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THE HORIZON OF POLITICAL LIBERALISM:

CITIZENSHIP, CULTURE AND THE LIMITS OF RAWLSIAN PUBLIC REASON

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DAVID PEDDLE

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ABSTRACT

The thesis developed in this essay is that public political debate must accommodate the moral, religious and cultural dimensions of citizenship. Commitment to shared public deliberation and participation can be developed only if citizens are drawn into political engagement with their various embedded identities intact; their personal integrity can be sustained only if they can bring to bear all the moral resources with which they are graced. Moreover, citizens' cultural identities, because they are a source of a deep sense of belonging, will pose an obstacle to common political life unless a common political culture can transform (and be transformed by) their culture of origin. "Political" culture must be seen as arising from the historical identity formed from the various differing roots of the background culture. "Non-political" culture is likewise transformed by the political realm. The locus of basic political issues, then, cannot be described simply as "political"; rather, it must be seen as "cultural-political", "moral-political" or "religious-political", each realm determining the configuration of the other. This then is the primary meaning of the term "horizon" in this essay's title: the comprehensive and cultural commitments of citizens must play an important role in defining the nature and limits of public political reason in any determinate account of liberal democracy.

Through consideration of the instructive debate generated by John Rawls's "political" conception of justice and responses to this conception by Michael Sandel and

Will Kymlicka, this essay attempts to develop a more inclusive conception of public reason. I am concerned to broaden the scope of public reason in three ways: (1) to further include citizens' comprehensive views in public debate; (2) to ensure recognition of the importance of the history of democratic institutions within the conception of the political and; (3) to extend the defense of group-differentiated rights to include exemptions for non-liberal religious groups.

The concept of public reason and political participation developed in this essay attempts to show how the differences between liberalism and republicanism may be diminished. It presents a liberalism enriched by a more inclusive public reason and by a richer understanding of the historical nature the public culture. Also it defends a pluralist republicanism which, tainted by neither exclusion nor coercion, represents a viable alternative to liberal neutrality.

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public reason, republicanism and freedom.

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CHAPTER ONE

Introduction:

Citizenship, Culture and the Horizon of Political Liberalism

Contemporary liberal democracies consist of a plurality of individuals, moral beliefs, and cultures. The central concern of much debate among political philosophers, liberals, republicans, pluralists alike, is focussed on the question: How can a common citizenship obtain in the face of moral and cultural difference? Or put another way: How can there exist a legitimate political order respectful of moral and cultural differences among its citizens?

As expressed in its emphasis on individual rights, the foundational principle of liberalism is respect for the moral person. In abstract terms, as expressed, for example, in Rawls's "original position", all individuals are conceived as free and equal and thus share a common though abstract identity. But conceived as individuals heavy with moral commitment and cultural background, citizens are divided from and in conflict with each other, about basic issues of freedom and equality. Debates over abortion, equal rights for women, pornography, and self-government reveal that in the concrete world of actual political action, difference and identity compete for public space.

The immense pluralism of liberal democracies suggests that the challenge of democratic political activity will consist as much in recognizing legitimate differences among citizens, as in guaranteeing their universal rights. But as the history of the Civil Rights movement in the United States and recent constitutional conflict in Canada indicate, both action and inaction are fraught with difficulty: To ignore cultural and moral difference

seems to breed resentment, instability and violence. To embrace diversity seems to court fragmentation, the disintegration of a common political identity.

This essay examines recent attempts to conceptualize a middle ground between oppressive unity and destructive difference. It investigates the relation between culture, morality, and politics through consideration of the instructive debate generated by Rawls's "political" conception of justice. Specifically, it examines how various conceptions of the political realm are related to concepts of culture and morality; it considers the role these concepts play in defining the nature of the political and considers what a political realm respectful of cultural and moral difference must look like.

The main normative concern of this essay is that various representative viewpoints in the debate surrounding political liberalism refuse or fail properly to accommodate comprehensive moral positions. I shall seek thus to demonstrate that the views of Rawls, Michael Sandel, and Will Kymlicka while instructive, each in their own way, nevertheless fail adequately to balance the principles of freedom and cultural belonging. Rawls's concept of the public culture of the United States is one-sided (in favour of liberalism) and he develops an overly restrictive concept of public reason; Sandel's account of this public culture, while having a far stronger historical component than Rawls's is likewise one-sided (in favour of republicanism) and; Kymlicka's liberal defence of group-differentiated rights can neither accommodate the comprehensive religious interests of many Americans nor provide adequate grounds for social unity within a liberal state.

My argument throughout attempts to lessen the difference between the liberal and

republican positions, for example of Rawls and Sandel respectively. Partly because the prevailing American standpoint is predominantly liberal both in actual politics and in academic circles, it is useful to present this central aspect of my argument as aimed at enriching the liberal position, at making it more inclusive of various comprehensive doctrines by bringing out the conditions under which the culture of freedom was historically achieved. While offering in this way a constructive critique of political liberalism, I shall also be seeking to present a more balanced republicanism, by indicating the important historical ties between republicanism and liberalism in America and by suggesting how individual freedom can be protected within a politics of the common good.¹ On the whole, therefore, this essay aspires to lessen the differences between liberalism and republicanism through a fuller account of their historical relation in the United States and of the resources each offers the other for an enriched concept of citizenship.

The guiding intuitions which underlie this essay are that all cultural and political life is and must be grounded on human freedom; that the source of the legitimacy of all social and political institutions is found in the sovereignty of the "people" and; that political authority is just only when it can gain the assent of those subjected to it. Likewise I hold that

¹ It is important to note that this essay focuses on debate among Anglo-American philosophers about Rawls's Political Liberalism and addresses neither contemporary "continental" alternatives to the Rawlsian view nor historical attempts to synthesize liberalism and republicanism, those of Montesquieu and Hegel, for example. It is hoped, however, that the result of refining the liberal-republican dialectic in the specific corner which this essay inhabits, will allow for constructive dialogue with a broad range of viewpoints.

a precondition of adequate individual freedom is the sense of belonging and identity that one receives from cultural membership. While an extensive definition of culture is beyond the scope of this essay, for the purpose of orientation I will distinguish two senses of belonging and two different uses of the term culture which derive from this distinction.

The first sense of belonging which I exploit is civic belonging. It is the sense individuals have of sharing a common citizenship. James M. McPherson, in his recent Is Blood Thicker than Water: Crises of Nationalism in the Modern World, illustrates something of what is involved in civic belonging: "Just as, for Pierre Trudeau, Canadian nationalism is embodied in the Charter of Rights, for Americans the origins of their civic nationalism can be traced not to descent from some ancient bloodline, but to the Declaration of Independence, the Founding Fathers of 1776, the flag, the Constitution, and the shared history of victorious struggle for independent nationhood."² This is a form of belonging characteristic of the public culture and it is expressed in the variety of ways in which citizens identify with each other and with the liberal state, from somewhat emotional patriotism, to the rational acceptance of constitutional principles.

By contrast, "local" belonging, as I will call it, arises from an identification with the traditions of art, religion, thought, technology and labour which actualize one's place in the world in relation to one's family, friends and neighbours often in a specific geographical locale. These sources of belonging are characteristic of what I will call local culture. A

² James M. McPherson, Is Blood Thicker than Water?: Crises of Nationalism in the Modern World (Toronto: Random House Canada, 1998) p. 34.

thriving local culture will enhance one's confidence to function in one's surroundings and give one the self-respect and the intellectual and practical tools to pursue one's sense of the good life among one's cultural membership, to explore the intimations of one's tradition. Local culture, thus defined, is a precondition of the individual's mature freedom and, as Kymlicka has demonstrated, the protection of (local) culture through group-differentiated rights is consistent with the liberal principles of freedom and equality. Furthermore, I conceive both public culture and local culture as central to individual identity, one's place and sense of membership in these realms defines what one is.³

The present argument suggests that the traditions of the local culture and of the public political culture, especially as expressed in comprehensive moral and religious views, form the horizon of political liberalism. Basically, they compose the context in which it develops and has meaning. There are two main senses to the word horizon as I use it.

The first sense of "horizon" as I use it arises from the fact that differences of morality and of culture set the basic problem which Rawls addresses. Rawls's goal in Political Liberalism is to find a common forum for political debate in the face of differences and conflicts among moral views and among cultures.⁴ To this end he draws his political conception from what he contends are shared ideas implicit in the public culture of the

³ It is important to note that belonging in both civic and local senses contains a crucial subjective dimension, in part it is a matter of willfully identifying with one's group.

⁴ John Rawls, Political Liberalism, (New York: Columbia University Press, 1993)

United States. The public culture thus forms the horizon of Rawls's conception, it is the context from which his concepts are drawn and to which they are applied.

Second, culture and comprehensive doctrines form the horizon of political liberalism in that they indicate the limitedness of the Rawlsian view. His conception of justice attempts to comprehend the political dimension of the major moral, religious and philosophical views characteristic of the public culture of the United States -- but it cannot. While Political Liberalism with its emphasis on "reasonable pluralism" comes closer than A Theory of Justice to engaging citizens of conflicting comprehensive views in a common political pursuit, the Rawlsian conception of liberalism never reaches its goal. Not only is his conception unable adequately to reflect the public culture of the United States but it is also unable sufficiently to accommodate those citizens who have yet to find a place in the mainstream public culture, aboriginal groups for example.

This essay is grounded in the sense that public political debate cannot and should not avoid the moral and cultural dimensions of citizenship. Commitment to shared public participation can be developed only if citizens are drawn into political engagement with their various embedded identities fundamentally intact; public forums can sustain the personal integrity of citizens only if they provide substantial opportunity for citizens to bring to bear all the moral resources with which they are graced. Moreover, citizens' cultural identities, because they are the source of a deep sense of belonging, will pose an obstacle to common political life unless a common public culture can transform (and be transformed by) their culture of origin. Public political culture must be seen in part as arising from the historical

identity formed from the various differing roots of the local culture. Likewise, local culture is itself transformed by the political realm. The locus of basic political issues, then, cannot be described simply as "political", rather it must be seen as cultural-political or moral-political, each realm determining the configuration of the other.⁵

Liberal democracy results in a culture of freedom and it transforms those non-political cultures with which it comes into contact. This essay suggests that the possibility of a just transformation requires that culture must itself be seen as the product of free human activity. Unless the liberal culture of freedom is seen to express this deepest source of culture itself, it will be rendered sectarian and unable to unify individuals from differing cultures in a common humanity and freedom. Freedom must thus be conceived as the common denominator among culture, morality and liberalism. I am concerned to show that liberals must respect and protect not only those groups which ensure freedom by maintaining a broad range of alternatives from which individuals may choose but also those groups which define human freedom in terms of a relatively restricted range of options. Liberals must attend not only to the abstract presuppositions of freedom but also to the historical enactments of freedom, the ways of life in which individuals make sense of the world and

⁵. It important, then, to avoid radically disassociating local and public culture from each other. In contemporary liberal democracies, local identity is in fact mediated by its relation to the public culture and the laws and institutions of government. For example, Amish commitment to the "Ordnung" is, in part, dependent on the decision in *Wisconsin v. Yoder* 406 U.S. 205 (1972). The destinies of local cultures and public political cultures are intertwined and must be understood in relation to each other.

actualize their potential.

To these ends, I investigate Rawls's conception of political liberalism and argue that it is only partially reflective of the principles shared in the public culture of the contemporary United States. Further I draw on the work of Michael Sandel to show the failure of the Rawlsian view to comprehend the historical dimensions of this public culture. And finally, I develop a strengthened defence of Kymlicka's view that Rawlsian liberalism does not adequately accommodate those cultures which lie outside the mainstream public culture. Thus the central argument of the essay shows that Rawls's political conception cannot adequately comprehend either the public culture of the United States, in its contemporary and historical formations, or the local culture of those citizens who do not fully participate in the public culture.

Chapter Two, focuses on Rawls's political conception of justice and argues that the basic terms through which he develops his view are incapable of resolving the impasse in contemporary democratic theory and of becoming the focus for an overlapping consensus of reasonable comprehensive doctrines. This chapter considers basic Rawlsian conceptions of “will-formation” (civic education), “the facts of pluralism and oppression”, the “moral person”, and “public reason” and argues that they are based on a sectarian liberal conception of citizenship. As a result of Rawls's, in effect, biased approach the political conception he develops will not be able to become the basis of an overlapping consensus of comprehensive doctrines. Further, a political order formed on the basis of Rawls's conception would be unable to ensure the allegiance of citizens. Rawls rightly acknowledges that participation

in liberal democratic politics has a broad formative function which educates citizens towards allegiance to the principles of justice. However, he does not give an adequate account of how this transformation occurs. Rather he merely presupposes that there is a certain looseness in individual's comprehensive doctrines and that these doctrines are transformed without the full consciousness of citizens. Rawls thus insufficiently appreciates the significance of moral, religious and philosophical views, the depth to which individuals are committed to these views and the role such views play in the history of the United States. He fails adequately to describe the relation between comprehensive doctrines and the political order. The restrictions he places on comprehensive debate in the public political realm deprives individuals of their most profound moral resources. As a result, the Rawlsian conception cannot ensure the stability of the state. Individuals will question the "unconscious" impact the political realm has on their moral views; they will be suspicious of the degree to which other comprehensive doctrines actually support the political conception of justice. Their deep "moral energies" will not be engaged in the public realm and thus these comprehensive views will not be sufficiently liberalized.

Amy Gutmann and Dennis Thompson suggest ways in which public reason can be made more inclusive of individual's moral values. Their conception of deliberative democracy suggests a broader forum for public debate and thus improves on the Rawlsian conception. However, they overestimate the degree to which their principle of "accommodation" will ensure a moral basis for respect for the moral views of those to whom one is opposed. Following Gutmann and Thompson, in Chapter Two I argue that there are

occasions on which public forums and debate on constitutional essentials must allow individuals to express their comprehensive doctrines and must allow public debate on the validity of these views.

As Gutmann and Thompson suggest, public expression and scrutiny of comprehensive doctrines will allow for a deeper respect of the positions involved and a fuller sense of the degree to which certain comprehensive views actually support the political order. However, while such debate can increase respect for the moral views of others there is no assurance that convergence and respect will always be achieved. The most that can be hoped for is that being allowed comprehensive expression in the public realm, citizens will see the political order as not in principle opposed to their deeper moral commitments. Where a convergence of views is not found, citizens can at least know that they are given a fair opportunity to convince others in public debate. Where moral views are deeply opposed it is unreasonable to assume that individuals will respect the moral character of the views of others. Pro-life and pro-choice views are mutually exclusive; both sides, in order to remain consistent, must see the other side as immoral. The view I uphold in Chapter Two both makes comprehensive convergence possible by allowing public debate of moral views and allows for pragmatic acceptance of decisions contrary to one's viewpoint. Because my conception of public reason allows for public expression of comprehensive doctrines it holds out the potential for deeper convergence on moral, religious, and philosophical doctrines than is available on the Rawlsian view. At the same time it settles for less than is acceptable to Gutmann and Thompson, for a practical compromise which maintains the moral integrity of opposed

views, specifically because it has no pretense to “moral” accommodation.

While there are occasions on which it is appropriate and indeed essential publicly to debate the merits of relevant comprehensive views, for the most part public discussion of such views is either irrelevant or quite possibly destructive. Thus following Greenawalt, I argue for certain restraints on the public expression of the comprehensive bases of one's political judgments. These restraints are defined in terms of the roles citizens and officials perform in the public culture. It is crucial however that these restraints be flexible and sensitive to context. In this light, I argue by contrast with Rawls, that the legislature and not the Supreme Court best exemplifies public reason.

My attempt to expand the boundaries of public reason also includes an important historical component. However, my use of historical resources, primary sources but mainly historians' interpretations, is intended at all times to have a philosophical purpose -- to show that the Rawlsian view fails to comprehend the moral resources inherent in the history of the public culture of the United States; to show how the historical role of moral and religious views in the public culture of the United states supports an extension of public reason to be more inclusive of these views.

Chapter Three focuses on the recent work of Michael Sandel, among the most eloquent critics of the Rawlsian pretension to have developed a political conception which will satisfy citizens embedded in their comprehensive views and associations. Rawls argues in response to communitarian critics that his political conception is drawn from shared ideas implicit in the public culture of the United States. Rawls thus attempts to circumvent the

communitarian criticism that his theory of justice is untenably universalist; he insists that it is drawn from the particular political life of the United States. I concur with Sandel however, that Rawls's view abstracts from the public culture to such a degree that the actual shape of this culture is lost. Rawls's political conception relies on an analytical approach which does not ring true to the historical and moral character of individuals and events.

In his Democracy's Discontent, Sandel investigates the history of the public political culture of the United States and argues that the political life of America has a long tradition of substantive moral argument and commitment and that the Rawlsian conception of public reason, devoid of such moral resources, represents a distortion of the type of political reasoning which symbolizes what is best in American public life.⁶ According to Sandel, the Rawlsian view has come to dominate American political life and has resulted in a disenchanted and anxious public realm.⁷ He contends that the hope for a more engaging political participation rests on the reemergence of a republican interest in substantive

⁶ Michael Sandel, Democracy's Discontent (Cambridge: Harvard University Press, 1996)

⁷ In a forthcoming essay, Will Kymlicka raises important questions as to whether Rawlsian liberalism in fact dominates American public philosophy. Kymlicka is concerned to show that a more conservative form of liberalism dominates U.S. politics and is responsible for the "anxiety" to which Sandel points. My argument has a different focus than Kymlicka's in that I argue that Sandel underestimate the degree to which republicanism (at least as he defines it) is an active force in recent U.S. history. Nevertheless from our varying perspectives both Kymlicka's and my own view hold: (1) that the Rawlsian view does not completely dominate the public culture of the U.S. and (2) that civic republicanism and Rawlsian liberalism share significant common ground.

moral/political debate. Sandel's argument suggests two important points. First, it suggests that rather than drawing on the shared traditions of the public culture, the Rawlsian view presents instead a one-sided liberal account. Second, it suggests that historical investigation provides a vantage point from which to see that the current Rawlsian public philosophy of the United States is in fact a corruption of a richer political heritage. Sandel's view calls into question the analytical Rawlsian approach by indicating the importance of historical context for normative judgment. From a Sandelian perspective, abstract Rawlsian analysis cannot adequately comprehend the determinate historical and moral character of American political life.

Rawls's concession to his communitarian critics entails that to evaluate his conceptual construction one must determine whether or not his fundamental concepts are in fact "shared ideas" within the actual public culture of the United States. The public culture does not exist in a vacuum, however, or in a thin sliver of time called "now". Rather the public culture has a history, indeed it is fundamentally historical; the bearer of the tradition of political activity and thought which animates its institutions. The "shared ideas" implicit in the public culture, assuming they exist, are likewise historical. Only by experiencing the consequences of the "separate but equal" doctrine, for example, could citizens come to understand that, in relevant respects, where there is equality there will not be separation. As Faulkner said: "The past is not dead it is not even past."

Chapter Three, then, focuses on Sandel's accounts of the Lincoln-Douglas debates and the New Deal. Sandel finds in the Lincoln-Douglas debates an example of the role

moral commitment plays in the history of the public culture of the United States. Against Douglas's view that the Federal government should remain neutral over the issue of the extension of slavery into the Territories and allow each territory to decide for itself, Lincoln argues that on an issue of such moral import the state could not remain neutral. Against the supposed neutrality of Rawls's conception of public reason Sandel brings out the importance of moral debate concerning constitutional essentials and also the nefarious ends (slavery) which may be served by neutrality. This chapter supports Sandel's claim by drawing further on historical accounts which show the pervasiveness of Lincoln's moral commitment and the underlying substance of Douglas's neutrality.

However, Sandel's sees the historical record as exhibiting a gradual displacement of republicanism by liberalism. By contrast, my argument suggests that liberalism and republicanism are diverse sides of the one American coin, that they are in constant relation to each other. Thus, the republican victory in the Civil War, for Black civic-participation, contributes to the victory of liberal voluntarism in the growth of a capitalist economy. Likewise, the liberal emphasis on Black civil rights beginning with the New Deal and culminating in the Civil Rights movement was crucial to the survival of Black communities and increased Black civic participation. Thus while supporting, with some reservations, Sandel's general account of the Lincoln-Douglas debates and its normative conclusion, this chapter argues that his "linear" account of history cannot make sense of the important republican elements of the New Deal. The normative conclusion of this historical inquiry supports Sandel's critique of neutrality and argues further that any conception of a political

order which would be drawn from the public political culture of the United States must adequately reflect this important liberal-republican dialectic.

As noted above, Sandel primarily criticizes Rawls's assumption that the liberal tenets of voluntarism and neutrality are central to the public culture of the United States.⁸ By contrast with this liberal view, Sandel states: "The republican tradition taught that to be free is to share in governing a political community that controls its own fate. Self-government in this sense requires political communities that control their destinies, and citizens who identify sufficiently with those communities to think and act with a view to the common good."⁹ So for Sandel, by contrast with the liberal's emphasis on voluntarism and neutrality, the republican emphasizes self-government and the common good. Moreover, in advocating a politics of the common good, republicans argue that government has a role in the formation of the virtue of individuals.

These conclusions, that individuals, in order to be free, must participate in public debate concerning the common good and that government has a role in the formation of the character of its citizens are anathema to liberals. The central liberal criticism is that a politics of the common good is both exclusive and coercive, exclusive because it prevents

⁸ Voluntarism defines freedom as individual choice. The doctrine of neutrality, asserts that "the state should not reward or penalize particular conceptions of the good life but rather should provide a neutral framework within which different and potentially conflicting conceptions of the good can be pursued." Will Kymlicka, "Liberal Individualism and Liberal Neutrality" Ethics 99 (July 1989) p. 883.

⁹ Sandel 1996: 202.

minority dissent and coercive because it limits the options among which individuals may choose. On the liberal view, a politics of the common good both inhibits the rational reflection and distinction from one's ends which makes it possible to live one's life from the inside and eliminates the options which make it feasible to revise one's conception of the good. The present argument attempts to lessen the difference between liberal and republican positions. But in order to make this aspiration to a diminution of differences palatable to liberals it must address legitimate concerns about the supposedly exclusive and coercive character of republicanism.

So Chapters Two and Three present both: (1) a liberalism enriched by a more inclusive sense of public reason and by a deeper comprehension of the historical nature of the public culture, and (2) a defence of a pluralist republicanism which is marred by neither exclusion nor coercion and which thus represents a viable alternative to liberal neutralism. By providing public political forums for the discussion of the common good and by emphasizing participation, liberalism takes on a more republican hue and so renders possible a deeper respect of individual rights than is otherwise possible and a closer relation between the public philosophy of the liberal state and its actual public culture. By restraining the public expression of comprehensive beliefs in accordance with the roles of citizens and public officials, republicanism sustains the stability of the public realm. Moreover, it ensures that no one sectarian comprehensive position comes to coercively dominate pluralist society.

But what of those groups which are not integrated within the public culture to the

same degree as, say, the Roman Catholics whose comprehensive view of abortion we attempt to accommodate in Chapter Two? What of aboriginal groups and fundamentalist groups?

Chapter Four examines Will Kymlicka's ground-breaking Liberalism, Community and Culture and Multicultural Citizenship which provide a thoroughgoing defence of "group-differentiated rights".¹⁰ Kymlicka argues that Rawls has an overly cerebral conception of citizenship which cannot adequately comprehend the interests of those citizens who belong to national and ethnic minorities. Whereas Sandel wishes to develop a conception of political life which is responsive to the depth and historical character of individuals' moral beliefs, Kymlicka wishes to account for the depth to which individuals are embedded in their cultures. The central thrust of Kymlicka's argument shows how group-differentiated rights are compatible with the liberal principles of freedom and equality. However, Chapter Four argues that, while Kymlicka's criticisms of Rawls are persuasive, his own view rests on an untenable distinction between cultural structure and cultural character. It suggests that Kymlicka's central contention, that minority rights are consistent with liberal principles, is better stated in terms of a conception of cultural choice, which emphasizes that culture is a product of free human activity. Conceiving culture as a product of free activity, contributes to a more successful account of various multicultural issues and implies a more inclusive conception of religious toleration than is available on Kymlicka's view.

¹⁰ Will Kymlicka, Liberalism, Community and Culture (Oxford: Clarendon Press, 1989) and Multicultural Citizenship (Oxford: Clarendon Press, 1995).

Basic to this essay then is a sense that certain categories of contemporary political theory are not mere opposites, that the differences are not as radical as they may seem at first or even second glance. It is clear that Rawls has adjusted the universality of his theory of justice; he has particularized it to meet the insights of his communitarian critics. In Political Liberalism Rawls now attempts to draw his theory from the public culture of a particular liberal democratic community. Likewise, Kymlicka has indicated that an individual's sense of belonging to a "secure" culture is necessary to individual freedom. In the wake of the liberal-communitarian debate of the 1980's the distance between both sides has lessened considerably.

In light of the instructive dialectic which has emerged between liberalism and communitarianism, in this essay I take the view that political activity in liberal democracies is fundamentally communal. On the one hand it gives rise to a political community or culture, which attempts to secure individual rights and freedoms. Moreover, political activity is a nexus of both the political or civic community and the various local communities which form its horizon.

Further, as defined by Sandel, republicanism has much in common with liberalism: Rawlsians *and* Sandelians can find grist for their respective mills in both the New Deal and the Civil Rights movement.¹¹ Rawls himself contends that justice as fairness has no

¹¹ Sandel, however, does not always make this commonality explicit. Nevertheless, at central moments in American history similarities between liberalism and republicanism become apparent. For example, Jefferson and other leaders of the American Revolution saw republican ideas as

fundamental opposition to what he calls "classical republicanism". He states that both views hold that: "The safety of democratic liberties requires the active participation of citizens who possess the political virtues needed to maintain a constitutional regime."¹²

Rawls, however, argues that his view is fundamentally opposed to civic humanism. Following Charles Taylor, Rawls sees civic humanism as a form of Aristoteleanism which holds that man is a political animal and that participation in democratic politics is "the privileged locus of the good life".¹³ What Rawls objects to in civic humanism is that it presupposes a comprehensive doctrine about the good life.

However, it is not obvious that liberalism itself, "political" or otherwise, makes good its claim to neutrality.¹⁴ I shall argue that it does not for reasons like the following. First, liberal neutrality itself presupposes a conception of the good life, as consisting in part in individual freedom. Indeed, Rawls's view ends up asserting that all reasonable comprehensive doctrines have been shaped by liberalism -- what this amounts to is that a portion of every reasonable comprehensive view will be determined by liberal doctrine.¹⁵

compatible with those of Locke. Cf. James Young, Reconsidering American Liberalism: The Troubled Odyssey of the Liberal Idea (Boulder: Westview Press, 1996) p. 50.

¹² Rawls 1993: 205.

¹³ Rawls 1993: 206.

¹⁴ Cf. Ronald Beiner's instructive "Liberalism as Neutralism" in his Philosophy in a Time of Lost Spirit: Essays on Contemporary Theory (Toronto: University of Toronto Press) pp. 28-34.

¹⁵ Cf. 2.I.1 below.

A second point is that there are many issues that cannot be decided in a neutral way. Critics of liberalism, like Galston and Sandel have brought out that on issues like abortion any decision is bound to support one reasonable view over another. It does not seem enough for liberals to argue that the state must be as neutral as possible. In all instances, only those views transfigured by liberalism will find support in a liberal state.

So without wishing to reject liberalism I do want to deny that it can be neutral or justified on political grounds. Thus, I support a more than purely political conception of public reason which allows individuals to express the comprehensive bases of their beliefs, to engage the dominant liberal public philosophy in terms which do not already prefigure the outcome to the degree that Rawlsian public reason does.

For the purpose of this essay I take as a given the liberal views that the individual must assent to coercive authority, in order to render it legitimate, and that certain forms of political relationship, like slavery, are rightly forever stricken from the constitutional agenda. However, I hold that there are some ways of life, that of the Amish, for example, which though they restrict the options available to individuals more narrowly than some liberals deem permissible, are nonetheless worthy of recognition within a liberal state. Further, I argue that protection of individual rights requires that comprehensive doctrines play a larger role in the public realm than is suggested on the Rawlsian view.

The conception which I advance here as lessening the difference between liberalism and republicanism and as expanding the boundaries of public reason may be called pluralist republicanism. First it is composed of many strands: republicanism, liberalism,

perfectionism and communitarianism. Like those whom Rawls labels classical republicans, Machiavelli, for example, I hold that political participation is instrumental to individual freedom. To ensure that they have a voice in the effect which the state will have on the vision of the good life they pursue, holders of comprehensive doctrines need to participate in political life. Political life is thus a necessary precondition of the successful pursuit of the good. In liberal societies, the pursuit of political justice is instrumental to the pursuit of the good life. Because the pursuit of the good occurs in an inherently political context which can both secure and threaten one's way of life, it is as practically meaningless to speak of an a-political pursuit of the good life as it would be to speak of an a-human pursuit of the good life.

In this light, I concur with the Aristotelean conception of humans as political animals. Further, following Aristotle, I likewise hold that the highest good for individuals may be beyond political life.¹⁶ Nevertheless, I do not deny the perfectionist claim, of thinkers who argue that political life should be informed by a conception of the highest good. Liberals have been too quick to assume that the pursuit of a common good is an inherently illiberal goal. Rawls asserts the permanence of pluralism, while never showing why it is impossible that, even on his view, individuals in the background culture may not reach consensus on seemingly intractable moral, religious and metaphysical issues. Moreover, he does not refute

¹⁶ Cf. Aristotle's Nichomachean Ethics Book X: Ch.8 where he defines the highest good as philosophical contemplation.

the view of those who contend that such consensus already exists.¹⁷ Further, James Madison in the seminal document of American political science, the Federalist Papers, argued that the American constitution gave institutional form to such a common good. Were individuals to share such a consensus, I do not see why it would result in an inherently exclusive and coercive political life.¹⁸ Public debate conceptualized as I suggest would allow for the possibility of a political pursuit of a common good which is neither exclusive nor coercive.

Thus, by contrast with political liberalism, pluralist republicanism does not aim for an overlapping consensus or claim that its fundamental principles must be based on shared principles implicit in the public culture. Pluralist republicanism holds that political liberalism overstates the degree to which a liberal state may be neutral. It replaces the Rawlsian pretense to neutral or shared principles with expanded public forums which allow citizens to influence the comprehensive doctrines of the state and to protect their ways of life from the state's coercive power. On this view, neutrality is not a moral imperative of the whole state but is rather an appropriate expression of fairness within certain of the state's functions, for the most part those of the judiciary, for example.

While pluralist republicanism cannot offer an unbiased standpoint, a view from nowhere, it can offer citizens increased input into the comprehensive composition of the state. Further, in place of the moral accommodation of Gutmann and Thompson it places

¹⁷ Cf. for example, Michael Perry, Love and Power (New York: Oxford University Press, 1991).

¹⁸ Cf. 3.I.4 below.

greater emphasis on plain political compromise.¹⁹

By showing ways in which liberalism and republicanism are historically and theoretically compatible and by indicating ways in which seemingly illiberal cultural groups such as the Amish may be included under the aegis of the democratic state, the pluralist republicanism which underlies this essay hopes to ensure a more inclusive public reason. It is pluralist in its attempt to secure a wider range of legitimate views of the good life than is available on many liberal views and it is republican in its emphasis on the fundamental relationship between politics and the pursuit of the good life.²⁰

¹⁹ Cf. 2.II.2 below.

²⁰ A fully developed conception of "pluralist republicanism" is beyond the scope of this essay, though I do intend to explore such a concept in more detail in further work. I hope, however, that in this essay steps have been taken in that direction especially in the expansion of the boundaries of public reason.

CHAPTER TWO

Rawls's Proposal:

Moral Pluralism and Public Reason

The development in Rawls's conception of justice from its presentation in A Theory of Justice to his recent Political Liberalism stems from his recognition of what he calls the deep and intractable plurality of moral, religious and philosophical standpoints characteristic of liberal democracies.¹ Rawls alters his conception of a well-ordered society as presented in A Theory of Justice because on that account the reasons for maintaining one's sense of justice can be decisive only on a Kantian interpretation of the principles of justice.² On this interpretation "acting justly is something we want to do as free and equal rational beings"; we act justly because this satisfies our human nature.³ Thus, as presented in A Theory of Justice, the concept of a well-ordered society is inconsistent with Rawls' s intention that the principles of justice allow individuals to pursue their own comprehensive ends.

In A Theory of Justice, Rawls had described the existence of a multiplicity of comprehensive doctrines as "the fact of pluralism". However, in Political Liberalism, he

¹ John Rawls, A Theory of Justice, (Cambridge: Harvard University Press, 1971)

² Rawls 1971: 572.

³ Rawls 1971: 572 also 476,574.

emphasizes not just the existence of a plurality of incompatible comprehensive doctrines but also that the differences among doctrines, are reasonable. He states: "in framing the political conception so that it can, at the second stage, gain the support of reasonable comprehensive doctrines we are not so much adjusting that conception to brute forces of the world but to the inevitable outcome of free reason."⁴ Thus for Rawls, the various conflicts among comprehensive views in liberal society are legitimate because grounded in the free use of reason.⁵ He argues that conflicts among reasonable persons inevitably arise because of "the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life."⁶

From this legitimate pluralism of comprehensive views, Rawls draws the conclusion that such views are too diverse to serve as the basis of "lasting and reasoned political agreement".⁷ Moreover, as a corollary of the fact of reasonable pluralism, Rawls asserts what he calls the "fact of oppression". He states: "continued shared understanding on one comprehensive religious, philosophical, or moral doctrine can be maintained only by the oppressive use of state power."⁸ On Rawls's view then, it is a permanent feature of liberal democracies that their non-public or background culture is marked by a diversity

⁴ Rawls 1993: 37.

⁵ Rawls 1993: xiv also 1,36f.,55,129,135,144.

⁶ Rawls 1993: 56.

⁷ Rawls 1993: 58.

⁸ Rawls 1993: 37.

of reasonable yet conflicting comprehensive doctrines.⁹

Moreover, for Rawls, there is a basic conflict in the tradition of liberal democratic thought as to how the basic rights and freedoms of citizens may best express the values of liberty and equality. He contrasts the Lockean tradition which emphasizes "freedom of thought and conscience, certain basic rights of person and of property and the rule of law" with the Rousseauian tradition which emphasizes "the equal political liberties and the values of public life".¹⁰ In the public culture of the United States, this difference is found in the dichotomous approaches of liberalism and republicanism. Liberals traditionally assume the rights of the individual as prior to political life and conceive the task of politics as the aggregation of the desires of individuals within a system that respects this prior right. By contrast, republicans, while likewise emphasizing individual freedom, find in political participation the correction and completion of individual freedom, through the inculcation of civic virtues.

