The question that must be faced, however, concerns the structure of his arguments for his primary philosophical conclusions: do these arguments rely on the religious doctrines as essential premises, or

do they not? Seventeenth century writers were fond of larding their writings with allusions and citations of all sorts, particularly to the Bible and other religious texts. Hugo Grotius, an exact contemporary of Williams, is a neat parallel in this respect. Grotius, however, helpfully informs his readers, in the Prolegomena to *De Iure Belli Ac Pacis*,¹ that these religious doctrines are absolutely inessential to his arguments. In a famously scandalous sentence, he points out that his conclusions would follow “even if we should concede (*etiamsi daremus*, words that became famous as a name for the scandal) that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.”² Without that sentence, no doubt many interpreters would have thought that the religious references that are so frequent in the subsequent text supplied premises essential for Grotius’s conclusions. Grotius informs us that this is not the case: the arguments are independent of religion. What I am saying about Williams is that he argues like Grotius: in such a way that his conclusions follow even if we leave aside the religious doctrines, thus in a way that can be followed and accepted by someone who does not share Williams’s own religious views. Since Williams had very heterodox religious opinions, and therefore was writing to an audience composed primarily of people who did not share his views, a reconstruction of the arguments that shows how he might have expected them to persuade such people seems to me to have advantages over one that makes them depend on a view that, as Williams knew, almost nobody accepted. I offer such a reconstruction. Now the ball is in the other court: it is incumbent upon critics to show that my reconstruction doesn’t work, and/or to propose a superior one, going into the detail of the text.

As for Williams’s influence: I have no wish to claim that Williams’s books, published in England, were influential in America. But he was a voluminous correspondent, and his public letters to the colony of Rhode Island were public documents of much influence, as was the charter he helped Charles II design. For many decades, moreover, he administered that colony and designed its institutions. So his political practice is what I think influential, and the theory that evidently and conspicuously underlay that practice. (Many of his public letters are highly theoretical, concerning such matters as the nature of conscience, the idea of religion-based accommodation, and much more.) Not everyone liked Rhode Island: but by Independence, even those colonies that still had established churches all had, in their state constitutions, very strong defenses of liberty of conscience in the Williams spirit.

Concerning the specialness of religious conscience, Greenawalt and I do not have a large difference, I believe. I take very seriously the issue of fairness to non-religious comprehensive doctrines, and I therefore pro-

1. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE*, BOOK III 1745-62 (Richard Tuck ed., Liberty Fund, Inc. 2005) (1625).

2. *Id.* at 1748.

pose that, if we wish to defend accommodations, we broaden the notion of conscience to include many good-faith searchers after meaning whose views do not fit a standard religious definition. Greenawalt agrees, where the draft is concerned. He proposes a sterner standard for drug cases. I agree that in those cases we face a larger problem of sincerity, and to that extent, he may, after all, be right to propose a more stringent inquiry. Philosopher that I am, I am indeed, as he says, “nervous” about having different principles in different areas. I would prefer a consistent and principled approach. The problem is complicated by the fact that I do not believe drug laws are good public policy or, indeed, good philosophy. (I am a Millian about the criminal law.) So for me, one way of achieving a consistent principled approach might involve jettisoning the drug laws. But I agree that if we keep existing drug laws, we have to have some way of screening out bogus claimants, and to that extent, Greenawalt’s proposal, as a practical strategy, may be the best we can do.

On the question of religious groups and non-discrimination: I do not address that issue in *Liberty of Conscience*, but it is a hugely important issue, and I shall address some parts of it in my Reply to Brennan.

The bulk of this Reply, however, will now be devoted to answering Greenawalt on his fourth question: the question about “public reasons.” Greenawalt says that in *Liberty of Conscience* I discuss the issue of “public reason”: that is, what sorts of arguments should citizens of a pluralistic society give one another in various different contexts, and are religious arguments appropriately among such arguments? I was not aware that I had discussed that issue in *Liberty of Conscience*, and if I did allude to it, it must have been extremely briefly, for it forms no part of the argument I was presenting there. I do, however, have views on the topic, and, since Greenawalt presses me, I think it is time to say what they are. Before I can do that, however, I will need to give a much more detailed description of the debate that has unfolded around this issue, which is primarily a debate about John Rawls’s *Political Liberalism*.³

Rawls’s basic aim in *Political Liberalism* is to show that a liberal political conception of justice can be the object of an overlapping consensus among people who hold a wide range of different religious and secular comprehensive conceptions of the good. Only in this way, he believes, can the conception be justified to citizens of faith; and the wholehearted acceptance of the political conception by citizens of faith is, in his view, a key to the very survival of liberal democracy. Many aspects of Rawls’s program have won broad acceptance among thinkers representing a range of religious traditions. But one important part of his argument has occasioned ongoing controversy: the characterization of public reason and the related arguments concerning the “duty of civility.” This controversy was of great

3. JOHN RAWLS, *POLITICAL LIBERALISM* (expanded ed. 1996). I defend the view expressed in this section at greater length in an Introduction to a volume of essays commemorating the twenty-fifth anniversary of *Political Liberalism*, edited by me and Thom Brooks, and under contract to Columbia University Press.

concern to Rawls. In order to address it he revised his view in two successive stages: first, in the Introduction that he added to the Paperback Edition of *Political Liberalism* in 1996; and then, extending and clarifying this revision, in the important article “The Idea of Public Reason Revisited,” first published in the *University of Chicago Law Review*.⁴ The article is crucial to a full understanding of Rawls’s view on this important topic. Although Rawls’s revised view is surely not beyond criticism, it is important to distinguish criticism based on misunderstanding from criticism of the view as it is presented; to do this, we need to spend some time clarifying the notion of public reason.

According to Rawls, citizens in a constitutional democracy engage in many types of reasoning. Many of these go on within what he calls the “background culture,” a concept that includes both what is commonly called “civil society” and many parts of the political culture itself.⁵ It is very important to recognize that Rawls holds an extremely inclusive view of the forms of reasoning that can and should occur within the background culture. Citizens may appeal to any aspect of their comprehensive doctrine at any time, and Rawls does not even introduce any sort of moral ideal concerning how they ought to speak to one another. In this respect his view of public debate is much less restrictive than that of Jürgen Habermas, or the view of democracy advanced in some recent American writings on “deliberative democracy.”⁶

There are certain issues, however, in discussing which citizens ought to focus on the fundamental commitment to mutual respect and reciprocity on which the entire political conception is based. These are what Rawls often calls “constitutional essentials and matters of basic justice.”⁷ These include both structural issues—how basic political institutions are defined and related to one another, “the powers of the legislature, executive and the judiciary; the scope of majority rule”—and the definition of fundamental “equal basic rights and liberties of citizenship . . . such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law.”⁸ In the economic sphere, a social minimum “providing for the basic needs of all citizens” is an essential, but Rawls’s own more demanding and contentious “difference principle” is not.⁹ It is extremely important to recognize how specific and how narrow the range of issues that trigger the duty

4. John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

5. *See id.* at 767-68.

6. *See, e.g.*, AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996).

