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ARE THERE LIMITS TO CONSTITUTIONAL CHANGE? RAWLS ON COMPREHENSIVE DOCTRINES, UNCONSTITUTIONAL AMENDMENTS, AND THE BASIS OF EQUALITY

Charles A. Kelbley*

Does a proper understanding of Rawls's idea of "constitutional essentials" require us to say that certain rights and liberties must be a part of our Constitution? Does that same idea also mean that essential features of our present Constitution may not be removed by means of the amending power of Article V? Are there no circumstances in which constitutional change can reasonably embrace the repeal of constitutional essentials? Does Rawls commit us to a form of constitutional essentialism that is based on nothing more than our long-standing traditions and practices? And must the Supreme Court declare a properly ratified amendment to the Constitution invalid if it is inconsistent with constitutional essentials or long-standing traditions and practices? These are among the central questions this Article addresses. First, however, is the question of the nature and extent of Rawls's influence on the law.

INTRODUCTION

It may be true that the Supreme Court has yet to cite John Rawls's work on justice in its formal opinions,¹ but that proves nothing about the lack of Rawls's influence on American constitutional discourse.² Rawls's influence on the law has been much more general than specific, much more indirect than direct, and much more a matter of questioning than providing the Justices with ready-made conclusions.³

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1. See Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law*, in *The Cambridge Companion to Rawls* 394 (Samuel Freeman ed., 2003). "As of July 4, 1999, a database check showed that no opinion filed by a member of [the Supreme] Court had ever mentioned the name of the philosopher John Rawls." *Id.* at 408. *But see* Lawrence B. Solum, *Situating Political Liberalism*, 69 *Chi.-Kent L. Rev.* 549, 550 n.8 (1994) (listing representative lower federal court and state court cases citing Rawls's *A Theory of Justice*).

2. Michelman, *supra* note 1, at 408.

3. For a cogent assessment of Rawls's influence, see Thomas Nagel, *The Rigorous Compassion of John Rawls: Justice, Justice, Shalt Thou Pursue*, *New Republic*, Oct. 25, 1999, at 36.

The evidence for Rawls's intellectual and indirect influence is nevertheless abundant. For over thirty years his work has been a dominant presence in undergraduate and graduate syllabi of diverse departments of the universities, including, of course, law schools. Above all, his work has contributed a massive fund of challenging ideas to the ongoing task of rethinking the foundations of justice. In the United States, Rawls has surely given renewed life and meaning to the Constitution's Preamble. *A Theory of Justice*,⁴ ("*Theory*") with its famous ideas of "justice as fairness"⁵ and the "original position"⁶ provides a profound model of how We the People might better establish justice. Similarly, *Political Liberalism*,⁷ with its notion of an "overlapping consensus" on a freestanding conception of justice, does much the same for the Preamble's aim of forming "a more perfect Union" and ensuring "domestic Tranquility."⁸ There can be no serious doubt that Rawls's work has had a profound and continuing influence on American and many other nations' reflections on how to establish or reform our institutions and their underlying principles of justice and law.

Prior to 1971, when *Theory* was first published, Americans arguably shared a more historical and static outlook on those fundamental notions in the Preamble: The "Union" was already formed and justice was established. To the extent that this is so presently, perhaps it is simply a familiar reflection of how ideas and practices tend to become calcified for long periods of time within an ongoing status quo, awaiting eventual re-examination and renewed challenge from unknown persons at unpredictable times. In part, Rawls's genius, we might well say, was to provide us with the means for *seeing* how moral theory, and later political theory, could put the founding purposes of

As is always the case with philosophy, Rawls's direct influence is almost entirely intellectual. Even political philosophy, when it has an impact on the world, affects the world only indirectly, through the gradual penetration, usually over generations, of questions and arguments from abstruse theoretical writings into the consciousness and the habits of thought of educated persons, and from there into political and legal argument, and eventually into the structure of alternatives among which political and practical choices are actually made.

Id. at 36-37.

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

5. *Id.* §§ 1-9.

6. *Id.* §§ 20-30.

7. John Rawls, *Political Liberalism* (2d ed. 1996). All references to this work will be to the paperback edition of 1996, which includes a new Introduction. Apart from the two Introductions, the pagination of the paperback edition is the same as in the original 1993 edition.