Thus, on Rawls's view, not only is the background culture of the United States characterized by conflict among various comprehensive standpoints, but also the public political culture is "of two minds at a very deep level". But obviously even a pluralistic democracy presupposes certain common values and procedures. Rawls states: "Society's main institutions and their accepted forms of interpretation are seen as a fund of shared

⁹ Rawls 1993: 220.

¹⁰ Rawls 1993: 4-5.

ideas and principles."¹¹ He conceives Political Liberalism as a reconstruction of these basic ideas of citizenship and of a well-ordered society in a manner which overcomes the impasse in liberal democratic theory.¹²

This chapter argues that Rawls is unsuccessful in drawing on "shared ideas and principles". I do not address the question of whether there are such principles, though I suspect that if they do exist they occur at a much more philosophical, moral and religious level than is captured in Rawls's political conception.¹³ Rather, the question here is whether Rawls's basic concepts are shared in the public culture. I argue that his fundamental concepts, will formation (civic education), reasonable pluralism, moral personality, and public reason, are based on sectarian liberal principles and thus neither resolve the impasse in the democratic tradition nor establish a political conception that can be the focus of an overlapping consensus of the many comprehensive doctrines in the background culture. Further, I contend that while Gutmann and Thompson suggest valuable ways of expanding the concept of public reason, they overestimate the potential for "mutual respect" in the face of comprehensive disagreement. While the Rawlsian conception of public reason should be extended to include comprehensive debate, this

¹¹ Rawls 1993: 14.

¹² Rawls 1993: 300.

¹³ Cf. Michael Perry, Love and Power (New York: Oxford University Press, 1991) for an interesting argument which suggests that there are shared standards of political morality in the United States which "derive from the religious traditions of American society, in particular the biblical heritage" (Perry 1991: 8).

will not necessarily result in agreement when citizens are divided on crucial matters. In concluding Chapter Two, I draw on the work of Kent Greenawalt to suggest appropriate restraints for public discourse, restraints which are more flexible than those suggested by Rawls. In light of this flexibility of restraint, I argue by contrast with Rawls that the legislature and not the judiciary best exemplifies public reason.

Part One: Unity, Plurality and the Moral Person

2.I.1 Rawlsian Will-formation

A key indicator of the success of Rawls's view, on its own terms, will be its ability to recognize and appropriate significant elements of the republican component in the public culture and he is at least partially successful in bridging the divide between liberals and republicans. For example, the conception of an overlapping consensus grounds liberal democracy in the substantive moral commitments of citizens. While the content of justice as fairness is clearly defined as political and while the political is starkly distinguished from the comprehensive in terms of both its form of justification and the status of its claims, Rawls nonetheless insists that citizens can derive reasons for adherence to a political conception of justice from within their own comprehensive standpoints. Like republicans, Rawls emphasizes the importance of non-public morality.

Further, Rawls argues that through active participation in families, various associations, and political institutions individuals are educated into a sense of public

justice.¹⁴ Like Tocqueville, Rawls recognizes the importance of local associations in the development of a more universal sense of justice.¹⁵ As Joshua Cohen states, Rawls's "underlying idea --which traces to Rousseauian and Hegelian theories of will formation-- is that people living within institutions and a political culture shaped by certain ideas and principles are likely to come to understand those ideas and principles and to develop some attachment to them."¹⁶ Thus the Rawlsian view incorporates, in part at least, the republican interest in formative politics.

This emphasis on will-formation and civic education counters William Galston's criticism that the Rawlsian conception of citizenship is an ideal which citizens will find it impossible to live up to. Criticizing Rawls, Galston refers to the founders of the U.S. Constitution. He states: "One may wonder, for example, whether the men who drafted the U.S. constitution would have embraced it [Rawls' view of the citizen's capacity for a regulative sense of justice]. There is much evidence to suggest that they did not, that in their view the dominance of both passion and interest was such as to make an effective sense of justice the exception rather than the rule." Further, Galston points to their

¹⁴ Rawls 1971: 462-79.

¹⁵ Alexis De Tocqueville, Democracy in America (Ed.) J.P. Mayer (Tr.) G. Lawrence (New York: Harper and Row, 1969) p. 70.

¹⁶ Joshua Cohen, "Political Liberalism" (Review) Michigan Law Review, v.92 (May, 1994) pp. 1531-2. Paul Compos also indicates Rousseauian elements of Rawls's theory. Arguing that Rawls's theory of legitimacy traces its roots to Rousseau's concept of the general will. Cf. Paul F. Compos, "Secular Fundamentalism," Columbia Law Review, vol.94 (Oct. 1994) p. 1818.

reliance on "auxiliary precautions" that is, on institutions whose workings were independent of the motivations of office holders or of ordinary citizens.¹⁷ On the Rawlsian view, however, the wide function of public reason includes educating citizens in the political conception and hence to a sense of justice. Hence, Rawls does not need to make the naive assumption that people are born with a sense of justice, so to speak. Rather, all he needs to assert is that having been educated by the liberal public culture, citizens can acquire and sustain a sense of justice.¹⁸ Like republican theorists, therefore, Rawls emphasizes the importance of both active participation and political virtues for maintaining the stability of a democratic state.¹⁹ His conception of civic education provides a realistic account of how citizens may gain a sense of justice.

Still, Rawls's conception of will-formation is highly problematic.²⁰ An important aspect of Rawls's view is the "historical" transformation of individuals' comprehensive doctrines by liberal institutions. He states: "the liberal principles of justice, initially

¹⁷ William Galston, Liberal Purposes, Goods, Virtues, Diversity in the Liberal State, (Cambridge, 1991) p. 130.

¹⁸ Cf. Rawls 1993: 71,82-5 and Rawls 1971: 460-479. Further, and by contrast with Galston's conception, it is not apparent that for the "founding fathers" auxiliary precautions were conceived as excluding a virtuous citizenry. Madison, for example, states: "To suppose that any form of government will secure liberty or happiness without any virtue in the people is a chimerical idea" (Cited in Sandel 1996: 132).

¹⁹ Rawls 1993: 205.

²⁰ It is important to note that Rawls's concept of will-formation is central to his account both the historical development of liberalism and the education of citizens in contemporary liberal democracy.

accepted reluctantly as a *modus vivendi* and adopted into a constitution, tend to shift citizens' comprehensive doctrines so they at least accept the principles of a liberal constitution."²¹ In fact, on Rawls's view it is the transformative power of liberal institutions which makes possible an overlapping consensus on a political conception of justice. In discussing the transition from a *modus vivendi* to a principled "constitutional consensus", Rawls argues that political liberalism can take advantage of "a certain looseness" in the comprehensive standpoints of most citizens. He states: "Most people's religious, philosophical, and moral doctrines are not seen by them as fully general and comprehensive, and these aspects admit of variations of degree." Further: "many if not most citizens come to affirm the principles of justice incorporated into their constitution and political practice without seeing any particular connection, one way or the other, between those principles and other views." And: "Should an incompatibility later be recognized between the principles of justice and their wider doctrines, then they might very well adjust or revise these doctrines rather than reject those principles."²² Finally he argues that "the political conception shapes comprehensive doctrines to cohere with it" and liberal principles of justice "tend to shift citizens' comprehensive doctrines so that they at least accept the principles of a liberal constitution".²³

But this account of the formative power of liberal institutions raises significant

²¹ Rawls 1993: 163.

²² Rawls 1993: 160.

²³ Rawls 1993: 160n.25, 163.

difficulties for Rawls's view. First it relies on an a-historical conception of the looseness with which citizens hold their comprehensive doctrines.²⁴ In the pluralist culture of the contemporary United States there may well be substantial looseness of fit in the way in which individuals relate their comprehensive doctrines to their political ideals but would this be true of the citizens of 17th century New England or 18th century Virginia? Moreover, even granting such looseness of fit, this does not explain why liberal principles of justice would shape comprehensive views instead of the other way around.

Further, it is misleading to suggest that many if not most citizens "come to affirm the principles of justice ... without seeing any particular connection, one way or the other, between those principles and their other views".²⁵ In the political struggles of the United States, the Revolution and the Civil War, for example, citizens knew that they were fighting for principles of justice and moreover they believed these principles consistent with, if not derived from their religious views.²⁶ Rawls's portrayal of the development of the American constitution from a modus vivendi to a more principled order neglects that the emphasis on individuality upon which toleration was thought by those involved to be consistent with, if not developed from, the Protestant sense of

²⁴ Rawls's difficulty is that he applies the distinction between public and comprehensive reason to the actual history of the U.S. Their connection is deeper than he allows.

²⁵ Rawls 1993: 160.

²⁶ Cf. Young 1996: 50-51, 120-22 for a discussion of the role of Puritanism in the American Revolution and of the role of William Lloyd Garrison in the abolitionist movement.

inwardness.²⁷ Rawls's historical speculation as to the development of an overlapping consensus is thus questionable, its initial stages cannot be described simply as a transition from a modus vivendi to a constitutional consensus.

Second, Rawls's account seems to rely on a paternalistic "invisible hand" which shapes individuals' comprehensive doctrines in a non-reflective, non-transparent manner. It is difficult not to picture the citizen of this account as unreflective and uneducated, led to a sense of justice through the noblesse oblige of a liberal vanguard. Stephen Macedo defends Rawls against this criticism. Macedo contends that "no political order counts solely on self-conscious educative procedures" and more importantly, on his view, that liberals can defend fully and openly their preferred institutions and practices.²⁸ If successful, this defense would support Rawls's conception of historical and contemporary will-formation.

But this after-the-fact justification undermines the liberal value of informed consent. It relies on the fact that citizens do not realize that their attitudes towards comprehensive doctrines and the doctrines themselves are being molded by liberalism.

²⁷ Cf. Young 1996: 16-18, and Charles Taylor, Sources of the Self: The Making of the Modern Identity (Cambridge, Mass.: Harvard University Press, 1989) p. 184. For an interesting discussion of the Rhode Island Charter of 1663, the first among the colonies to formulate freedom of conscience, cf. Michael W. McConnell "The Origins and Historical Understanding of Free Exercise of Religion," Harvard Law Review Vol.103, No.7 (May 1990), pp.1425-30.

²⁸ Stephen Macedo, "Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls," Ethics 105 (April 1995) p. 495

While an unconscious transformation which shapes comprehensive doctrines in the image of liberalism explains how an overlapping consensus might be possible, it does not respond to questions about the justification of liberalism itself. Moreover, because the possibility of an overlapping consensus depends on a "hidden-hand", only those citizens who have already been indoctrinated by liberalism will recognize the justness of the political conception. Rawls is thus preaching to the converted and seems to underestimate the depth of the impasse in the public culture of the United States. For citizens to whom the compatibility of liberalism with their moral, religious and philosophical views is in question, Rawls provides no answer.

Further, assuming Rawls's description of the historical transformation were correct, would citizens accept liberal principles of justice if they knew what was going on? Macedo's Rawlsian response accepts a little subterfuge because the goal of political liberalism is a transparent public order. What Macedo and Rawls fail to realize is the potential such subterfuge has for destabilizing the overlapping consensus. The recognition that one's tradition of comprehensive belief was and is unconsciously shaped by external forces would give pause to a sincere believer. One might well ask: "Has my belief been corrupted over time?" Depending on the strength with which one held one's belief one might very well suspend one's commitment to liberalism while one looked into the roots of one's comprehensive position. While Macedo and Rawls correctly indicate that political liberals may have transparent reasons to defend their positions, they underestimate the suspicion which may be generated by the "hidden hand" argument.

Given that the acceptability of the political conception to comprehensive doctrines is an important part of its justification, the public reason used to justify liberal institutions is itself called into question by this suspicion.

In this light we may question whether Rawls has thus provided a substantially more realistic account of a well-ordered society. While Rawls's conception of reasonable pluralism makes room for comprehensive doctrines other than Kantianism, his conception of a well-ordered society is realistic only on the assumption that comprehensive doctrines are molded by liberalism. Citizens must endorse either a generally comprehensive liberal doctrine or a partially comprehensive doctrine, whose conceptual limits are, in important ways, determined by liberalism. So far as one participates in the public political realm, one must recognize that one's preferred comprehensive doctrine does not apply to debate about basic political issues, hence can only apply to a limited sphere of human activity. Rawls might respond that in the non-public sphere one can construe the public realm as one likes, as derived from one's comprehensive doctrine, for example. However, on the Rawlsian view, one's comprehensive standpoint can never suffice for public justification of liberalism, hence it can remain only partially comprehensive of human endeavor. As Paul Compos states, for Rawls: "the bewildering plurality of moral belief found [in a democratic culture] should in principle give rise to a satisfyingly monistic note of reasonable consensus on all truly fundamental political questions."²⁹ While Rawls's

²⁹ Compos 1994: 1818.

conception of a well-ordered society no longer specifies that the content of comprehensive doctrines must be Kantian, he now determines the range of issues to which comprehensive moral, philosophical, and religious views can apply.

Rawls's conception of the transformative character of liberal institutions is thus at odds with the republican conception which emphasizes transparent public debate of individuals' comprehensive doctrines. Thus his assumption that liberalism is justifiable fails to recognize the depth of the impasse in the public culture of the United States. Further his conception of liberalism's historical transformation of comprehensive doctrines will create suspicion among the holders of many comprehensive doctrines, because it relies on a hidden hand which transforms their doctrines without their consent.

2.I.2 Facts of Pluralism and Oppression

Rawls's emphasis on the "unconscious" transformative power of liberal institutions is made necessary by his assumption of a false dichotomy between the permanence of the fact of reasonable pluralism and the fact of oppression. Because Rawls has asserted a permanent diversity of reasonable comprehensive views, arising from the free use of reason and the burdens of judgment, it seems that he must likewise recognize a permanent diversity of reasonable conceptions of justice. Even though a political conception is but a subset of all moral beliefs, differences among individuals are qualitative and having quantitatively less things to disagree about does not ensure consensus. Thus, restricting oneself to the rights and duties of the citizen leaves a broad scope for disagreement.

Rawls can claim that restricting oneself to the political is more likely to generate consensus only if there is some qualitative characteristic of the political realm which suggests that the burdens of judgment do not apply to the principles of justice. Rawls thus relies on the educative capacities of liberal institutions. As Cohen argues, without such a mechanism, agreement would be impossible.³⁰

However, the basic “facts” which require Rawls to enlist the support of transformative institutions are problematic. Mulhall and Swift, for example, argue that Rawls’s assertion of the fact of pluralism involves his position in a dilemma. They argue that on the one hand, Rawls’s view that pluralism is a fact suggests that a shared political understanding based on comprehensive doctrines is possible because a fact can change. For Mulhall and Swift, this conception of the factual nature of pluralism together with Rawls’s explicit commitment to public justifiability, seem to push him in the direction of regarding the anti-perfectionist neutrality of the state as a matter of circumstance. Such neutrality, they argue, is required only so long as the public culture can be characterized by the fact of pluralism. Were this fact to change, there is no reason, they suggest, why public agreement on a comprehensive view would not meet the publicity criteria. However, they contend that on the other hand, Rawls’s substantive commitment to the conception of the person and his belief in the values of an anti-perfectionist state seem to

³⁰ Cohen 1994: 1533.

push him in the direction of a comprehensive anti-perfectionism.³¹ They conclude that Rawls's attempt to provide a purely political defense of anti-perfectionist liberalism creates the following dilemma: He can either restrict his theory of justice to the political domain but only at the cost of regarding his commitment to anti-perfectionism as dependent on circumstance; or he can maintain the inviolability of his anti-perfectionism but only at the cost of invoking a more comprehensive liberal doctrine. According to Mulhall and Swift, if Rawls chooses the first option, he makes a substantive concession to his perfectionist critics by ceding the absoluteness of his anti-perfectionism; but if he chooses the second option, he is forced to admit that the supposedly purely political state is in fact based on a comprehensive moral doctrine, and so fails to live up to its own claims of neutrality.³²

This criticism has some force but it fails to recognize that for Rawls it is not just pluralism which is a fact but its permanence. Rawls is thus not involved in the dilemma Mulhall and Swift suggest because, for all practical purposes, the permanence of pluralism makes it clear that anti-perfectionism is not circumstance-dependent. Rather, Rawls's difficulty is more along the lines of the second horn of the proposed dilemma: he proposes a concept of the person which is not appropriately political and as a result he reifies contingent sociological circumstances into permanent "moral" facts.

³¹ Stephen Mulhall and Adam Swift, Liberals and Communitarians (Cambridge: Harvard University Press, 1992) p. 225.

³² Mulhall and Swift 1992: 226.

Rawls presupposes that the liberal values of individual freedom and toleration arose historically only when it was realized that peace could not be achieved on comprehensive grounds during the Wars of Religion.³³ Thus on Rawls's view, toleration is linked with the denial that a political order can be grounded in a single comprehensive doctrine. Likewise conceptions of a political order based on a comprehensive common good are linked with oppression. However, in terms of historical and sociological evidence the most that can be argued is that it is unlikely that comprehensive agreement can be achieved without oppression. But this does not translate into the fact that we are bound by the alternatives of pluralism and oppression. Thinkers like Alasdair MacIntyre have developed persuasive accounts of how it is that differences among divergent traditions might be reduced on rational grounds.³⁴ To refute this suggestion Rawls requires more argument than is provided by the mere assertion of fact. Moreover, the political affirmation of a common good does not necessarily eliminate diversity or imply oppression.

Michael Sandel, for example, distinguishes Rousseau's view, which inclines towards coercion because it conceives the common good as unitary and uncontestable, from Tocqueville's emphasis on a dispersed and differentiated public life.³⁵ Also, Sandel

³³ Rawls 1993: xxiv.

³⁴ Cf. Alasdair MacIntyre, Whose Justice? Which Rationality? (London, 1988) also cf. Taylor 1989.

³⁵ Sandel 1996: 320.

states: "There is no reason to suppose that a politics organized around republican themes would command a greater measure of agreement than does our present politics."³⁶

Further, Sandel's persuasive account of the republicanism implicit in the movement which ended slavery, suggests that in certain forms, pursuit of a substantive common good can be fundamentally inclusive. Likewise Raz suggests: "not all perfectionist action is a coercive imposition of a style of life. Much of it could be encouraging and facilitating action of the desired kind, or discouraging undesired modes of behavior. Conferring honors on creative and performing artists, giving grants to one kind of leisure activity, e.g., hunting, more heavily than others are all cases in which political action in pursuit of conceptions of the good falls far short of the threatening popular image of imprisoning people who follow their religion, express their views in public, grow long hair, or consume harmless drugs."³⁷

Thus as long as the conception of justice is grounded on the fact of pluralism, the public realm will encourage pluralism at the expense of reasonable comprehensive views which encourage unity. There is reason to suspect therefore that the concept of the moral person and the free use of reason which underlies this reified fact will likewise be problematic.

³⁶ Sandel 1996: 335.

³⁷ Joseph Raz The Morality of Freedom (Oxford University Press: Oxford, 1986) p. 161.

2.I.3 The Moral Person

Rawls conceives the free use of reason as the enactment of two moral capacities: a “reasonable” capacity, for a sense of justice and a “rational” capacity for a conception of the good life. He states that the capacity for sense of justice “expresses a willingness, if not the desire, to act in relation to others on terms they can publicly endorse”. The capacity for a conception of the good, by contrast, he sees as “the capacity to form, to revise, and rationally to pursue a conception of one’s rational advantage or good”.³⁸ But this account seems one-sided. On a republican conception, for example, the capacity for a sense of the good is not merely rational but also reasonable in the Rawlsian sense of the term. First, for republicans, one’s liberty, which is one’s highest good can be found only through political life. Sandel distinguishes a strong and weak form of this ideal, arguing that some following Aristotle conceive civic virtue and participation as intrinsic to liberty while others like Machiavelli conceive them as instrumental to liberty.³⁹ Second, for republicans the state has an interest in the moral life of its citizens, because individual virtue is crucial to a virtuous political realm. On the Rawlsian view, civic education engenders in citizens the necessary cooperative virtues and otherwise one’s moral beliefs are a non-public matter. While Rawls accepts that certain virtues are required in a

³⁸ Rawls 1993: 19.

³⁹ Sandel 1996: 26. Cf. also Aristotle, The Politics (Tr.) Ernest Barker (Oxford: Oxford University Press, 1977) Books 1 and 3 and Niccolo Machiavelli, The Discourses (Ed.) Bernard Glick, (Tr.) Leslie J. Walker (Hammondsworth: Penguin Books, 1970).

democratic society, he makes the puzzling claim that conversion is not relevant to a citizen's public or institutional identity. On the republican view, because one's private virtues affect the quality of government, what one is committed to privately is of public relevance. While, given the common roots of Judaism and Christianity, Rawls *may* be correct that for the purposes of public life Saul of Tarsus and St. Paul are the same person, it is not clear that conversion to all religions is compatible with liberal citizenship.⁴⁰ It is only on the assumption that conversion does not affect one's malleability by state institutions that Rawls can assert that conversion is unimportant to citizenship. Given the questions raised about Rawls's concept of will-formation, this assumption is weakened. Rawls's political conception of the moral person is thus in conflict with the republican conception of the person and does not appear to be drawn from shared belief but rather from a sectarian liberalism.

William Galston raises similar concerns in his Liberal Purposes. He argues, for example that religious fundamentalists would not consider as good the capacity to form and revise one's conception of the good. He states: "they might well declare that the best human life requires the submissive capacity to receive an external good (God's truth) rather than actively to form a conception of the good for oneself, and to hold fast to that truth once received rather than revise it."⁴¹ For Galston, Rawls's conception of moral personality is one among many views of public culture and is not one about which there

⁴⁰ Cf. Rawls 1993: 32n.34.

⁴¹ Galston 1991: 130.

is consensus. Indeed for Galston, there is "acute conflict" over the adequacy of this conception of liberalism.⁴² Rawls's conception is adequate only for those who consider the capacity for revision essential to free faith, and thus leaves a significant minority of Americans outside his consensus. Michael Sandel makes a similar point. According to Sandel, by contrast with Rawls's voluntarist view of religion, the republican conception of religion treats it as a matter of conscience. He states: "It is precisely because belief is not governed by the will that freedom of conscience is inalienable."⁴³ Further: "freedom of conscience and freedom of choice are not the same; where conscience dictates, choice decides. Where freedom of conscience is at stake the relevant right is to perform a duty, not to make a choice."⁴⁴ He argues that what makes a religious belief valuable is not how it is acquired but what role it occupies in a good life, what virtue it produces.⁴⁵ Sandel, however, does not wish to assert that people can never choose their religious beliefs rather, that even those religious beliefs which are not a matter of choice are worthy of respect. While I agree with the general thrust of Sandel's contention, I don't think

⁴² Galston 1991: 131.

⁴³ Sandel 1996: 66.

⁴⁴ Sandel 1996: 66. The concept of conscience is difficult to measure. For example, it is difficult to determine whether or not what one claims is a matter of conscience is in fact merely a matter of preference. In the following account, I accept Sandel's description of conscience and merely wish to indicate that it is not radically opposed to choice.

⁴⁵ Sandel 1996: 66.

conscience should be radically distinguished from choice. Rather, conscience should be conceived as providing a strong even compelling reason to make a choice. However, as captured in the Pauline conception of sin as “knowing the good but doing evil anyway”, the urgings of conscience may be accepted or rejected. Granting that one can choose to follow one's conscience or not, from the Sandelian perspective, the choice not to follow one's conscience results in a division within the self, a cognitive dissonance which can only be overcome by an affirmation of the urgings of conscience.

Mulhall and Swift raise a further though less successful criticism of Rawls's conception. They argue that Rawls's conception of the moral person implies a too sharp distinction between the public and non-public realms. For Mulhall and Swift, Rawls's view entails a severe separation between the political and the personal in the lives of citizens. Further, on their view, while this separation will be acceptable to anyone holding an anti-perfectionist moral doctrine, it will involve those committed to other comprehensive doctrines in a greater or lesser degree of “schizophrenia”. A “schizophrenia” intensified by the results of Rawls's view on which, the public political conception always wins when conflicts arise between public and non-public commitments.⁴⁶ In order to reduce this “schizophrenia” citizens are required to hold their non-liberal comprehensive doctrines in a half-hearted way. However, it is unclear that Rawls, in fact, intends the distinction between public and personal to be quite this radical.

⁴⁶ Mulhall and Swift 1992: 209.

First, Rawls does not employ a radical separation, but speaks of the distinction as one between public and non-public and asserts that a common human reason is operative in each sphere.⁴⁷ Moreover, on a more charitable reading, Political Liberalism can be seen as attempting to draw these spheres together while recognizing their differences. His conception of an overlapping consensus among comprehensive doctrines attempts to show how public reason can gain the support of non-public reason. Were an overlapping consensus possible on Rawlsian terms, concerns about the division of public and non-public would not be substantial. The basic difficulty Rawls's concept of the citizen faces is rather a threshold problem: it relies on a one-sided account of the conception of the moral person. Hence, his political conception is unacceptable as the basis for consensus from the start.

Thus, the fundamental concepts which frame Rawls's conception of public institutions and debate are inadequate to the public culture from which they are supposedly drawn; they are merely politicized accounts of one element of that culture. It is not surprising, therefore, that Rawls's account of reasonable public debate is likewise flawed.

Part Two: The Limits of Public Reason

⁴⁷ Rawls 1993: 220n.7.

2.II.1 Public Reason

According to Rawls, American democracy is based not simply on a modus vivendi but on a constitutional consensus.⁴⁸ However, on Rawls's view, the limits of a constitutional consensus lead to the current impasse in liberal democracy, "namely that there is no agreement on the way basic social institutions should be arranged if they are to conform to the freedom and equality of citizens as persons".⁴⁹ The concept of public reason is a key element of Rawls's argument that an overlapping consensus on a political conception of justice improves upon a constitutional consensus. However, Rawlsian public reason, like the other basic components of his political conception will not be compatible with many, otherwise reasonable, viewpoints in the public culture. Thus his argument for the significance of an overlapping consensus is weakened.

On Rawls's view, a constitutional consensus is insufficient because it lacks depth, breadth and specificity. He contends that this consensus satisfies certain liberal principles of justice but that it does not ground these in shared ideas of society and person, and most significantly in a shared public conception. This lack of "depth" means that a constitutional consensus lacks the conceptual resources to guide constitutional amendment and interpretation.⁵⁰ Also, a constitutional consensus will have an

⁴⁸ Cf. Chapter Two, Section 1, which examines difficulties in Rawls's account of the transition from a modus vivendi to a constitutional consensus in American democratic society.

⁴⁹ Rawls 1993: 300.

⁵⁰ Rawls 1993: 165.

insufficient conception of rights, liberties and procedures to cover the fundamental political questions that will be debated. This “narrowness” means that there will be insufficient unity among citizens and that conflict will arise about basic issues of justice. Further, according to Rawls, unless justice as fairness is “specified” as applying to the basic structure of society, and as prior to all other liberal conceptions, there will be a conflict among the varying interests who hold these conceptions.⁵¹

However, on Rawls's view, these limitations give rise to tendencies towards an overlapping consensus. He argues that once a constitutional consensus is in place, political groups must enter the public forum of political discussion and appeal to other groups who do not share their comprehensive doctrines. It is thus rational for them to develop political conceptions beyond their comprehensive doctrines, in terms of which they can explain and justify their preferred policies and obtain a democratic majority.⁵² Likewise, it will be necessary for judges or the officers in question to develop a political conception of justice in the light of which the constitution is to be interpreted and important cases decided. Rawls states that within a constitutional consensus "groups will tend to develop broad political conceptions covering the basic structure as a whole in order to explain their point of view in a politically consistent and coherent way".⁵³ Thus,

⁵¹ Rawls 1993: 164-8.

⁵² Rawls 1993: 165. This argument is more compelling when divorced from Rawls's "hidden-hand" argument to which it is unfortunately tied. Cf. Chapter Two, Section 1 above.

⁵³ Rawls 1993: 167.

a constitutional consensus contains the seeds of an overlapping consensus. Rawls argues that: (1) It fixes the content of certain political basic rights and liberties, and assigns them special priority; (2) It enables liberal principles to be applied following the ordinary guidelines of public inquiry and rules for assessing evidence, that is, common sense and the procedures and conclusions of science when not controversial and; (3) The previous two points tend to encourage the cooperative virtues of political life: the virtue of reasonableness and a spirit of fairness and compromise.⁵⁴

Rawls contends that cooperative persons see that the burdens of judgment set limits on what can be reasonably justified to others and thus they endorse some form of liberty of conscience and freedom of thought.⁵⁵ Moreover, he contends that no citizen, when considered as free and equal (as represented in the original position), can grant the political authority to another citizen or association to decide constitutional essentials on the basis of a comprehensive doctrine and he concludes that such authority is without grounds in public reason.⁵⁶ Further, it follows that a public and shared basis of justification that is drawn from and applies to comprehensive doctrines is lacking in the public culture of a democratic society.⁵⁷ Rawls argues, therefore, that only an overlapping consensus on a political conception of justice, can justify the basic structure

⁵⁴ Rawls 1993: 161-3.

⁵⁵ Rawls 1993: 61. Cf. also Rawls 1993: 162.

⁵⁶ Rawls 1993: 226.

⁵⁷ Rawls 1993: 60-61.

and public policies to all citizens.⁵⁸ Exploiting a Rawlsian distinction, we can say that in a constitutional consensus there is agreement on the "concept" of justice while in an overlapping consensus there is agreement on the "conception" of justice. Following Hart, Rawls argues that "concept" refers to the meaning of a term while a conception includes the principles required to apply it. He contends that while people can agree on the meaning of the concept of justice they can, nevertheless, be at odds since they affirm different principles and standards for deciding matters of justice.⁵⁹ On Rawls's view, the notion of public reason establishes a legitimate basis not only for the interpretation of constitutional essentials but also for their application to specific cases.

According to Rawls, reason is public when it has three characteristics: (1) it is the reason of the public, of citizens; (2) its subject is matters of fundamental justice and the public good and; (3) its content is "given by the ideals and principles expressed by society's conception of political justice" (i.e., the political values of justice and the political values of public reason) and it is conducted publicly.⁶⁰ Rawls specifies the principles of public reason in the same way as he generates the principles of justice, that is, through the representation of the original position. He states: "the parties in the original position, in adopting principles of justice for the basic structure, must also adopt

⁵⁸ Rawls 1993: 224.

⁵⁹ Rawls 1993: 14n.15.

⁶⁰ Rawls 1993: 213.

guidelines and criteria of public reason for applying those norms".⁶¹ The parties in the original position specify that public discussion concerning constitutional essentials must be based on political values that other citizens can be reasonably supposed to endorse.⁶² Hence, for Rawls, the values of public reason are as follows: (1) Appropriate use of fundamental concepts of judgment, inference, and evidence; (2) Reasonableness and fair-mindedness (as shown in (3) below); (3) Adherence to the criteria, procedures and generally accepted beliefs of commonsense knowledge; (4) Acceptance of non-controversial methods and conclusions of science.⁶³ Rawls asks what other guidelines and criteria have we for this case?⁶⁴ Further he asserts that these guidelines apply to the parties in the original position and are meant to ensure that the principles of justice are applied in the light of principles reasonable citizens can be expected to endorse.⁶⁵ Thus, public reason specifies a just form of public discourse in which three conditions are affirmed: (1) we normally give overriding weight to the ideal of public reason; (2) we believe public reason is complete as specified by a political conception and; (3) we

⁶¹ Rawls 1993: 225.

⁶² Rawls suggests further, that one possible criterion for principles of public inquiry is that they be agreed to from the standpoint of the original position (Rawls 1993: 226-27).

⁶³ Rawls 1993: 66-67, 139, 162, 224.

⁶⁴ Rawls 1993: 224.

⁶⁵ Rawls 1993: 225.

believe that the view we propose expresses a reasonable balance of political values.⁶⁶

But like the concept of the moral person the concept of public reason is controversial. Galston contends, for example, that most problems allow for differing judgments and that the issue of personal judgment is often guided by the sorts of private incommunicable beliefs, to be excluded from the public sphere. It follows, he contends, that most of what we understand as public argument will be ruled out by the notion of publicity.⁶⁷ This is potentially a dangerous argument because it appears to render political judgment private or subjective and would result in a fragmentation of public political reason. Nevertheless, the obvious long-standing disagreements about abortion, for example, show that even given the same information and with similar intentions of fairness, people make radically different judgments. Moreover, opposing opinions on such issues have not been shown to be based on mistaken judgment. Further, Galston contends that public argument may circumscribe the boundaries of reasonable disagreement by defining relevant considerations for judgment in controversial areas. However, he rightly states: "Nonetheless, the relative priority or weight to be attached to the various considerations is frequently under-determined by the totality of available evidence and argument. It is the role of personal judgment to affirm the importance or unimportance, significance or insignificance, of the reasons commonly acknowledged as relevant." He quotes Kent Greenawalt: "Everyone on such questions must rely finally on

⁶⁶ Rawls 1993: 241.

⁶⁷ Galston 1991: 113.

deep-seated feelings that are not subject to convincing interpersonal argument."⁶⁸

I think this argument better stated and its political hazards tempered when three elements are stressed. First, it must be emphasized that one's "feelings" have the status of final judge only when strictly public reason reaches an impasse. Otherwise, retreat into one's own subjectivity is politically unacceptable, showing a lack of public spirit. Second, Greenawalt's statement that these feelings "are not subject to convincing interpersonal argument" must likewise be tempered. Feelings obviously have an eradicable personal element. However, they are not simply "personal", or perhaps better put, they are not "personal" conceived in radical opposition to "public". The purely personal element of feeling is its facticity, one feels a certain way at a given juncture. Moreover, one owns one's own feelings, they do not belong to anyone else and, qua personal feeling, cannot be transferred to another. Nevertheless, our feelings are educated from childhood by the mores and emotions of parents and those who occupy an important role in our lives. We are taught appropriate limits to feeling. Likewise, our feelings can change on the basis of arguments. And, as Galston notes, the components to be weighed by feeling can be circumscribed by public reason.

The third way to temper an emphasis on feeling is to stress that differences of opinion can be accounted for not simply as matters of feeling but also as matters of

⁶⁸ Galston 1991: 113. Here Galston quotes from an unpublished paper by Greenawalt, "Rescuing Liberal Democracy From its Defenders". Cf. also Kent Greenawalt, Religious Convictions and Political Choice (New York: Oxford University Press, 1988).

conscience. While these considerations need to be fleshed out in terms of specific arguments, their prima facie relevance calls into question Rawls's view of the limits of public reason. The burden of evidence, of proof vis-a-vis specific issues and arguments belongs as much to Rawls as to his opponents. Galston has raised an important criticism of Rawls' s conception of public reason.