7. RAWLS, *supra* note 3, at 227-30; Rawls, *supra* note 4, at 767.

8. RAWLS, *supra* note 3, at 227.

9. Thus, “matters of basic justice” are not coextensive with “matters regulating the basic structure.”

of civility is. “[T]he limits imposed by public reason do not apply to all political questions.”¹⁰

In such fundamental areas, Rawls argues citizens ought to reason with one another using ideas and conceptions that all citizens can be expected not only to understand but also to accept. Our “exercise of political power is proper and hence justifiable” only when it is exercised in accordance with principles that all citizens can be expected to endorse.¹¹ This being the case, citizens ought to argue for these principles using concepts and premises that they can expect other citizens, holding different comprehensive doctrines, to accept. To argue in this way is to show adequate respect for one’s fellow citizens, who can be expected to hold a wide range of different comprehensive doctrines. (Although Rawls does not make this point sufficiently explicit, he is clearly thinking of discussions in the context of political decision-making, not the sort of discussion of constitutional ideas and conceptions in which citizens often engage in informal social associations in the “background culture.”)

What can such citizens expect one another to share? The “freestanding” concepts, principles, and arguments of the political conception (or family of conceptions): that is all. So, they should make their arguments in these fundamentally important matters using the materials of the political conception and that alone.

That is what Rawls means by the “duty of civility.”¹² This duty “also involves a willingness to listen to others and a fairmindedness in deciding when accommodations to their views should reasonably be made.”¹³ The duty of civility is a moral ideal and has no legal status. Thus, there is absolutely no question of citizens being restricted in their speech or given lower civic status on account of their nonobservance of this ethical duty.¹⁴ (People who speak of Rawls “silencing” religious citizens may possibly have misunderstood the nature of Rawls’s recommendation.) And it obtains in areas that could not possibly even be known to others, much less enforced by them: thus, it obtains not only when citizens are acting as legislators making proposals or as judges deciding cases involving constitutional essentials, but also when they are simply voting in the privacy of the voting booth, on issues that involve such essentials. Even then, says Rawls, they ought to endeavor to vote not simply in order to advance personal interests, but on the basis of reasons that they can expect their fellow citizens to share, as elements in the political conception they also share. Voting, although secret, is not a merely private matter, where such fundamentals are at issue: a moral ideal of reciprocity indicates that citizens ought to respect

10. RAWLS, *supra* note 3, at 214.

11. *See id.* at 217.

12. *See id.*

13. *Id.*

14. People who speak of Rawls “silencing” religious citizens may possibly have misunderstood the nature of Rawls’s recommendation.

one another even when they can get away (in terms of ethical criticism) with not doing so.

Rawls made it increasingly clear, in the later versions of his view, that the political conception should not be understood as a single account of political justice, but rather as a family of such accounts, the members of which would change over time. There are many acceptable liberal political conceptions that might fall within the overlapping consensus.¹⁵ Rawls's own conception is only one member of this family of "reasonable political conceptions."¹⁶ Another, he says, would be Habermas's discourse conception; another would be "Catholic views of the common good and solidarity when they are expressed in terms of political values."¹⁷ New doctrines may also be proposed over time, and this is important: "otherwise the claims of groups or interests arising from social change might be repressed and fail to gain their appropriate political voice."¹⁸ But "[t]he limiting feature of these forms is the criterion of reciprocity, viewed as applied between free and equal citizens, themselves seen as reasonable and rational."¹⁹ Thus, Rawls implies that public reason is never univocal and may contain within itself many types of disagreement. Argument on matters of basic justice will never be the mere application to a situation of principles already spelled out. (He also stresses that there may be many differences about how to assign weight to relevant considerations in a particular case.)

Public reason is not secular reason, Rawls stresses.²⁰ By secular reason, he means reasoning in terms of a non-religious comprehensive doctrine.²¹ Such doctrines are treated exactly the same way we treat religion: that part of the doctrine that figures in the political conception is a legitimate source of arguments in public reason. Utilitarians and other holders of ethical comprehensive doctrines are asked to be just as abstemious as religious believers.²²

What, however, becomes of the non-shared aspects of the comprehensive doctrines of citizens? When may citizens who accept the ideal of civility invoke aspects of their comprehensive doctrine that do not figure in the political conception or conceptions? Here again, Rawls's position evolved in response to criticism. In *Political Liberalism*, he contrasts two different approaches one might take to this question. The first, which he calls the "exclusive view," holds that "reasons given explicitly in terms of

15. See RAWLS, *supra* note 3, at l-li.

16. See Rawls, *supra* note 4, at 767.

17. *Id.* at 775.

18. *Id.*

19. *Id.* at 774.

20. See *id.* at 775.

21. See *id.*

22. In that sense, Rawls's position is very different from the influential position of Robert Audi. See, e.g., Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, in PHILOSOPHY AND PUBLIC AFFAIRS 259-96 (1989).

comprehensive doctrines are never to be introduced into public reason."²³ The second, which he calls the "inclusive view," holds that in certain situations citizens may present the "basis of political values rooted in their comprehensive doctrine, provided that they do so in ways that strengthen the ideal of public reason itself."²⁴ Rawls now argues that the choice between the two conceptions should be made by asking which one "best encourages citizens to honor the ideal of public reason and secures its social conditions in the long run in a well-ordered society."²⁵ In terms of this question, the inclusive view seems to him superior because it is more flexible, allowing citizens to advance the political conception in different ways as the situation seems to demand. For example, in a divisive debate about government support for religious schools, it may prove helpful, and stabilizing, to encourage religious citizens to express their arguments in terms of their comprehensive doctrine, if they do so in order to show "how their comprehensive doctrines do indeed affirm" the essential political values.²⁶ In a different case, suppose society is not well-ordered and there is a profound division about constitutional essentials, as happened over slavery. In this case, the abolitionists were well advised to invoke the religious sources of their views, which were very meaningful for many people; the same thing happened in the civil rights movement, except that there Martin Luther King, Jr. could also appeal to already established constitutional doctrines. Rawls argues that neither the abolitionists nor King violated public reason, since they invoked religion "as the best way to bring about a well-ordered and just society in which the ideal of public reason could eventually be honored."²⁷

Despite Rawls's support for the inclusive view, some religious critics felt that the view was not inclusive enough. Philip Quinn focuses on cases in which public reason fails to provide uniquely reasonable answers to troubling questions.²⁸ Rawls's ideal then asks us to try for a balance of values that we think other citizens will see as reasonable, or at least not unreasonable.²⁹ Quinn argues that in order to show our fellow citizens how reasonable persons can affirm the balance of values we favor, we may have to introduce elements of our comprehensive doctrine, and he worries that the requirement that citizens do this in ways "that strengthen the ideal of public reason itself" may possibly prove too narrow.³⁰ One cannot

23. RAWLS, *supra* note 3, at 247.

24. *Id.*

25. *Id.* at 248.

26. *See id.* at 248-49.

27. *Id.* at 250.

28. *See* Philip L. Quinn, *Political Liberalisms and Their Exclusions of the Religious*, in RELIGION AND CONTEMPORARY LIBERALISM 138-61 (Paul Weithman ed., 1997). Quinn does not actually produce a case in which he thinks the "inclusive view" would give bad advice; he agrees with Rawls that it covers well the cases Rawls discusses.