8. "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. Const. pmbl.

the Constitution's Preamble in a new light, revealing some of the imperfections in the ways the basic structures of a constitutional democracy have been honoring or failing to honor those purposes.⁹

This Article explores a number of themes in both Rawls's early and later work, demonstrating how those themes contribute to the overall model of a revised understanding of a constitutional democracy, such as our own, and how they impact or could impact on specific features of our constitutional law—not directly, but as norms that might and perhaps should be adopted. The Article first focuses on what is arguably the overarching theme of Rawls's later work, the crucial distinction between comprehensive doctrines of a moral, philosophical, or religious nature on the one hand, and the contrasting freestanding political conception of justice that is independent of comprehensive doctrines, on the other.¹⁰

Part I explores this distinction between comprehensive doctrines and a purely political conception of justice. One reason for focusing on this distinction is that Rawls's concept of a comprehensive doctrine is crucial to the evaluation of possible constitutional amendments that incorporate values beyond the limits of a political conception of justice, which is part of the subject of Part II. Part I also discusses some contemporary examples of the distinction and the bearing they may have on constitutional law. Among other things, Part I suggests that the incidence of conflicts between comprehensive doctrines and law or justice is almost a daily occurrence in one or another part of the world.

The second half of Part I takes Rawls's evaluation of the limited role of comprehensive doctrines in a constitutional democracy and compares his position on that role with the way in which the United Nations Commission on Human Rights ("U.N. Commission") went about drafting the Universal Declaration of Human Rights. The Declaration, adopted by the United Nations in 1948, inaugurated the human rights era.¹¹ In drawing up the list of human rights, the U.N. Commission implicitly embraced a distinction very similar to Rawls's contrast between comprehensive doctrines and a freestanding conception of political justice. This discussion defends Rawls's idea

9. See William F. Harris II, *The Interpretable Constitution* ix (1993) ("To theorize is to see—deeply, comprehensively, apprehending the connections among things. Every serious student of political theory is reminded . . . that the Greek source of the word *theory* means 'the act of seeing.'").

10. See generally Rawls, *Political Liberalism*, *supra* note 7.

11. Another Panel within this Conference on Rawls and the Law deals with the subject of Rawls and Human Rights. My discussion does not directly impact on Rawls's theory of human rights, as found in his book, *The Law of Peoples* (1999). My purpose is limited to the aim of comparing the theme of comprehensive doctrines in *Political Liberalism* with the rationale of the Human Rights Commission in its approach to drafting the Universal Declaration of Human Rights. I take no position on Rawls's extension of "justice as fairness" to the international context.

that the aim of a political conception of justice is not truth but what is reasonable¹² by analogizing it to the methods employed by the U.N. Commission in its effort to draft a document purporting to define a *universal* statement on human rights.

Part II relates the ideas of comprehensive doctrines, freestanding political conceptions, and human rights to Rawls's controversial position on the limits of the Constitution's Article V amendment provisions. The main question is whether the Supreme Court must accept as valid an amendment repealing core freedoms of the Bill of Rights, such as those contained in the First Amendment, or one repealing the equal protection of persons that is set forth in the Fourteenth Amendment.¹³ Rawls's negative answer—that the Supreme Court should not find such amendments valid—does not flow from a commitment to a comprehensive doctrine, which would scarcely be consistent with his overall view of a political conception of justice. On the contrary, his answer arguably requires us to consider the central importance of his revised explanation of the basis of equality (which is the subject of Part III). There is, of course, extensive disagreement about the Court's duty in regard to such amendments, and Part II surveys a range of positions on both sides of the issue. In a way, that issue poses a question about the outer limits of constitutional change, even whether there are in fact any such limits. Does Article V permit a more or less complete reversal of our constitutional traditions and principles? Or are there "constitutional essentials" and therefore substantive limits imposed on valid constitutional amendments? If the answer to the last question is affirmative, then it would appear that Rawls's theory may be at bottom a form of constitutional essentialism, which raises the further question of whether that is consistent with the plain meaning of Article V.

Part III reviews Rawls's two views of the basis of equality and assesses the relevance of these views to his claim that certain amendments are unconstitutional and must be declared invalid by the Supreme Court. Whereas *Theory* had located the basis of equality in a minimalist theory of natural rights, which arguably did form part of a comprehensive doctrine, in *Political Liberalism* Rawls presents a markedly different foundation of equality, one that aims to be purely political.¹⁴ This raises several questions: If a valid constitutional amendment could repeal religious freedom or equality, would that entail the abandonment of the freestanding political conception of justice as well as the norm of reasonable comprehensive doctrines? Would it, in other words, introduce and inaugurate an "unreasonable comprehensive doctrine" that is wholly at odds with political justice?