Galston also contends that proponents of revealed religion would be compelled to reject the distinction between evidence-based propositions and religious faith. He states: "Many believers insist that their faith is based on evidence--indeed on personal experience--that is communicable to others. Indeed, they typically try to share it with others, frequently with success. And they have a range of non-circular explanations for the failure of others to disagree with them." He asserts that arguments both from faith and from secular evidence can fail to persuade.⁶⁹

This is potentially a damaging problem for Rawls because, in this instance, the believer is not asserting any oppressive political claims. Moreover, if public reason accepts certain scientific conclusions as premises, derives political conclusions from them, and legislates these conclusions, the legislation will not seem legitimate to believers who do not accept the premises.⁷⁰ Public reason fails to achieve the universality

⁶⁹ Galston 1991: 112. Cf. also Elizabeth H. Wolgast, "The Demands of Public Reason," Columbia Law Review, vol.94 (Oct. 1994) p. 1943 for a similar view. She states that framing religious arguments in the legalistic terms of public reason involves a loss of persuasive power.

⁷⁰ Cf. also Stephen L. Carter, "Evolutionism, Creationism, and Treating Religion as a Hobby," Duke Law Journal (1987)

it promises. It is not enough for Rawls to assert, "what other guidelines do we have"; it appears that we do not even "have" the ones he suggests.⁷¹ If Rawls disallows comprehensive doctrines from the public sphere because they are controversial, he must likewise disallow all controversial reasoning. Instead, Rawls merely presupposes the acceptability of common-sense and scientific reasoning.

Rawls might argue, however, that the guidelines of public reason are not so much presupposed as proven valid because chosen from the standpoint of the original position.⁷² However, as Samuel Scheffler points out, this is a highly questionable claim. First Scheffler argues that "the array of options from which the parties choose and the basis of their choice requires further elaboration".⁷³ It is true that Rawls spends far more time discussing the available options for choices of primary goods. A second point, Scheffler makes, ties in directly with Galston's criticism. Scheffler argues that Rawls does not set forth the methods of reasoning and the modes inquiry used in choosing the guidelines of public reason. He states: "in the absence of some further explanation of the relation between the methods of inquiry the parties employ and the methods of inquiry

p. 978 which states that liberalism derogates: "religious belief in favour of other, more "rational" methods of understanding the world".

⁷¹ Cf. Rawls 1993: 224.

⁷² Rawls 1993: 224.

⁷³ Samuel Scheffler, "The Appeal of Political Liberalism", Ethics 105 (October 1994) p. 16

they adopt, there is a danger that any choice they make will appear question begging".⁷⁴ Further, in his "The Limits of Public Reason", Bruce Brower, likewise, points to circularity in Rawls account of public reason.⁷⁵ He argues that Rawls defines a reason as public if it can be reasonably expected to be endorsed by all citizens. Moreover, for Rawls, doctrines and people are reasonable only if they "are willing to propose principles and standards as fair terms of cooperation and abide by them, willingly, given the assurance that others will likewise do so".⁷⁶ But as Brower rightly asserts, this is precisely a willingness to treat everyone equally by giving them public reasons. To define public reason in terms of the reasonable, then, is to define it in terms of the desire for public reasons.⁷⁷ Likewise, to ground public reason in the duty of civility, as Rawls does in lecture six, is to ground it in a duty to cooperate with others on the basis of public reason.⁷⁸ Thus Rawls presupposes the acceptability of a public reason which, so far as it excludes comprehensive views from the public sphere, is, in fact, highly controversial.

2.II.2 A More Inclusive Public Reason

⁷⁴ Scheffler 1994: 16.

⁷⁵ Bruce Brower "The Limits of Public Reason", The Journal of Philosophy 91 (1) (Jan. 1994).

⁷⁶ Cf. Rawls 1993: 49.

⁷⁷ Brower 1994: 9.

⁷⁸ Rawls 1993: 217. Cf. also Simon Caney, "Anti-perfectionism and Rawlsian Liberalism" Political Studies, XLIII (1995) p. 254.

Rawls does not, however, entirely exclude comprehensive doctrines from the public sphere. Whereas, most of Political Liberalism (up to VI,7) relies on an exclusive view of public reason which disallows all reference to comprehensive doctrines, Rawls introduces an inclusive view at VI,8 which allows reference to comprehensive doctrines when they support public reason. He states that the inclusive view allows: "citizens in certain situations to present what they regard as the basis of political values rooted in their comprehensive doctrine, provided that they do this in ways that strengthen the idea of public reason itself".⁷⁹ On Rawls's view, it is only in the "ideal case", where citizens recognize an overlapping consensus and no deep disputes exist, that the exclusive view is appropriate.⁸⁰ He discusses two other cases: (1) of a nearly well-ordered society in which there exists a serious dispute in the application of the principles of justice and;(2) of a society which is not well-ordered and in which there exists profound division about constitutional essentials. In both of these cases the inclusive view is to hold.⁸¹

Further in response to criticism, Rawls has expanded the notion of public reason to be even more inclusive of comprehensive doctrines. Whereas in the first edition of Political Liberalism he permitted appeal to comprehensive moral reasons in public

⁷⁹ Rawls 1993: 247. Cf. Rawls 1993: 249-251 where he indicates the conceptual aspects of the inclusive view in his discussion of abolitionists and civil rights activists. I will examine Rawls's discussion of abolitionism and Sandel's criticism of it in Chapter Three.

⁸⁰ Rawls 1993: 248.

⁸¹ Rawls 1993: 248-9.

deliberation only where there is reason to believe that it would help make society more just, in the paperback edition of the book, he explicitly revises this view. Now he argues that reasonable comprehensive doctrines may be introduced in public reason at any time to support a law or policy, provided that in due course reasons consistent which may be justifiable to all may be presented to support the same law or policy.⁸²

Nevertheless, Rawls's conception of public reason remains too narrow. As Cohen notes, (referring to "The Idea of Public Reason: Further Considerations") these revisions neither permit criticism of others' comprehensive views and the political implications that flow from them nor require citizens to offer their comprehensive views for public challenge.⁸³ Cohen goes on to argue that although the desirability of a convergence on comprehensive issues is often cited as a reason for allowing comprehensive discussion, in the public realm, it is unclear whether such convergence is possible. According to Cohen, we are faced both with the fact of disagreement and the lack of a theory which would lead us to expect convergence on comprehensive moralities. Moreover, he argues that there is no institutional mechanism which can produce such convergence. However, Cohen's argument and Rawls's conception of public reason face a number of difficulties. First, as argued in Chapter Two, Section 1. above, Rawls's mechanism of civic education

⁸² John Rawls, Political Liberalism (Paperback Edition) Int. Sect. 5 and his reply to Habermas, same edition, pp. 372-434. Cf. also Rawls's unpublished "The Idea of Public Reason Further Considerations" quoted in Macedo 1995 and Cohen 1994.

⁸³ Cohen 1994: 1540.

is itself questionable. Second, the narrowness of the restrictions on comprehensive public debate has the potential to create significant distrust. When citizens cannot scrutinize each others' comprehensive views in a public forum there are a number of unfortunate results. First, restrictions on the public political expression of comprehensive doctrines may create a public realm characterized by suspicion and hypocrisy.⁸⁴ On Rawls's view comprehensive doctrines will be variously related to the overlapping consensus.

Lawrence Mitchell suggest two possible relations: (1) a "coincidental" relation in which "support for the overlapping consensus may well be a logical or practical outgrowth or consequence of holding a particular comprehensive view, but is not an integral or necessary part of that belief system itself" and; (2) a fundamental relation in which "the principles underlying that consensus form an integral part of that comprehensive view".⁸⁵

Mitchell suggests that utilitarianism supports the political conception of justice in a coincidental way. He states: "If perfect knowledge of the measure and means of maximizing average utility were obtainable, the utilitarian would withdraw her support for the overlapping consensus, to the extent that the political conception of justice precluded the maximization of utility." He sees Kantianism as offering fundamental

⁸⁴ I do not mean to suggest that there are no restraints which appropriately apply to public discourse, simply that there are less and that they are less stringent than those proposed by Rawls. Cf. 2.II.3 below.

⁸⁵ Lawrence E. Mitchell, "Trust and the Overlapping Consensus," Columbia Law Review, vol.94 (Oct. 1994) p. 1927.

support.⁸⁶ The holders of doctrines which are fundamentally related to the political conception are thus more likely to sustain the compatibility of their doctrines with the political view. By contrast, there will be a contingent quality to the support of other groups for the political conception which will increase uncertainty, even instability, in the public realm. Citizens may be suspicious of the degree to which other citizens' comprehensive doctrines are compatible with the political conception of justice. They could come to fear that it is only a matter of time before these citizens realize this incompatibility and eschew the political conception. Moreover, if citizens viewed other citizens as holding comprehensive views incompatible with the political conception, they might suspect that those holding incompatible views are acting hypocritically, that they do not, in fact, believe the views compatible and merely utilize the public forum for their own nefarious gains.⁸⁷

Open discussion in public forums could be helpful both when suspicions prove justified and when they prove unjustified. When suspicions are not justified, those who harbor suspicion could be convinced that the views in question are compatible with the political conception. When suspicions are justified, only public discussion will make

⁸⁶ Mitchell 1994: 1927-8.

⁸⁷ It is arguable that slave owners in the Ante-bellum South were guilty of such hypocrisy. Cf. 3.II.1 below. This nefarious hypocrisy contrasts with the giving of incomplete reasons in public debate, which is sometimes appropriate -- when it is a recognized aspect of the function of a public official. Cf. Greenawalt 1995: 163 and Greenawalt 1988: 245.

explicit the hypocrisy and hidden agendas involved.⁸⁸ Michael Sandel makes the point that the attempt to ensure neutrality in the public sphere by restricting discussion of comprehensive doctrines is a form of toleration which leaves prejudices intact and allows them to fester in private life, ultimately spilling over into the political arena. Sandel makes a similar case against neutralist toleration of homosexuality. He states: "The neutral case for toleration leaves wholly unchallenged the adverse view of homosexuality itself. A fuller respect would require if not admiration, at least some appreciation of the lives homosexuals lead."⁸⁹

Moreover, Sandel contends that on certain issues it is impossible for the state to be neutral. His analysis of *Roe v. Wade* supports this position. In *Roe v. Wade* the Court, claiming to be neutral, struck down a Texas law prohibiting abortion, arguing that the law was not neutral. However, according to Sandel, the stance of the court merely replaced the preferred theory of life of the government of Texas, which viewed life as beginning at conception, with one of its own, which stressed viability.⁹⁰ As Sandel argues, while this

⁸⁸ Elizabeth Wolgast states: "expressing one's beliefs honestly is surely part of a life of integrity, and the ways a person argues will inspire trust in him only if the terms of his arguments are characteristically true to his beliefs." If one accepts Rawls's view of public reason, she argues: "one cannot believe that the reasons someone gives for a position [in a public forum] are truly his" (Wolgast 1994: 1947).

⁸⁹ Sandel 1996: 107.

⁹⁰ Sandel 1996: 101. Cf. also Sandel 1994: 1782. Likewise, Carlos Nino states: "Contrary to Justice Blackmun's opinion it does not seem possible to avoid a position about the value of the fetus when dealing with the abortion issue.

does not mean the Court's decision was mistaken, it does indicate that it was not neutral.

Further, as Sandel suggests, even the question of what counts as bracketing may require: "either a substantive evaluation of the interests at stake or a conception of the self that minimalist liberalism resolves to avoid".⁹¹ *Thornburgh v. The American College of Obstetricians* upheld *Roe v. Wade* in 1986. Sandel's consideration of the response made by Justice Stephens to Justice White's dissent in *Thornburgh* provides a good example of this difficulty. Rather than impose a controversial moral view on the whole country, White argued, each state should be allowed to decide the issue for itself. He states: "Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the constitution they have adopted."⁹² In response, Stephens argued that the decision should be left to the woman. He states: "no individual should be compelled to surrender the freedom to make that decision for herself simply because her value preferences are not shared by the majority".⁹³ Sandel rightly indicates that Rawls could respond to the suggestion that a decision between the positions of White and Stephens requires a non-

Justice Blackmun implicitly adopted a view about the fetus." On Nino's view, the real question is "not **whether** to decide the value of the fetus but **who** must reach it with binding power over others." Carlos S. Nino, The Constitution of Deliberative Democracy (New Haven: Yale University Press, 1996) p. 212.

⁹¹ Sandel 1996: 102.

⁹² Sandel 1996: 102.

⁹³ Sandel 1996: 102.

minimalist conception of the person by claiming that one need only refer to his political conception of the person. But as argued in Chapter Two, Section 3 above, this conception is not adequate to the public culture of the United States because it expresses a one-sided liberal perspective. As Sandel argues: "Whatever its appeal, it does not underlie the American political tradition as a whole, much less "the public culture of a democratic society".⁹⁴ The Rawlsian position will thus not be able to justify a decision between these alternatives in its own terms. It would first have to prove its sectarian position to be superior to others in the public culture of the United States.

Rawls's approach to the question of abortion in Political Liberalism shows further the inadequacy of Rawlsian public reason in recognizing the depth of individuals' comprehensive attachments. While Rawls limits his comments on abortion to a footnote, they are intended to illustrate how public reason expresses a reasonable balance of political values and thus provide an important example of the application of public reason. Rawls considers the ideal case of a well-ordered society in which a mature adult woman requests an abortion. He asserts that any reasonable balance of the political values of "the due respect for human life, the ordered reproduction of political society over time, including the family, in some form, and finally the equality of women as equal citizens" requires that the woman has "a duly qualified right to decide whether or not to end her pregnancy during the first trimester".⁹⁵ However, here Rawls merely asserts the

⁹⁴ Sandel 1996: 103.

⁹⁵ Rawls 1993: 243-4n.32.

overriding political value of the equality of women, at least for the first trimester.⁹⁶ This assertion is not an adequate response to the deeply held views of those who oppose abortion.

Amy Gutmann and Dennis Thompson give a clear indication of the limits of the Rawlsian position. For Gutmann and Thompson the public controversy over abortion is the paradigm of a deliberative disagreement. On their view, both sides make generalizable claims that are recognizably reciprocal in their moral and empirical content.⁹⁷ Thus, like Sandel, they contend that the moral conflict involved in the abortion issue cannot be banished from public debate. Though pro-choice and pro-life activists agree on basic moral premises "that innocent people should not be killed, and that women have basic liberty to live their own lives and control their own bodies" they, nevertheless, derive radically different conclusions from these common premises.⁹⁸ Thus the abortion debate accords with their principle of reciprocity which insists that in public debate citizens appeal to reasons or principles that can be shared by fellow citizens who are similarly motivated.⁹⁹ Moreover pro-life advocates appeal to non-controversial scientific

⁹⁶ For further criticisms Rawls's argument cf. Miriam Galston, "Rawlsian Dualism and the Autonomy of Political Thought," Columbia Law Review, vol.94 (Oct. 1994) pp. 1854-5n.43.

⁹⁷ Gutmann and Thompson 1996: 74.

⁹⁸ Gutmann and Thompson 1996: 74.

⁹⁹ Gutmann and Thompson 1996:55. The principle of reciprocity is basically a more inclusive conception of what Rawls intends by "reasonable". Cf. Rawls 1993: 50: "it is by the reasonable that we enter as equals the public world

facts about fetal development, while pro-choice advocates refer to "testable claims about the effects of unwanted pregnancy and childbearing on women". The point Gutmann and Thompson wish to make is that neither side can show the other's claims to be implausible.¹⁰⁰

Thus, according to them, neither Rawls's conception of the reasonable nor their own conception of reciprocity is of itself adequate to solve the conflict. Having enlarged the range of reasonable public disagreement, Gutmann and Thompson contend that "reciprocity" must be extended by "principles of accommodation". On their view, by contrast with Rawls's conception of an overlapping consensus, there may be reasonable disagreement about both constitutional essentials and matters of basic justice. Moreover, they intend their principles of mutual respect to apply to all matters of justice and public morality.¹⁰¹ By contrast with the Rawlsian view, they accept that moral conflict will permeate the public political realm. Thus, for Gutmann and Thompson, "accommodating" this pervasive conflict requires "a more favourable attitude toward and constructive interaction with the persons with whom one disagrees".¹⁰² They stress the development of political virtues which permit public life to flourish in the face of deep-seated and intractable disagreement. While Rawls establishes restrictions on the content

of others and stand ready to propose, or to accept, as the case may be, fair terms of cooperation with them."

¹⁰⁰ Gutmann and Thompson 1996: 74.

¹⁰¹ Gutmann and Thompson 1996: 377n.44.

¹⁰² Gutmann and Thompson 1996: 79.

of speech permitted in the public realm, Gutmann and Thompson emphasize restrictions on its form.¹⁰³ They argue for three principles of accommodation: (1) the principle of civic integrity; (2) the principle of civic magnanimity; (3) the principle of the economy of moral disagreement.

The principle of civic integrity calls for consistency in speech, consistency between speech and action, and integrity of principle. What is required is that citizens support a moral position independent of circumstance, that their public and private actions mirror their publicly espoused principles and that citizens accept the broader implications of their principles.¹⁰⁴ Civic magnanimity requires that citizens acknowledge in their speech the moral status of the positions they oppose.¹⁰⁵ Further it requires open-mindedness, the attempt to break habits that discourage modification in one's position.¹⁰⁶ Finally the economy of moral disagreement requires that citizens should "seek the rationale that minimizes rejection of the position they oppose".¹⁰⁷

Gutmann and Thompson's discussion of Roe v. Wade illuminates the practical application of the economy of moral disagreement. While, like Sandel, they recognize

¹⁰³ Thus Gutmann and Thompson wish to allow a wider range of comprehensive content to be expressed in public forums but advocate restraints on the manner in which it is expressed.

¹⁰⁴ Gutmann and Thompson 1996: 81.

¹⁰⁵ Gutmann and Thompson 1996: 82.

¹⁰⁶ Gutmann and Thompson 1996: 83.

¹⁰⁷ Gutmann and Thompson 1996: 84-5.

the impossibility of a neutral solution to the abortion issue, they do find in this Supreme Court decision a remarkable attempt to respect the economy of moral disagreement. The Court did not accept the pro-life argument that the fetus was a person. However, they did acknowledge that the state has a compelling interest in protecting human-life once the fetus is viable. Lawrence Tribe expresses the strength of the decision: "Indeed, Roe at its core rests on a vision that seems compatible in broad outline, with the views of most Americans about abortion. Most Americans who look at the abortion issue see both a fetus and a pregnant woman."¹⁰⁸ Like Tribe, Gutmann and Thompson see in the decision "moral and legal consideration both for the woman and for the fetus".¹⁰⁹ Gutmann and Thompson further argue that the Court would have furthered moral accommodation by following its own logic to its conclusion: increased protection for fetal life as medical advances extend viability to earlier stages of pregnancy.¹¹⁰

However, in their further discussion of the moral economy of the abortion debate, Gutmann and Thompson run into significant problems. Consider the following statement: "a pro-life advocate might argue that, although in a democracy she may have to perform actions that violate her fundamental moral principles (even acts she regards as murder),

¹⁰⁸ Laurence H. Tribe, Abortion: The Clash of Absolutes, (New York: W.W. Norton and Co., 1990) p. 136.

¹⁰⁹ Tribe 1990: 138; Gutmann and Thompson 1996: 86.

¹¹⁰ Gutmann and Thompson 1996: 88. This point is likewise expressed by Justice Sandra O'Connor who in 1983 said that the trimester approach of Roe v. Wade was on a collision course with itself. Quoted in Tribe 1990: 220.

she should not be forced to contribute to those actions with her own funds through taxes. If her fellow citizens truly acknowledge the moral seriousness of her views, they should find some way to reduce her complicity in actions she regards as murder."¹¹¹

While, in this section, Gutmann and Thompson are clearly attempting to accommodate the moral interests of pro-lifers, they underestimate the depth of the pro-lifers' stance. For many pro-lifers, the legalization of abortion calls into question the moral basis of liberal democracy itself. Supporting a system which they believe allows the murder of fetal life, is anathema and it is thus highly questionable whether it is possible for one who holds such a view to cooperate with those who disagree.

Is it in fact possible to hold that abortion is murder and to accept that those who uphold abortion as a woman's right have a moral view? Is the principle of "civic magnanimity" realistic here? Gutmann and Thompson hang their conception on a version of Rawls's burdens of judgment. On their view, reasonable citizens will recognize that: "reason itself, as one philosopher reminds us, does not "point in either direction: it is we who must point it, and we who are led by it. If you are led in one direction rather than the other, that is not because of logic, but because you respond in a certain way to certain facts [about the fetus]."¹¹² However, here Gutmann and Thompson suggest that a rational

¹¹¹ Gutmann and Thompson 1996: 89.

¹¹² Gutmann and Thompson 1996: 75. Here they quote Wertheimer's, "Understanding the Abortion Argument" from Cohen, Marshall et al. (ed) The Rights and Wrongs of Abortion (Princeton: Princeton University Press, 1974) p. 41.

person will see that neither side has refuted the other. They state: "the effect of reading and listening to the arguments on both sides, at least for citizens who are open to opposing views, has been to conclude that neither side has refuted its rival".¹¹³ Yet it is unclear, in the absence of further argument, why this position is rationally convincing. Proponents of either side in the abortion debate can either argue directly against such agnosticism or state that it too is an existential attitude towards the debate. Further, this existential interpretation of the positions in the abortion debate clearly conflicts with the view of Catholics who consider their belief in the personhood of the fetus a matter of conscience and natural law. On the Catholic view, a pro-life stance is not grounded in an existential response to a question which does not admit of a rational or reasonable solution. Rather, they see themselves as compelled by natural law and the God-given light of reason. On this view, the failure to be moved by conscience to protect the fetus is not a result of the burdens of judgment but rather the product of a sinful and disordered will. In this light, the exhortation to open-mindedness is mere temptation to sin, a call to follow the weakness of the human will in the face of the unmistakable requirements of conscience. To suggest that Catholics acknowledge the moral status of the pro-choice is thus in effect to require that they deny the morality of their own position: the burdens of judgment and civic "magnanimity" here require the absence of conscience. A pro-lifer could admit that pro-choice advocates support a morally just value, the freedom and

¹¹³ Gutmann and Thompson 1996: 75.

equality of women. But this is not the issue. The issue is one of priority, of whether the burden placed on the mother overrides the sanctity of fetal life. On this issue, the pro-life Catholic must hold that the pro-choice is immoral because it valorizes “undue burden” at the expense of life itself.

Gutmann and Thompson's integrity requirements are thus strained. There would be no conflict if Catholics did not consider the abortion issue a matter of conscience. But on the terms of accommodation it is hard to imagine that a conscience-bound pro-life advocate, even if he could acknowledge the moral status of his opponent's position in the public realm, which is doubtful, could avoid telling his children that abortion is murder. In this case “civic magnanimity” is likely to conflict with “integrity”.

It is not enough, therefore, for Gutmann and Thompson to state: "Deliberative reasoning is not correctly represented if it is described as giving more weight to the value of mutual respect or deliberation than to the sanctity of life. A citizen may believe that sanctity of life is more important but recognize that under current conditions her understanding of the value is not yet sufficiently appreciated by her fellow citizens and therefore cannot become the basis of public policy that is justified from a reciprocal perspective."¹¹⁴ Deliberation in this instance is fundamentally grounded in recognition of the burdens of judgment and acceptance of the description of the conflicting standpoints on the abortion issue as matters of choice. To valorize the burdens of judgment is

¹¹⁴ Gutmann and Thompson 1996: 93.

likewise to valorize deliberation over conscience and mutual respect over the sanctity of life.

Gutmann and Thompson are correct that Rawlsian strictures on public reason are not adequate to the issue of abortion but it is not apparent that their conception of accommodation solves the problem, because it cannot guarantee the integrity of the pro-life position. A pro-life advocate who sincerely conceives abortion to be murder can accept legalized abortion, if at all, only as a *modus vivendi*. No moral acceptance is possible, because legalized abortion compromises the moral standpoint of pro-life. From this perspective, Gutmann and Thompson fail to preserve a moral basis for accommodation when it comes to abortion.

It is overly optimistic to believe that the civility which might reign over the discussion of abortion will be based on moral accommodation. The pro-life and pro-choice positions are entrenched on a matter of life and death and it is no surprise that the abortion issue strains the bounds of civility. From the pro-life standpoint, abortions are murder and the abortion issue itself cannot be constrained within the confines of the economy of “moral disagreement”. The pro-lifer will likely want to “seek the rationale which *maximizes* rejection of the position they oppose”. Proponents of either side may choose to speak in the polite tone advocated by Gutmann and Thompson but they will do this for moral reasons only if they value deliberation over their specific stand on the abortion.

For many who hold strong views in the abortion debate, the only way of accepting

civic politeness will be as the only possible means of convincing one's opponent of their mistakenness. This seems a more realistic account of the basis for orderly public debate. The sides could move towards accommodation on specific issues as long as they were not required to respect the moral status of their opponent's view. From a moral perspective merely reducing the complicity of pro-life advocates in abortion by earmarking their taxes for other purposes is clearly inadequate: the pro-life advocate would still conceive himself as complicit in murder because he supports a regime which permits abortion. As a "political" compromise, given that one can only hope to alter the opinions of others by continuing debate, legalized abortion becomes more acceptable because the bar for acceptability is lowered. Politics is, after all, a dirty business as well as a moral enterprise.

Granting that accommodation on this issue is possible only as a political compromise, accommodation of the pro-life position could go farther than is suggested by Gutmann and Thompson. First, as they do suggest, a clearer balance of the values involved would require the development of the logic of *Roe v. Wade*. The state's interest in protection of life should increase with technological advances which make the fetus viable at an earlier stage. But beyond this, it is not enough that the complicity of pro-life advocates in abortion be reduced; they should also have room to advance their cause. Pro-life advocates should be able to earmark their taxes for such technological development.

Also, given the reasonableness of both sides, on Gutmann and Thompson's

account, if abortion is legalized, it should be recognized that the pro-choice side has been granted a substantial victory. The onus should then shift to the pro-choice side to sustain the compromise.¹¹⁵ Without reducing the pro-choice victory to nil, pro-life advocates should have more say in determining what constitutes an undue burden on the mother and likewise what funds will be spent, for example, on encouraging unwed mothers to care for their own children.¹¹⁶

In spite of these difficulties, however, Gutmann and Thompson provide for a forum in which debate about abortion can occur and this is a distinct development on the Rawlsian view. While it does not appear that moral accommodation will be successful in reducing conflict on the abortion issue, the mere fact that individuals have a public forum in which to express their comprehensive views should increase trust in the public realm: at the least, it will not seem entirely to shut out comprehensive moral commitment and debate. Moreover, there is the genuine possibility that common public discussion will convince some on comprehensive grounds that their views should be altered. But in the absence of comprehensive agreement, for some citizens the public political realm will be legitimate only as a *modus vivendi*. Loosening the strictures of Rawlsian public reason, allows, for those who desire it, at least the possibility of something more.

¹¹⁵ This "onus of victory" principle should be applied in all cases of "moral disagreement" where non-neutral decisions must be made.

¹¹⁶ Cf. also Gutmann and Thompson 1996: 89.

2.II.3 The Legislature as the Exemplar of Public Reason

Thus far I have argued that Rawlsian strictures on public reason are too severe. Further I have argued against the principles of accommodation advanced by Gutmann and Thompson. The principles of restraint they propose can disfigure the moral basis of individuals' political opinions, as witnessed in my discussion of the abortion debate. I do not intend, however, to deny the validity of all principles of restraint. Rather, I wish both to extend the boundaries of public reason beyond those set by Rawls and to maintain certain important restrictions on the appropriate use of controversial moral and religious principles in the public sphere. In this light, I will argue that the legislature and not the Supreme Court best exemplifies the virtues of public reason.

Thus far we have considered three central reasons for expanding the boundaries of Rawlsian public reason. First, I have argued that the basic components of Rawls's view are controversial and unlikely to generate the support required for an overlapping consensus. Second, I have argued that Rawls's view would result in suspicion as to whether other members of society in fact support the political conception and thus would lead to political instability. And third, I have indicated how some issues which concern constitutional essentials, notably abortion, have an irradicably comprehensive component which cannot and ought not to be excluded from public discussion.

Nevertheless, under current conditions of a plurality of conflicting comprehensive views, an unlimited expansion of the boundaries of public reason would be hazardous. There are a number of good reasons to inhibit the public expression of one's controversial

comprehensive and religious commitments¹¹⁷: (1) The support for a separation of church and state from both secular and religious camps. (2) The unsuitability of the public realm as a forum for comprehensive debate. (3) The potential for destabilization. (4) The lack of a comprehensive component in many, if not most political issues. (5) The distinction which can be drawn between incomplete accounts and hypocrisy. (6) The nature of official public roles.

Let us now take these up in turn. First there is an argument based on the tradition of the separation of church and state in the U.S.. As Mark De Wolfe Howe and Michael W. McConnell have argued, the "wall of separation" between church and state admits not only of secular but also of religious interpretation.¹¹⁸ Thomas Jefferson, for example, was critical of "enthusiastic" religions, favoring the rationalism of the Unitarian Church. He advocated the separation of church and state, and the establishment clause of the First Amendment to protect individuals from religious irrationalism.¹¹⁹ By contrast evangelical churches, for example, Baptists, Quakers, Presbyterian and Lutherans saw in the "wall of

¹¹⁷ It is assumed here that one reason one's comprehensive view might be controversial is that it is based on reasons which are non-accessible, that is, is based on personal experience of a very specific kind, for example, an act of faith. While it is reasonable to place restraints on the public expression of such views, at least in some forums, there are circumstances in which the restraints may be lifted.

¹¹⁸ Mark DeWolfe Howe, The Garden and the Wilderness (Chicago: University of Chicago Press, 1965) Ch. 1. and McConnell 1990: 1437-43.

¹¹⁹ McConnell 1990: 1449-50.

separation" a protection of the purity and supremacy of the claims of religious conscience.¹²⁰ The point here is that there is a tradition of broad agreement about the separation of church and state which clearly suggests the importance of certain restraints on public expression of comprehensive views.¹²¹

A second and related concern is that the public political realm is unsuitable for discussion of comprehensive and religious doctrines. Greenawalt illustrates this unsuitability: "Any genuine dialogue over the import of particular biblical passages for political positions [for example] is likely to be between people who accept the authority of the passages but begin by interpreting them differently, not between those who think they carry none."¹²² In a pluralist society there is likely to be a wide range of differing comprehensive beliefs. Agreement on specific matters of faith will not be reached in strictly political forums. Further, Greenawalt contends that deeper philosophical beliefs in God, for example, will not profitably be discussed in debates over political policy. He states: "A more likely result is the trading of insults...."¹²³

¹²⁰ McConnell 1990: 1439.

¹²¹ Cf. Greenawalt 1995: 173.

¹²² Greenawalt 1995: 137. However, it is important not to overstate this type of concern. Cf. my criticism of Kymlicka below.

¹²³ Greenawalt 1995: 87. While I think this is a reason for caution, I do not think that it is of itself an overriding reason for restraint. Uncharacteristically, Greenawalt here seems to overstate the case. On his own account: "Roughly 95 percent of Americans believe in God, and 80 percent believe Jesus is divine; most belong to churches and go to

This leads to our third concern, that is, with stability: "putting forth opposing political positions and other comprehensive political views in narrow political debate will often lead to acrimony, a hardening of lines, and less fruitful interchange about the comprehensive views of themselves than the omission of those views in political debate."¹²⁴ As these first three points suggest, there are good reasons both from "public" and "non-public" standpoints to inhibit the expression of comprehensive doctrines in public debate.

church with some regularity."(Greenawalt 1995: 168) From this it follows that there will be much common ground when it comes to possible comprehensive debate. Further, before comprehensive debate is introduced in the public political realm, groups could be encouraged to engage in comprehensive dialogue in the background culture.

On my view, the development of a more inclusive public reason with less restraint on comprehensive debate will be a slow even arduous process through which restraints are lessened to the degree that common ground for constructive argument (perhaps as described by Greenawalt) develops. An argument can be constructive even if agreement is not reached. Where there is ground for debate it is enough that insight is gained into another's position, much as Gutmann and Thompson would have it, though this is not a prerequisite of public debate. The present argument holds that there will be debates, like abortion, where debate is perhaps even necessarily acrimonious. Such debate enlightens citizens as to the deep divisions in their society and while it must be tempered it should not be hidden by a thin veneer of civility. However, as noted above in the discussion of Gutmann and Thompson, even when one side is the loser in the political decisions which stem from such debates, there are still ways in which this side can be accommodated. The principle of the "onus of victory" represents a second way in which such debate may be constructive: it can give losers the sense not only that they have had a "fair" hearing but that they have won the most concessions possible from their opponent. In some instances this is all that can be hoped for.

¹²⁴ Greenawalt 1995: 164.

Fourth, many political and judicial decisions have nothing to do with the transcendent concerns of comprehensive doctrines. The political realm is one of zoning laws, resource management and federal-state jurisdictional disputes which, except in exceptional circumstances, are of little interest from a moral or religious standpoint.

Fifth, while the type of hypocrisy discussed above can lead to suspicion and instability, this can be distinguished from those situations where incomplete disclosure is a recognized and desirable aspect of the political process. Greenawalt contends, for example that although judges and legislators are influenced by their comprehensive commitments, in public forums it is best to aspire towards accessible justifications for their positions.¹²⁵ Here Greenawalt makes an important distinction between “internal bases of judgment” and “publicly stated justifications”.¹²⁶ While the personal dimension cannot be denied, one's function as a judge is to make decisions informed by laws valid for all citizens. Greenawalt's suggestion does not deny the judge's reliance on moral resources but recognizes a function performed by the judge which is distinguishable from these resources.

The nature of the specific functions which officials perform is the basis of the

¹²⁵ Greenawalt 1995: 150,156.