29. *See* RAWLS, *supra* note 3, at 253.

30. *See* Quinn, *supra* note 28, at 152.

be sure what the outcome of introducing a part of one's comprehensive doctrine will be, and Quinn suggests that it may be unfair to require citizens to make such calculations before they explain themselves in ways that may indeed be illuminating and helpful.

Whether this criticism is a strong one depends, I believe, on the further interpretation of Rawls's requirement. If it is understood as a requirement on the *intentions* of citizens, it is possible that it is not too narrow; if, however, the requirement is one of *rational prediction*—citizens can introduce such elements only when they have good reason to expect that doing so will strengthen the ideal of public reason—that may indeed be too limiting, requiring a time-consuming and indeterminate inquiry before expression is given to something citizens may feel helpful. Instead of making the condition more explicit, however, Rawls removes it, as we shall see.

Nicholas Wolterstorff focuses on cases where religious citizens are moved to object to the treatment of the poor in their society. Such citizens, he says, will rightly feel themselves “silenced” by Rawls's constraints, since they will want to appeal to their religious doctrines in saying why this treatment is wrong.³¹ Why, says he, should I pretend these are not my real reasons? Rawls's doctrine prevents religious citizens from having a “religiously integrated existence,” forcing them to make a sharp division between reasons that they link closely in their own minds.³² It is not at all clear to me that Rawls's “inclusive view” cannot handle the actual example, which seems similar to Rawls's own examples of King and the abolitionists. One might say, too, that part of living on respectful terms with others in a pluralistic society is, precisely, learning how to segment one's existence in certain ways; insofar as Wolterstorff objects to this segmentation, he may be objecting to the very idea of a pluralistic liberal society based on the values of mutual respect and reciprocity.

Paul Weithman makes a criticism that is, to my mind, especially telling because it accepts Rawls's ideal of public reason and finds fault with the doctrine of civility in terms of that idea. Religious citizens in a pluralistic society need to understand one another, lest divisive conflicts emerge, says Weithman. Often the best way to promote this mutual understanding is to encourage them to bring their doctrines forward in public debate, presenting in religious terms, for example, a narrative of the oppression their group has suffered. Such religiously inflected narratives are familiar

31. See Nicholas Wolterstorff, *Why We Should Reject What Liberalism Tells Us About Speaking and Acting in Public for Religious Reasons*, in RELIGION AND CONTEMPORARY LIBERALISM, *supra* note 28, at 162-81. Wolterstorff makes a number of other points, but since there are serious misreadings of Rawls in his paper, I shall not introduce them here.

32. Wolterstorff also questions the connection between respect and restraint, though perhaps he is focusing on cases that Rawls later calls “declaration” and “witnessing,” in which one is not asking the other party to accept one's premises and to be persuaded, but is rather just explaining the roots of one's own view.

to Americans, and they are often more explanatory and more gripping than terms drawn from the abstract nature of the political conception. Mutual trust and respect, far from being hindered by such appeals to religion, may be strengthened thereby. Sometimes it is helpful to conceive of one's fellow citizens as members of a specific group whose narrative we know; such contextualization often helps citizens to see how the values others invoke are in fact supportive of the key ideas of the political conception. Weithman cites the case of Abraham Heschel, who sent a telegram to President Kennedy urging him to support an expensive plan to aid African-Americans; he said that citizens of all faiths should support such a plan because "[w]e forfeit the right to worship God as long as we continue to humiliate Negroes." This invocation of religion, Weithman argues, far from showing disrespect to fellow citizens, actually helps them to understand the seriousness and force of Heschel's proposal. And yet Rawls might well exclude it, even on the "inclusive" view.

I am less convinced than Weithman is by his example. First of all, it is far from clear that an expensive plan of aid to minorities is among the "constitutional essentials" with regard to which Rawls's duty holds. Given that the difference principle is explicitly said not to be an essential, it is likely that this plan would not be either. If it is not an essential, then conversations regarding it are not regulated by any ethical duty; they are part of the very inclusive give and take that Rawls envisages going on in the "background culture," and the appeal to God in such a context would be unproblematic. But suppose that it were an essential: isn't there a problem about justifying a constitutional matter with reference to a monotheistic conception of God, in a nation containing polytheists and non-theists of many kinds, Hindus, Buddhists, Confucianists, Taoists, atheists, and so forth? It is not clear that adequate respect is being shown to those religious and non-religious minorities when public discourse justifies a fundamental matter in terms of God's judgments on our deeds. On the other hand, we can agree with Weithman to at least this extent: it is helpful to understand where our fellow citizens are coming from in such matters, and to that extent, unhelpful to invite them to conceal their views.

An important discussion of the whole issue of civility and restraint is offered in Christopher J. Eberle's recent book, *Religious Conviction in Liberal Politics*.³³ Because Eberle's is a book-length treatment of the issue, discussing not only Rawls but many other writers, and advancing an original view of the issues, it cannot be adequately treated here. Its rigor and care make it essential reading for anyone interested in these questions. It is difficult even to sketch its treatment of Rawls, because Eberle's questions and categories do not always map precisely onto Rawls's, as is natural in a major constructive work, and because Eberle, focusing on *Political Liberalism*, does not discuss in detail the successive modifications of Rawls's view

33. CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTION IN LIBERAL POLITICS* (2002).

in the 1996 preface and in "The Idea of Public Reason Revisited." But let me try to state the essentials of his position. Eberle agrees strongly with Rawls that citizens in a liberal democracy have a duty to pursue a public justification for coercive laws and policies, and he agrees, as well, that a public justification ought to be one that citizens with different comprehensive views would find convincing, and one that involves a conscientious attempt to understand other people's convictions and to engage in respectful dialogue with them. But what if they try and try, and are unable to find such a public justification, and yet, on the basis of their religious convictions, they believe that the matter is of enormous moral urgency? (His central example involves financial aid to the poor in other nations.) In such a case, Eberle argues, respect for one's fellow citizens does not require restraint: believers may, compatibly with respect, offer their moral or religious reasons as reasons for public action, and they may rightly vote and act on the basis of those convictions. Their situation is utterly different ethically from that of a person who simply offers religious reasons without a conscientious prior search for public reasons.

This objection to Rawls's view seems to me a strong one. Whether it is really an objection to Rawls's "inclusive view" remains unclear to me, since Rawls treats as a special case the case in which society is not well-ordered, and citizens plausibly feel that their nonpublic arguments are necessary for the establishment of political justice, as might have been the case with the abolitionists and Martin Luther King, Jr.³⁴ In any case, it seems to me that the objection is well handled by Rawls's later modifications of his view, to which I now turn.

In response to criticisms of his doctrine of civility, Rawls made an important modification in his account which he gives briefly in the 1996 Introduction and more fully in "The Idea of Public Reason Revisited."³⁵ Rawls now introduces what he calls the "proviso": reasonable comprehensive doctrines may be invoked at any time, even in fundamental matters, "provided that in due course public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support."³⁶ In his article, he expresses the proviso as follows: "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

34. See RAWLS, *supra* note 3, at 249-51.

35. See Paul J. Weithman, *Citizenship and Public Reason*, in LIBERAL PUBLIC REASON, NATURAL LAW AND MORALITY 125-70 (R. George & C. Wolfe eds., 1999). Weithman's article postdates Rawls's revision, and he is not fully satisfied by it. Nonetheless, the sort of concern he raises seems to have been on Rawls's mind in producing the revision. See PAUL J. WEITHMAN, RELIGIONS AND THE OBLIGATIONS OF CITIZENSHIP 180-211 (2002).

36. RAWLS, *supra* note 3, at xlix-l.

are said to support.”³⁷ (Here, as before, we need to think of the conditions as applying to discussion in the context of public decision-making, not to informal discussions of constitutional essentials in the “background culture.”)

Rawls acknowledges that this new view, which he calls the “wide view of public political culture,” leaves a lot to be specified later on.³⁸ Who must fulfill the proviso, and must it be the same person who invokes the comprehensive doctrine? What does “in due course” mean? In the 1996 Introduction, Rawls seems to hold that it would be important, ultimately, to produce a “clear and established” account of how the proviso is to be appropriately satisfied.³⁹ In “The Idea of Public Reason Revisited,” he adopts a more flexible and pragmatic approach. Such matters, he says, must be worked out “in practice and cannot feasibly be governed by a clear family of rules given in advance.”⁴⁰

The fuller discussion of the proviso in “The Idea of Public Reason Revisited” makes it clear that Rawls means to leave no doubt that political liberalism acknowledges the depth of comprehensive doctrines in people’s lives: citizens are to recognize “that the roots of democratic citizens’ allegiance to their political conceptions lie in their respective comprehensive doctrines, both religious and nonreligious.”⁴¹ Citizens are not asked to conceal those roots. To reveal them strengthens stability, rather than threatening it. They are, however, asked to bring them forward in a manner that is ultimately respectful of others who believe differently. Once again, Rawls cites the abolitionists and the Civil Rights movement as cases fulfilling the proviso—although without emphasizing, as he earlier did, the distinction between well-ordered and non-well-ordered societies.⁴² Sometimes, Rawls adds, it is positively good to invoke a comprehensive doctrine, since then people can better understand how religious citizens can square their comprehensive doctrine with the political conception: introducing the doctrine opens the way for explanations that are very helpful. He adds several suggestive passages about some further ways in which comprehensive doctrines may be invoked: by “declaration” (statements to one another of each person’s own doctrine), “conjecture” (a good-faith attempt to characterize reasons someone of a different doctrine might have for supporting the public political conception), and “witnessing” (expressing a principled faith-based reason for dissenting from an established policy that is agreed to be just, although one’s own doctrine does not support it—the example is Quaker pacifism.)⁴³

37. Rawls, *supra* note 4, at 783-84.

38. *See id.* at 768.

39. *See* RAWLS, *supra* note 3, at 1 n.26.

40. Rawls, *supra* note 4, at 784.

41. *Id.* at 784-85.

42. *See id.* at 785-86.

43. *See id.* at 786.

In these revisions Rawls has gone a very long way toward answering his religious critics. In particular, Eberle's critique is well accommodated, for the reasonable citizen may now offer his or her religious reasons, continuing over time to pursue a search for public reasons. All that is required is that the citizens have a conscientious commitment to finding such reasons in due course, and, perhaps, some degree of confidence that this will ultimately be possible.⁴⁴ Some may feel that Rawls has gone too far, in that the elasticity of the proviso allows all sorts of religious appeals in politics, with no clear way of showing that civility has been violated. Those who feel that he has not gone far enough need to bring forward cases where the wide view gives bad guidance. Rawls himself invites this sort of challenge, arguing that we cannot assess further criticism "in the abstract independent of actual cases."⁴⁵

I am not sure where Greenawalt's objections fall among the positions investigated in this discussion because he gives relatively little detail. Nor am I sure whether he is attacking one of Rawls's positions or, instead, a more extreme view such as that of Audi. Concerning my own view, however, suffice it to say that I am most drawn to Rawls's last view, with all of its elasticity, and I have outlined here the reasons for my adherence to that position.

II. REPLY TO SCHENK

I have learned a great deal from Schenk's illuminating discussion of the Catholic tradition regarding conscience and religious difference. He articulates eloquently a position he and I share with regard to respect: respect is addressed to the faculties of the person, not to the correctness of their employment. Because I find myself in agreement with so much that he says, I can only add three supplementary notes.

The first one regards the human rights tradition. Within the history of Western philosophy, there are two distinct strands of thought that lead from a reflection on human dignity to an account of human rights and the duties of governments to respect them. Schenk has well described crucial elements of the Catholic tradition. So far as ancient Greek philosophy is concerned, this tradition owes its greatest debt to Aristotle. There is also, however, a separate strand, though frequently interwoven with this Aristotelian tradition. The strand that most influences my own work, when I describe the capabilities approach, begins from Greek and Roman Stoic ideas and continues through a primarily Protestant tradition of thought about rights and conscience, some of whose outstanding exemplars are Hugo Grotius, Roger Williams, and Immanuel Kant.

44. That requirement may seem too strong to Eberle, but in the case where society is reasonably well-ordered, it is probably not too strong; Eberle's critique gets too much mileage by its focus on the case of grave social injustice and disorder.

45. See RAWLS, *supra* note 3, at li.

The Stoic position begins from an assertion that all human beings are equal, in virtue of their possession of a faculty of valuation and choice, which they identify with the presence of a faculty that they call the *hêgêmonikon*, or directive faculty, a faculty, then, concerned with directing us through life, ranking and ordering values, and proposing a plan of action accordingly. Unlike Aristotle, the Stoics from the start assert that male and female, slave and free, citizen and alien, are all equal, and that social circumstances merely create an illusion of inequality that morality ought to try hard to dispel.⁴⁶ Thus the modern exponents of this tradition do not need to struggle with the unfortunate baggage of Aristotle's thought regarding slaves and women. Unlike Aristotle, again, the exponents of this tradition see our ethical duties as utterly world-wide in nature, since they hold that all human beings are, first and foremost, "citizens of the entire world," *kosmou politai*, not simply citizens of a particular city-state. This aspect of the Stoic tradition, again, proves valuable when transferred to the modern era, since it provides a foundation for Grotius's account of just and unjust wars, the aspiration of all human beings to peace, and the duties we have not to conduct ourselves excessively during even a just war. The Aristotelian tradition has such elements as well, but in spite of Aristotle rather than with his aid. Kant's *Perpetual Peace* is one of the crowning achievements of this tradition.⁴⁷

What I now want to suggest is that this tradition also has an easy time defending a broad account of liberty of conscience, because it has from the start valued all human lives equally, and has insisted that the directive faculty needs to be respected wherever it is. Again, the Aristotelian tradition ultimately reaches the same destination, but with less help from its ancient sources. Whereas Roman Stoicism was frequently used to ground rebellion against the Roman Empire in the name of Republican liberty and non-domination, the Aristotelian tradition could not draw on Aristotle for any account of political liberty or resistance to tyranny.