¹²⁶ Greenawalt argues that by contrast with internal bases of judgment, publicly stated justifications are evident to fellow citizens and the restraints which apply to them are more enforceable. Cf. Greenawalt 1995, p. 137 for discussion of enforceability and reciprocity.

sixth reason for restraining expression of comprehensive doctrines. The functions performed by judges and public officials define the degree to which they are to be informed by publicly accessible and widely accepted principles and by the comprehensive commitments of their constituents and themselves. Following Greenawalt, I see the judge's role as the most restrained of any in a liberal democracy. Judges represent the people in a most universal way, tied neither to party, as is the president nor to the particular interests of citizens as are legislators. This universality of standpoint ought to be given expression in judicial opinions. Greenawalt states: "The reasons given are ones that are claimed to be available to all judges, reasons deriving directly from the legal materials themselves, or from shared cultural values, or from modes of making judgments that do not depend on special or personal insight."¹²⁷

Nevertheless, as the above discussion indicates, the abortion debate is a significant example of an issue in which legal and public reasons are indecisive. Moreover, there is not a shared understanding among U.S. citizens as to an explicit resolution of the debate. Thus, judges can resolve this issue neither by reference to the law nor to the shared understandings of the community and have no other recourse but to their own comprehensive and moral views. Greenawalt argues however, that on such rare occasions of justifiable unrestraint: "the opinion should symbolize the aspiration of

¹²⁷ Greenawalt 1995: 143.

interpersonal reason and be limited to public reasons."¹²⁸

I agree with Greenawalt in the main, but although he indicates that some decisions cannot be made on the grounds of public reason he fails clearly to recognize that some decisions simply cannot be *articulated* in public reason. As argued in the above discussion, *Roe v. Wade* substitutes the non-neutral doctrine of Texas with its own non-neutral doctrine. Thus Greenawalt's concept of "aspiring to public reasons" is not applicable to all judicial opinions. On rare occasions, judges should aspire only to be as-public-as-possible.¹²⁹

From this discussion we can see that Rawls's view that "public reason is the sole reason the court exercises", that "they have no other values than the political" is overstated.¹³⁰ Further, although Rawls contends that legislators and citizens are less restricted than judges in the use of public reason, his account of these roles is "infected" by the same mistaken restraints that mar his account of the Supreme Court.

¹²⁸ Greenawalt 1995: 150. In line with Greenawalt's view I suggest a scale of reference for the judiciary, one which runs from law to personal conviction. Only if the higher more publicly accessible level is indecisive would it be appropriate to refer to the next level. (1) Law, (2) Shared Public (ly accessible) Understandings, (3) Personal Publicly Accessible Beliefs (4) Publicly Shared Comprehensive Views (5) Personal Comprehensive Views.

¹²⁹ For further criticism of Greenawalt on this point cf. Thomas L. Shaffer, "Checking the Artifacts of Canaan: A Comment on Levinson's 'Confrontation,'" 39 De Paul Law Review 1113 (1990) and Richard Fallon Jr. "Of Speakable Ethics and Constitutional Law," 56 University of Chicago Law Review (1989).

¹³⁰ Rawls 1993: 235.

Rawls *wishes* to allow for less restraint in the use of public reason by citizens and legislators than by judges. He states: "[the limits of public reason] do not apply to our personal deliberations and reflections about political questions, or to the reasoning about them by members of associations such as churches and universities, all of which is a vital part of the background culture."¹³¹ Yet as Greenawalt contends, Rawls's comments on the limits of public reason are more restrictive than they seem at first.¹³² While Rawls removes restraints on discussion in the background culture on matters which do not touch on constitutional essentials, he still maintains that political advocacy in public forums and voting in elections when "constitutional essentials and matters of basic justice are at

¹³¹ Rawls 1993: 215. Cf. also p. 235 where Rawls states: "Citizens and legislators may properly vote their more comprehensive views when constitutional essentials and basic justice are not at stake; they need not justify by public reason why they vote as they do nor make these grounds consistent and fit into a coherent constitutional view over the whole range of their decisions." The revisions I suggest in the concept of public reason lessen the difference between the background culture and the public political culture. Important political discussions in the "background culture" including "ecumenical dialogue" are best considered a kind of "quasi-public" dialogue. They are an example of "public" debate which is mostly unrestrained (though one expects a certain common-sense civility). A discussion within a specific denomination about whether Jesus made certain statements attributed to him in the Gospels, for example, would be solely within the background culture. But if that denomination is concerned with obscenity laws, for example, or if an inter-denominational meeting discusses the right to life, a step has been taken into the public realm. A concern with religious liberty may lead one either to stress the "background" character of such debate or to stress its political importance. No hard-and-fast rules can govern such situations.

¹³² Greenawalt 1995: 112.

stake" must be governed by public reason. But as Greenawalt rightly argues, public advocacy, prompting legislators to vote in a certain way, and voting are the central ways in which citizens effect the resolution of political issues. He states: "If decisions by citizens and legislators on how to vote are to be determined by public reasons, just what is the significance of discerning in reflection, or in discussion with co-believers, the implications of one's comprehensive views for particular political issues."¹³³ On the Rawlsian paradigm, then, one's reflection and discussion in the "background" culture will be strongly influenced by the standards of public reason.¹³⁴

The central reason Rawls's view is permeated by this restrictive notion of public discourse is his conception of the "special" role of the court as the institutional exemplar of public reason.¹³⁵ Rawls does allow that other institutions may also exemplify public reason. He finds an example in: "public financing of elections and restraints on private funding that achieves the fair value of political liberties, or at least significantly move the political process in that direction."¹³⁶ Also he states: "while the Court is special in this

¹³³ Greenawalt 1995: 112.

¹³⁴ Cf. Greenawalt 1993: 113. On my view, the public and non-public realms have strong mutual influence. Where I differ from Rawls here is in my description of the nature of this influence. Public reason influences non-public forums but does not create the restrictions implied on Rawls's view.

¹³⁵ Rawls 1993: 235-240.

¹³⁶ Rawls 1993: 235n.22.

respect, the other branches of government can certainly, if they would do so, be forums of principle along with it in debating constitutional questions."¹³⁷

But, Rawls defines the degree to which the debates held and decisions made by other institutions exemplify public reason in terms of their likeness to those of the Court. He states: "To check whether we are following public reason we might ask: how would our argument strike us presented in the form of a supreme court opinion?"¹³⁸ However, as argued above, judges *do* have recourse to their own comprehensive doctrines and to those of the community, albeit on rare occasions. Thus, they *do not* exemplify public reason in the sense Rawls suggests. Further, if even judges cannot enact such a restrictive notion of public reason, there is reason to suspect that it is chimerical. When it is recognized that judges do not live up to the restraints Rawls places upon them, it becomes more feasible to suggest that not judges but legislators best exemplify public reason. A consideration of the restraints which should apply to legislators and citizens in their public expression and the contrast between these restraints and those which ought to apply to judges indicates the paradigmatic quality of the legislature.

Greenawalt contends that there is a widely shared understanding among most officials and many citizens that serious political discourse ought to be non-religious. He refers to this understanding as a set of "weak conventions" that disputes by officials over

¹³⁷ Rawls 1993: 240.

¹³⁸ Rawls 1993: 254.

national laws and politics should be carried on in non-religious terms."¹³⁹ The primary grounds for such a restriction is that legislators usually represent citizens of many different comprehensive views. Sectarian expression of comprehensive views by legislators in public forums raises serious questions about the representative character of the legislature and leads to feelings of exclusion among those citizens and groups who do not share the views expressed.¹⁴⁰

However, while *legislators* should function within the aforementioned restraints, Greenawalt states: "I now believe that comprehensive views and nonaccessible grounds can appropriately figure in resolution of the broad range of political issues that *ordinary citizens* face."¹⁴¹ He supports this view with two considerations: (1) To restrain citizen's judgment is far more restrictive of religious liberty than to restrain their public discourse. (2) Restraints on citizens reach far more people than do judicial and legislative restraints.¹⁴² Nonetheless, Greenawalt insists on the distinction between judgment or decision and discourse. On his view, while citizens and legislators may rely on comprehensive views to make decisions, in public discourse they should emphasize

¹³⁹ Greenawalt 1995: 156.

¹⁴⁰ Cf. Greenawalt 1995 pp. 151-64 for a detailed discussion of the executive and other roles and of their corresponding levels of restraint.

¹⁴¹ Greenawalt 1995: 160. Italics mine.

¹⁴² Greenawalt 1995: 160.

public reason.¹⁴³

By contrast with ordinary citizens, however, legislators have a far greater effect on legislation, which in turns affects citizens of differing views. Hence legislative-restraint is more crucial to an equitable and representative political realm than is citizen-restraint. Nevertheless, by contrast with Supreme Court judges, each individual legislator has less influence on the law and is thus under less restraint. Further, for Greenawalt, because citizens are properly influenced by comprehensive views, legislators properly take such judgments into account, both when moral issues are at stake and when the primary concern is the trade off of interests.¹⁴⁴ Legislators thus bring together both the universal presuppositions of liberal democracy (respect for rights, freedom, and the rule of law) and the embedded interests of citizens. It is in the political activity of legislators that the interests of citizens are given their most public form. Whereas on the Rawlsian view the judiciary exemplifies an ideal of public reason which other branches of government vaguely approximate, it is more appropriate to see the legislature as the one branch of political life which best exemplifies the ideal of public reason.

But it is crucial when considering the political culture of the U.S. to recognize that the legislature and all branches of government are fundamentally shaped by their relation to each other in the context of the whole Constitution. The U.S. Constitution expresses

¹⁴³ Cf. Greenawalt 1995, pp. 160-1 for instructive account of the various roles citizens might play and of their corresponding restraints.

¹⁴⁴ Greenawalt 1995: 162.

the basic political will of the American people, giving primary shape to their shared political life. It is subject to differing interpretations and applications but the Constitution and the major historical events which led to its creation and refinement have a fundamental role in defining the political aspirations of Americans, their history is largely the history of the Constitution. In the broadest sense, then, the Constitution itself is the best exemplar of public reason. The separation of powers limits each branch by its own function and that of the other branches. The abstract universality of law is tempered by the particular interests expressed by the representatives of the people. The executive branch gives energy and focus to the government, especially in times of great struggle.

In principle all branches of government are committed to defending the constitution.¹⁴⁵ Thus, in principle, each branch through its relation to the others gains an appreciation of the whole constitution and thus of a crucial element of the public good. Each branch in its own way thus expresses the public reason which is primarily embedded in the Constitution as a whole.

In summary, while the Rawlsian view of public reason and its suggested revision in the work of Gutmann and Thompson prove too restrictive, self-restraint in public discourse nevertheless plays an important role. But public reason should not be conceived simply as excluding the comprehensive interests of individuals. Even Supreme Court judges, whom Rawls conceives as utilizing only public political reasons do not, in

¹⁴⁵ Cf. Greenawalt 1995, p.57.

fact, operate under such constraints. Some issues of constitutional law are issues precisely due to debate on comprehensive grounds; we have considered, for example, the issue of abortion. Moreover, as Greenawalt has argued there are occasions when the constitution is indecisive and recourse to personal judgment or the shared understandings of the community is appropriate.

The Supreme Court should be more restrained than legislators and citizens but it is a misleading construction to make it the exemplar of public reason. Like legislators and citizens judges draw on constitutional and political resources but also on personal comprehensive views and on shared communal understandings. Public reason cannot and should not privilege one of these resources to the exclusion of the others. What is appropriately expressed in public forums is a restrained version of what public officials and citizens think most important. The historical practice of constitutional democracy in the United States has already shaped the parameters of public debate and there is broad consensus on certain types of restraint, that judicial decisions must refer primarily to the law as opposed to personal moral views, for example. However, there is likewise the recognition that the configuration of some moral-political issues and the inconclusiveness of law necessitate input from comprehensive perspectives. Public political life, then, is best seen as an inter-play between public political aspiration and non-public comprehensive aspiration.

Public reason then can be seen as allowing individuals an opportunity to express, discover and test the political ramifications of their comprehensive views. The stability

of the liberal state can be made more secure because it allows citizens a public forum for the expression of their comprehensive and other concerns. Public reason, then, is thought to emerge from the conflict and refinement of individuals more personal concerns. This view is consistent with the political practice of the U.S.. On Madison's view, for example, the common good developed through government arises out of the division and clash of particular interests; indeed on his view, given the division of interests, a majority could coalesce only around principles of justice and the general good.¹⁴⁶

But it would be naive to believe that the process of legislative and constitutional refinement will result in unanimity in all or even most instances. On my view, citizens may argue on metaphysical or on empirical grounds that political policy should reflect their perspective. At the end of the day, however, appropriate democratic decision-making procedures should be enacted and the decisions held to be binding.¹⁴⁷ The risk for those who argue on the basis of more sectarian comprehensive doctrines alone is that these views will not prove persuasive and they will thus be outvoted on the issue in question. But the accommodation of comprehensive views should not end here, that is, merely with a fair hearing. As indicated above, deeply controversial matters like abortion

¹⁴⁶ Madison, Federalist, 51. Note that on this view, the existence of differences ensures that the good achieved is truly common, if it were not truly common it could not be acceptable to the many different interests in a pluralist society. For Madison a philosophy of the common good does not imply the destruction of differences.

¹⁴⁷ Though there must be room for dissent and civil disobedience. Cf. Greenawalt 1995: 179.

do not appear resolvable in any publicly satisfactory way. Yet decisions must be made and will necessarily result in unfairness towards some comprehensive doctrines. Thus, I have argued for an onus on the part of the victors to offer extensive accommodation to those views which lose. With regard to abortion, as indicated, the pro-life side should perhaps have a greater say in what counts as undue burden on the mother and on funds to be distributed to those organizations which provide support for alternatives to abortion.

Further, in the United States there is an important tradition of allowing religious groups exemptions from generally applicable laws. While the intricacies of First Amendment debate are beyond the scope of this essay, the general thrust of the present argument supports the exemption interpretation of the First Amendment religious clauses.¹⁴⁸

Conclusion

Rawls's attempt to develop a political conception of justice which can be the focus of an overlapping consensus thus fails because its sectarian liberal bias can comprehend neither the republican alternative in the public culture of the United States nor the comprehensive commitments of citizens. The public culture of the United States is marked by deep-rooted controversy over the nature of the moral person and the role comprehensive doctrines should play in the political realm. Rawls correctly indicates that

¹⁴⁸ Cf. McConnell 1990. I discuss the importance of religious exemptions re. *Wisconsin V. Yoder* in 4.II.4 below.

the stability of liberal democracies, marked by a pluralism of conflicting comprehensive doctrines, depends on engaging the support of individuals with deeply held comprehensive views. However, his method of, for the most part, excluding comprehensive views from the public realm makes his political conception unable to gain the support of citizens. Debate over issues like abortion and slavery is fundamentally moral in nature, and a public reason capable of interpreting constitutional principles which would apply to such issues must itself be informed by deep moral commitments.

Rawls's historical presupposition, that liberal toleration is the result of a failure to achieve consensus on comprehensive grounds (for example, in the peace after the Wars of Religion) implies a false dichotomy between moral and religious views and political toleration. Thus, his account of how it is that citizens' comprehensive views are transformed by participation in political activity, ignores the role moral views have had in the creation and development of American democracy. His account does not examine sufficiently the deep historical ties between moral standpoints and liberal principles of justice, as indicated by the above discussion of abolitionism.¹⁴⁹ Assuming a radical historical distinction between moral and political realms, he resorts to a "hidden-hand" argument in which political life transforms comprehensive doctrines from the outside as it were. If this account were true, it would result in a public realm marred by hypocrisy and suspicion.

¹⁴⁹ Cf. also Chapter Three, Section 2 below.

Gutmann and Thompson suggest important ways in which Rawls's concept of public reason could be broadened to encourage comprehensive debate and moral accommodation. However, their position fails in its attempt to take seriously the depth of moral disagreement, they assume that principles of respect will outweigh comprehensive disagreement, and thus their account threatens the integrity of individuals' moral views, as suggested in the above discussion of the abortion debate. Nevertheless, the present argument suggests a form of public reason which is more inclusive than that of Rawls or Gutmann and Thompson: contra Rawls, public debate must include critical discussion of individual moral commitments; contra Gutmann and Thompson, it must not be assumed that individuals will respect the views of all participants in debate, as this may infringe the integrity of their own moral standpoint. Public reason should aim for more than Rawls indicates, but it should require in some instances less than would satisfy Gutmann and Thompson.

It is important to note, however, that within the public culture of the United States, there is a tradition of broad acceptance of a separation of "church and state" and of the need for some restraints on public discourse. Kent Greenawalt, especially in his Private Consciences and Public Reasons provides a judicious view of the types of restraint required for by the roles of various types of officials and citizens. By contrast with Rawls's view, I have advocated restraints along the lines of those suggested by Greenawalt and have concluded that the legislature and not the judiciary best exemplifies public reason.

What the Rawlsian view primarily lacks is an adequate historical account of the important role comprehensive doctrines play have played in the formation of the public culture of the United States. Only if there is contained within the traditions of the public culture of the United States a deeper relation between morality, religion and justice than is suggested by Rawls, will it be possible to articulate a conception of the political order which is not biased against comprehensive views and which can engage individuals of differing moral beliefs in a common political pursuit. The next chapter examines Michael Sandel's account of the importance of morality in American public life and finds it a step in the right direction.

CHAPTER THREE

Sandel's Response:

Republican Citizenship and the Public Culture of the United States

This chapter focuses on Michael Sandel's conception of a republican alternative to Rawlsian liberalism as developed in his fascinating Democracy's Discontent. Sandel portrays an anxious America whose politicians cannot respond to the two most prominent fears of the age, fears over the erosion of community and the loss of self-government.¹ His purpose in writing Democracy's Discontent is to show "how the inability of the reigning political agenda to address the erosion of the community reflects the impoverished conception of citizenship and freedom implicit in our public life".²

Sandel argues that the root of the problem lies in America's public philosophy. On his view public philosophy is: "the political theory implicit in our practice, the assumptions about citizenship and freedom that inform our public life".³ According to Sandel, America's public philosophy is rooted in its conception of freedom. With extensive historical detail and some broad brush strokes, he portrays American political history as the gradual transition from a public political philosophy grounded in a republican conception of freedom, to contemporary practice which is grounded in a

¹ Sandel 1996: 3.

² Sandel 1996: 323.

³ Sandel 1996: 4.

liberal view. The present chapter investigates this republican alternative and explores Sandel's republican account of two central events in American history: the Civil War and the New Deal.

Part One: Republican Self-Government and the Problems of Coercion and Exclusion

3.I.1 Freedom and Self-Government

Both republicans and liberals share a conception of negative liberty, both consider human freedom to consist, at least partially, in the absence of interference. Likewise, both conceive tyranny to be the greatest threat to freedom, whether tyranny of the one, the few or the many. Further, both views justify the existence of government as a protection from tyranny and both concede that in order to defend against tyranny the government must have sufficient coercive power. Both, therefore, face the following problem: For government to defend against tyranny it must have considerable coercive power. How then can government be prevented from itself becoming tyrannical?

The traditional liberal strategy has been to distinguish public and non-public realms, to guarantee individual rights so long as the individual does not interfere with the rights of others, and to argue that government should be neutral towards differing conceptions of the good life. On this view one is free so long as these rights are respected and no matter what the form of government. This view goes back at least as far as Hobbes: "Whether a Commonwealth be Monarchicall or Popular, the freedom is

still the same."⁴ On the liberal view, as long as the government protects the rights of individuals and remains neutral among competing conceptions of the good there is no infringement of individual freedom. Further, individuals need not participate in public life if they do not wish; humans, on the liberal view, are not necessarily "political animals". Sandel characterizes the liberal concept of freedom as *voluntarism*, the view that freedom consists in the capacity to choose one's ends. A quotation from Rawls gives clear expression to this conception. Rawls states that individuals: "do not think of themselves as inevitably bound to, or as identical with, the pursuit of any particular complex of fundamental interests that they may have at any given time, although they want the right to advance such interests (provided they are admissible). Rather, free persons conceive of themselves as beings who can revise and alter their final ends and who give first priority to preserving their liberty in those matters."⁵ Taken together, voluntarism and its implication for the public conception of the good, that is, neutrality, are the fundamental tenets of what Sandel calls the procedural republic. He argues that the liberal public philosophy holds that: "government should not affirm in law any particular vision of the good life. Instead it should provide a framework of rights that

⁴ A recent defender of the same view is the late Isaiah Berlin who states that freedom is "not logically connected with democracy or self-government ... there is no necessary connection between individual liberty and democratic rule." Isaiah Berlin, "Two Concepts of Liberty" in Four Essays on Liberty (London: Oxford University Press, 1969) pp. 129-30.

⁵ John Rawls, "Reply to Alexander and Musgrave", Quarterly Journal of Economics, 88/4, p.641.

respects persons as free and independent selves capable of choosing their own values and ends." Further he states: "Since this liberalism asserts the priority of fair procedures over particular ends, the public life it informs might be called the procedural republic."⁶

According to Sandel, Rawls has articulated the most explicit contemporary defense of the procedural republic.⁷ Rawls argues that the free exercise of public reason in a liberal democracy has as its result a plurality of reasonable comprehensive doctrines of the good life. Rawls accepts the importance these doctrines have in the lives of individuals, indeed he sees them as crucial to individual identity. Nevertheless, he argues that individuals are not bound to any particular comprehensive view and must have the freedom to revise their views. Further, because citizens recognize that it is reasonable to disagree on moral and religious views, they will not expect the state to enforce their own preferred view.

On Rawls's view, the state must be neutral among comprehensive views in at least two ways: (1) The state's legitimacy is grounded in a political conception which is the focus of an overlapping consensus. The political conception is thus neutral in that it can be the basis of agreement among even conflicting reasonable comprehensive doctrines; it is agreeable to all. (2) The basic institutions and public policy grounded in the political conception are not designed to further any particular comprehensive view; public

⁶ Sandel 1996: 4.

⁷ Sandel 1996: 290. Sandel characterizes Rawls's's view as "minimalist liberalism". Sandel 1996: 17-19.

agreement is not based on, for example, a conception of the common good.⁸

According to Rawls, it follows that for citizens to engage in just public deliberation about constitutional essentials, they must be able to argue on the basis of what he calls public reason: common political presuppositions, uncontroversial evidence, and common forms of argument acceptable within the political conception. Thus, as Sandel contends, the Rawlsian view: "depends on the plausibility of separating politics from philosophy, of bracketing moral and religious questions where politics is concerned."⁹

By contrast, with the liberal emphasis on voluntarism and neutrality, on the republican view, the form of government has everything to do with individual freedom, freedom itself is defined as self-government. There are two central arguments for this position, arguments which are related but distinct: (1) Justification in terms of security (2) Justification in terms of the impossibility of neutrality.

3.I.2 Justification in Terms of Security

Philip Pettit contends that for the republican, freedom is to have the secure or resilient absence of domination: essentially it is to have such a status in law [that of citizen] to protect against contingencies. So, on Pettit's view, for republicans like Machiavelli and Montesquieu, freedom consists in the confidence that one will not be

⁸ Rawls 1993: 192.

⁹ Sandel 1996: 19.

tyrannized over.¹⁰ This was likewise one of the primary motivations of the Federalists in designing the U.S. constitution and of the Anti-federalists in arguing for a Bill of Rights.

Experience after the American Revolution led to a sense that the Articles of Confederation were inadequate and that having replaced the monarchic principle with an elected and time-limited executive, the real concern was no longer executive tyranny but legislative tyranny. Alexander Hamilton and others made explicit the limits of the Articles. The central defect, on their view, was that the federal government was not directly related to individuals but merely to state governments. As a result Congress could raise neither men nor money by direct conscription or taxation of individuals but relied on the fulfillment of various requisitions by the states. With "neither troops, nor treasury, nor government" the security of the Confederation was in question.¹¹ Individuals thus had a more stable allegiance to their particular states which they knew as the basis of the security of life and property and whose authority they knew in the sanction of law and taxation. So long, therefore, as the primary division was between state government and Congress, the people's loyalty was with the state. Hence Hamilton's description of the Confederation: "Each state yielding to the persuasive voice of immediate interest has successively withdrawn its support till the frail and tottering

¹⁰ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997) p. 71.

¹¹ Hamilton, *Federalist*, 15.

edifice seems ready to fall upon our heads and crush us beneath its ruins."¹²

However, state governments likewise could not gain the allegiance of citizens. State legislatures engaged in "paper money schemes" and enacted laws which confiscated property and which suspended established ways of debt collection. Private property thus became insecure and the legislative expression of the people's will appeared capricious and arbitrary -- as tyrannical as that of a monarch. ¹³As Madison stated: "The legislative department is everywhere extending its activity and drawing all power into its impetuous vortex." ¹⁴ In the words of Gordon Wood, the Revolution had "turned back on itself", destroying the institutions which gave stability to its democratic will and making its freedom vulnerable to outside interests, those of other states or foreign powers.¹⁵

The Federalist answer to both these difficulties was to secure the judicial realm in local and federal government, giving supremacy to the Federal Court and to temper the

¹² Hamilton, Federalist, 15. For example, various states ignored the nation's treaties with foreign countries, waged war on aboriginal groups, built their own navies and refused to fulfill national requisitions. Cf. Edmund Morgan, Birth of the Republic, 124.

¹³ Cf. Gordon Wood, The Creation of the American Republic 1776-1787, (Chapel Hill: The University of North Carolina Press, 1969) pp. 403-9. Edmund Morgan states: "Rhode Island where a wildly depreciating paper currency had been made legal tender, was the notorious example. Hordes of happy debtors were paying off their obligations in worthless paper, leaving their creditors bankrupt." Edmund Morgan, The Birth of The Republic 1763-1789 (Chicago: University of Chicago Press, 1977), p.124.

¹⁴ Madison, Federalist, 48.

¹⁵ Hamilton, Federalist, 6.

legislative branch of government by internal division and by both executive and judicial power. As conceived by the Framers, all government, federal and state, was grounded in the universal will of the people. As Hamilton states: "The fabric of American empire ought to rest on the solid basis of CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure original fountain of all authority."¹⁶ But the will of the people was divided between the universal identity of all Americans and their particular identities as members of the various states. In conceptualizing the republican institutions which would secure the freedom of American citizens and stabilize their relations to federal and state government, the major difficulty with which the framers wrestled was that of faction. What was required was a form of government which would operate directly on all citizens thus achieving "national" government while leaving substantial jurisdiction to the states and maintaining a federal character.¹⁷

Moreover, as the legislature tends to predominance in republican government, it would be divided into Senate and House of Representatives.¹⁸ Further the President would have veto power over acts of the legislature -- "an indispensable barrier against the encroachments of the latter upon the former."¹⁹ Finally, as Hamilton contends, the

¹⁶ Hamilton, Federalist, 22.

¹⁷ Madison, Federalist, 39.

¹⁸ Madison, Federalist, 51.

¹⁹ Hamilton, Federalist, 66.

judiciary would be: "designed to be an immediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority."²⁰ But neither the executive nor the judiciary would in principle be superior to the legislature. As Madison states: "The several departments being perfectly coordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."²¹ All authority comes from the people and as each department is grounded in the popular will all are in principle equal.

The sense of the Framers of the constitution, then, was that individual freedom could not be secured unless government had a republican form, tempered by checks and balances and the division of powers and thus established self-government. But this much seems agreeable to both liberals and republicans. Nevertheless, there is a substantial difference of emphasis. This difference arises primarily from the second argument for self-government which is based on the impossibility of neutrality.

²⁰ Hamilton, Federalist, 78.

²¹ Madison, Federalist, 49.

3.I.3 Justification in Terms of the Impossibility of Neutrality

In 2.II.2 above we considered Sandel's argument that neutrality is impossible, an argument which he develops in an insightful analysis of Roe v. Wade. For Sandel, the Court merely claimed to be neutral while in fact it substituted its own theory of life (which stressed viability) for that of the government of Texas (which emphasized the moment of conception). Also we considered Sandel's analysis of Thornburgh v. The American College of Obstetricians which upheld Roe v. Wade. For Sandel reflection upon this case reveals that even the question of what counts as bracketing may require: "either a substantive evaluation of the interests at stake or a conception of the self that minimalist liberalism resolves to avoid."²²

Further, Sandel makes the point that even where neutrality is possible it is not always desirable. He contends that the attempt to ensure neutrality in the public sphere by restricting discussion of comprehensive doctrines is a form of toleration which leaves prejudices intact and allows them to fester in private life, ultimately spilling over into the political arena. Sandel makes a similar case against neutralist toleration of homosexuality. He states: "The neutral case for toleration leaves wholly unchallenged the adverse view of homosexuality itself. A fuller respect would require if not admiration, at least some appreciation of the lives homosexuals lead."²³

So, for Sandel, government cannot and should not be neutral towards at least some

²² Sandel 1996: 102.

²³ Sandel 1996: 107.

of the comprehensive beliefs and ways of life of individuals and groups. Thus in order to have a say both in the comprehensive positions adopted by government in the public sphere and in the effect government has on comprehensive views in the non-public realm, citizens must participate in government. Further, if government is to be fair it must not adopt a sectarian comprehensive doctrine but must concern itself with a good all may participate in, with a common good. Moreover, republicans, believing that government cannot be neutral, embrace this non-neutrality and argue for government activity in the formation of individuals' virtues.

3.I.4 Coercion and Exclusion: Addressing Liberal Concerns

As noted in Chapter One, these conclusions, that individuals, in order to be free, must participate in public debate concerning the common good and that government has a role in the formation of the character of its citizens are matters of grave concern to liberals.²⁴ The central liberal concern is that a politics of the common good is both

²⁴ Philip Pettit, who espouses a form of republicanism, likewise criticizes this concept of positive liberty. Pettit contends that republicanism conceived as non-domination represents a third path between positive and negative liberty. To distinguish non-domination from positive liberty, he argues that absence of mastery by others (non-domination) does not guarantee the achievement of the self-mastery which is enjoined by conceptions of positive liberty (Pettit 1997: 22). But this view does not capture the traditional republican worry that a non-virtuous citizenry will not be able to defend itself against tyranny, that they will not accept constitutional limitation. Madison in Federalist 51 makes the clear statement that checks and balances are required because "men are not angels". However in Federalist 55 he also states: "As there is a degree of depravity in mankind which requires a certain

exclusive and coercive, exclusive because it prevents minority dissent and coercive because it limits the options among which individuals may choose. On the liberal view, a politics of the common good both inhibits the rational reflection and distinction from one's ends which makes it possible to live one's life from the inside and eliminates the options which make it feasible to revise one's conception of the good. To lessen the difference between liberal and republican positions I must address these legitimate liberal concerns.

Sandel makes the interesting point that republican views tend to exclusivity so far as they tie the capacity for virtue to specific classes or roles within the society. This view goes back to Aristotle who distinguished three ideal forms of polity Kingship,

degree of circumspection and distrust, so there are also other qualities in human nature which justify a certain portion of esteem and confidence." Further he states: "Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government can render us secure" (in Sandel 1996: 132). Thus while the absence of mastery by others does not guarantee self-mastery, a longstanding republican concern is that without self-mastery there is little likelihood that one can defend against mastery by others. Pettit fails to demonstrate that non-domination represents a plausible alternative to positive liberty.

Likewise, Pettit's attempt to differentiate non-domination and negative liberty is less than successful. One may be a slave, Pettit argues, without being interfered with by one's master in any of one's choices. On Pettit's view the criterion of negative liberty is met under these conditions (Pettit 1997: 23) However, the master can only dominate the slave by interfering with the slave's choice to end his slavery. If one were free to choose not to be a slave, if this choice were not interfered with, the basis for domination would end. Thus, Pettit has shown that there may be interference without domination but not that there may be domination without interference. He fails to demonstrate that non-domination represents a plausible alternative to negative liberty. Cf. Pettit 1997: 21-27.

Aristocracy and Polity. On Aristotle's view, however, each form of government was subject to vices; Tyranny, Oligarchy and Democracy (or mob rule) respectively.²⁵ On the theory of *mixed government* these vices and the inevitable political instability which results would be overcome by including each of the simple forms of government in one constitution. Gordon Wood argues that the basis of the persuasiveness of this mixed theory was: "its ability to relate the government to society, to involve in the government all of the social orders of the body politic --- the monarch, the nobility, and the people...."²⁶ However, on this view the political virtues were class-bound, the monarchy possessing order or energy, the nobility possessing wisdom, and the masses possessing honesty or goodness.²⁷

But the Constitution of the United States, for example, does not base the separation of branches on social classes but on their constitutional function, and the legitimacy of each branch is grounded in the people as a whole without reference to class. Thus, republicanism is not inherently tied to the identification of class and virtue and, on the republicanism inherent in the Constitution, in principle, one is not excluded on the basis of class from participation in the offices of government.

However, Sandel contends that although the tendency of republican politics to

²⁵ Aristotle, The Politics, Ed. and trans. Ernest Barker, (London: Oxford University Press, 1977) Book III, Chapter VII.

²⁶ Wood 1969: 199.

²⁷ Cf. Wood 1969: 198.

sanction exclusion gives way when the incorrigibility essay is removed, the danger of coercion grows as the tendency to exclusion recedes.²⁸ He states: "Modern democracies are more likely to suffer this pathology. For given the demands of republican citizenship, the more expansive the bounds of membership, the more demanding the task of cultivating [common] virtue." As an example of a coercive republicanism, Sandel quotes Rousseau who argues that the task of the legislator is: "to change human nature, to transform each individual ... into a part of the larger whole from which this individual receives, in a sense, his life and his being." And further: "if each citizen is nothing and can do nothing except in concert with all the others ... one can say that the legislation has achieved the highest possible point of perfection."²⁹

But as Sandel argues, republican civic education need not be so harsh. He distinguishes Tocqueville's view from that of Rousseau. Instead of harmony and a unitary will, Tocqueville's republicanism emphasizes dispersed power and multiple sites of civic formation. Sandel states: "Instead of collapsing the space between persons, it fills this space with public institutions that gather people together in various capacities, that both separate and relate them."³⁰ Not only are there various associations but also diverse levels of government, municipal, state, and federal.

Thus, there is no necessity that a republican view destroy private interests and

²⁸ Sandel 1996: 319.

²⁹ In Sandel 1996: 319.

³⁰ Sandel 1996: 320.

individual judgment. Again it is instructive to look at the U.S. constitution. This republican form of government was not imposed on the people but rather answered their need for justice and stability given the experienced limits of state constitutions and the Articles of Confederation. Further, as conceived by Madison, for example, the common good developed through government arises out of the division and clash of particular interests; indeed on his view, given the division of interests, a majority could coalesce only around principles of justice and the general good.³¹ Here the existence of differences of interest and comprehensive belief ensures that the good achieved is truly common; if it were not truly common, it could not be acceptable to the many different interests in a pluralist society. Thus, republican government need not destroy pluralism but may be seen to depend on it. Madison states: "The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of government."³² On this republican view, then, government itself is pluralistic.

The thrust of pluralist republicanism is to prevent tyranny and thus to secure both the good of society and the freedom of the individual, it does not necessarily imply that the individual be subordinate to society. Rather, there is a reciprocal relationship: participation in debates about the common good is required to protect individual freedom (from the inevitable influence of the state upon one's conception of the good life) and

³¹ Madison, Federalist, 51.

³² Madison, Federalist, 10.

independent individual reflection is required to secure rational deliberation on the common good (unless the conception of the good genuinely develops from the deliberations of private individuals it is not common).