When the founders of the United States thought about republican liberty, it was, as my book documents, primarily this Stoic tradition that inspired them.⁴⁸ For this reason, the idea of liberty as non-domination, freedom from arbitrary authority, came to play a central role in their thinking, and the idea of a life in accordance with human dignity was, thus, closely linked to the idea of republican institutions that protect basic human rights. I think that by now contemporary Catholic thought has for the most part reached the same destination, but perhaps its different starting point made it take somewhat longer to commit itself decisively to republicanism, and to the rejection of monarchy.

46. For the primary elements of this position, see my article *Kant and Cosmopolitanism*, in *KANT'S PERPETUAL PEACE* 25-58 (James Bohman & Matthias Lutz-Bachmann eds., 1997).

47. IMMANUEL KANT, *PERPETUAL PEACE* (1795).

48. See MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* 72-114 (2008).

My second comment pertains to the notion of human dignity. Both Schenk and I consider this to be an important notion, and both he and I give a specific account of human dignity, in connection with the faculty of conscience and its unfolding. One must, however, bear in mind that the concept of human dignity is a slippery one, which can do little philosophical work on its own, unless it is securely defined in terms of other concepts. I feel that today the notion is sometimes used somewhat more casually, particularly in debates in bioethics. As a contributor to the volume of essays published by the President's Council on Bioethics, under the direction of Ed Pellegrino,⁴⁹ I note that in that volume the notion of dignity is used in many different ways, and not always well defined. At times, one feels that an appeal to dignity is used to stop debate short in its tracks, as if it were self-evident that certain proposed policies (e.g. stem cell research) violate human dignity and must not therefore even be considered. I am not happy with that way of proceeding: I think we always need precise definitions of our key concepts, and if different definitions are offered for this key notion, we need to explore them by thinking about the entire course of argument involved, rather than stopping debate short. More and clearer argument is what we need here and it is not always forthcoming.

Finally, I want to comment very briefly on the relationship between dignity and conscience in my own work. In *Women and Human Development*⁵⁰ and *Frontiers of Justice*,⁵¹ I articulate my "capabilities approach" in connection with a notion of a life commensurate with, or worthy of, human dignity. In my paper for the present symposium, I use the notion of "conscience" to refer to one part of that idea of human dignity. It is, however, not the entirety of that notion. Rape, domestic violence, and deprivation of food are all violations of human dignity, but it would be odd to call them offenses against conscience. Conscience, as I use the notion, is the faculty of choice and direction, but human dignity resides, as well, in our bodily nature and its health. Therefore, a good account of human rights would be considerably broader than an account of rights of conscience.

These are all addenda, not criticisms. Once again, let me thank Schenk heartily for his illuminating paper.

III. REPLY TO MCGREEVY

In replying to McGreevy, first let me acknowledge the considerable debt I owe to his illuminating work on the Catholic tradition, which I cite often in *Liberty of Conscience*. I am also grateful to him for his supplementation, here, of the account that I provided, which helps balance the picture.

49. See Martha Nussbaum, *Human Dignity and Political Entitlements*, in HUMAN DIGNITY AND BIOETHICS 351, 351-80 (2008).

50. MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* (2001).

51. MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE* (2006).

To begin with a small point: I did not say that Roger Williams “bracketed” his religious convictions. I said, instead (see my Reply to Greenawalt) that he deliberately provides an argument for his political principles that can be accepted by people who do not share his religious convictions.⁵² Of course, he amply states those convictions, but, according to my reconstruction of his argument, the convictions do not figure as essential premises in his primary argument.

The primary point in McGreevy’s paper that I wish to address, however, concerns individualism, and India. In my work on India,⁵³ I have, of course, observed much valuable solidarity among women and other disadvantaged groups, as they struggle for full equality. Where law and constitutional rights are concerned, however, my experience there has shown me how crucial it is to frame fundamental political entitlements as individual rights—because groups contains hierarchies, and often subordinate their more powerless members. When privileges are given to the family as such, its weaker members, usually women and children, are apt to lose out. When privileges are given under law to a religious group, its most powerless members, again often women, lose out. The system of “personal law” in India, according to which four major religious (Hindu, Muslim, Parsi, and Christian) have separate laws, passed by parliament but mediated by clerics, in areas including family law, property, and inheritance, has led to decades of sluggishness in women’s attempt to achieve full equality. Christian women in India, for example, gained the right to divorce on grounds of cruelty only in 2001—because it took that long for clerics from many regional origins and denominations to get together and agree to listen to the voices of women, and then to go to Parliament with a proposal for legal change. So women lose out by virtue of the power granted to unelected clerics. They also have rights that are unequal even to one another: a Christian woman gets a worse deal on divorce than other women (or did before 2001) by the sheer accident of being born Christian. (Similarly, Muslim women have had particular difficulty with maintenance after divorce, and Hindu women with shares in agricultural land.) The delegation of rights to a group has been a recipe for inequality.

Moreover, the personal law system has, for this reason, brought religion itself into disrepute. So many progressive people in India, from all the traditions, describe themselves as secular, in part because they associate religion with reactionary policies and secularism with change. Should a group want to innovate by forming a new denomination or sect—as has so frequently happened in the U.S.—such changes are impeded by the large amount of legal power reposed in the traditional clergy. All in all, then, the system of personal law and group rights seems to have been a bad thing, both for people and for religion.

52. See *supra* Part I (Reply to Greenawalt).

53. MARTHA NUSSBAUM, *THE CLASH WITHIN: DEMOCRACY, RELIGIOUS VIOLENCE, AND INDIA’S FUTURE* (2007).

IV. REPLY TO CHOPER

Choper's paper raises a number of important questions that would require a lengthier discussion, if we were really to resolve them, than will be possible here. Let me address, briefly, just five of them.

First, I believe, and have argued in Chapter 8, that there are significant differences between "In God We Trust" on our currency and the words "under God" in the Pledge of Allegiance. Justice O'Connor's very helpful test for such entrenched religious references, proposed in *Elk Grove Unified School District v. Newdow*,⁵⁴ is not correctly applied by her to the case of the Pledge. By contrast to "In God We Trust," (which dates to shortly after the Civil War), "under God" in the Pledge dates only to 1954, and the debates surrounding it, which denigrate atheists, agnostics, polytheists, members of non-theistic religions, and many standard theists, are part of living memory. "Under God" is also part of a kind of act of worship, and that prong of the O'Connor test also differentiates it from "In God We Trust." So my view is that the words "under God" are unconstitutional (for the reasons of peer pressure to which Choper alludes, well established in *Lee v. Weisman*⁵⁵), and that "In God We Trust" is not.

As for tax exemptions: I am not sure why Choper holds that even a broadly based neutral program of tax exemptions that includes religious bodies along with others (for example a tax exemption for charitable or non-profit institutions) is unconstitutional. *Walz v. Tax Commission*⁵⁶ certainly held otherwise, and I agree with the reasoning in that case. *Texas Monthly v. Bullock*⁵⁷ is also pertinent: for there the Court struck down a non-neutral sales tax exemption that went only to religious periodicals, but stated that a neutral program would pass constitutional muster. I think, indeed, that to exclude religious bodies from a program of subsidy would itself raise constitutional problems, as was recognized in *Rosenberger v. University of Virginia*.⁵⁸

Concerning government aid to religious people who want to purchase religious insignia, such a program would plainly not pass constitutional muster at present, given the precedents, and some principles that have been introduced help us to see why. In thinking about school aid, the Court has wisely focused on two pertinent issues: directness and choice. Aid that goes directly to a religious body is highly suspect; aid that goes, instead, to parents may possibly in some cases be all right. And aid is most likely to be upheld if it is given in such a way as to permit choice between religious and non-religious uses, as in the Cleveland voucher case,⁵⁹ (which, of course, had other special circumstances that contributed to the

54. 542 U.S. 1 (2004).