However, Kymlicka has argued, over and against Sandel, that the debate between liberals and civic republicans should not be described as a debate about the existence of a common good.³³ Rather, for Kymlicka, the debate concerns whether or not public political forums are the proper venues for debate about the common good. He states: "the opportunities for collective inquiry simply occur within and between groups and associations below the level of the state -- friends and family in the first instance, but also churches, cultural associations, professional groups and trade unions, universities, and the mass media."³⁴

Kymlicka contends that a collectively determined ranking of the value of different conceptions of the good will make it harder for those who do not advance persuasive arguments to maintain their way of life. By contrast, in a liberal society with a neutral

³³ Cf. Kymlicka 1989, Chapter Three for his argument that it is misleading to conceive the liberal-communitarian debate as a dispute about the relative priority of the right and the good.

³⁴ Kymlicka 1989 [b]: 897. As argued in Chapter One, Part Three there is some justification for this view. However, Kymlicka overstates the case. While there may be general restraints on the expression of comprehensive views in public forums there, are occasions when such expression is desirable. Further, when these "background" associations concern themselves with "public" matters they enter a realm best described as quasi-public, neither solely private or fully public.

state while people may lose out in the cultural market place they will not face adverse state action. But this type of response fails to confront the republican worry, considered above, that the state has a major effect on comprehensive doctrines because it inevitably adopts its own comprehensive agenda. The republican concern is to involve a wide citizenry in the comprehensive decisions of the state and to dissolve the doctrine of neutrality which merely masks the state's comprehensive purposes.

Kymlicka argues further, however, that: "state perfectionism would in fact serve to distort the free evaluation of ways of life, to rigidify the dominant ways of life, whatever their intrinsic merits, and to unfairly exclude the values and aspirations of marginalized and disadvantaged groups within the community."³⁵ He gives two reasons for his view. First, perfectionism at the state level makes possible a "dictatorship of the articulate" and would penalize the inarticulate. Second, perfectionism at the state level would encourage minorities to describe their practices in such a way as to be most acceptable to the majority thus downplaying what is truly unique and significant about them.

Kymlicka recognizes that these problems also arise in the cultural marketplace but contends that by contrast with state neutrality: "state perfectionism intensifies these problems, since it dictates a time and place--political deliberation over state policy--in which minorities are most vulnerable." On his view, state neutrality gives these groups control over the place and time in which they will confront those of the majority culture,

³⁵ Kymlicka 1989 [b]: 900.

thus assuring a maximum of comfort.³⁶

However, as the above account has indicated, republicanism has the resources to respond to this charge by means of the dispersal of sovereignty. Minority groups can conceivably have their own spheres of influence, as the Amish have re. education, for example, and there is no reason they would be "forced" to participate fully in the broader culture.³⁷ The pluralist republicanism with which the present argument is concerned is inherently neither exclusivist nor coercive.

³⁶ Kymlicka 1989 [b]:901.

³⁷ For example, interpreting the free exercise clause of the first amendment as an exemption from generally applicable laws allows minority religions a realm of action and speech freed from the intrusion of the majority culture. Cf. McConnell 1990. Further, as the example of the Amish shows (cf. Chapter Four below), participation in the broader culture will grow slowly and in terms appropriate to the minority concerned. The development of inter-governmental boards between the Amish and the federal government provides an excellent example of non-distorting participation.

Part Two: Public Reason and Moral Principle: The Lincoln-Douglas Debates

Sandel's historical investigations intend to demonstrate that: "a political conception of justice must sometimes presuppose an answer to the moral and religious question it purports to bracket. At least where grave moral questions are at stake, it is not possible to detach politics from substantive moral judgment."³⁸ Further he wishes to indicate that the historical predominance of the liberal attempt to create a public political realm exclusive of moral and religious argument impoverishes political discourse and erodes civic virtue and the capacity for self-government. Sandel attempts to demonstrate that the history of the public culture of the United States is animated not only by liberalism but by a vivid republican alternative. He finds in the archetypal events and actors of American history a paradigm of republican political participation. He offers this version of civic republicanism as a correction and enrichment of the malaise of liberal public culture.

Part Two of Chapter Three, investigates Sandel's account of the Lincoln-Douglas debates during the 1858 senate campaign in Illinois which set out the theoretical bases of the war against slavery. The Lincoln-Douglas debates, give historical support to Sandel's criticism of neutrality. A more thorough analysis than he provides suggests both the pervasiveness of Lincoln's moral interpretation of the evil of slavery and the substantive interests served by Douglas's apparent neutrality. However, Sandel's account of the Civil War and his criticism of neutrality is weakened by his failure adequately to recognize the important role played by William Lloyd Garrison as the moral gadfly of abolitionism.

³⁸ Sandel 1996: 23.

I am in general agreement with Sandel's vision of the importance of moral and religious arguments in the public political realm. Also, I concur with his assertion of the importance of the republican moment of American history. The historical scholarship of Gordon Wood, J.G.A. Pocock and Bernard Bailyn has provided a significant correction of Louis Hartz's brilliant and influential consensus thesis. Whereas Hartz conceives American history in terms of a consensus on the fundamental principles of Lockean liberalism, these studies have indicated the depth of the influence of Machiavelli, Harrington, and Sydney, for example. One of my purposes in what follows is to bolster Sandel's account of the Lincoln-Douglas debates, illustrating the pervasiveness of Lincoln's moral interpretation of the evil of slavery and examining the substantive interests served by Douglas's apparent neutrality. However, I find Sandel's account of American history one-sided. While he recognizes that both liberal and republican conceptions of freedom have been present throughout American history, he nevertheless focuses on the displacement of republicanism by liberalism: "Broadly speaking, republicanism predominated earlier in American history, liberalism later."³⁹ This focus distorts the complex dialectic of the public political culture of the United States. So, while in one way buttressing Sandel's view about the role of republicanism and moral views in American political culture, in another way I want to correct his claims, by showing that the role of these was both deeper and more continuing than he supposes. I shall be borrowing from historians to establish my conclusion, which is nevertheless

³⁹ Sandel 1996: 6.

primarily philosophical and not historical: the conclusion being that legitimate political debate was not, cannot, and ought not be contained within the confines of political liberalism, of so-called public reason.

3.II.1 The Limits of Bracketing Moral Controversies

Sandel's account of the Lincoln-Douglas debates focuses on whether it was proper to bracket the dispute over slavery in order to preserve the stability of the Union. He states: "The debate between Lincoln and Douglas was primarily about whether to bracket a moral controversy for the sake of political agreement."⁴⁰ The central thrust of Sandel's interpretation of the debate shows how the type of neutrality embodied in the procedural republic is inadequate to important moral issues. Sandel draws on the ethical and symbolic position which Lincoln occupies in the public culture of the United States. He points to Lincoln as an archetypal political figure whose greatness consists precisely in his moral argument, in his criticism of neutrality. Time after time in his debates with Douglas, Lincoln attacks the presuppositions of neutrality. For example: [Of Douglas's indifference] "I hate it because of the monstrous injustice of slavery itself. I hate it because it deprives our republican example of its just influence in the world..."⁴¹ Also: "Is it not a false statesmanship that undertakes to build up a system of policy upon the

⁴⁰ Sandel 1996: 22.

⁴¹ Roy P. Basler, (ed), Abraham Lincoln: His Speeches and Writings, (Cleveland: The World Publishing Co., 1981) p.291.

basis of caring nothing about the very thing that everybody does care the most about?"⁴²

Lincoln, however, was not an abolitionist. He thought that the immediate emancipation of all slaves would cause untold suffering and instability. Nor did he support radical integration of the races. He argued, for example, that just because he believed in freedom and equality for the Negro, this didn't mean he would like to marry one.⁴³ George Fredrickson offers a judicious reading of Lincoln's view of Black people: "for Lincoln the Negro was a man --to alter the abolitionist battle cry-- but not a brother."⁴⁴ Yet Lincoln fought for the ultimate extinction of slavery, believing that the Union could not maintain a balance between the two positions and that slavery was a grave moral evil. In his famous "house-divided" speech he states: "Either the opponents of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in course of ultimate extinction; or its advocates will push it forward, till it shall become alike lawful in all the states, old as well as new -- North as well as South."⁴⁵

Sandel's argument is strengthened upon recognition of the pervasiveness of Lincoln's moral commitment in the climate of the time. Not only did Lincoln quote

⁴² Quoted in Sandel 1996: 23.

⁴³ Saul Sigelschiffer, The American Conscience: The Drama of the Lincoln-Douglas Debates (New York: Horizon Press, 1973) p. 281.

⁴⁴ George R. Fredrickson, The Arrogance of Race (Wesleyan: Wesleyan University Press 1988) p. 68.

⁴⁵ Basler 1981: 372-3.

scripture and assert Christian principles, but his assertions in the context of the 1850's represent a controversial interpretation of Christianity. As Saul Sigelschiffer contends, in 1844: "Southern clergy men could not accept the position that slavery was evil and un-Christian.... The Southern Methodists now withdrew from the national church and formed their own Methodist Episcopal Church South. A similar schism soon followed in the Baptist and Presbyterian Churches."⁴⁶ This bolsters Sandel's general portrayal of the interrelationship between morality and politics. Lincoln's assertions went two ways, so to speak. On the one hand, he drew on Christian principles to support his "political" argument against slavery; on the other hand, his political position implicitly took sides on the substantive "theological" question of whether or not Christian doctrine legitimized slavery.

A broader account of the debate than Sandel himself gives, provides even further evidence for his claims about the limits of neutrality. First, Douglas's belief in neutrality presupposes a moral commitment. Though Douglas wished to bracket moral beliefs at the federal level, this was based on his prior allegiance to popular sovereignty, at the level of state or territory. Moreover, implicit in Douglas's position are two conflicting notions of what it means to bracket.⁴⁷ On the first interpretation the federal government allows

⁴⁶ Sigelschiffer 1973: 26.

⁴⁷ Sandel misses this point and recognizes only the first alternative. For further discussion of the need for substantive doctrines in determining the mode of bracketing cf. Sandel's discussion of *Thornburgh v. American College of Obstetricians*. Sandel 1996: 102.

each territory to decide for itself whether to enter the Union slave or free. This is indicated by Douglas's support for the Kansas-Nebraska Act. On the second interpretation, the federal government respects the right of each individual to decide whether or not to own slaves. This is indicated by his support of *Dred Scott*.⁴⁸ Thus Douglas's substantive adherence to popular sovereignty supports not only his concept of neutrality but also his interpretation of bracketing.

Second, in context, neutrality can be used by political interests to further their own non-neutral agendas. As Lincoln observed, bracketing moral concerns and accepting the judgment of the court in *Dred Scott* implied the extension of slavery, which was the stated desire of the slave-owners. He accused Douglas of this subterfuge: "This declared indifference, but, as I must think, covert real zeal for the spread of slavery, I can not but hate."⁴⁹ But this does not seem entirely fair to Douglas. While, on Lincoln's view, *Dred Scott* ensconced the individual right to slavery as against both federal and state government, Douglas, in fact, interpreted *Dred Scott* in terms of territorial sovereignty. In a letter to a friend, J.B. Dorr, he states that he would not accept the Democratic

⁴⁸ The notorious *Dred Scott* decision, as Sandel notes, was the only time prior to the Civil War that the Supreme Court enforced the Bill of Rights against an act of Congress (Sandel 1996: 38-9). *Dred Scott* was a slave who sued in court for his freedom. Three cases in Missouri upheld the rights of Scott's owner. In February of 1856 the case of *Dred Scott v. Sanford* was argued before the Supreme Court of the United States. The Supreme Court likewise upheld the property rights of Scott's owner. *Dred Scott v. Sandford* 60 U.S. 393 (1856). Cf. below for further discussion.

⁴⁹ Basler 1981: 291.

nomination for president if the policy of the party: "either establishes or prohibits slavery in the Territory beyond the power of the people legally to control it, as other property."⁵⁰ Moreover, this is the interpretation the Southern wing of the Democratic Party gave to Douglas's view.⁵¹

Though Douglas's own views can be distinguished from those of Benjamin, Lincoln convincingly demonstrated that Douglas served the interest of the slave-owners. Lincoln considered the Kansas-Nebraska Act and the *Dred Scott* decision as an "almost complete legal combination" as a "piece of machinery so to speak".⁵²

⁵⁰ Sigelschiffer 1973: 391-2.

⁵¹ In a speech which presaged a split in the Democratic Party and in which the radical South denounced Douglas, Senator Judah P. Benjamin from Louisiana stated: "We accuse him of this, to wit: that having bargained with us upon a point upon which we were at issue, that it should be considered a judicial point; that he would abide the decision; that he would act under the decision, and consider it a doctrine of the party; that having said that to us here in the Senate, he went home, and under the stress of a local election, his knees gave way; his whole person trembled his success in the canvass for the Senate, purchased for an ignoble price, has cost him the loss of the Presidency of the United States"

⁵² Basler 1981: 37. Lincoln states: "The working points of that machinery are: First that no Negro slave, imported as such from Africa, and no descendant of such slave can ever be a citizen of any State, in the sense of that term used in the Constitution of the United States.... Secondly that "subject to the Constitution of the United States" neither Congress nor a Territorial Legislature can exclude slavery from any United States Territory.... Thirdly, that whether the holding a Negro in actual slavery in a free State, makes him free, as against the holder, the United States courts will not decide, but will leave to be decided by the courts of any slave State the Negro may be forced into by the master.... Auxiliary to all this and working hand in hand with it, the Nebraska doctrine or what is left of it, is to educate and mould public opinion, at least Northern public

Douglas did not see the conflict between his concept of territorial sovereignty and *Dred Scott's* instantiation of a universal individual right to own slaves. But Lincoln clearly realized that if the implications of *Dred Scott* were played out, the only role territorial sovereignty could play was democratically to support the slave trade. If citizens voted against the slave trade they would be contradicting the rights of the individual which, under *Dred Scott*, were protected by the Supreme Court.

Third, the relation of the constitution to the slave trade supports Sandel's claim that a neutralist republic cannot contain the moral energies of the people and cannot engage them in debate and criticism.⁵³ A look at how the South overturned the intentions of the Framers of the constitution is instructive. It is arguable that the framers of the constitution intended that slavery die out.⁵⁴ Nevertheless, in spite of this opposition to slavery, within the confines of constitutional neutrality, a vociferous minority in the south stretched the boundaries of slavery on all fronts.

It is arguable that with the *Dred Scott decision*, the constitution had been hijacked

opinion, to not care whether slavery is voted down or voted up."

⁵³ Sandel 1996: 24.

⁵⁴ Three aspects support this interpretation: (1) Article 1,9,11 which prohibits the slave trade after the year 1808, the least ambiguous evidence; (2) the political injunctions against slavery in the territories (e.g., the Ordinance of 1787) and; (3) Lincoln's analysis of the voting habits of the framers, perhaps the most ambiguous evidence. Cf. "The Cooper Institute Address", Basler 1981: 517-39.

by southern interests.⁵⁵ *Dred Scott* effectively eliminated the constitutional and political bulwarks against the spread of slavery, and this on the basis of the individual rights of the slave-holder.

The official doctrine of neutrality thus left the slave owners outside of the corrective influence of democratic debate and provided the moral space for more nefarious activities in the support of their own interests. This form of toleration leaves prejudices intact and allows them to fester in private life, ultimately spilling over into the political arena.

Historical interrogation of the Lincoln-Debates thus supports Sandel's criticism of the political conception of neutrality in a number of ways: the historical stature of Lincoln indicates the political pedigree of reference to comprehensive doctrines; Douglas's view shows how neutrality presupposes moral commitment, and the growth of slavery suggests that a politics of neutrality cannot correct the perverse moral energies of its citizens.

⁵⁵ Five of the judges hailed from the South and a "heavy correspondence passed between leaders and judges". As Sigelschiffer indicates, there was an exchange of letters between President elect Buchanan and Justice Grier. In fact, two weeks before his inauguration, Grier wrote Buchanan: "I will give you in confidence the history of the case before us with the probable result ... there will therefore be six, if not seven (perhaps Nelson will remain neutral) who will decide the Compromise law of 1820 to be of non-effect." Further, on March 4, in his inaugural address, Buchanan stated that he would "cheerfully submit" to whatever the Court decided. On March 6 the Court rendered its judgment by a vote of 7-2. Justice Taney arguing: (1) that Negroes were not citizens, (2) that the Constitution didn't include them as citizens and; (3) that the Missouri Compromise was void. (Sigelschiffer 1973: 49-50)

3.II.2 Rawlsian Public Reason and the Lincoln-Douglas Debate

In light of his analysis of the Lincoln-Douglas debates and the moral critique of slavery, Sandel criticizes Rawls's suggestion that his political conception of public reason is compatible with the moral critique and actions which ended slavery. Rawls argues that his view of public reason permits citizens to present the comprehensive basis of their political values provided that there is division in the society about constitutional essentials or about the application of principles of justice, and provided that they do this in ways that strengthen the idea of public reason.⁵⁶ He points to the abolitionist movement as a paradigm for reference to comprehensive doctrines. He argues that, although they referred to their comprehensive doctrines, "they could have seen their actions as the best way to bring about a well-ordered and just society in which the ideal of public reason could eventually be honoured."⁵⁷ So, for Rawls, because they "could" have thought that the reasons they referred to, though comprehensive, were required to strengthen the political conception to be subsequently realized, they did not contravene public reason.

Sandel rightly argues, however, that in the absence of extraordinary assumptions, it is difficult to interpret the abolitionist argument as consistent with the ideal of public reason advanced by political liberalism. What is more likely, he contends, is that abolitionists were hoping to get Americans to extend religious and moral reasoning to

⁵⁶ Rawls 1993: 251.

⁵⁷ Rawls 1993: 251.

other issues.⁵⁸ Sandel concludes that Rawls cannot account for why Lincoln was right and Douglas wrong in 1858.

Sandel's account of Rawls's attempted appropriation of Lincoln and the abolitionists is persuasive. Rawls underestimates the significance of the fact that neither Lincoln nor the abolitionists were motivated by the intention of strengthening public reason. Moreover, in like circumstances it would be impossible to judge whether one's actions will, in the end, strengthen public reason. On what grounds could it have been predicted that the bloodshed and division of war would lead to an harmonious consensus on public reason, from what standpoint could it be reasonably suggested that resentment and disharmony would not be the result? The complexity of the calculations required makes them prohibitive from the standpoint of public reason. The conceptual point which Rawls wishes to make, presumably, that comprehensive doctrines can strengthen public reason, is muddied by his historical example.

Moreover, from a Rawlsian standpoint it is difficult to see how a legitimate conception of public reason could even have existed. According to Rawls, public reason is based on certain substantive conceptions of the person implicit in the public culture of a liberal democracy. On his view we accept his account of public reason in part because we share his intuitions about the nature of moral persons.⁵⁹ However, in its broadest

⁵⁸ Michael Sandel, "Political Liberalism" (Review), Harvard Law Review, v.107 (May, 1994) pp. 1791-2.

⁵⁹ Rawls 1993: 18-19, 192.

sense the Civil War was fought over the meaning of the word person. Because the meaning of person was controversial there could have been no sense in which a legitimate conception of public reason could have been appealed to.

Further, in this context, the position which won the day had its origin in the extremist views of William Garrison. Neither Rawls nor Sandel gives an adequate account of the relative roles of Garrison and Lincoln. While Sandel is right to note that the free labour movement found Garrison's views too radical, he underplays Garrison's contribution. George Fredrickson offers a more judicious appraisal. Noting that Garrison's extremism isolated him on the far left of the anti-slavery movement, and that, therefore, he did not lead the political assault, Fredrickson states: "Nevertheless, he remains, and deservedly so, the central figure in the crusade against slavery."⁶⁰ Though Sandel is correct that Garrison's extremism alienated many, Fredrickson states: "his primacy as instigator of the movement was unchallenged, and he continued, up to the time of emancipation, to play an indispensable role as a moral gadfly, keeping the ideal ever in the sight of those engaged in confronting, the actual."⁶¹ Likewise, C. Vann Woodward, indicates Garrison's importance: "History supports Garrisonian dogma ... that to be effective the eradication of slavery had to be root-and-branch, that the racist ideology supporting it permeated the country, and that abolishing slavery in alliance with

⁶⁰ Fredrickson 1988: 73.

⁶¹ Fredrickson 1988: 75.

racists and without eradicating their ideology would be largely an empty victory."⁶²

Garrison's zealous refusal to compromise with the "practical realities" of his time distinguishes his position from that of Lincoln.⁶³

Further, while Sandel's characterization of Lincoln's "non-neutrality" is convincing, he neglects the implicit neutrality of Lincoln's position on the issue of white supremacy. On Lincoln's view, the state did not have a role in correcting the moral views of white supremacists. While Garrison attacked colonization, Lincoln favoured colonization, bracketing the problem of racism, so to speak, by separating the races.⁶⁴ Thus, Lincoln's view, by contrast with Garrison's, did not permit Blacks to participate in American political life and allows no fundamental correction of racism.

Moreover, Sandel underplays the inconsistency and fundamental danger of Lincoln's position. In his 1854 Peoria speech, for example, Lincoln is caught in a dilemma between his moral position and his practical position.⁶⁵ According to Lincoln,

⁶² Quoted in Young 1996: 122.

⁶³ It should be noted, however, that while Garrison's zealotry can be distinguished from Lincoln's cautious practicality, he praised Lincoln's refusal to compromise on slavery in the Territories and also urged support of Lincoln's war effort. Cf. James M. McPherson, The Struggle for Equality: Abolitionists and the Negro in the Civil War and Reconstruction (Princeton: Princeton University Press, 1995) pp. 31,55.

⁶⁴ In George Fredrickson's characterization, Lincoln was: "a pragmatic white supremacist in his concept of domestic race relations but indulged a principled egalitarianism in his world outlook." Fredrickson 1988: 66.

⁶⁵ Cf. Basler 1981: 304.

slavery is opposed to the Declaration of Independence because it permits men to be governed without consent. However, he is willing to compromise this position because he cannot admit the practical possibility of social and political equality between Blacks and whites.

Harry Jaffa argues that Lincoln accepted the political inequality of Blacks because his fellow countrymen judged it necessary to the security of their rights, and the Declaration of Independence granted them the right to judge of this security.⁶⁶ But if slavery itself can be judged practically necessary to the security of white rights, it remains possible that the extension of slavery can likewise be judged necessary. While Lincoln argues against the moral basis for the extension of slavery, he leaves room for an argument for extension based on necessity.⁶⁷ In certain respects then, Garrison's outlook was more republican than Lincoln's in that he demanded equal participation for Blacks and argued for the correction of racist attitudes.

Garrison's moralism makes a particularly unhappy companion for Rawls. As Sandel notes, the abolitionists wanted to extend the reach of religious reasoning to other political-moral issues. This is inadmissible according to Rawlsian strictures on public reasoning; Garrison's radical Protestantism would conflict with other comprehensive views. Rawls, then, can claim neither Garrison nor Lincoln as a supporter of public

⁶⁶ Harry Jaffa, Crisis of the House Divided (New York: Doubleday, 1959) pp. 48-9.

⁶⁷ Cf. also Fredrickson 1988: 67.

reason: Garrison's extreme comprehensive view cannot be the basis for consensus and Lincoln's view excludes Blacks from political participation.⁶⁸ Hence, Rawls must deny that his political conception can account for the justness of abolitionist actions or must broaden his conception of public reason.

This indicates a further weakness in Rawls's conception of public reason. Rawls's reference to the Civil War points to a deeper historical relationship between comprehensive doctrines and public reason than he can account for. The form of public reason current in the United States has its genesis in the zealous assertion of comprehensive doctrines in the public realm. But as we have seen these assertions are not compatible with the Rawlsian conception of public reason. The difficulty is that Rawls's view cannot account for the conditions in the public culture required to ensure the existence of public reason. In the United States public reason is parasitic on comprehensive views of equality and freedom. While Sandel draws attention to the importance of comprehensive doctrines in American history, his one-sided focus on republicanism distorts the complex dialectic of the public political culture of the United States.

⁶⁸ It should be noted that abolitionism came in many forms. James M. McPherson identifies three major groups: Garrisonians, evangelicals, and political abolitionists. It is arguable that Garrisonians had the most effect of these three. Cf. James M. McPherson 1975, The Abolitionist Legacy: From Reconstruction to the NAACP (New Jersey: Princeton University Press, 1975) p. 4. Also cf. Fredrickson 1988: 73-80.

Part Three: The Republican Vision and the New Deal

The Lincoln-Douglas debates are thus an instructive example of the limits of neutralist dogma. Still the twin defeat of voluntarism and neutrality in the Civil War was not final. As noted above, the free labour criticism of slavery shares with republicanism an opposition to the dependence slavery creates. Further, both conceive the wage system characteristic of capitalism as similarly destructive of independence. However, the revolutionary republicanism of the Civil War, based in part on a conception of freedom as self-government, cleared the way for a capitalist revolution whose voluntarist ideology was antithetical to republicanism. As Sandel states: "Abraham Lincoln turned the aspirations of the labourer into a critique of the South ... But the Union victory in the war put to rest the threat to free labour posed by slave power, only to revive and intensify the threat posed by the wage system of industrial capitalism."⁶⁹

However, Sandel does not attend sufficiently to the complex dialectic evinced by these events. The victory of republicanism in the constitutional sphere opened the door to the victory of liberal capitalism in the economic sphere. Further, with the withdrawal of the Union army in 1877 and the decision in the Civil Rights Cases (1883), many of the advances made in terms of Black independence were destroyed. And yet, one of the results of federal non-intervention and neutrality in terms of the problems of race has a distinctively republican cast: an increase in national civic participation by southern whites. The importance of this result for national unity should not be underestimated,

⁶⁹ Sandel 1996: 183.

though in the absence of state and federal commitment to Black rights, this dispersal to the states of power over race relations was in many ways disastrous for Blacks.

The New Deal marks a significant growth in the participation of Blacks in the political life of the United States. Sandel, by emphasizing the consumerist elements of the New Deal fails to recognize important republican elements both in its underlying Keynesian ideology and in its advancement of Black citizenship.

Section 1 gives a brief and highly selective account of how capitalism, which flourished with the destruction of slavery, was appropriated as a justification for racist ideology. On the one hand, the present argument supports Sandel's claims about the limits of voluntarism and a "neutralist marketplace" vis-a-vis the civic morality of citizens; on the other, contra Sandel, it provides a context which helps situate the republican elements of the New Deal. Section 2, argues, by contrast with Sandel's view, that for Keynes both individualism and voluntarism were to be limited by the state. Section 3, indicates that Roosevelt, the architect of the New Deal, conceived its programs not simply in consumerist terms but also and importantly as limiting mere choice. Finally Section 4, contends that in relation to Blacks the New Deal showed strong republican elements, protecting Black communities and in a manner analogous to Lincoln's position in his debates with Douglas, refusing to be neutral among state interests in the regulation of issues of race.

Sandel's abstract focus on the progressive ascendancy of liberalism thus has two significant results. First, his account of the Civil Rights movement, what he calls, "the

finest expression of republican politics in our time," is weakened.⁷⁰ Without recognition of the republican elements in the New Deal, a serious lacuna is present in any account of the development of Black civic-engagement. The national interest in civil rights did not suddenly emerge in 1954 with *Brown v. the Board of Education of Topeka* or in the 1960's with the moral eloquence of Martin Luther King.⁷¹ The New Deal of the 1930's helped politicize Blacks and involved them in government on a national scale.

Second, Sandel's criticism of Rawls is weakened. Sandel's history exhibits a profound republican element in the constitution and public culture of the United States. This gives force to his criticism of Rawls's conception of public reason, by indicating the inadequacy of the Rawlsian conception to the public culture of the United States. However, so far as this republican element is portrayed as thoroughly supplanted by liberalism, its relevance to contemporary public culture is obscured; Sandel's attempt to demonstrate the inadequacy of Rawls's conception of public reason to the political culture

⁷⁰ Sandel's account would be strengthened by further examination of the civil rights movement. But the criticism I make here is not that he **does not** provide an adequate account of the civil rights movement but that he **cannot** because he neglects the republican origins of this movement in the New Deal.

⁷¹ *Brown v. the Board of Education* consolidated under one name a group of cases, all of which challenged the "separate-but-equal" doctrine of *Plessy v. Ferguson*. consolidated under one name. In the **Brown** decision Chief Justice Earl Warren stated: "Segregation of white and coloured children in public schools has a detrimental effect upon the coloured children" for it "generates a feeling of inferiority as to their status in the community that may effect their hearts and their minds in a way unlikely ever to be undone." *Oliver Brown v. Board of Education of Topeka, Kansas* 347 U.S. 483 (1954)

of the United States would be greatly strengthened if he more fully indicated the presence of civic republicanism in contemporary public life and political institutions.

Part Three thus continues the argument of Part Two that the public culture of the United States must be understood in terms of both its republican and liberal moments and that neither Rawls nor Sandel gives an adequate account of their presence in the public culture.

3.III.1 Background to the New Deal: Capitalism and Racism

Though the growth of capitalism has substantial roots in the elimination of slavery it was not itself inimical to racism.⁷² Herbert Spencer's intellectual legitimation of laissez-faire, voluntarist capitalism dealt a severe blow to Black participation in American civil life. In the thirty years after the Civil War it was impossible to be involved in the intellectual world without coming to terms with Spencer's views which, prior to

⁷² There are at least four reasons why the destruction of slavery removed a major bulwark against industry. (1) Because slaves were not compensated for their labours, slavery generated relatively low consumer demand, as slaves could not be consumers. (2) Slavery, obviously, lacked capitalism's means for engendering a work ethic in labourers Cf. James Oakes, Slavery and Freedom: An Interpretation of the Old South (New York: Alfred A. Knopf, 1990) p. 102. (3) As James Young states: "The defining characteristic of capitalism was the separation of the labourers from the means of production and the attendant transformation of labour into a commodity" (Young 1996: 112). In the absence of this separation there was no market for free labour in the south. (4) As land grew scarce, it became explicit that wage labour was more consistent with liberalism than was the free labour ideal which depended on the availability of land.

Darwinism, applied the concepts of survival of the fittest and natural selection to the social-economic realm. Richard Hofstadter states: Herbert Spencer whose evolutionary philosophy glorified automatic progress, who threw all his authority into support of the essay that natural economic processes must be allowed to go on without hindrance from reforms was idolized in the United States.⁷³ Spencer sanctioned only those state functions acceptable to classical liberals, basically those of the night-watchman state. As Young states, Spencer was opposed to: poor laws, state support for education, tariffs, state banking, sanitary supervision, government postal systems, and even protection against medical quacks.⁷⁴ This prototypical Darwinism legitimized not only the accumulation of wealth by those at the top of the economic order and its resultant privilege but also the appropriateness of the status of those on the bottom: the Blacks. With this conception, transformed into a “scientific” doctrine of white supremacy the ideology of the South had, in a sense, become the ideology of the nation.

This shared racist ideology was an important aspect of the reintegration of the South into the Union. Reintegration was furthered by the non-interventionist stance of the federal government. The Civil War had been fought primarily to secure the stability of the United States, to unify diverse states under one federal constitution. Northern victory saved the Union but only through the use of force, with the result that although

⁷³ Richard Hofstadter, The American Political Tradition and the Men Who Made It (New York: Vintage Books, 1948) p. 168.

⁷⁴ Spencer's views were widely disseminated by his most important American disciple among the intelligentsia, William Graham Sumner. Young 1996: 130-1.

the states were unified, southerners resented the destruction of their wealth and institutions. Ralph Henry Gabriel captures the post-war spirit: "After Appomattox, however, the North and South had different traditions, personified by different heroes. Chancellorsville and Gettysburg had opposite meanings in Wisconsin and Alabama. Wartime emotionalism persisted, moreover, in a hatred that was slow to die."⁷⁵ Resentment was heightened by Reconstruction which asserted the federal government's power to determine the legal framework of race relations; southern intransigence was inevitable in the face of the measures enforced by the United States. Gabriel makes the interesting point that the federal governments retreat from intervention was crucial to the re-emergence of southern loyalty to the Union. In 1877 the army was withdrawn. Further the decision in the Civil Rights cases of 1883, limited the power of congress to interfere in state matters, and in consequence gave the states power over race relations, subject only to the limitation that slavery not be reestablished. Gabriel states: "In 1883, only eighteen years after the surrender of Lee, the Court accepted Calhoun's principle that the disposition of the race problem should be denied to the central government and be left to the local community."⁷⁶ This local sense of sovereignty over the issue of race restored the relationship of the South as a sovereign state to the constitution and contributed greatly to national unity.

⁷⁵ Ralph Henry Gabriel, The Course of American Democratic Thought (New York: Ronald Press Company, 1956) p. 141.

⁷⁶ Gabriel 1956: 142.

The obvious limit of reunification and the reemergence of Southern loyalty, however, is that it renders Blacks second-class citizens. While reunification helps reestablish the patriotic unity among states, it infringes the universality of the rights of the citizen. But the federal government's retreat from intervention on race matters is markedly different from its initial neutrality on the slavery issue: they retreat having demonstrated the supremacy of the Union and having abolished slavery. Whereas secession, which attempted to prevent federal intervention, originated with the southern states, the removal of the army in 1877 originated with a victorious federal government which had proven its authority. Having sovereignty over race matters thus drew the South back into the Union and though the race problem still existed, there had been progress in the lives of Black citizens and secession was no longer a viable answer.

This brief sketch indicates the difficulty in radically separating the republican and liberal moments in American history. The interventionist policy characteristic of Reconstruction politics usurped the sovereignty of states and thus seems problematic in republican terms. While, on the one hand, its substantive commitment to the dignity and humanity of Blacks secures the integrity of Black communities, on the other, its focus on civil rights infringes the republican interest in localized power. The federal neutrality on the question of race, characteristic of Redemption policy, and supported by Spencerian *laissez faire* ideology, permits state control of matters of race and is consistent with the republican interest in the dispersal of sites of sovereignty. Yet, in this context, neutrality is destructive of the civil rights of Blacks and of the strength of Black communities. A

linear account of American history is thus inadequate to the complexities of concrete events. Further, this practical and theoretical nexus of capitalism and racism is a crucial background condition without which one's understanding of the New Deal remains incomplete.