55. 505 U.S. 577 (1992).

56. 397 U.S. 664 (1970).

57. 489 U.S. 1 (1989).

58. 515 U.S. 819 (1995).

59. 536 U.S. 639 (2002).

Court's decision, in particular the fact that the Cleveland public schools had already been declared to be a disaster and were in federal receivership). In Choper's imaginary case, a program of insignia-buying is most likely to be upheld if money is given to all families or all individuals for the purpose of buying whatever symbols they choose, religious or non-religious. This would be a pretty weird program, and I can't imagine any city council passing it. Moreover, if it were passed, we'd have to scrutinize it carefully to see whether its primary purpose was really to advance religion, and the inclusion of non-religious symbols was just a way of rendering that project constitutional. The closest real case I can think of is, in fact, *Rosenberger*, where the Court struck down a practice of subsidizing a whole range of student activity groups, political, artistic, and so forth, but excluding only the religious group.⁶⁰ The inclusion of the religious group in such a program was held to be not just permissible, but, in the circumstances, required, and I think this was the right result.

As for the idea that *Sherbert v. Verner*⁶¹ represents the imposition on taxpayers of compulsory support for religion, I suggest that we have, here, a baseline problem. Against the baseline that the work week is arranged to suit the convenience of standard Christians, putting Jews and Seventh-Day Adventists on a plane of equality does cost something. So too, against the baseline that the physical environment is designed for people who walk, the full inclusion of people who use wheelchairs is costly. But why should we use those baselines? Why not instead think that the baseline should be whatever includes minorities on a plane of full equality with majorities? In that case, the unemployment compensation, (which, by the way, does not seem to me to impose a significant cost) would just be at that neutral baseline, and would not impose any extra burden.

Finally, the endorsement test: Choper says it is too subjective. But this complaint could be made against so many useful tests in the law: the "reasonable person" standard in the law of homicide, norms of reasonable care in the law of torts, and so many others. The point here is that law is not a system of deductive principles, as Christopher Columbus Langdell thought. Instead, it is a realm of judgment and perception, in which, in many difficult cases, there is no substitute for thinking about all the details of the case and grappling with many contextual factors. One of our greatest judges, Benjamin Cardozo, wrote in his autobiography:

I was much troubled, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding

60. See *Rosenberger*, 515 U.S. at 819-46.

61. 374 U.S. 398 (1963).

than its pale and glimmering reflections in my own vacillating mind and conscience.⁶²

After years of being a judge, however, Cardozo understood that this “solid land” of certainty was not attainable, and that the judge must grapple with the indeterminacies of hard cases as best he can. In a similar spirit, I would conclude that the fact that a test requires careful contextual thought is not a point against that test, it is simply a sign that the test is realistic, suited to the complex world we actually inhabit, rather than a merely fictive “paradise.”

V. REPLY TO STONE

I am grateful to Stone for devoting his paper to this very important topic. As he knows, I have recently completed a new book on the topic of sexual orientation and constitutional law, for a series on constitutional law that he edits for Oxford University Press.⁶³ Lest readers think, however, that the topic of same-sex marriage is not pertinent to *Liberty of Conscience*, I do address it in Chapter 8, where I consider contemporary controversies. Although I argue that the Religion Clauses of the Constitution are not, in the end, pertinent to its resolution, I also argue that considering the history of American debates over religion can teach us something important about how to approach it. Specifically, when we understand the way in which people, anxious about economic, social, or political change, stigmatize new or unpopular groups, failing to recognize their entitlements, we can understand that the struggle of gays and lesbians for respect and recognition is not all that unlike the struggle of Mormons, Jehovah’s Witnesses, and Roman Catholics for equal respect.

In my new book, I argue that the best approach to the issue of same-sex marriage in constitutional law is the approach Stone mentions at the start of his paper, building on the idea that marriage is a fundamental personal right under the Due Process Clause, and, at the same time (as the “right to marry” cases typically do) invoking the Equal Protection Clause in arguing that a right accorded to many cannot be denied to some without a very strong justification. (I argue that the Court ought to recognize sexual orientation as a suspect classification for Equal Protection purposes, as several state courts have recently done in interpreting their state constitutions.)

Stone argues, however, that the issue of same-sex marriage is also pertinent to the Religion Clauses, because it involves dragooning all individuals to lead their lives in accordance with the religious beliefs of a particular group. He observes in Note 18 that “No thoughtful person takes seriously the claim that the hostility to same-sex sex and same-sex marriage is not

62. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 166 (1921).

63. See MARTHA NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* (forthcoming 2010).

rooted in Christian religious belief.”⁶⁴ Well, I am a counter-example to this claim, as Stone knows from his wonderful editorial work on my book. I believe, and argue, that opposition to same-sex sex and same-sex marriage is rooted, instead, in a more universal and deep-rooted human tendency to disgust at the body, which typically gets projected onto some group or groups in society that seem conveniently to symbolize that which the dominant group fears in itself (smell, waste products, decay, liquids, etc.). This tendency can be seen in many different types of stigmatization and discrimination in anti-Semitism, misogyny, racial hatred, and caste-based hatred, among others. The ideas that propel this type of discrimination are not, at their root, moral ideas or theological ideas: they are ideas of contamination and defilement, ideas about what we don’t want to have happen to our bodies. Such ideas may often be cloaked in moral or religious ideas, but close study will show that the religious argument is not what is really driving the discrimination or giving it its virulence.

I think that such a close study will show us that the vehemence of opposition to same-sex marriage does not come in any major way from the Judeo-Christian tradition.

First of all, not all opponents of same-sex marriage are religious. The primary predictor of opposition is age, rather than religious membership. Many secular groups in recent history (Marxists of many types, for example) have vehemently opposed same-sex activity.

Second, not all Christians and Jews are against same-sex marriage. Some denominations (Reform, Conservative, and Reconstructionist Judaism, Unitarian Universalism) support same-sex marriage. Mainline Protestant denominations are deeply divided over the issue, and the Episcopal Church has taken a stand, permitting the ordination of Bishop Eugene Robinson, an openly gay man living in a committed partnership with another man, that risks fracturing the Anglican Communion. Roman Catholic clergy and lay people are divided also, although the Church hierarchy is firmly opposed. It is true that some evangelical groups and the Mormon Church are single-mindedly opposed, and that the latter, at least, has spent a lot of money campaigning against same-sex marriage, but this hardly proves that opposition to same-sex marriage flows from religious principle.

If we examine the biblical texts that are usually taken to justify opposition to same-sex marriage (as I do in Chapter 8), we find that they are far narrower and more disputed than they are usually taken to be, and we also find that dozens of other prohibitions in *Leviticus* and *Deuteronomy* are utterly ignored (for example, the injunction to stone fortune tellers). As I argue in Chapter 8, this selectivity shows us that we need to look deeper for a reason why this one half-sentence of *Leviticus* is regarded as all-important, and so many other sentences are not.