The late nineteenth and early twentieth centuries thus saw the perpetuation of the doctrine of white supremacy in the United States and in its highest office.⁷⁷ But Franklin Delano Roosevelt's second New Deal marked a significant transformation of Black participation in the public political culture of the United States. Contrary to Sandel's portrayal, the New Deal is, in principle and in practice, consistent with the republican interest in a politics of the common good, institutional reform, the correction of voluntarism and civic participation.⁷⁸ Recognition of the continuing presence of both liberal and republican moments in the history of the United States allows for a more comprehensive account of its public culture and strengthens the basis on which Sandel

⁷⁷ Teddy Roosevelt emphasized the racial inferiority of blacks. In fact the 1913-14 congress enacted the most racist legislation in its history. Woodrow Wilson would not publicly denounce lynching and refused to appear at any Negro school or conference. Harding descried racial amalgamation as an impossibility. Coolidge did absolutely nothing to assist blacks. Hoover's legacy is perhaps best described by Chief Justice Taft who confided that Hoover aimed: "to break up the solid south and to drive the Negroes out of Republican politics." Harvard Sitkoff, A New Deal for Blacks: The Emergence of Civil Rights as a National Issue, Volume I: The Depression Decade, (New York: Oxford University Press, 1978) pp. 18-28.

⁷⁸ C. Vann Woodward notes this as the foundation of what he calls the second reconstruction. Gunnar Myrdal contends: "this changed the whole configuration of the Negro problem." Sitkoff 1978, 58.

can refer to republicanism as a possible enrichment of American political life.

3.III.2 Keynes and the New Deal

Sandel focuses on the Keynesianism of the New Deal. He argues that there are three essential aspects to the economic philosophy which underlies the New Deal: (1) the acceptance of consumption as the basis of political identity and economic policy; (2) the rejection of any attempt on the part of government to form or educate individual desires and; (3) the "embrace of the voluntarist conception of freedom and the conception of persons as free and independent selves, capable of choosing their ends for themselves."⁷⁹ Moreover, he states: "From the late 1930s to the early 1960s, Keynesian fiscal policy appealed to policy makers as a way of avoiding the intractable controversies among advocates of various reforms and spokesmen for various sectors of the economy."⁸⁰ Thus for Sandel, the New Deal is a decisive phase in the development of the procedural republic.

However, Sandel's account of the New Deal is one-sided. There are explicit republican elements in the New Deal which he ignores. A consideration of Keynes's social-political philosophy indicates its compatibility with civic republicanism. First it is not clear that for Keynes "consumption is the sole end of economic activity".⁸¹ Keynes

⁷⁹ Sandel 1996: 267.

⁸⁰ Sandel 1996: 263.

⁸¹ Sandel 1996: 268.

argues, for example, that once humans are securely employed in the economic realm, they will be freer to pursue what he called the highest objects of life: love, beauty, truth, timeless contemplation, and the pursuit of knowledge.⁸² We shall have, he states: "most sure and certain principles of religion and traditional virtue. We shall value ends above means."⁸³ In fact, Keynes conceived the whole economy as directed to a common good. He states: "The state is a sovereign body of which the purpose is to promote the greatest good of the whole."⁸⁴ On this basis, Keynes wanted to prevent market forces from interfering with what is fit and proper in the interests of social stability and social justice.⁸⁵ And he argues, for example, that savings and loans should not: "be left entirely to the chances of private judgments and private profits."⁸⁶ Therefore, it is arguable that Keynes conceived distinct limits to individualism and voluntarism. Second, while a self-proclaimed conservative on certain matters, there are, contrary to Sandel's suggestion, important institutional reforms which Keynes believed necessary. Principally he argued for: (1) a central institution to control currency and credit; (2) the regulation of savings and investment and; (3) the control of population size. Finally, Keynes thought that the economy required communal and moral direction. He states: "What we need is the

⁸² In Allan Meltzer, Keynes's Monetary Theory: A Different Interpretation (New York: Cambridge University Press, 1988) p. 34.

⁸³ In Meltzer 1990: 36.

⁸⁴ In Meltzer 1990: 59.

⁸⁵ In Meltzer 1990: 36-7.

⁸⁶ In Meltzer 1990: 38.

restoration of right moral thinking, a return to proper moral values in our social philosophy."⁸⁷ He envisioned the control of investment by a group of public-spirited, disinterested individuals.⁸⁸ Further he thought that: "Planning should take place as much as possible in a community in which as many people as possible share your own moral position."⁸⁹ Thus Keynesianism is, in principle, more conducive to a republican sense of community than Sandel allows.⁹⁰

3.III.3 The New Deal and the Regulation of Choice

By contrast with Sandel's portrayal, Roosevelt's New Deal is in certain ways a correction of voluntarism. Government and politics were seen to play an essential role in the economy, to be a correction of laissez-faire. In 1941 Roosevelt states: "The liberal party is a party which believes that as new conditions and problems arise beyond the

⁸⁷ In Meltzer 1990: 37.

⁸⁸ In Meltzer 1990: 10.

⁸⁹ In Meltzer 1990: 38.

⁹⁰ Further, Sandel and Keynes have a similar conception of the role of ideas. Early in Democracy's Discontent Sandel states: "Political institutions are not simply instruments that implement ideas independently conceived; they are themselves embodiments of ideas" (Sandel 1996: ix). Compare Keynes's suggestion at the end of The General Theory of Employment, Interest and Money: "the ideas of economists and political philosophers, both when they are right and when they are wrong are more powerful than is commonly understood. Indeed the world is ruled by little else." John Maynard Keynes, The General Theory of Employment Interest and Money (New York: Harcourt, Brace and World Inc., 1935) p. 383.

power of men and women to meet as individuals it becomes the duty of government to find new remedies with which to meet them."⁹¹ While Sandel is correct that one of the goals of the New Deal was to secure freedom of choice for consumers, there was likewise a clear sense of the limits of mere choice. As James Young states: "By the time the reform impulse was exhausted in the early days of Roosevelt's second term, the relation of the U.S. government to the society and the economy had been transformed. A welfare program that emphasized work over the dole was established. There were extensive new regulations covering the banking and securities industries. In one way or another, industry was also widely regulated. Unemployment and wages-and-hours legislation were passed, and the social security system was established."⁹² Though the reform phase of the New Deal ended, it is thus arguable that it accomplished lasting and important changes and a context in which voluntarism and self-interest can be regulated. Ralph Henry Gabriel makes a similar point, arguing that Roosevelt emphasized both a new and an older conception of the free individual. Gabriel contends that the Wagner Act vastly strengthened unions giving protection to collective bargaining.⁹³ Collective action is sanctioned for the protection of worker-consumers. However, he also indicates that in the New Deal agricultural policy, the Jeffersonian theory of individualism prevailed. Gabriel notes two specific measures in support of his view: (1) the limiting of benefits going to

⁹¹ Young 1996: 170-71.

⁹² Young 1996: 169-170.

⁹³ Gabriel 1956: 433.

any one enterprise and (2) the upholding of the established limitation of farms in irrigated areas to one hundred sixty acres."⁹⁴ These measures gave preference to small farms, as opposed to corporate farms and they supported the independence of the individual farmer. This interest in independent farmers cannot adequately be described in voluntarist terms. For the voluntarist it makes no difference whether one is employed by a corporation or on one's own farm.

3.III.4 The New Deal and Black Civic Engagement

In terms of Black rights, the New Deal was anything but neutral. First, its economic interventionism was extremely controversial in the South. Second, it marked a significant improvement in the lives of Black citizens. Sandel contends that the Civil Rights movement of the mid-fifties to the mid-sixties was in essence a republican movement. He states: "To assimilate the Civil Rights movement to the liberalism of the procedural republic is to miss its most important lessons for our time. More than a means to equal rights, the movement itself was a moment of empowerment, an instance of the civic strand of freedom."⁹⁵ By contrast with Sandel's account, however, the civic strand of the Civil Rights movement was profoundly influenced by the civic strand of the New Deal. To accept the republican nature of the struggle of Martin Luther King and the

⁹⁴ Against the Central Valley Reclamation Project which wanted the removal of this limit. Gabriel 1956: 433.

⁹⁵ Sandel 1996: 348.

SCLC is to accept the republican influence of Franklin Roosevelt and the New Deal.⁹⁶ The New Deal opened the door to the Civil Rights movement.⁹⁷ By contrast with Sandel's focus on the neutrality of the second New Deal and its preference for the spending solution over "drastic institutional reforms", the second New Deal was more controversial than the first, with regard both to institutional reform and to civil rights. Initially the New Deal had little to do with race and did little to change the status of Black citizens. FDR did not want to jeopardize economic bills required for national recovery and thus, in order to placate Southern interests he could not defy the southern dominated congress on racial matters and capitulated to their resistance to programs which would jeopardize their control of southern political and economic policy. Sitkoff states: "The leadership elites in Dixie looked askance at new federal programs that reduced dependency and paternalism in their domains, raised wages, aided the labour movement, skirted local government, and extended the New Deal to those indigents previously unassisted."⁹⁸

To justify their resistance to the New Deal, southern politicians criticized its interference in race matters. The New Deal's support for Blacks was anathema to

⁹⁶ **SCLC** refers to the Southern Christian Leadership Conference.

⁹⁷ It is important to keep in mind the extraordinary influence of Eleanor Roosevelt. Long before the Roosevelt administration adopted serious policies for the improvement of the lives of Black citizens, she kept the Black voice alive in the halls of government and in the press. Cf. Sitkoff 1978: 59-62.

⁹⁸ Sitkoff 1978: 102.

southern prejudice; however, their criticism led to results which contradicted their intentions. Southerners argued that the New Deal was an attempt to overturn white supremacy but in the North, white supremacy thus became explicitly aligned with conservative economic policies which were now out of vogue. This relationship between economic reform and civil rights reform was made explicit with the result that Southern Democrats supportive of the New Deal were edged towards concern with Black issues.⁹⁹ Further federal intervention which began as economic reform turned back judicial precedents such as *Slaughterhouse* and *Cruikshank*, as the Roosevelt-stacked Court broadened the regulatory powers of the national government.¹⁰⁰ As Sitkoff states: "The growing acceptance of the idea that the federal government had the right and the duty to intervene on behalf of the economic well-being of its citizens led to the corollary that the federal government had the obligation to protect the lives and constitutional rights of the

⁹⁹ For a detailed analysis of this development and the rift it caused in the Democratic Party cf. Sitkoff 1978: 102-138. The growing importance of the black vote enabled Roosevelt to survive this rift. Sitkoff 1978: 84-101.

¹⁰⁰ In the *Slaughterhouse Cases* some butchers claimed that a Louisiana law which granted a monopoly on the slaughtering business violated their Fourteenth Amendment Rights. The Supreme Court rejected their claim because such a precedent would "fetter and degrade State governments ... in the exercise of powers heretofore universally conceded to them." (*Slaughterhouse Cases* 83 U.S. 36,78 (1873). In *Cruikshank* the Supreme Court dismissed nearly 100 indictments against whites involved in the Colfax Massacre arguing that the Fourteenth Amendment authorized no power for Congress to enact: "laws for the suppression of ordinary crime within the States.... That duty was originally assumed by the States; and it still remains there." *United States v. Cruikshank* 23 U.S. 710 (1876).

Afro-Americans"¹⁰¹

Crucial to this reform and to the advancement of Black rights was what Sitkoff calls the federalization of the Bill of Rights. Whereas the Slaughterhouse cases in 1879 had relegated the protection of civil rights to the states and the Civil Rights Acts of 1883 had ended federal enforcement of the 14th Amendment, the decision in the Scottsboro case marked the first time in the twentieth century that the Supreme Court asserted its power to supervise the enforcement of justice to Blacks in the states by investigating the evidence of discrimination itself.¹⁰² Likewise, in a footnote to the 1938 opinion in *Carolene Products*, Harlan Stone highlighted the Court's direction by asserting that laws involving the bill of rights required more exacting judicial scrutiny.¹⁰³ Further, in *Lane v. Wilson* 1939, the Court invalidated Oklahoma's attempt to keep the grandfather clause. Judge Frankfurter states that the Fifteenth Amendment: "nullified sophisticated as well as simpleminded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the coloured race although the abstract

¹⁰¹ Sitkoff 1978: 272.

¹⁰² Nevertheless, as Sitkoff points out, the distance to be travelled was apparent in that on the same day the Court unanimously upheld the right of a political party to white only primaries. Sitkoff 1978: 328.

¹⁰³ Here the Supreme Court upheld a federal law which banned interstate commerce in adulterated milk declaring that regulations affecting ordinary commercial transactions would be presumed constitutional as long as it had a rational foundation. In his famous footnote he indicated grounds for expanding judicial review. *Carolene Products Company v. United States*, 304 U.S. 144, 152 n.4 (1938) Cf. also Sandel 1996: 47.

right to vote may remain unrestricted as to race."¹⁰⁴ As Sitkoff notes, this asserted that:
"the Court would look beyond the letter of the law to ferret out discrimination."¹⁰⁵

Whereas the separate-but-equal doctrine was consistent with the Bill of Rights in theory, in practice it was the basis of racial oppression. The interventionist, non-proceduralist approach of the Roosevelt Court signalled the demise of *Plessy v. Ferguson* and its separate but equal philosophy.¹⁰⁶

Thus, by contrast with Sandel's view, dramatic institutional reform was an important facet of the New Deal, as the federal government asserted its authority in both the economic and racial jurisdiction of the South. Moreover, the New Deal was concerned not just with fairness of procedure but with the practical outcomes for citizens. The reform of the laissez-faire economy reveals a substantive interest, especially in relation to the status of Black citizens. The New Deal originated, of course, in response to the massive unemployment and financial chaos brought on by the collapse of industry and the economic system during the Great Depression. Left to itself, the free play of individual interest produced an inherently unstable economy with dramatic effects on the

¹⁰⁴ *Lane v. Wilson*, 307 U.S. 268 (1939).

¹⁰⁵ Sitkoff 1978: 237.

¹⁰⁶ In *Plessy v. Ferguson*, Homer Plessy sued a New Orleans railroad which forced him to leave a whites-only car. He argued that segregation was illegal under the Fourteenth Amendment. The Supreme Court decision established the separate-but-equal doctrine ruling that separation of the races is within the bounds of the Constitution so long as equal accommodation are made for Blacks. *Plessy v. Ferguson* 163 U.S. 537 (1896)

political and socio-economic lives of all citizens. One could no longer have faith in the combination of laissez-faire and survival of the fittest to provide a workable social order. Both rich and poor were devastated by the economic collapse. The depression marked a practical demonstration that laissez-faire capitalism was not a natural order, success in which was a measure of the virtue of citizens; even those who were successful and were judged to be the fittest suffered during the depression. By contrast with the Spencerian laissez-faire hierarchy of race, the New Deal implicitly recognized a universality of suffering; all humans, Black and White, were thought to have the same needs.

It is important to recognize as well that despite Sandel's claims to the contrary, the New Deal exhibits elements of central to Sandel's republican vision. Sandel characterizes the Civil Rights movement as a moment of self-government and civic engagement; the active participation of Blacks in their own political fate. He fails to recognize, however, that the New Deal saw significant advances in Black participation in government. Sitkoff contends that the Works Progress Administration, for example, made Blacks feel included.¹⁰⁷ He quotes a Black respondent in an interview with Studs Terkel: "It made us feel like there was something we could do in the scheme of things."¹⁰⁸

¹⁰⁷ This sense of inclusion grew when Roosevelt issued Executive Order 7046 which stipulated that there shall be no discrimination between otherwise qualified workers in the WPA. Discrimination persisted, but the number of blacks on relief and the money they earned increased. Sitkoff 1978: 69.

¹⁰⁸ Sitkoff 1978: 70. Not only did the WPA empower individual Blacks but it was central to the survival of Black communities, rivaling agriculture and domestic labour as the main source of income for Blacks. Moreover, the WPA

Increased political participation significantly strengthened the power of the Black vote. In 1934, the vision among the Black leadership of the Black vote as a "balance of power" was becoming a reality as a majority of Blacks voted Democrat for the first time, thus switching allegiance from the GOP.¹⁰⁹ No longer hamstrung by devotion to the Republican party, Black voters would now be courted by both parties. A quotation from a *Time* article of 1936 is indicative of growing Black influence: "In no national election since 1860 have politicians been so Negro minded as in 1936."¹¹⁰ Further, grassroots protest indicates the growing activity of Blacks in American public political life.¹¹¹

Education Program taught almost two hundred and fifty thousand Blacks to read and write. The Federal Music Project and the Federal Theatre Project conserved and enhanced Black culture by recording and publishing Black folk music, holding music classes for Blacks and employing Blacks in the production of dramas which portrayed the lives of Nat Turner, Harriet Tubman, Pierre Toussaint. Further, as Gunnar Myrdal argues, the tripling of Blacks in the civil service (mostly in the lower ranks) and the appointment of over one hundred Blacks to administrative positions were "the first significant step toward the participation of Negroes in federal government activity." The Federal Council of Negro Affairs (dubbed by the press as the Black Cabinet) also raised the level of Black participation and interest in government by initiating Blacks into the maze of civil service organizations and by initiating an end to discriminatory hiring by civil agencies. Sitkoff 1978: 71, 76, 78-9.

¹⁰⁹ Sitkoff 1978: 89.

¹¹⁰ Sitkoff 1978: 91. Cf. *Time*, vol XXVIII (August 127, 1936) p. 10.

¹¹¹ Protests against decisions in the Scottsboro and Herndon cases, and against the eviction of Blacks in Chicago unified whites and blacks under the aegis of the communist party. A banner at a funeral procession for blacks killed in a protest over the evictions read: "NEGRO AND WHITE WORKERS UNITE TOGETHER". Sitkoff 1978: 154.

Perhaps the most significant protest march, however, was one that didn't take place: the proposed March-on-Washington.¹¹² Sitkoff states: "More than any other single leader, organization, or event, Randolph's electrifying effort in behalf of the March-on-Washington catalyzed the supporters of civil rights into a mass movement that could not be ignored."¹¹³ Randolph's militancy brought a radical edge to the Black Civil Rights movement which mobilized Blacks to a greater degree than the gradualism of the NAACP. His efforts legitimized a more combative approach to civil rights matters and gave rise to a more aggressive Black leadership.¹¹⁴

By contrast to Sandel's view, then, the voluntarism of the New Deal did not exclude a republican interest in civic engagement and the common good. The republican moment of American politics thus extends well into the twentieth century and the New Deal cannot be adequately characterized as a decisive moment in "the victory of the procedural republic".

¹¹² In response to the exclusion of blacks from the defence program, the idea of a march on Washington was raised at a meeting of various civil rights groups in Chicago. From the early estimates of between five and ten thousand marchers, by June, A. Philip Randolph was predicting one hundred thousand protesters. In the face of this threatened march, Roosevelt signed Executive Order 8802 which put into effect an end to discrimination in defence agencies. In return the march was cancelled. But the result of the political force which secured Roosevelt's capitulation went far beyond the executive order. Sitkoff 1978: 316.

¹¹³ Sitkoff 1978: 316.

¹¹⁴ Sitkoff 1978: 333.

Conclusion

By contrast to the one-sided approaches of Sandel and Rawls, recognition of the dual moments of American public political life is important both historically and normatively. Sandel has an almost Whiggish conception of American history. He portrays this history as a decline from first principles, the gradual subordination of republicanism to liberalism as the official public political doctrine. The result of this decline, on his view, is a public life devoid of the civic virtues required to maintain an adequate sense of community. He looks to the redemption of this fragmented and discontented public life in a retrieval of republican-communitarian first principles. Rawls, by contrast, has an almost "Progressive" view, according to which the key to the stability of American public life consists not in a return to a republican notion of civic virtue but rather in the continuance of liberal tradition. Implicit in Rawls's sketchy account of liberal history is the view that this history is the development of a common public life made possible by the overcoming of sectional comprehensive differences. All that is required, then, to secure the stability of the liberal state is for citizens to accept common non-comprehensive criteria for public political discussion. On his view, citizens must agree to use public reason in their political debates, to accept political criteria for the solution of political disputes. Both of these accounts are inadequate to the public political culture of America. First, American history cannot adequately be described as the progressive victory of neutrality. Secondly, its public life can be invigorated neither by a return to a republican sense of participation through the dispersal of sites of sovereignty nor by the acceptance of an overlapping

consensus on a political conception of the state. American history suggests instead that republicanism and liberalism exist in a continuous dialectic with each other. The Lincoln-Douglas debates and the Civil War exhibit a conflictual mixture of these moments. Civil conflict was engendered by a division between the constitutional assertion of the universal rights of the citizen and sovereign southern states whose culture, founded on slavery, denied this universality on the basis of race. The public culture was torn between respect for the cultural integrity of the south, instantiated in the Constitution, and a sense of the inadequacy of slavery to the concept of freedom underlying the Constitution. Post Civil-War America attempted to reconstruct southern culture in terms of the new reality of emancipation. But the protection of individual rights could not transform the racism of southern communities. Federal intervention in the protection of Black rights was anathema to southern interests which traditionally had authority over race relations. The dispersal of power in the removal of troops and the reemergence of southern sovereignty over race, while respectful of southern communities, was disastrous for Black rights: Jim Crow laws everywhere infringed the spirit if not the letter of the constitution. The federalization of the Bill of Rights, which begins with the New Deal and culminates in the Civil Rights movement of the sixties, represents a very determinate unification of the liberal and republican moments of the American polis. Beginning with a concern with the universal reality of need, with the vast human suffering caused by the Great Depression, the New Deal moved to a concern with universal rights. To satisfy needs and rights it adopted a consumerist ideology and

upheld the rights of Black individuals, for example, against southern states but it also bolstered communities and encouraged participation in self-government. The New Deal promoted a role for government beyond the protection of individual interest as expressed in a laissez-faire economy. Over and against the proceduralism and contractualism of the Lochner court, it looked to transform the conditions of the working lives of citizens, recognizing that real freedom is more than the choice to sign a contract. The New Deal promoted a sense of the national American community inclusive of Blacks and whites and asserted the role of this national community in regulating and correcting the choices of consumers in the market-place. Sandel thus misses an opportunity to draw on the substantive moment of the New Deal, because he adheres to a one-sided account of American history. As a result, his suggestion that the malaise in self-government can be rectified by the dispersal of power to smaller sites of sovereignty is only a partial solution. What is further required is the education of particular communities to a sense of their basis in human freedom. Unless particular communities recognize the universal right of human freedom, the dispersal of power will result in prejudiced exclusion of minority groups. Moreover, Sandel is unclear as to how exactly a sense of national community will be created from this dispersal. He recalls the Tocquevillean view that: "Practicing self-government in small spheres impels citizens to larger spheres of political activity as well" (Sandel 1996: 347). Exactly how this occurs Sandel never elucidates. What needs to be recognized and further explored is the way in which the national community already underlies the particular sites of sovereignty, and protects them from illegitimate intrusion;

how the Black community, for example is supported by the liberal interest in the Bill of Rights. Together with the recognition of the role of federalism in the lives of particular communities, one must acknowledge that legal restraints and protections cannot educate and correct the comprehensive moral ideals and prejudices of particular citizens and communities. The full enactment of Black civil rights in the south demanded the moral conversion of the nation, a response in part to the dignity of Black protest, and Martin Luther King's insistent interpretation of the necessary social manifestation of Christianity. So far as citizens and communities are racist in their souls, civil rights remains a partial accomplishment and the public reason of a Rawlsian overlapping consensus will fail to correct their prejudiced comprehensive presuppositions. The union of community and individual, of rights and participation, is already implicitly accomplished in the United States, in the public culture which holds together the moments of republicanism and liberalism. To overcome the contemporary discontent is not to adhere to one side or the other but more clearly to spell out their relation. Any attempt to conceptualize American politics which begins with the public political culture must articulate both moments: respect for individual rights and for the integrity of culture; respect for the freedom to revise and to participate in self-government.

CHAPTER FOUR

Kymlicka's Concern: Culture and Citizenship

Chapter Two argued that Rawls's political conception of justice cannot become the focus of an overlapping consensus because it is based on sectarian liberal principles. As such, it is unacceptable to many comprehensive doctrines in the background culture and further, it fails to resolve the impasse in democratic theory. Michael Sandel's historical study, the subject of Chapter Three, shows the significance, within the public culture of the United States, of a republican political philosophy which the Rawlsian view inadequately comprehends. Thus far, I have assumed that the democratic culture to which Rawls's view is addressed is one whose citizens share in a common political activity and accept as just the basic political institutions. Further, by virtue of this common tradition of political activity I have assumed that citizens share a common identity, they recognize each other as democratic citizens and feel a basic sense of patriotism and allegiance. Thus the underlying issue is not one of creating just institutions and a shared political culture *ex nihilo*, as it were, but of developing an adequate account of principles implicit in the public political culture, in an attempt to make the public political realm more inclusive and stable. However, this account does not provide a full portrayal of the cultural context of liberal democracy. Liberal democracies are characterized not simply by shared political institutions but also by deep-seated controversy as to the legitimacy of liberal institutions.

Will Kymlicka's ground-breaking studies in Liberalism, Community and Culture

(1989) and Multicultural Citizenship (1995) indicate that Rawlsian political liberalism does not recognize the cultural differences characteristic of liberal democracies and does not provide an adequate account of how liberal institutions can be made legitimate for members of minority cultures who do not fully share in the “common” political culture of the majority. I have argued that Rawls's political conception does not recognize the diversity within the shared public culture of the United States, it is not surprising, therefore, that his conception does not comprehend the cultural differences of those who do not participate fully in the public political culture.

Kymlicka's argument is written from a distinctly Canadian perspective which mirrors the multiculturalism which is a significant value in the public political culture of Canada. However, he also argues that the contrast between the American “melting-pot” and the Canadian “ethnic mosaic” is misleading as both countries are marked by significant national and ethnic differences.¹ Yet while most countries are both multi-national and polyethnic, Kymlicka contends, few are prepared to recognize this fact.² Kymlicka's argument is an attempt to demonstrate that minority rights are consistent with basic liberal principles and thus to fill a lacuna in contemporary liberal theory. He states: “I believe it is legitimate, and indeed unavoidable, to supplement traditional human rights with minority rights. A comprehensive theory of justice in a multicultural state will include both universal rights, assigned to individuals regardless of group membership,

¹ Kymlicka 1995 [b]: 14, 18.

² Kymlicka 1995 [b]: 22.

and certain-group differentiated rights or "special status" for minority cultures."³

Kymlicka's work provides a systematic and extended criticism of John Rawls's view of citizenship. While Rawls recognizes that ethnicity is among the most basic problems of contemporary life he does not address this issue in Political Liberalism. Rather, he limits his discussion to "a family of classical problems that had been at the centre of the historical debates concerning the moral and political structure of modern democratic state" and asserts, "once we get the conceptions and principles right for the basic historical questions, those conceptions and principles should be widely applicable to our own problems also".⁴

However, according to Kymlicka, Rawls's answer to these basic questions relies on an "overly cerebral" conception of diversity. He argues that Rawls treats modern conflicts of race, ethnicity, and gender as if they were analogous to the conflicts over religious belief during the Reformation, that is, he treats them "as conflicts over individuals' beliefs about the meaning, value and purposes of human life".⁵ From a Kymlickean standpoint, a problematic inference can be drawn from this conception: that like conflicts between religions, conflicts between ethnic minorities and the broader liberal state can be solved by ensuring ethnic minorities the right to freedom of conscience and association, and by developing shared liberal values among all members

³ Kymlicka 1995 [b]: 6.

⁴ Rawls 1993: xxviii,xxix.

⁵ Kymlicka 1995 [b]: 224n.19.

of the society.⁶ In Liberalism, Community and Culture, Kymlicka implies that social unity could be accomplished by a shared liberal conception of the rights of individuals and cultures. In this earlier work he states: "Liberal individualism of this sort does not conflict with the idea of community, but rather provides an interpretation of it. The result of this conception of individual responsibility is not to set people against each other, but to tie all citizens in bonds of mutual respect."⁷ In Multicultural Citizenship however, Kymlicka contends that only a shared identity can establish a stable social union and that the urgent task of liberal theory is to develop an account of such an identity.⁸ Thus, over

⁶ Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative" in Will Kymlicka (ed) The Rights of Minority Cultures (Oxford: Oxford University Press, 1995) p. 110. He states: "the collapse of the Herderian argument based on distinctively human need seriously undercuts any claim that minority cultures might have to special support or assistance or to any extraordinary provision or forbearance. At best it leaves the right to culture roughly on the same footing as the right to religious freedom".

⁷ Kymlicka 1989: 254.

⁸ There are four further ways Multicultural Citizenship (1995) develops on the view presented in Liberalism community and Culture (1989). Although he still endorses the argument in Kymlicka 1989, Ch. 9, he has clarified its scope. He states: "I would now describe the argument in that chapter as an equality based defence of certain external protections for national minorities" (Kymlicka 1995 [b]: 219n.3). Also, he distances himself from the language of collective rights. He argues that it is misleading to describe "group-differentiated" rights in the language of collective rights. He states: "Some group differentiated rights are exercised by individuals, and in any event the question whether the rights are exercised by individuals or collectives is not the fundamental issue. The important issue is why certain rights are group-differentiated" (1995:46). Further, he supplements the equality based argument with arguments based on historical agreements and on the value of cultural diversity. However, he clearly indicates the priority of the equality argument. He states:

and against Rawls's emphasis on a pluralism of belief, Kymlicka stresses a pluralism of belonging.⁹ Kymlicka thus expands Rawls's conception of public reason, by showing how the public arena must be inclusive not only of a plurality of comprehensive doctrines but also of a plurality of cultures. Kymlicka argues that while the common rights of citizenship adequately protect a diversity of beliefs, group-differentiated rights are required to protect diverse cultures.

In this chapter, I argue that while Kymlicka's criticism's of Rawls are persuasive, his own view rests on an untenable distinction between cultural structure and cultural character. I suggest that Kymlicka's central contention, that minority rights are consistent with liberal principles, is better stated in terms of a conception of cultural choice, which emphasizes that culture is a product of free human activity. Conceiving culture as a product of free activity, allows for a more successful account of various multicultural issues and implies a more inclusive conception of religious toleration than available on

"Since historical agreements must always be interpreted and inevitably need to be updated and revised, we must be able to ground the historical agreements in a deeper theory of justice" (Kymlicka 1995 [b]: 120). Moreover: "the diversity argument supplements but cannot replace justice arguments based on equality or historical agreement" (Kymlicka 1995 [b]: 123). Finally, he distinguishes two groups who claim minority rights (national minorities and immigrants) and three types of rights claimed by these groups (self-government, group representation, and polyethnic).

⁹ Cf. Rainer Baubock, "Cultural Minority Rights for Immigrants" International Migration Review vol xxx, No.1 1996, pp. 212-3. He states: "Liberal theories have tended to reduce all conflicts to those between different conceptions of the good. This is often an inadequate approach for understanding cultural conflict. In many such conflicts belonging is more important than believing."

Kymlicka's view.

Over and against Rawls's view, Kymlicka argues that, whereas beliefs can be protected under the universal rights of citizenship, cultural membership can be protected only through the introduction of group-differentiated rights, that is, in terms of rights defined in part by cultural particularity.

But how can a liberal justify such divergence from the universal rights of citizenship? As Kymlicka recognizes, two factors suggest that such a justification will be highly problematic.¹⁰ First, liberals question the right to membership in the specific culture to which one belongs. The existence of alternative cultural structures seems to guarantee the equal right to cultural membership, and all that appears to be required, on the liberal view, is assistance for members of minorities to integrate with the majority culture. Thus on this view, a right to membership in one's specific culture is unnecessary.

Second, liberals question the cost of minority rights. Conceiving cultural membership as the result of a choice among alternative cultures, liberals argue that members of minority groups should be held responsible for the cost of preserving their culture. On this view, because minority rights for aboriginals, for example, entail special costs for non-aboriginal citizens, restricting their rights and resources, there seem to be good reasons for denying that individuals from aboriginal minorities should have such rights. On this view, a right to membership in one's specific culture places an illegitimate burden on one's fellow citizens and thus contradicts the liberal principle of equality.

¹⁰ Kymlicka 1989: 186.

Thus, in order to make his argument convincing to liberals, especially Rawlsians, Kymlicka must show: (1) that the right to membership in one's specific culture is compatible with liberal principles, (2) that the special costs involved in minority rights do not subsidize reasonably revisable choices made by the individuals who constitute the minority and thus that differences in citizenship are compatible with the liberal principle of equality.

Part One: Autonomy, Equality and Group-Differentiated Rights

4.I.1 Cultural Structure and Cultural Character

Crucial to Kymlicka's defence of group-differentiated rights is his distinction between cultural character and cultural structure.¹¹ Kymlicka defines cultural character as the products of people's cultural choices. These choices are expressions of culture and reflect changing styles, mores, allegiances, and associations, everything from folk-tales to political parties, from rug-weaving to religion. By contrast, he defines cultural structure, as the context of choice, itself not the product of a reasonably revisable choice, but rather, an arena in which a culture's character can be chosen.

(i) The Autonomy Argument

Kymlicka responds to those who contend that the right to membership in one's particular culture is unnecessary by arguing that secure cultural membership is a presupposition of the individual autonomy which is a central liberal value. Kymlicka contends that a secure cultural structure provides a set of meaningful alternatives from which individuals may choose the goods they wish to pursue.¹² The meaning of these alternatives is expressed in cultural narratives and Kymlicka states: "We decide how to live our lives by situating ourselves in these cultural narratives, by adopting roles that have struck us as worthwhile ones, as ones worth living."¹³ For Kymlicka, these

¹¹ He states that without this distinction no liberal defence of minority rights is possible (Kymlicka 1989: 169).

¹² Kymlicka 1989: 165.

¹³ Kymlicka 1989: 164-5.

narratives point out the limits and dangers of the resources at our disposal (Kymlicka 1989: 170).¹⁴

Kymlicka draws on sociological analyses to defend further his claim that individuals have a right to membership in the specific culture to which they belong. He states: "Cultural membership affects our very sense of personal identity and capacity."¹⁵ Assuming that the language in which one is raised and which one utilizes is an aspect of one's identity, Kymlicka refers to evidence that language has a content which is formed by values which have their origin in the community. Also he notes that cultural heritage is a source of emotional security, of pride and self-respect, of the sense that we are capable of pursuing our goals efficiently.¹⁶ Referring to Margalit and Raz for support of his view of national identity, he states: "Cultural membership has a "high social profile", in the sense that it affects how others perceive and respond to us, which in turn shapes our self-identity. Moreover, national identity is particularly suited to serving as the "primary foci [sic] of identity" because it is based on belonging not accomplishment."¹⁷

¹⁴ He goes so far as to suggest that the absence of these narratives can prove fatal (Kymlicka 1989: 170).

¹⁵ Kymlicka 1989: 175.

¹⁶ Kymlicka 1989: 175-6.

¹⁷ Kymlicka 1995 [b]: 89. Cf. Avishai Margalit and Joseph Raz, "National Self-Determination", Journal of Philosophy, 87/9 (1990) Cf. also Anne Phillips, Democracy and Difference (Philadelphia: Pennsylvania State University Press, 1993); Anna Galeotti, "Citizenship and Equality: The Place for Toleration", Political Theory, 21/4 (1990) and; Baubock 1996:213.

Further: "Identification is more secure, less liable to be threatened, if it does not depend on accomplishment. Although accomplishments play their role in people's sense of their own identity, it would seem that at the most fundamental level our sense of our own identity depends on criteria of belonging rather than on those of accomplishment. Secure identification at that level is particularly important to one's well-being."¹⁸

Thus, on Kymlicka's view, liberals should be concerned with the fate of cultural structures because: "it is through having a rich and secure cultural structure that people can become aware in a vivid way of the options available to them and intelligently examine their value".¹⁹ Cultural structure, therefore, is necessary to the development and exercise of the individual's sense of justice and capacity to form, pursue, and revise a conception of the good, in short it is a presupposition of self-respect, and thus a primary good.²⁰ Kymlicka thus maintains that minority rights are consistent with and necessary to the liberal value of autonomy.

Further, stressing that the culture structure must be a context of "choice" allows

¹⁸ Kymlicka 1995 [b]:89. Cf. Maraglit and Raz 1990: 447-9. Rawls likewise supports the view that emigration is generally not a viable option (Rawls 1993: 136n4,277).

¹⁹ Kymlicka 1989: 165.

²⁰ According to Kymlicka, Rawls neglects the importance of cultural membership and develops a rationalistic conception of diversity because he identifies the cultural community with the political community. However, he argues that implicit in Rawls's view is the ground for recognizing the importance of cultural membership. Kymlicka states: "Rawls's own argument for the importance of liberty as a primary good is also an argument for the importance of cultural membership as a primary good because it is a condition of self-respect" (Kymlicka 1989: 166).

Kymlicka to limit principled liberal recognition of culture to those cultures which respect individual autonomy. Kymlicka stresses that liberal principles cannot support oppressive, illiberal minorities. He makes an important distinction between “external protections” which can be justified on liberal principles and “internal restrictions” which cannot be justified.²¹ Whereas internal restrictions limit the basic civil and political liberties of group members, external protections seek to protect the distinct existence of an ethnic group by limiting the impact of the larger society.²² According to Kymlicka, internal restrictions limit the individual's freedom to revise cultural practices and are thus inconsistent with a liberal defence of minority rights. Were culture identified with the character of a society at any given moment, no liberal defence of minority groups would be possible because, this would mean accepting even the illiberal prejudices of a group.²³ Given Kymlicka's distinction, however, one can argue that such oppressive characteristics cannot be justified because they do not respect the context of choice and thus violate the reason liberals have for wanting to protect cultural membership in the first place.²⁴ Kymlicka's distinction between cultural character and cultural structure thus provides not only the basis for a liberal defence of minority rights but also the basis for criticizing

²¹ Kymlicka 1995 [b]: 44, 152, 204n.11.

²² Kymlicka 1995 [b]: 36.

²³ Kymlicka criticizes, for example, Lord Devlin's claim that the English laws against homosexuality could be defended as an aspect of that culture's character (Kymlicka 1995 [b]: 230n.1).

²⁴ Kymlicka 1989: 172; 1995: 153.

illiberal minorities.

(ii) The Equality Argument

Kymlicka's conception of cultural structure as a matter of circumstance also provides his response to suggestions that group-differentiated rights impose an illegitimate cost on non-minority citizens and thus result in inequality. First, stressing that cultural structure is a matter of "circumstance", that cultural belonging is a matter of fate, so to speak, allows Kymlicka to limit individual's responsibility to revise their culture in the light of the primary goods they may reasonably be expected to obtain. On Kymlicka's view, cultural membership is itself a primary good because a sense of belonging is a presupposition of the individual's pursuit both of justice and of the individual's own conception of the good.

Moreover, according to Kymlicka, minority rights can be justified only if they rectify some inequality, only if they are required to establish an equal playing field between cultures.²⁵ He argues that this is clearly the case with aboriginal peoples, for example. He states: As a result of their vulnerability to cultures around them, aboriginals have to "spend their resources on securing the cultural membership which makes sense of their lives, something which non-aboriginals get for free."²⁶ Thus, the special measures demanded by aboriginals do not subsidize choice, rather they serve to correct an advantage shared by non-aboriginals; they remove inequalities in the context of choice

²⁵ Kymlicka 1989: 218-9n.7.

²⁶ Kymlicka 1989: 187.

which arise even before people make their choices.²⁷ Kymlicka concludes: "certain collective rights can be defended as appropriate measures for the rectification of an inequality in circumstances which affects aboriginal people collectively."²⁸ Kymlicka's analysis thus makes the concept of equality more complex; equality becomes a basis for treating people differently, at least in some respects. In order to grant fundamentally equal respect to all, it is necessary to rectify inequalities by securing differentiated rights.

(iii) Differentiated Citizenship and Stability

But even if we concede that group-differentiated rights are consistent with the liberal principles of freedom and equality another significant problem arises. The concept of differentiated citizenship is often criticized because it results in separatism and instability, an erosion of civic purpose and solidarity.²⁹ However, an examination of Kymlicka's distinction between the two kinds of minority groups, characteristic of liberal democracies, as well as his distinction among the three kinds of rights they claim, suggests the limits of this criticism.

²⁷ Kymlicka 1989: 190.

²⁸ Kymlicka 1989: 194.

²⁹ Cf. for example, Alan Cairns "The Fragmentation of Canadian Citizenship", in William Kaplan (ed) Belonging: The Meaning and Future of Canadian Citizenship (Montreal: McGill-Queens Press, 1993) and Chandran Kukathas "The Idea of a Multicultural Society" in Chandran Kukathas (ed) Multicultural Citizens: The Philosophy and Politics of Identity (St. Leonards: Centre for Independent Studies, 1993).

Kymlicka argues that there are two forms of ethnic diversity: multinational and polyethnic.³⁰ He contends that a multination state has two or more nations within its territorial boundaries and that when a nation forms a subunit of a larger state it is a national minority.³¹ He indicates that these minorities generally desire more autonomy from the larger federation.³² By contrast with multination states, polyethnic states are composed not of distinct national minorities but as a result of immigration, by individuals from other cultures who among themselves share a common language and history but who have left behind the cultural structure which gave expression to this.³³ By contrast with national minorities, immigrant minorities desire recognition within the institutional framework of the society to which they immigrate not autonomy from it; they wish to integrate with the broader society, not to challenge its authority.³⁴

³⁰ He also notes that a single nation can be both multinational and polyethnic (Kymlicka 1995 [b]: 16).

³¹ He defines a nation as "a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language or culture" (Kymlicka 1995 [b]: 11).

³² Kymlicka 1995 [b]: 27.

³³ Kymlicka states: "In general, then, I believe that national minorities have societal cultures and immigrant groups do not" (Kymlicka 1995 [b]: 101).

³⁴ Like self-government rights (discussed in Kymlicka 1989) polyethnic rights (discussed in Kymlicka 1995 [b]) are grounded in the "equality argument". Kymlicka claims, for example, that many of the symbols, holidays, uniforms etc. of those countries which accept the greatest number of immigrants were created at a time of far less religious diversity and, thus, privilege Christianity over other religions. He states: "In so far as existing policies support the language, culture, and identity of dominant

Thus, national minorities and immigrant minorities seek fundamentally different rights. The former, seek self-government rights, that is: "some form of political autonomy or territorial jurisdiction".³⁵ The latter, in order to facilitate integration into the broader society, seek polyethnic rights, that is, public funding for their cultural practices and exemptions from laws and regulations that place them at a disadvantage.³⁶ Moreover, there is a difference in the potential for fragmentation, implicit in each type of right.

Polyethnic rights, do not seem to promote fragmentation. Rather, the primary thrust of these rights is the integration of the members of immigrant groups into the mainstream society. Immigrants, in fact, show a strong affiliation for states which

nations and ethnic groups there is an argument of equality for ensuring that attempts are made to provide similar support for minority groups..." (Kymlicka 1995 [b]: 115). In order that these rights be enforced and that voice be given to their interests, it is essential that these groups are fairly represented in the institutions of the broader culture. Kymlicka outlines two kinds of group representation rights on the basis of his equality argument: (1) temporary measures in response to specific oppression, and which having removed relevant disadvantages are no longer required (Kymlicka 1995 [b]: 32) and; (2) permanent measures derived from the right to self government (Kymlicka 1995 [b]: 32-3). Further, according to Kymlicka, much of the recognition demanded by immigrant groups (such as anti-racism laws and inclusive curriculum requirements) can be ensured on the basis of citizenship rights which belong to all citizens and which do not qualify as group differentiated rights (Kymlicka 1995 [b]: 31).

³⁵ Kymlicka 1995 [b]: 27.

³⁶ Kymlicka 1995 [b]: 31. However, although their fundamental claims have different ends, Kymlicka argues that both seek special representation rights which are derived from their diverse claims (Kymlicka 1995 [b]: 31-3).

recognize and welcome their cultural differences.³⁷ Thus, polyethnic rights promote rather than erode civic unity.³⁸

Self-government rights are a different matter. According to Kymlicka, self-government is the fullest and most divisive case of differentiated citizenship. He admits that democratic multinational states which recognize self-government rights are fundamentally unstable because minority nations may view their own political community as primary, and the larger federation as derivative. Self-government rights thus involve dual citizenship and conflicting allegiances.³⁹ Yet although recognition of self-government rights has the definite potential for fragmentation of common civic purpose, this is the lesser of two evils and cannot be dismissed.

According to Kymlicka, although the group identity which underlies a claim for self-government makes social unity problematic it is nevertheless a permanent component of the political life of liberal democracies. Moreover, self-government claims are meant to rectify inequalities in the relation of the minority cultural communities to the majority

³⁷ Kymlicka 1995 [b]: 178.

³⁸ Cf. Richard D. Alba, "Assimilation's Quiet Tide" The Public Interest, No. 119, (Spring 1995) for a discussion of assimilation which contends that although assimilation is a reality for the majority of immigrants this does not imply the obliteration of all traces of ethnic origin. Cf. also Nathan Glazer, "Immigration and the American Future", Public Interest No.118, Winter 95 which likewise points to the continued effectiveness of assimilation but also points to differences between past views and current views of immigration in the United States.

³⁹ Kymlicka 1995 [b]: 181-2.

culture and the political community. As noted above, individuals in minority cultures are disadvantaged in terms of cultural membership because the stability of their culture is threatened. Therefore, they do not have a secure sense of autonomy and self-respect and cannot actively engage in citizenship rights characteristic of the political culture.

Kymlicka contends that refusal to recognize self-government claims aggravates alienation and provokes violence.⁴⁰ Refusal to recognize self-government thus results in a dialectic of instability. Because they are excluded from participation, minorities are alienated from the political culture and cannot obtain a sense of belonging from it. Thus they are thrown back into their own culture in reaction to the political culture. However, because their own culture is under threat, they cannot achieve a sense of self-respect there either. Thus minorities are doubly alienated: from the political community and from their own cultural community.

Further, the political community, because unable to include members of minority groups cannot be said to represent their interests fully. Hence the political community tends to protect merely the interests of the majority and the universality of citizenship rights is infringed. Asserting shared political values, as does Rawls, thus creates further division and instability.⁴¹ In these circumstances citizenship rights are rightly seen as the

⁴⁰ Kymlicka 1995 [b]: 183.

⁴¹ Kymlicka further contends that it is not clear that shared values are sufficient for two or more national groups to stay together within one country. Cf. Kymlicka 1995 [b]: 188 for detailed discussion.

exclusive domain of elite members of the majority culture, of Wasps, for example.⁴² In these circumstances the political community becomes a threat to minority communities. Hence, the political community, so far as minorities participate at all, is itself divided between those citizens who are alienated and those who enjoy the privileges and rights of citizenship. Therefore, so far as there is no reconciliation of these two forms of respect for the individual, there will be a general conflict between the political community and minority cultures, and both the political community and cultural communities will be rendered unstable because of the alienation of their members.

Kymlicka's attempt to demonstrate a common ground for both the individual rights characteristic of the political community and the group rights demanded by minority cultures is thus meant to reduce the intensity of this instability. In principle this common ground would guarantee individuals the self-respect required for democratic political participation and through such participation make the political culture more inclusive and less alienating. Further, a political community in which members of minority cultures participate will be seen as less hostile to minority interests and the minority community will feel less threatened. Hence, membership in one community will not conflict radically with membership in another. Also the education received by the members of minority cultures in the political community should enhance the liberality of the minority

⁴² Kymlicka 1995 [b]: 183.

culture.⁴³

Kymlicka's view is thus, a contribution to the development of a principled liberal concept of accommodation. On his view, the larger polity will command allegiance from minority nations only if these nations see it as a context which nurtures their national identity.⁴⁴ Kymlicka supports Charles Taylor's concept of deep diversity arguing that individuals must respect not only diverse groups within society but a diversity of approaches to both differentiated and common membership.⁴⁵ Nevertheless, while this respect for diversity might help to sustain solidarity, it will not create it from scratch. Hence, on Kymlicka's view, the fundamental challenge for liberal theorists is to identify the sources of unity in a democratic multinational state. By contrast with the Rawlsian vision, on Kymlicka's view, unity will originate not from a reasoned adherence to equal rights and liberal virtues but from a sense of mutual belonging, a shared identity.

Kymlicka's view is original and effective. It shows why liberals should conceive cultural membership as a primary good and it provides an eminently liberal "equality" argument for group-differentiated rights. Moreover, his distinction between self-government rights and polyethnic rights clarifies the differing tensions within the

⁴³ Even where a minority group claims self-government rights, intergovernmental bodies could serve this integrative function allowing for an increase in trust, an important basis for a common identity. Kymlicka recognizes that in certain cases, however, secession will be the only solution to conflict (Kymlicka 1995 [b]: 186).

⁴⁴ Kymlicka 1995 [b]: 188.

⁴⁵ Kymlicka 1995 [b]: 189-90.

multicultural liberal state. Specifically, it indicates that the rights claimed by immigrants express a desire for integration with the mainstream liberal society and that the common rights of citizenship are inadequate to those nations which demand self-government rights. Kymlicka thus fills in a significant lacuna in liberal thought and develops the liberal conception of pluralism to include cultures as well as comprehensive doctrines.

Part Two: Culture, Choice and Toleration: A Critique of Kymlicka

In Part Two I criticize two central elements of Kymlicka's view: (1) His distinction between cultural context and cultural structure and; (2) His emphasis on freedom of revision as a criterion of liberal toleration. The basic question for Kymlicka is: "To revise or not to revise?" When it come to cultural structure his answer is "yes". On the one hand, by identifying cultural structure with circumstance, Kymlicka defends cultures from having to revise their cultural structure in the light of the reasonable expectations of fellow citizens from other cultures. He provides an argument for external protection. On the other hand, he argues that the reason liberals have for protecting cultures is that they provide a context for the choices of individuals. Thus, he provides an argument against internal restrictions on the right to revise one's conception of the good life.

Through attending to the weaknesses in Kymlicka's account, Part Two seeks to develop a more coherent and tolerant account of why it is that liberals should recognize cultural differences. This continues my central argument which attempts to expand the liberal concept of public reason by making it more inclusive of ways of life which center

around a concept of the common good. As noted above there are two aspects of the concept of the common good which are of primary interest, its comprehensive and communal dimension. In Chapters Two and Three I considered reasons why Rawlsian public reason should be expanded to be more inclusive of comprehensive doctrines in the public domain. On my view this would draw more of the members of liberal society into an active citizenship because, within certain limits, it would allow for the expression of what is of most important to citizens and would allow a deeper accommodation of comprehensive concerns. Moreover such an expanded conception of liberalism would reflect the contemporary and historical dimensions of the public culture more fully than is possible on the Rawlsian view.

In Chapter Four the focus has shifted to the cultural and communal aspect. In Part Two I seek to develop an expanded concept of toleration, which will secure the principled respect deserved by even illiberal minority cultures like the Amish.⁴⁶

Kymlicka's work is exemplary in its attempt to relate its theoretical arguments to the concrete details of actual cultures. This will be the focus of my criticism. I argue that Kymlicka misconstrues the Quiet Revolution in Quebec and the nature of Amish culture. I seek to develop concepts of cultural choice and toleration which while being palatable to liberals are also truer to history and culture than those suggested by Kymlicka.

⁴⁶ The defense of toleration I develop would be included within a concept of public reason.

4.II.1 Choosing the Cultural Structure: The Case of the Quiet Revolution

Kymlicka supports his distinction between character and structure with a reference to the Quiet Revolution, a major cultural and political shift in Quebec society, which occurred in the 1960s. He claims that in the 1960s, French Canadians began to make very different choices than they had traditionally made. For example, they revised their relationship with their central religious institution, the Roman Catholic Church, and with their central political party, the Union Nationale.⁴⁷ He states that as a result: "One French Canadian may be committed to serving God, another may be committed to dispelling all religious mysticism, their life plans conflict, yet they share a common identity as French Canadians."⁴⁸

In this section I argue that Kymlicka misconstrues the Quiet Revolution because he conceives cultural structure as a matter of circumstance. Over and against his view I support a concept of culture as the product of free activity.

The historical example of the Quiet Revolution tells against Kymlicka's distinction between cultural structure and cultural character. While the institutions which Kymlicka isolates may be conceived as aspects of character in the 1960s, prior to the 1960s they had been crucial elements in the very survival of French Canadian culture. If one looks back to the 1760s, for example, one finds a nascent Québécois identity inexorably linked to the Roman Catholic Church. Christian Dufour states: "Catholicism was the hard core

⁴⁷ Kymlicka 1989: 239.

⁴⁸ Kymlicka 1989: 239.

of the Canadian identity at a time when the religious domain occupied a considerable portion of the political field" ⁴⁹ Moreover, although as early as October 26, 1764, French Canadian jurists requested that they be judged as "French, by French, in accordance with ancient custom and in their national language", Dufour makes the point that reference to language was in fact rare at this time.⁵⁰ He states: "Their collective identity was based more on French civil rights and the Catholic religion ... than on language."⁵¹ Dufour also notes that in 1840 the strength of the Church was at its highest point and would play a role until 1960.⁵² Moreover, he notes that the strong identification with Catholicism saved the honour of the French collectivity. Though excluded from political power, they defined themselves against "Protestant materialism". While, on Dufour's view, this religiosity prevented French Canadians from taking advantage of confederation with Canada, it nevertheless maintained the psychological integrity of French Canadians.⁵³ The point here is that at an earlier stage of French Canadian history, religion was the key factor in the structural integrity of French Canadian culture. In line with Kymlicka's standards for societal culture, it provided members with "meaningful ways of life across

⁴⁹ Christian Dufour, A Canadian Challenge/Le Defi quebecois (Lantzville: Oolichan Books, 1990) p. 36.

⁵⁰ Dufour 1990: 41.

⁵¹ Dufour 1990: 42. Cf. also A.I. Silver The French-Canadian Idea of Confederation: 1860-1900 (Toronto: University of Toronto Press, 1982) pp. 10-11.

⁵² Dufour 1990: 66.

⁵³ Dufour 1990:67.

the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres".⁵⁴

Kymlicka might respond that Quebec society prior to the Quiet Revolution was unjust and that the liberalization of Quebec society had precisely the result that its cultural structure became a context of choice. However, the force of this response is very much weakened. The current cultural structure of Quebec society is the product of choice and not merely a context of choice; they have chosen language as the basis for their identity, just as in a past time they chose religion.

But what does it mean to choose one's culture? Rainer Baubock, in his instructive essay "Cultural Minority Rights for Immigrants" points to four ways in which individuals may exercise cultural choice: affirmation, internal challenge, assimilation, and combination. First on Baubock's view, individuals can simply affirm the culture into which they have been born, they can accept its traditions and practices. Second, while generally affirming their cultural membership, individuals can criticize and challenge specific customs and mores. He argues that such internal challenge can take three forms: (1) practice of deviant behaviour and profession of deviant beliefs; (2) claims that what is now considered deviant is in fact consistent with cultures traditions and; (3) work which aims at changes to the core customs currently characteristic of the culture. Third,

⁵⁴ Kymlicka 1995 [b]: 76. This indicates the inadequacy of Kymlicka's distinction between religion as a product of choice and cultural structure. Religion can itself be culture.

individuals may attempt to assimilate into another culture thus changing their cultural membership.⁵⁵ Finally, on Baubock's view, individuals may combine aspects of different cultures.⁵⁶

Thus culture cannot be viewed in terms of the abstract division of character and structure.⁵⁷ Rather it must be seen as a process in which, from a given range of alternatives, certain aspects are appropriated and identified with as best securing, preserving and developing a nation's identity.⁵⁸

4.II.2 Constitutive Choice and The Equality Argument

By identifying cultural structure with circumstance, Kymlicka provides an

⁵⁵ Baubock 1996:207. Baubock also notes that voluntary assimilation can be reconciled with the basic claims made by minorities. He notes that "the denial of assimilation is often even more harmful to minority members than coercion" (Baubock 1996:208). For other accounts which point to the strength and justness of assimilation in America cf. Alba 1995 and Glazer 1995. Kymlicka under-emphasizes (though does not deny) the positive aspects of assimilation.

⁵⁶ Baubock 1996:209.

⁵⁷ Cf. Avishai Margalit and Moshe Habertal "Liberalism and the Right to Culture" Social Research Vol.61, no.3 Fall 1994, p. 505. where they argue that the notion of an abstract cultural context lacks all value for members of a particularist group unless they happen to be liberals of Kymlicka's sort for whom the supreme good is the ability to examine and change one's way of life. Further they contend that culture not only provides alternatives but gives individual lives meaning on a variety of levels.

⁵⁷ Cf. also Katherine Fierlbeck "The Ambivalent Potential of Cultural Identity" Canadian Journal of Political Science XXIX:1 (March, 1996) p.18 which rightly argues that self-esteem is a dynamic process not identification with a permanent context.

argument against requiring cultures to revise their structure in the light of the reasonable expectations of fellow citizens from other cultures; he asserts a theoretical bulwark against enforced assimilation. However, reinterpreting cultural structure as a product of choice does not remove this bulwark, in fact, it strengthens it. Though in meaningful ways, one chooses one's culture, one cannot reasonably be held responsible to revise this choice. In Liberal Nationalism, Yael Tamir rightly argues that cultural choices "belong in the category of constitutive choices, which due to their importance to individuals should be granted special right" ⁵⁹

Rethought along these lines, Kymlicka's emphasis on circumstance can be seen to illuminate certain important aspects of this constitutive choice. We do not choose which society we are born into and we are educated in our culture's mores and traditions before we can reasonably be said to consent to them. The result of being thus embedded in a cultural context, is an almost overwhelming tendency to affirm one's cultural membership, even if one disagrees with various elements in one's culture . But while one's identity is initially a matter of circumstance, of the education one receives from parents, teachers and cultural institutions, by contrast with Kymlicka's view, one can nevertheless, choose to affirm or to reject one's circumstances. Indeed, unless such

⁵⁹ Yael Tamir, Liberal Nationalism, (Princeton: Princeton University Press, 1993) p. 41. The concept of constitutive choice has quite a lineage in the history of philosophy. Cf. Augustine's account of his conversion, Kant's concept of duty, and Hegel's view of ethical life. Tamir, like Hegel, conceives constitutive choice in terms of culture. Cf. Hegel's Philosophy of Right Tr. T.M. Knox (Oxford: Clarendon Press 1967) p. 155.

choice were possible, the context of choice (which on Kymlicka's view is a matter of circumstance) would be an illegitimate restriction of freedom. On the one hand, cultural circumstances would ground the individual's sense of belonging. On the other hand, these circumstances would alienate the individual because he would not be free in relation to them. If the cultural structure is beyond choice, it leads individual's lives from the outside.⁶⁰ Once one reflects upon one's culture and chooses to affirm or to reject it or certain aspects of it, one begins actively to constitute not only one's own identity but also the identity of one's culture.

What is crucial here is that although, over and against Kymlicka's argument, culture is chosen, individuals cannot reasonably be expected to revise their culture in the light of the expectations of fellow citizens who belong to other cultural groups. On the one hand, one's cultural identity, though chosen, is analogous to an identity which is a matter of circumstance. One's cultural identity takes root, it is at least partially constitutive of one's self. Hence, the difficulty of changing one's cultural identity and the threat this would cause to one's self-respect makes it prohibitive, unless change is freely chosen. On the other hand, one's cultural identity is the product of choice; a cultural creation. The ability to create one's self and one's culture is the foundation of one's self-respect, enforced revision is thus an affront to individual freedom.

Thus Kymlicka's equality argument is effective even when cultural structure is

⁶⁰ Kymlicka unduly restricts individual freedom in his view that the range of alternatives remains unchosen.

conceived as a product of choice. Because one's cultural identity, though chosen, is constitutive of one's sense of self, it is not easily revisable and individuals cannot reasonably be expected to change their culture when this is demanded by others.⁶¹

Still, conceiving culture as a product of choice and as constitutive of one's identity raises important concerns that the emphasis on the constitutive element or embedded quality of our ends makes it more difficult to defend the full range of liberal rights and freedoms. Kymlicka believes that he has sidestepped such concern by conceiving culture as a context of choice. On his view, liberals can defend the constitutive cultural component of individual identity but only to the extent that it provides an adequate range of alternatives. To subscribe to such a range in a meaningful way is to subscribe, in the main, to liberal rights and freedoms. So far as a culture does not subscribe to such rights and freedoms it can be criticized from a liberal perspective.

On the Kymlickean view then, my conception which sees culture as a product of choice and de-emphasizes its nature as a context of choice is bound to appear suspicious

⁶¹ Constitutive choice thus plays the role "circumstance" played in Kymlicka's argument, it shows that revision of one's cultural identity cannot be reasonably expected. Conceiving culture as the product of choice in principle makes Kymlicka's equality argument more acceptable to a critic like Kukathas. No longer is the argument between a position which views culture as circumstance and one which views it as a product of choice (as an association on Kukathas's view). One can argue against Kukathas, on his own terms, that culture is a peculiarly significant form of association because of its constitutive character, and thus that it requires protection. Cf. for example Chandran Kukathas, "Are There any Cultural Rights?" Political Theory, Vol. 20 No.1, Feb. 1992 105-139.

and plainly illiberal. First, however, I must make it clear that I do not deny that culture is a context of choice, although, as my discussion of the Amish in section 3 will indicate, Kymlicka and I disagree over the range of alternatives which are essential. My argument above is that the Québécois chose to transform their cultural structure. The sense of identity formed in part by their religious resources provided the sense of community required for this choice, for their appropriation of the freedom to create their own culture. The Roman Catholic church contributed in at least three ways. First, as argued above, it was a crucial aspect of the Québécois identity for many formative years. Second as the Québécois began to develop a desire for a more liberal society, the conservative aspects of the Church as well as the Union Nationale became a focus for discontent, a common enemy. Finally, Roman Catholicism itself was in a process of liberalization through the Second Vatican Council which held sessions from 1962-65. The Catholic church contained within itself a sense of individual freedom which in course of time would overthrow many of the oppressive aspects of traditional practice.

Further, as a province within the Canadian Confederation, Quebec's identity was formed in relation to "English" Canada and to the rest of North America. The twentieth century in Canada and the United States has seen the transformation of many oppressive aspects of sub-communities, provinces and states as they come under the influence of the broader liberal society. Prior to the Quiet Revolution, Quebec society was infiltrated by liberal ideas which germinated in universities and other associations. With cultures like Quebec prior to the Quiet Revolution it seems that a conservative approach to the

liberalization of culture is appropriate -- allowing individuals to reconstitute their cultural identity in due course and avoiding the inevitable backlash which results from interference.

There are, however, cases where interference seems necessary to protect minority groups. For example, the decision in *Brown v. the Board of Education* and civil rights legislation in the 1950s and 1960's, for example, was obviously appropriate. But the degree of harm which Blacks suffered and the depths of prejudice and segregation called for extreme measures. Moreover, as members of the United States, the various states which had racist laws had legal obligations fixed by the Supreme Court. Here the participants had a dual identity, membership in the broader liberal public culture and in the local culture of racist states. But it is important to note that the civil rights movement arose as the third monumental attempt to transform racism in the South, preceded by the Civil War and Reconstruction. The degree of the struggle to end racism in the U.S. indicates the degree to which it is embedded in U.S. history and culture and the degree of coercion it made possible. By contrast the liberalization of Quebec society did not require such activist liberalism.

While liberal values and cultural belonging can be reconciled, this is not always easy to achieve. In extreme cases like the American South, where Blacks were denied citizenship and consigned to denigrated roles and spaces, it is obvious that the cultural belonging of the white majority was consciously achieved at the expense of the Black minority. Here liberal values appropriately trumped the cultural belonging of Southern

whites -- radically oppressive cultures cannot be tolerated within a liberal union.

Nevertheless, cultural belonging provides crucial orientation for individuals even within illiberal societies and it is important to treat this fact with respect. In the 1960's churches became public political forums and public debates in governmental assemblies were often concerned with why racism was wrong, and on comprehensive grounds. Where interference with an illiberal culture is justified public forums can go along way towards explaining why such interference is appropriate. However, most subcultures within predominantly liberal public cultures, will not require such interference, for either they are subject to the general influence of the broader culture or they simply find their freedom within a more restricted range of alternatives than liberals like Kymlicka believe to be desirable.

4.II.3 Revision and Toleration: The Case of the Amish

As we have seen, by contrast with Kymlicka, I conceive cultural structure to be a product of choice and not a matter of circumstance. Thus we disagree on where freedom comes into the picture. For Kymlicka it is important that one be free to do with one's circumstances what one will; he is concerned that one's circumstances not unduly inhibit the range of alternatives from which one makes one's choices. Thus, on Kymlicka's view, restrictive aspects of culture must be considered matters of character for, otherwise, liberals will not be able to assert that they should be changed. Kymlicka then construes the task of liberalization as concerned with altering peripheral aspects of character -- he

assumes that what is essential to culture is consistent with liberal values. However, as indicated in my brief examination of the Quiet Revolution, this puts the normative cart before the historical horse. On my view, what is required in the liberalization of culture is the transformation of structure, of what is essential not peripheral to culture. The task for liberals is thus much more difficult than Kymlicka proposes: because liberalization is the transformation of the cultural identity of individuals and because cultural identity plays a constitutive role in individual identity, liberals must approach the transformation of culture with respect and caution. They must be careful to investigate the degree of satisfaction which individuals have with their culture and be aware that there are many senses in which individuals can be free.

On my view, the concept of culture as the product of choice and as an example of constitutive freedom plays an important role here. In this section I seek to show how even a restrictive culture can be seen as a product of freedom. Further, a restrictive culture may well help achieve the goals of the culture in question. Because freedom is involved in the production of culture, the liberal has, at first glance at least, reason to respect culture prior to the question of whether or not the chosen culture provides a wide range of alternatives for further choice. The issue then is not simply whether there is a wide range of alternatives but whether the accepted limitations on the range of alternatives are severe enough to overturn the interest liberals ought to have in protecting the right of individuals to create their own cultural communities. The fact that culture is the product of freedom tempers the concern with a restricted range of alternatives; in

certain cases it permits more restriction than would be allowed on Kymlicka's view in order to protect the freedom involved in the creation and maintenance of culture.

Through an examination of Kymlicka's approach to Amish culture, I seek to show how an emphasis on range of alternatives and on revisability, as such, misrepresents Amish culture and the degree of respect and toleration it deserves on liberal grounds.

Actually, Kymlicka's consideration of the Amish case in *Wisconsin v. Yoder* is rendered problematic both by his basic distinction between cultural structure and character and by his emphasis on revision. In that 1972 case, the American Supreme Court accepted the Amish claim to a right to withdraw their children from school before the age of sixteen. According to Kymlicka, the Amish believe that it is only by restricting knowledge of alternatives that they can prevent individuals from revising their adherence to Amish society. Further he argues that toleration of the Amish can only occur on the basis of historical considerations. He states: "For various reasons when these immigrant groups arrived, they were given exemptions from the usual requirements regarding integration and were allowed to maintain certain internal restrictions. We may now regret these historical exemptions but they were granted and we cannot entirely dismiss them, unless they are unconscionably unjust."⁶² Moreover, Kymlicka argues that it is not obvious how much weight should be given to merely historical considerations.

In presenting the reasons for a principled respect of such groups as the Amish, I wish to defend a more secure toleration than is available on Kymlicka's account. Here

⁶² Kymlicka 1995: 170.

my disagreement with Kymlicka is two-fold. First, I think Kymlicka's sense of the illiberality of Amish culture is mistaken. This is an issue of fact. Kymlicka contends that the Amish make it prohibitive for the individual to leave Amish society, hence that there is no capacity to revise, and that acquiescence does not signify consent. A closer look at Amish society, however, shows that it provides a definite context for revision and qualifies for membership in a liberal state. Second, I argue that Kymlicka is led to this misconstrual of Amish culture by his emphasis on the individual's freedom to revise and its corollary, the distinction between structure and character.

I will begin with the facts. First, the Amish are not subject to a tyrannical government.⁶³ In fact, there are significant democratic elements within their theocratic system. Although only men can hold "political-religious" office, all members of Amish society can vote. Though this vote is usually to accept or to reject the recommendation of the bishop, Amish members vote on all recommendations even those which concern excommunication.⁶⁴ Also, though not comparable to mainstream North American society, Amish society is pluralistic: local congregations vary in their interpretations of religious

⁶³ Cf. Donald B. Kraybill, The Riddle of Amish Culture, (Baltimore: John Hopkins University Press, 1989) p. 96. He quotes a minister as saying that the Amish way of life: "did not come overnight, nor did it come through rash or harsh decisions of our bishops".

⁶⁴ Kraybill 1989:72. Cf. John A. Hostetler, Amish Society. 3rd ed. (Baltimore: John Hopkins University Press, 1980). Hostetler has called this a patriarchal democracy (Hostetler 1980: 111).

regulations.⁶⁵

Further, expulsion from Amish society, occurs within relatively flexible limits. Though one can be excommunicated and shunned for adultery, divorce and even driving a car, it is also possible to return if one is willing to confess one's error in public.⁶⁶ Moreover, one cannot be excommunicated unless one has been baptized.⁶⁷

The structure of Amish baptism reveals a context in which the individual may reject Amish regulations. Amish members are not forced to be baptized. An important aspect of the baptism ceremony, which occurs in the teenage years, is a last chance to refuse to be baptized. Though the social pressure to be baptized is heavy, there is also a definite opportunity to turn back. In the ceremony great emphasis is placed on the difficulty of following the Amish life-style; applicants are even warned that it is better not to make a vow than to make a vow and later break it.⁶⁸ Further, one cannot be excommunicated for refusing to be baptized; those who refuse are allowed to relate to members of the community, although they usually leave it. It is noteworthy that twenty per-cent of Amish refuse baptism.⁶⁹ In the face of substantial socialization, this indicates substantial room for revising one's relationship to the community and a substantial right

⁶⁵ Kraybill 1989: 78,112.