64. Geoffrey R. Stone, *Same Sex Marriage and the Establishment Clause*, 54 VILL. L. REV. 617, 621 n.18 (2009).

If we then examine the rhetoric of the opponents of same-sex marriage, we find that a theme running throughout is disgust at the sex acts that gay men, in particular, perform. They are repeatedly portrayed as defiling and contaminating, as I show in my new book by analyzing the pamphlet literature circulated by groups opposing legalization. I then argue that only these deeper ideas of contamination and defilement explain the extraordinary claim that the legalization of same-sex marriage would spoil heterosexual marriages—which are never taken to be spoiled or defiled by the permitted marriages of people who are cruel, or irresponsible, or criminal.

These facts make me conclude that the Religion Clauses are not pertinent in the way that Stone suggests, and that a more traditional approach through the Fourteenth Amendment is still our best legal approach.

VI. REPLY TO BRENNAN

Let me take this opportunity to thank Brennan very warmly for organizing this entire symposium, and for all his graciousness and good work therein.

Brennan's spirited paper shows a striking awareness of many of my writings, so I wish to thank him for his care and wide-ranging reading. I first address two small points, and then turn to the more interesting issues involving overlapping consensus, and religious equality.

Brennan writes rhetorically and somewhat unfairly, when he states that my description of the U. S. tradition involves "cherry-picking from our own tradition"—as if that were something underhanded and bad. But, of course, I pick some things and leave others to one side, because my entire project is a normative philosophical project. My aim is to describe an attractive set of principles that can, I believe, be defended by good philosophical arguments, to give those arguments, and then to show that these attractive principles are embodied in some aspects of our tradition, though not, I continually stress, in all. So I don't think this is a useful criticism.

As for the quotation from my article on *Skepticism About Practical Reason in Literature and the Law*⁶⁵: I think it important to note that any remark I make about my own or any other comprehensive ethical doctrine is utterly irrelevant to my arguments about political principles, since I have consistently defended a form of political liberalism similar to that defended by John Rawls in his book of that name.⁶⁶ Like Rawls, I hold that we should never base political principles on any comprehensive ethical doctrine, since ethical doctrines are subjects of reasonable disagreement in pluralistic societies. Since Brennan cites amply from works in which I develop this Rawlsian position, I assume he is familiar with that view of

65. Martha Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714 (1994).

66. See RAWLS, *supra* note 3.

mine. So he really should inform his readers that the Skepticism article is, as it announces, about ethics, and thus has nothing to do with arguments for political principles.

Now to the more interesting issues. Brennan appears to believe that if we show that a given principle is not right now the object of consensus, that is sufficient to refute the claim that an overlapping consensus of the type both Rawls and I favor can be built around it. But that is not the way in which either Rawls or I employ the notion of overlapping consensus. In Chapter 6 of *Frontiers of Justice*, I state, “To . . . justify the conception, we do not have to show that the consensus exists at present; but we do need to show that there is sufficient basis for it in the existing views of liberal constitutional democracies that it is reasonable to think that over time such a consensus may emerge.”⁶⁷ Here, I am simply following Rawls. As Rawls explicitly says, “[P]olitical liberalism looks for a political conception of justice that we hope can gain the support of an overlapping consensus of reasonable religious, philosophical, and moral doctrines in a society regulated by it.”⁶⁸ That is of course very different from claiming that the society in question must already have such a consensus. In the relevant chapter of his book, he sketches an attractive transition process that he thinks could conceivably take place in our own society, from a *modus vivendi* to an overlapping consensus. All he wants to show is that this transition is possible and that there is sufficient material in our society to bring it about. That is all I too am trying to show, and I think that the fact that the principles I admire are deeply rooted in our tradition—certainly not alone, but really there—gives us sufficient reason to think that a transition to an overlapping consensus is possible and plausible.

Now to the basis of equality. In earlier writings, I employed a notion of “basic capabilities,” suggesting that people have to have at least a minimum set of innate human powers in order to be worthy of equal respect. In my more recent work, focusing on the entitlements of people with disabilities, I now withdraw this claim.⁶⁹ Now all that a human being has to have in order to be worthy of fully equal concern and fully equal political entitlements, is some type of sentience and active striving. (I thus rule out the person in a persistent vegetative condition, and the anencephalic person. I do not rule out the person with extremely severe cognitive disabilities, unable to speak, etc.) I feel that it’s important to put these recent changes of position on the record. I shall not go into the details of my position on disability further, since it is amply covered in *Frontiers of Justice* and in a new article.⁷⁰

67. NUSSBAUM, *supra* note 53, at 388.

68. See RAWLS, *supra* note 3, at 10.

69. See NUSSBAUM, *supra* note 51.

70. See NUSSBAUM, *supra* note 53; Martha Nussbaum, *The Capabilities of People with Cognitive Disabilities*, METAPHILOSOPHY (forthcoming).

Now to anti-discrimination laws. Brennan suggests that I would favor forcing the Catholic Church to ordain women. I have never said this, and I do not believe it. I think we ought to distinguish three different cases of employment: (a) core religious functions; (b) functions so closely bound up with religious functions that policing them would lead to an intolerable level of intrusion into religion; and (c) other employment functions. I do not favor interference in (a), because I think that a necessary condition of individual religious liberty is allowing churches some measure of autonomy in core religious areas. I do not favor interference in (b) for the reason given by the Court in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*,⁷¹ where the Court held that federal anti-discrimination law does not apply to the case of a janitor in the Temple in Salt Lake City who was fired for not being a Mormon in good standing, because to involve the courts all the time in distinguishing between religious and non-religious functions is too intrusive. Where (c) is concerned, however, I think we should be stricter. All the major Catholic universities, with the exception of Georgetown, have presidents who must by statute be a member of a given order of priests, hence male. Being a university president is not a core religious function, nor is it difficult to distinguish from one. Although it is a truly hard case to say whether such universities may be permitted to discriminate on grounds of religious membership—since affiliation with a tradition may indeed be a bona fide occupational qualification—I think it is not hard to conclude that being male is not a bona fide occupational qualification. I believe that federal anti-discrimination law should be invoked in this case. Or, another route to a related conclusion, the Court should remove the tax-exempt status of such universities, with reasoning similar to that used in *Bob Jones University v. United States*,⁷² where a university that forbade interracial dating on religious grounds lost its tax exemption. In that case, the Court granted that there was a substantial burden on the free exercise of religion of the members of that group, but they reasoned that the compelling state interest of not lending government approval to racism trumped that burden. I believe that a similar outcome in the case of gender bias in education would be correct. No doubt many other universities would quickly realize the wisdom of Georgetown's change, if the government proceeded in this way; and I see no reason why a Catholic university cannot retain a robust Catholic character with a lay president. I believe that Georgetown (of which I am proud to be an alumna, having received an honorary degree there in 2003) does retain that character, and it shows greater respect for women.

There are many other difficult cases to discuss, in which religious bodies wish to discriminate, whether on grounds of religious membership or on grounds of sex or sexual orientation. There is no time to discuss these

71. 483 U.S. 327 (1987).