⁶⁶ Kraybill 1989: 79,115.

⁶⁷ Kraybill 1989: 99,116.

⁶⁸ Kraybill 1989: 100.

⁶⁹ Kraybill 1989: 99.

to exit.⁷⁰

Amish teenagers are permitted exposure to the external world, what they call the "English" world and thus can make a somewhat informed decision. However, even if they were more ignorant of it than they are, I am not sure this would destroy the ability to make a meaningful choice. Chandran Kukathas makes the interesting point that if a person does not know anything about alternate cultures it may still be said that he has a meaningful choice. He states: "The problem is that one option is very costly or risky. One can make a meaningful choice to take a risk -- even a risk that places one in a situation of extreme uncertainty."⁷¹ One would have all the more reason to take such a risk if one felt oppressed by one's culture. Further, even isolated communities like the Amish often have comfortable alternatives with which they are familiar, many who leave the Amish become Mennonites.⁷² It is reasonable to conclude therefore that those who remain within Amish culture do so because they truly want to.

Amish culture greatly restricts the range of choices available to its members if they wish to remain within the community. However, though the culture is restrictive these restrictions are freely accepted by its membership. Further, they believe that their

⁷⁰ Here I disagree with Kraybill's assessment that the Amish youth do not have a real choice (Kraybill 1989: 140).

⁷¹ Chandran Kukathas, "Cultural Rights Again: A Rejoinder to Kymlicka," Political Theory, Vol.20 No.4 (Nov 1992) p. 677.

⁷² There is significant liberality within Mennonite culture. For example within some Mennonite groups there are associations for the promotion of homosexual rights.

obedience is itself productive of freedom. Consider the statement of Amish historian Joseph F. Beiler: "A person within the Ordnung actually has more freedom, more liberty, and more privilege than those who are bound to the outside."⁷³ The Amish choose the restricted range of alternatives set out by the Ordnung because they find that it frees them from "modern" worries and allows them to concentrate on the "Biblical truths" which are the basis of their community.

Moreover, the Amish do not show the psychological scars indicative of an oppressed people; they are a self-possessed and accomplished culture. Interpreting culture as a product of choice, one can see that a society of such apparent contentedness and cohesion expresses significant freedom, though a freedom more of adherence than of revision in that they do not feel that what they accept is continually open to question or reexamination. Amish culture is the product of the rational choices of its members, and this is apparent in the character of the culture: almost full employment; low divorce rates; and low crime rates. Most reasonable people would at least ask themselves whether some trade-offs between the liberties provided by civil society and the goods provided by Amish life may not be rational.⁷⁴

Further, the Amish have a tradition of respect for civil government and contrary to

⁷³ In Hostetler 1989: 84.

⁷⁴ Though on Rawlsian principles these tradeoffs are impermissible in public contexts, they are permitted in private contexts.

stereotypes they do pay taxes.⁷⁵ Thus, as a non-tyrannical, distinctively peaceful group, respectful of government, the Amish pose no threat to the stability of the liberal state, they are good citizens. This view is expressed by Chief Justice Warren Burger in the decision in *Wisconsin v. Yoder*. He states that the Amish have survived as a: "separate, sharply identifiable and highly self-sufficient community for more than two hundred years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief."⁷⁶

Why is it, then, that Kymlicka, a liberal genuinely interested in group-differentiated rights, would fail adequately to accommodate Amish culture? Why would he misrepresent it so thoroughly? My suggestion is that the basis for this misrepresentation is his mistaken distinction between cultural structure and cultural character. As argued above (4.I.1.i) Kymlicka contends that liberals should be interested in cultural structure because it provides individuals with a sense of belonging and the self-respect necessary to pursue a conception of the good life. Further, on Kymlicka's view, a culture's *character* should be important to liberals because it provides the range of options from which an individual chooses her conception of the good life. Group-differentiated rights can be defended because culture is essential to the individual's ability to make dignified and rational choices. Culture secures individual choice by

⁷⁵ Kraybill 1989:217.

⁷⁶ In Hosteller 1989, p. 142.

ensuring the existence of a broad range of alternatives to be chosen. However, while Kymlicka contends that liberals should not interfere with cultural structure, he insists that where a group restricts the options available to individuals, such a group is in breach of liberal principles. On Kymlicka's view, such a culture restricts its members' ability to revise their conception of the good life and thus interferes with the individual's right freely to pursue a conception of the good life. It is important to note here that Kymlicka is concerned not only with the individuals ability to choose whatever one wants but also with the ability freely to pursue a vision of the good. But it is clear that, on Kymlicka's view, the goal of liberalism is to ensure individual freedom by insisting that cultures maintain a wide range of alternative life-styles. Because he holds that cultural structure is a matter of circumstance and thus cannot be interfered with, so far as liberal principles can have an effect on culture, it can only be through ensuring that cultural character maintains a pluralism of options.

Amish culture runs afoul of Kymlicka's desired range because it places greater emphasis on the content and concrete results of freedom than on the conditions for free choice. The Amish downplay but do not dismiss freedom of revision and insist that to be truly free the individual must embrace a common good ordained by divine law. Kymlicka's view allows that individuals may choose whatever content they wish as long as they do not interfere with the rights and freedoms of others. By contrast with the Amish view, Kymlicka's account is concerned only that the individual not be interfered with in his pursuit of the good life. He believes that the state has no role in specifying the

content of the individual's concept of the good. His view emphasizes that one is free so far as one is not prohibited from revising one's choices. Kymlicka allows that individuals may choose specific versions of the good but he insists that a culture must provide ample opportunity for individuals to question and revise their concept of the good should they change their minds. For Kymlicka a range of alternatives is crucial because it allows the individual the ability to change his mind should he so desire.

Key to Amish culture, by contrast, is the doctrine that the individual's conscience gives witness to the truth of revelation. On this view, one requires revision only if one is on the wrong path -- generally speaking even illiberal groups accept righteous revision. But if one considers the life one is living to be good, there is no need for revision. Perhaps Kymlicka might respond that individuals might be wrong about the life they now lead and require the right to revise in order to correct their mistakes. But groups like the Amish believe that their life-style is ordained by God; while they may revise the details, the core of their belief is felt to be certain through their experience of faith. Because they are certain that their faith contains the truth, they need not place much value in the Millian liberal values of pluralism and experimentation.

Moreover, liberalism is not without its own costs in terms of the range of alternatives it makes possible. For Kymlicka, in order to be free citizens must adhere to liberal rights and values which ensure minimal interference with one's right to revise and pursue one's conception of the good life. In the real world the principle of revision thus has its own content built into it, the liberal way of life. On Kymlicka's account these

restraints must be accepted if the individual is to be free. In these abstract terms then, liberal freedom has a similar structure to Amish freedom. The Amish accept certain restraints because they believe this makes them free; they obtain their freedom by following the laws of the Ordnung.⁷⁷

Kymlicka could argue that the restrictions to which the liberal must adhere make possible free choice of a way of life from among the widest possible range of alternatives. However, in practice, the difference between the Amish way of life and the liberal in terms of sustaining alternatives is less than one might think. Amish society indeed restricts education, gender roles and all manner of everyday choices liberal citizens are used to making. However, as argued above, they also live in a close-knit society with little violence, stable family life, low crime rates and high employment. A member of Amish society might look at the practice of liberalism in the United States and see citizens who have freedom to revise their conception of the good but who are not free to walk down or park their buggies on certain streets; where divorce occurs at just under fifty percent; whose fellow citizens go to bed hungry and are ridden with anxiety over unemployment. The practice of liberalism is not without cost for a range of alternative conceptions of the good life.

One might argue that were egalitarian or conservative liberalism truly put in place, the state would provide opportunities for its citizens or allow the market to provide

⁷⁷ John Hostetler (ed) Amish Roots (Baltimore: John Hopkins, 1989) pp. 80-93.

opportunities which would greatly reduce these threats to individual freedom. But the Amish could easily say: “we already have a way of life which makes us happy and secures our freedom, why should we give that up to take part in your experiment which as yet seems very questionable?”

The case of the Amish is instructive because it demonstrates that even a typically illiberal minority need not oppress its members. In fact the Amish provide an archetype of minority cultures which are radically different from mainstream society and which nevertheless are deserving of liberal respect. Thus, within North American society, the Amish are a profound symbol of liberal toleration. Their culture shows that liberalism has the potential for great inclusiveness. Whereas Kymlicka’s view emphasizes the importance of a wide range of options and thus fails to accommodate Amish culture, it is my suggestion that the example of Amish culture indicates that a culture may be worthy of respect on liberal principles even when it both encourages adherence to a common good and restricts alternatives and the ability to revise. The Amish do not represent the paradigm of a free society by any stretch of the imagination. However, they do present a compelling practical example of a free non-liberal society. On the one hand, they meet reasonable requirements of revisability encouraging reflection on one’s commitment and allowing a real right to exit. On the other hand, they believe that they can sustain their conception of the good life only by encouraging adherence to a common good and by restricting the range of alternatives from which members may reasonably be said to choose.

From a consideration of Amish culture then, we can draw criteria which can form the basis for the liberal respect for illiberal minorities. To qualify for the principled respect of a liberal constitutional regime an illiberal minority must have the following characteristics. First, it must not be cruel, forcefully oppressing its citizens. Second, it must thus allow substantial right to exit. A liberal society, since it imposes this criterion upon the Amish, could provide financial support for people who leave Amish culture. Perhaps the Amish could be taxed in order to subsidize this support. Third, its decisions must be open internally and externally; both its members and the mainstream liberal society need to be assured that its decisions are not arbitrary. This is a publicity condition. Fourth, and connected with this publicity condition, the justification for decisions must show that they have a rational basis and are not intended for coercion. In the case of the Amish view of education, there is at least some justification of this sort in that, on their view, a culture of farmers receives its education on the farm and thus requires only a limited amount of formal education. Fifth, its decisions need to be acquiesced to by the citizens. In the absence of forceful oppression it is difficult to conceive how this condition could be satisfied without some form of democracy. Finally, in order for a liberal government to respect a minority it is necessary that they be informed of the minority's needs and claims. Moreover, a liberal government needs to know that in areas of dispute there can be some debate about the issues involved. Also it is to the advantage of both sides to develop procedures that assist with the fair resolution of disputes. Thus a further requirement is that an illiberal minority take part in

intergovernmental boards. The Amish "Steering Committee" which arose in the 1960s to aid conscientious objectors has become a broker between the Amish and government officials. It is a government liaison which stays abreast of legislation which affects the Amish.⁷⁸

These governmental boards play a significant role in my view. They provide a window of insight and communication between public and local cultures and give institutional embodiment to the interplay between cultures. Through these boards liberal representatives can raise questions about perceived coercion within the local culture. Likewise representatives from the local culture will have a venue in which to explain and defend themselves. Participation in these boards hold open the promise for mutual transformation of local and public culture.

It is not necessary, therefore, to ensure the full range of alternatives characteristic of liberal culture to ensure individual freedom. As William Galston states: "the state must safeguard the ability of individuals to shift allegiances and cross boundaries. But it

⁷⁸ Cf. Kraybill 1989: 87-90. Further, these requirements are consistent with Rawls's three requirements for a well ordered hierarchical society in his "Law of Peoples". in Stephen Shute and Susan Hurley (eds) On Human Rights (New York: Harper Collins, 1993) pp.60-64. However, Rawls's view that "though a society lacks basic equality it is not unreasonable for that society to insist on equality in making laws against other societies" seems puzzling. A society which does not interpret justice for its own members in terms of equality is unlikely to have developed a conception of equality applying to non-members, or other societies. While liberals will have egalitarian moral reasons to respect well ordered hierarchical societies, at best these societies will have their own moral reasons for cooperation or as Kymlicka argues will secure only a *modus vivendi*. Cf. Kymlicka 1995 [b]: 168.

should not seek to reconstruct practices within subcommunities in light of principles governing movement among communities."⁷⁹

It might be argued that requiring cultural groups to ensure a right to exit is no less biased than the Rawlsian conception of the moral person.⁸⁰ However, by contrast with the Rawlsian view, pluralist republicanism aims neither to draw its basic principles simply from ideas shared in the public culture nor to secure an overlapping consensus. If the basic concepts utilized by Rawls are not shared, then his view cannot obtain the neutrality which he believes to characterize his political conception — a bias in the basic concepts infects the whole construct. His political conception of justice, rather than forming the ground of an overlapping consensus, will in fact remain just one sectarian view among others.

By contrast with Rawls's attempt to secure political neutrality, pluralist republicanism expands public forums in order to allow individuals to have a say in the comprehensive commitments which underlie state action. It is thus not fatal to my standpoint that it not be shared by all groups in society. Unlike Rawls, I do not assume agreement in the first place and then structure the public realm as if such agreement existed. By contrast, I conceive the public forums as themselves an important arena for such debate..

⁷⁹ William Galston, "Two Concepts of Liberalism", Ethics 105 (April 1995) p.522.

⁸⁰ Cf. the criticism of Rawls in 2.I.3 above.

4.II.4 Cultural Choice and Group-Differentiated Rights

Conceiving culture as an expression of choice thus allows for a more tolerant liberalism and strengthens the argument for group differentiated rights in at least six ways. First, it grounds group-differentiated rights in a non-static concept of culture. It is now possible to preserve what Waldron calls the most fascinating feature of a culture: "its ability to generate a history".⁸¹ Also, it is no longer necessary to imply that transition periods in a culture are a sign of cultural insecurity and threat. Conceived as the products of choice, periods of transition can be seen as a sign of strength and growth.⁸²

Second, it makes possible a consistent account of how it is that some cultures are or become cosmopolitan while some are or become local. With the conception of context of choice as a matter of circumstance, that is, as given, it is difficult to conceptualize cosmopolitanism, which, by definition, is a going beyond what is given in one's own traditions to an acceptance of what is available in other cultures.

Third, it does not discriminate, as Kymlicka's view seems to, against societies which have a simple structure. Rhetorically, Kymlicka asks: "If the English can allow the character of their culture to change (by granting freedom of sexual practice) without destroying their cultural community, why can't other cultures?"⁸³ While Kymlicka

⁸¹ Cf. Waldron in Kymlicka 1995 [c]: 110.

⁸² Cf. also John Tomasi, "Kymlicka, Liberalism, and Respect for Cultural Minorities" *Ethics* 105 (April 1995):580-603 which criticizes Kymlicka for conceiving culture as static.

⁸³ Kymlicka 1989: 169.

accepts (at least temporarily) certain illiberal practices that are essential to structure, those which are merely aspects of character cannot be defended on his view. However, in cultures which are not cosmopolitan or which have a relatively simplistic social system, like Amish culture for example, changing even a single practice may dramatically affect the other practices with which it is closely interwoven. English culture is rich with an illustrious and infamous history. Losing one aspect of culture has little effect on the cultural structure of England because there is much else to identify with: the Magna Carta, the Beatles, football, the Queen, Anglicanism, John Locke, and Shakespeare. Moreover, this change in English law renders it more consistent with its liberal basis. Allowing divorce in Amish culture would introduce a principle of individuality which contrasts with principles of communal unity and which might even destroy it. In any case, it is one thing to change the practices of a complex cosmopolitan culture, which embraces change, and quite another to change the practices of a tightly knit social system which is in principle resistant to change.

Fourth, it allows proper consideration of the issue of decision. Kymlicka, by focusing on circumstance fails adequately to consider the issue of who decides that which belongs to the structure and that which belongs to the character. It is not enough to assume from beginning that what is permanent and essential to culture is amenable to liberalism while what is illiberal is merely phenomenal.

The relation between liberal principles and culture is far murkier than Kymlicka suggests. Even illiberal cultures provide individuals with a sense of belonging; with a

range of alternatives, however restrictive.⁸⁴ These alternatives, presented in cultural narratives, guide one in choosing one's good; they are the social bases of self-respect. Respect for the individual, then, implies respect for the illiberal basis of his self-respect but this is at odds with the principled disrespect which Kymlicka demands of liberals for cultures which do not secure a liberal context of choice. Further, as Margalit and Raz state: "If a culture is not generally respected, then the dignity and self-respect of its members will also be threatened."⁸⁵ Thus on the one hand, liberals must recognize that the individual's identity and capacity for freedom is created by his culture and on the other hand, liberals must threaten the culture and the individual's capacity for freedom.

This points to the abstractness and inapplicability of Kymlicka's distinction; he simply doesn't account for the role of decision in the composition of culture; historical cultural choice establishes what is essential to a culture, not abstract pre-determined categories.

Fifth, the importance of religion in the structure of certain minority cultures can be better appreciated. On Kymlicka's view, cultural structure is a matter of circumstance

⁸⁴ Kymlicka should have pointed out that while all cultures provide a context of choice, liberals respect only those cultures which provide a certain range of choices. While all cultures likewise place internal restrictions upon the range of choices, liberals likewise respect only those cultures which limit these restrictions to a certain range. In a liberal society choice is limited in terms of equality. Had he recognized the quantitative character of liberal respect there would be a broader range of cultures which could fall under the umbrella of liberal respect.

⁸⁵ Margalit and Raz 1990: 449. Cf. Kymlicka 1995 [b]: 89.

and thus religion which is a matter of belief and choice cannot be the basis of a culture's structure. Once this distinction is removed, and structure is seen as a product of choice, it is easier to give an account of actual cultures whose structure is primarily religious.⁸⁶ Moreover, the removal of this distinction, together with the assertion of the concept of "constitutive choice" makes it is easier to give an account which is adequate to most citizens' intuitions about the importance of religion. Kymlicka dramatically downplays these intuitions. He states, for example, "It is wildly implausible to suppose that allowing people freedom of religion or sexual practices would lead to the breakdown" of a community where individuals have a shared heritage.⁸⁷ However, whole nations have been organized around religion while none have been organized around sexual preference. Kymlicka's application of the abstract distinction between choice and circumstance to questions of culture, makes him less than sensitive to the historical importance of religion. Sixth, a more coherent account of immigration is now possible. Kymlicka tends to be of two minds about immigration. On the one hand, he states that immigrants reject their cultural structure, while on the other hand, he argues that in principle they can maintain it. He is torn between two conflicting intuitions. On the one hand, immigrants tend to wish to integrate. Also, they leave their cultural institutions behind and the practical difficulties of reestablishing them seem

⁸⁶ Quebec culture prior to the Quiet Revolution, and various religious minorities like the Hutterites and the Amish provide ample examples.

⁸⁷ Kymlicka 1989: 168.

insurmountable. Moreover, it is difficult to justify the potential destabilization of liberal states with a plethora of self-government claims. Thus, Kymlicka is inclined to suggest that immigrants leave their cultural structure behind and must ensure their polyethnic rights within a new cultural structure. On the other hand, this clearly implies that one can revise one's relation to the cultural structure, that it is not just a matter of circumstance. Hence, Kymlicka admits that in principle self-government claims may be possible.

Once culture is seen as the product of choice, the argument that immigrants can leave their cultural structure behind is more plausible. However, it is also more plausible to suggest that in principle and with the agreement of the mainstream society, immigrants could form a self-governing nation within a liberal state.⁸⁸ Still it is important to note that in the face of this potential destabilization, further argument would be required to show that it would be unjust for a liberal state either to restrict immigration or to require that immigrants waive the right to self-government. I only wish to indicate here that arguments for either assimilation or self-government, are clarified by the presupposition that culture is a matter of choice and not of mere circumstance.

⁸⁸ Though emigration does not necessarily imply rejecting one's cultural structure, the fact that most immigrants desire assimilation with mainstream American culture, for example, suggests that it is possible. For criticism of Kymlicka's view that immigrants give up their cultural structure cf. Baubock 1996: 218-20.

Conclusion

Kymlicka argues convincingly that group-differentiated rights are consistent with the fundamental values of freedom and equality. As the name suggests, the concept of group-differentiated rights combines the universality of right with the particularity of cultural difference and belonging. Kymlicka's view is an important development in liberal thought. It shows that culture is a primary good and, as such, is more than a matter of belief and choice. However, I have supported a version of Tamir's conception of constitutive choice which conceives belonging as a synthesis of circumstance and choice. Tamir notes that as a constitutive choice, cultural belonging is analogous to religious belief. On this view, belief itself is more than simple choice; it is a choice with which we identify, which forms our identity and gives us a sense of belonging. Thus, while Kymlicka's concept of group-differentiated rights extends Rawlsian universalism to culture, an emphasis on constitutive beliefs extends Kymlicka's respect for belonging to religious groups.

The implication of this view is a radical inclusiveness. Within certain limits, all cultures are worthy of respect, simply because they are products of rational persons. In its weakest sense, this basic respect is analogous to the respect due to criminals. Only "rational" persons are legally culpable and punishment recognizes the rational quality of criminal activity. Moreover, it attempts to rehabilitate the criminal to a relation to other persons which is more consistent with free moral personality. That minimal respect of this sort is due to illiberal minority cultures is a corollary of the fact that liberal principles

cannot be imposed on illiberal cultures.

In principle, then, nationality is not an obstacle to participation in universal humanity, as expressed in the common rights of citizenship.⁸⁹ The underlying belief of liberalism is that nationhood can develop on the basis of shared cultural experience and liberal self-government. In principle, it is a union of autonomy and belonging, the belief that a sense of community will develop out of the shared cultural life which results from attempting to live out the implications of liberal values.

Kymlicka's insightful reflection suggests that, although the liberal state unites autonomy and belonging in principle, this union is incomplete in practice. Nevertheless the self-conception of liberalism involves an articulate and principled relation to cultural particularity and difference. Nevertheless, attempts to impose liberalism have resulted in the alienation of cultural minorities. This alienation originated in attempts to impose an abstract liberalism on cultures, without a principled regard for their cultural differences and integrity. The recalcitrance of nationalist sentiment in minority nations is the practical demonstration of the limits of liberalism conceived as a body of universally applicable undifferentiated rights. As Kymlicka notes, practical solutions evolved before theory in this matter, most countries recognized some form of differential citizenship long before it was shown theoretically that differential rights are compatible with liberal values of freedom and equality.⁹⁰ Kymlicka's theory shows that differential rights represent not

⁸⁹ Once common rights are adequately differentiated, as on Kymlicka's interpretation.

⁹⁰ Kymlicka 1995 [b]: 26.

simply a practical compromise with recalcitrant nationalism but a principled response to cultural difference.

Group-differentiated rights represent liberal respect for embedded individuals whose freedom can only be actualized in relation to culture. The goal of differential rights is the production of groups which allow freedom to flourish, groups whose difference from the mainstream culture (whether it be one of religion or ethnicity) does not form an obstacle to the individual's participation in the more universal liberal society. As the attempt to promote civil rights taken together with respect for cultural difference suggests, liberals believe that, conceived properly, there is no fundamental contradiction between culture and free individuality. The liberal hope is that recognizing self-government will reduce the threat to minority cultures and allow the members of these cultures to participate as equals in the broader society. With the growth of cultural security and the diminishing of the prejudice, the differences between the minority culture and the broader culture will diminish. Participation in the larger culture will educate minorities in the culture of liberalism. In their own experience they will unify the culture of rights and their ethnic culture. They will appropriate control over the liberalization of their own culture; they will appropriate the right to choose their own culture, maintaining those aspects of ethnic culture to which they adhere, while adopting those aspects of liberalism they accept. Minority cultures may never be as liberal as the mainstream liberal culture but respect for these cultures is not against the spirit and principles of liberalism.

Moreover, attempting to impose liberalism cannot work in any case. To be truly liberal, a society must be based on liberal principles freely consented to and appropriated. These principles must be inwardized not only as rules but as virtues; they must become an expression of the individual's own self-conscious freedom. Further, as noted above, when a culture is shown a lack of respect, its member's self-respect is threatened. Thus imposition of liberal principles and the resultant destruction of the sense of belonging is impermissible on the basis of liberal respect for individual autonomy. The individual's culture of origin must be respected as the starting point of the journey towards freedom; only when individuals can freely transform their culture, can it be liberalized without the destruction of belonging and self-respect. Theoretical and practical liberalism meet in their respect for cultures.

But respect translates into neither the acceptance of an illiberal status quo nor the recognition of a minority as a member of a liberal state. There is a growing body of work which suggests that dialogue between cultures can be respectful without bracketing disagreements. However membership (in a liberal state) is a specific form of respect. While there may be a politically legitimate middle ground in specific cases, generally, if a minority culture wants to be recognized as a member of a liberal state it must adhere to certain membership rules. Membership in a liberal state demands the recognition of minimal civil rights and at least a minimal level of civic participation; a culture qualifies for membership in a liberal state only if its members consent to its authority. As Amish culture shows, consent is possible even when the culture to which one consents is not

liberal. Kymlicka is right to argue that liberal toleration is based on the value of freedom, what is required is a richer conception of freedom.

CHAPTER FIVE

Conclusion

Toleration and the Horizon of Political Liberalism

In a basic sense all groups within a liberal society must recognize the right to revise, must allow that individuals cannot be forced to follow a certain view of the good life. But the place such a right occupies within a cultural group and the degree to which it is promoted may vary considerably. I have argued that the liberal view demands at least the right to exit. But this does not mean that cultural groups, like the Amish, accept the Rawlsian account of the moral powers of the individual. Whereas the Rawlsian would see the act of revision as a positive actualization of one's moral potential, for the Amish this would amount to a failure to keep one's promise to adhere to the "Ordnung". Whereas the Rawlsian is concerned that the individual freely choose *a* view of the good life, the Amish are concerned that the individual choose *the* view of the good life. No overlapping consensus is possible between such groups but it is possible to lessen the divisions between them through more inclusive public debate and through institutional connections such as intergovernmental boards. To secure the stability of the liberal state and even the minimal allegiance of such citizens, one of the most important tools liberals have is the concept of exemption. To allow such groups exemptions from generally applicable laws on conscientious grounds secures the sense that the broader society is not an enemy. I have argued further that in cases of moral disagreement when non-neutral decisions must be made, there is an onus on those favoured by the decision to further accommodate those for whom the decision is a loss.

Rawls goes to great lengths to show how it is possible that a common political order be compatible with moral pluralism. Nevertheless, he does not go far enough; he does not provide a sufficient account of the importance of morality and culture for citizens in the public political realm. He thus asserts a truncated public realm, best fitted to the individuals abstractly represented in his "original position". His political conception does not adequately comprehend the role morality and culture plays in the public life of liberal democracy.

The Rawlsian conception assumes that moral beliefs have been transformed by contact with liberal society. This much cannot be argued with. However, his account of this transformation insults the integrity of citizens' moral, religious and philosophical views. On Rawls's account, individuals' comprehensive standpoints are altered by an education external to these standpoints: "many if not most citizens come to affirm the principles of justice incorporated into their constitution and political practice without seeing any particular connection, one way or the other, between those principles and other views."⁹¹ This implies a certain laxity in the way in which people hold their beliefs and seems a-historical. Thus his account of abolitionism does not ring true and he fails to appreciate the important role moral vision can play in political life. The view from "non-political" realms allows for perspectives which can criticize the political, though in non-political terms. Unfettered by pragmatism and compromise, such enthusiasms can invigorate public life. But these rich moral resources likewise require public debate and consideration.

Rawls's failure to consider the depth of comprehensive commitments is further

⁹¹ Rawls 1993: 160.

indicated by his assertion that his basic concepts are drawn from the public culture of the United States. Given the controversy which surrounds his notions of the moral person and public reason it is difficult to see how they are derived from a source shared by all citizens.

Sandel's account of significant events and epochs in the history of the public culture of the United States indicates the importance of history in defining the public culture. As argued in Chapter Three, he has shown that archetypal figures such as Abraham Lincoln espoused a public philosophy and a concept of citizenship quite distinct from that advocated by Rawls. The continued stature of Lincoln and his ability to inspire American citizens suggests that his viewpoint has a relevance beyond the Nineteenth century, that in the respect his vision generates, the past is present in the American public culture. Sandel demonstrates, by contrast with the Rawlsian view, the presence of an important republican moment in American political life, that the public culture is shaped by competing conceptions of freedom and equality. Although his account of American history has a tendency to be one-sided especially with regard to the New Deal, he nevertheless shows that the Rawlsian conception of a neutral political order does not comprehend one of the oldest and deepest streams in the public culture of the United States.

Chapter Four considered further divisions in North American political life, divisions which Rawls's view cannot fully comprehend. Will Kymlicka develops the conception of the universal rights of the citizen to include relevant cultural differences. He clearly shows both the inadequacy of the Rawlsian view to recognize the importance of culture and the fundamental consistency between group-differentiated rights and the liberal principles of

freedom and equality. Although he unfortunately relies on an abstract distinction between choice and circumstance in his account of the importance of cultural structure, he clearly brings out the necessity that traditional liberal rights become more comprehensive of cultural differences. His concept of group-differentiated rights is a welcome development within liberal thought giving the concept of rights added relevance and deeper comprehensiveness. Nevertheless, his basic conception of culture renders liberalism less inclusive than it has the potential to be. By showing that what Kymlicka has labeled structure and character are both chosen, I have attempted to take the emphasis off the range of alternatives a culture provides as the criterion for inclusion within liberal democracy. Moreover, as my account of pluralist republicanism indicates it is not inevitable that public realms which encourage the pursuit and discovery of a common good will be coercive and exclusive.

By contrast with Rawls, I believe that the divisions in the United States make an overlapping consensus impossible at least on the one-sided terms in which he conceives it. Moreover, I hold that his conception of public reason does not adequately comprehend the civic resources traditionally utilized in the public culture of the United States. Following Sandel, I have argued that the Rawlsian view thus results in an impoverished citizenship and is in fact threatening to those who hold ideals which are not consistent with voluntarism and neutrality. In the light of Greenawalt's more balanced restraints on public discourse I have argued that the legislature and not the judiciary best exemplifies public reason because it allows the citizens involved to more fully draw on and express their most prized moral resources. By contrast with Kymlicka's overemphasis on freedom of revision which dulls

his appreciation of the freedom achieved in cultures like the Amish, the view for which I argue, allows for principled toleration of such restrictive but non-coercive groups.

On my view, a pluralist-republican conception can protect individual freedom and given the limits of neutrality and voluntarism is more fair to differing ways of life than the Rawlsian conception. An emphasis on self-government which encourages the pursuit and discovery of a common good, combined with a more inclusive public reason allows, in light of the impossibility of neutrality, for a deeper degree of citizen participation in the forces which shape their public and local cultures. However, as seen in our discussion of Madison's conception of the common good in Chapter Three, such a view must genuinely arise from the differing perspectives of individuals, it cannot destroy them. Whatever is achieved in common must always be held in check by individual rights, the plurality of cultures and comprehensive views, and the possibility of change or development. When decisions are made on non-neutral grounds where there is genuine moral disagreement, as defined by Gutmann and Thompson, the view which loses must be accommodated as much as possible, there is an onus on the victor.

What remains is more clearly to specify how morality, culture and politics are mutually supporting. Such an account would provide a moral ground for broad tolerance while at the same time suggesting how it is that sectarian moral and cultural groups can legitimately be transformed to a clear recognition of their basis in human freedom. Conceived as requiring historically developed cultural and moral content, liberal freedom would no longer be based in an abstract individualism, at least partially opposed in principle

to deep social bonds. But morality and culture would not be conceived as mere restrictions on human freedom, as goods to which the individual must submit. Rather they would be conceived as enactments of freedom, expressions of the individual will which give it concrete historical reality.

I have sought to clarify the relationship between democratic politics and the background commitments which invest human life with meaning and purpose in a way which more fully recognizes the comprehensive and cultural dimensions of human life. The political realm cannot adequately be conceived in abstraction or isolation from these moments, it is in part based on deep rooted moral beliefs in human freedom and dignity. Further, the actual history of the democratic public culture of the United States shows a profound dependence on comprehensive views for moral inspiration: Would the Civil War be intelligible without some account of the evangelical moral fervour of the abolitionists, can the Civil Rights movement of the 1960's be understood without reference to the profound Christianity of Martin Luther King? Further, political life is itself culture-producing, one of the primary ways in which the citizens of liberal democracies give meaning to their lives and form to their freedom is through political activity. As Rawls indicates, though in an inadequate way, political participation shapes individuals to the depths of their moral views. Further examination of religious and moral views shows that they have important political and cultural manifestations, while examination of various national cultures shows how culture effects morality and politics.

The general conclusion of this essay is that a liberal democratic constitutional order

can become a “social union of social unions”, in Rawls's pregnant phrase, only if it is conceived as coordinating and cooperating with other free human endeavours; only if the relationship between comprehensive doctrines and politics is conceived in a far richer manner than is fashionable among political liberals. A cornerstone of such a conception is a public reason which is inclusive of the sublime moral, religious, and cultural resources which animate the human spirit.

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Bibliographical Note

Two aspects of this bibliography require comment. First, my investigation of Rawls focused on commentary on Political Liberalism. Within the limits of the essay I was concerned with debate which followed what might be called an anglo-american model, with exploring the nature of Rawlsian public reason, more or less within its own terms. Wide consideration of "continental" critics, though valuable in itself, is outside the scope of the present work. Within these limits, the Rawls bibliography is quite comprehensive.

Second, while it is always treacherous to step outside the boundaries of one's own discipline, it is likewise important not to exaggerate the hazards involved. The approach I used in my selection of texts on American history wished to achieve a relatively balanced account of both the events and their interpretation, on my view, history being a synthesis of both. Thus I investigated primary documents, for example, Lincoln's speeches, various court decisions and the Federalist Papers as well as a broad range of authoritative accounts of American history.

The historians selected are recognized experts. Moreover, they are representative of diverse historical schools, liberal, republican, marxist, idealist, and plain old empiricist. Their prestige lends authority to my account and their diversity forestalls criticism that I have utilized only those historians who support my own view, that I have rigged the history, so to speak. There is no common ideological thread which runs through Richard Hofstadter, Louis Hartz, Eric Foner, James McPherson, Saul Sigelschiffer, Gordon Wood, the

Geneovese, Ralph Henry Gabriel, C. Vann Woodward, Harvard Sitkoff and so on. While my account of the New Deal and Black participation in government relies extensively on Harvard Sitkoff's A New Deal for Blacks: The Emergence of Civil Rights as a National Issue, Volume I: The Depression Decade, this work merely argues that the New Deal was, in numerous ways, significant for Blacks, particularly in terms of the emergence of concern for Civil Rights. He is not concerned with whether this can be described as a liberal or republican phenomenon.

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