72. 461 U.S. 574 (1983).

cases here. I do believe, however, that the three-fold classification I have introduced above is useful as we proceed further.

VII. REPLY TO GARNETT

Garnett's paper raises very important issues concerning the Establishment Clause that I am eager to address. Let me begin, however, with two smaller points. The first concerns conscience. Garnett, approvingly citing Steve Smith, argues that the notion of conscience derives from religious ways of thinking. Well, yes and no. As I argue in my Reply to Schenk, the conscience tradition, in at least one of its prominent strands, can be traced back to the thought of the Greek and Roman Stoics, which was religious in a sense, but which did not involve belief in a transcendent deity.⁷³ (Zeus is the principle of rationality inherent in the universe as a whole, and prominently inside human beings.) Thinkers such as Hugo Grotius who set themselves in this Stoic tradition point out (as I mentioned in my Reply to Greenawalt) that their arguments are valid even for one who does not believe in God.⁷⁴ Kant similarly held that moral arguments were and must be independent of religious belief. I think that focus on the Roman Catholic aspect of the conscience tradition should not obscure this other strand, which has great importance for modern thought.

The second small point I want to emphasize is that I have argued, discussing *Lee v. Weisman*, that coercion is not necessary for an Establishment Clause violation. Garnett appears to agree with Justice Kennedy's analysis in that case, and I simply want to point out that I do not and have argued against it in chapter 6 of my book.

Now to *Hein v. Freedom From Religion Foundation, Inc.*⁷⁵ To show how I respond to Garnett's argument, I must describe the case and its background in somewhat more detail than he does. Since the seventeenth century, as I argued in Chapters 2 and 3 of my book, it has been well understood that establishments of religion threaten individual liberty of conscience, and are thus grievous burdens on citizens. This threat was a central theme of James Madison's famous *Memorial and Remonstrance*, discussed in Chapter 3, which focused on the evil of taxing citizens for the support of the established Anglican Church.⁷⁶ The tax that Madison opposed was a mild one, since non-Anglicans could divert their tax payments to their own churches, or to a fund for the support of teachers of religion; Quakers and Mennonites were not required to pay at all. Nonetheless, Madison argued that the bare announcement that the Anglican Church was the default option burdened citizens by making a statement that cre-

73. See *supra* Part II (Reply to Schenk).

74. See *supra* Part I (Reply to Greenawalt).

75. 551 U.S. 587 (2007).

76. JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* (1785), reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 10-11 (Marvin Meyers ed., rev. ed. 1981).

ated an inequality in basic civic standing, saying that some citizens were in an in-group and others were not.

Citing Madison, the Court in 1968, in *Flast v. Cohen*,⁷⁷ adopted an unusually broad account of standing in the context of Establishment Clause challenges, saying:

The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of government power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power⁷⁸

Flast concerned a specific appropriation, and thus did not address the question of spending for religious purposes that derives from general discretionary funds. The use of such funds by the Executive to hold conferences in connection with the Faith-Based Initiatives was challenged by a citizen group in *Freedom From Religion Foundation v. Chao*.⁷⁹ In 2006, a three-judge panel of the Seventh Circuit, in an opinion authored by Judge Richard Posner, held that the group does have standing under *Flast* to challenge the appropriations for these conferences. In *Hein*, the Supreme Court reversed.⁸⁰ The plurality opinion, written by Justice Alito and joined by Justices Roberts and Kennedy, holds that the Seventh Circuit interpreted *Flast* too broadly: it protects taxpayer standing only in the case of specific Congressional appropriations. Justices Scalia and Thomas, concurring, favor overruling *Flast* altogether.⁸¹ Justice Souter's dissenting opinion, joined by Justices Breyer, Ginsberg, and Stevens, agrees with the Seventh Circuit.⁸² Garnett, in his paper for this symposium, takes the position of Justices Scalia and Thomas, urging that *Flast* was wrong. We should notice, then, that he is taking a more extreme position than he needs to take to defend *Hein*. Nor, it seems to me, does he present any argument against the *Flast* majority's extremely plausible reading of Madison and the Establishment Clause tradition. *Flast*, it seems to me, is on solid ground when it asserts that citizens are severely burdened if government can tax for religious purposes, and that they thus have standing to contest such a policy. I believe he has provided no good argument for overruling *Flast*.

Flast, however, concerns a direct appropriation for religious purposes, and the Posner opinion extends it by applying the conclusion of *Flast* to

77. 392 U.S. 83 (1968).

78. *Id.* at 103-04 (citations omitted).

79. 433 F.3d 989 (7th Cir. 2006).

80. *See Hein*, 551 U.S. at 587.

81. *See id.* at 618-37 (Scalia, J. concurring).

82. *See id.* 637-43 (Souter, J. dissenting).

the President's use of his discretionary funds. Discretionary funds come, of course, from the taxpayers, but they are not raised in a religion-specific assessment. Because *Hein* thus extends *Flast*, it is a difficult case from the legal point of view, a case in which both the plurality and the dissenters have substantial legal arguments, and in which a larger than usual part is therefore inevitably played by a judge's sense of the nature of the problem and its history. Judge Posner does indeed defend a broad reading of *Flast* that is not absolutely entailed by the text (although his powerful argument is buttressed by his use of *Bowen v. Kendrick*⁸³). Nonetheless, when one considers the importance of the underlying issue at stake, it is difficult not to be alarmed by the plurality's indifference to the problem of minority conscience, a central issue in our political tradition since long before the Founding. The problem Judge Posner raises is a large one: if *Flast* is not read broadly, the Executive would be permitted, even, to erect a "national mosque," using taxpayer money. Judge Posner chooses his example hypothetically, preserving a polite detachment from political reality, but the reality would be, of course, the use of taxpayer money to create a national Christian Church, or in countless other ways to sponsor programs that put the official stamp of approval on Christianity and implicitly endorse and marginalize other religions. (The taxpayer group's challenge used the language of endorsement and disendorsement, familiar from Justice O'Connor's reformulation of Madison's *Memorial and Remonstrance*, to express what they find troubling about the President's choices.)

In a case where the law is difficult and to some extent indeterminate, "perception" often plays the deciding role. In this case, the dissenters are rightly worried about the threat to equal liberty of conscience posed by the use of taxpayer money for religious purposes, and the plurality, writing as if the burden of an imagined flood of litigation were the major problem presented by the case, exhibits a startling indifference to an issue that is so deeply implicated in the whole history of our nation. Equal liberty of conscience, as Madison made clear, lies at the root of more or less all of our entitlements as citizens, since it affects our ability to enter the public square "on equal conditions."⁸⁴ I thus disagree very strongly with Garnett and I think we can see that we are now, after *Hein*, in a perilous situation, vulnerable to the creation of all sorts of Establishment Clause violations by a President. Even though these violations may be ever so clear and ever so threatening, *Hein* concludes that no citizen has standing to challenge them so long as the President uses his discretionary funds. This seems to me a result that is unacceptable for the future of our nation.⁸⁵

83. 487 U.S. 589 (1988).

84. See MADISON, *supra* note 76.

85. See my general discussion of *Hein* and other cases from the 2006 Term in my Supreme Court Foreword, *Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 9 (2007).