12. See Rawls, *Political Liberalism*, *supra* note 7, at 94.

13. See U.S. Const. amends. I, XIV.

14. Rawls, *Political Liberalism*, *supra* note 7.

Would our constitutional democracy then become an instance of what Rawls later called, in *The Law of Peoples*, an “outlaw state”?¹⁵ And finally, to return to the question that prompts this inquiry, must the Supreme Court reject such amendments as invalid? To multiply the perspectives on the nature of the Court’s approaches to answering that question, Part IV conjures up several possible scenarios that may be supported by one or more of the Justices.

Finally, Part V proposes a way of mitigating the seemingly irreconcilable positions of those who, like Rawls, claim that the Supreme Court must declare invalid an amendment repealing core constitutional freedoms, and those who claim that the Court should abstain from making such a decision. In part, this mitigation depends less on theoretical or normative considerations than on natural and social contingencies surrounding proposed amendments. It is suggested that the resources for achieving this reconciliation can be found in Rawlsian theory itself.

I. COMPREHENSIVE DOCTRINES

A. *Comprehensive Doctrines and Political Liberalism*

This part briefly explores a few central aspects of the relationship between comprehensive doctrines and political liberalism.¹⁶ The underlying aim is to suggest the bearings that this relationship has or could have on the law. Although the relationship between comprehensive doctrines and political liberalism is not one of the more formal “constitutional essentials” that Rawls elaborates in *Political Liberalism*,¹⁷ it is certainly one of the most essential characteristics of Rawls’s mature understanding of justice as fairness as well as indispensable to the flourishing of a constitutional democracy on the model of political liberalism.¹⁸ Without this distinction, Rawls’s thesis in *Political Liberalism* simply would not make sense.

Rawls’s political conception of justice necessarily distances itself from comprehensive doctrines. These doctrines, of a religious, moral,

15. John Rawls, *The Law of Peoples* 90 n.1 (1999).

16. My purpose in this part is to set forth Rawls’s rationale for the concept of comprehensive doctrines without engaging in critical analysis of its tenability. Some of the presentations by members of the panel on “The Idea of Public Reason Revisited” expressed criticism of Rawls’s concept of comprehensive doctrines. See, e.g., Samuel Freeman, *Public Reason and Political Justifications*, 72 *Fordham L. Rev.* 2021 (2004); Abner S. Greene, *Constitutional Reductionism, Rawls, and the Religion Clauses*, 72 *Fordham L. Rev.* 2089 (2004).

17. For discussion of the idea of “constitutional essentials,” see, for example, Rawls, *Political Liberalism*, *supra* note 7, at 227-30.

18. See *id.* at xxxviii. Rawls says that the ideas of the domain of the political and a political conception of justice, as distinct from comprehensive doctrines, are “among the most crucial ideas of political liberalism.” *Id.*

or philosophical nature, are more or less comprehensive insofar as they embrace positions on all values, or at least on a wide spectrum of values.¹⁹ Various religions, philosophies, and moral theories are standard examples of comprehensive doctrines. The problem comprehensive doctrines present for political liberalism, however, arises precisely from the fact that there are a great many of them and even more from the crucial fact that they are incompatible and conflict with one another in fundamental ways. Consequently, the transformed version of justice as fairness in *Political Liberalism* urges and argues that an impartial conception of justice cannot be founded on a particular comprehensive doctrine, as Rawls says was the case, in certain respects, even in *Theory*.²⁰ Thus Rawls's revised theory of justice seeks to be freestanding, which would mean that it is independent of all reliance on comprehensive doctrines, the proper habitat of which is the "background culture" of civil society.²¹ Rawls says that this background culture "is the culture of the social, not of the political. It is the culture of daily life, of its many associations: churches and universities, learned and scientific societies, and clubs and teams, to mention a few."²² Thus, Rawls seeks to raise his theory to the realm of political culture rather than remain within the more common social culture.

This way of looking at comprehensive doctrines might seem to render them wholly irrelevant to the core of political liberalism, for the principles and content of Rawls's political theory of justice are elaborated entirely independent of such doctrines. That, of course, accounts for the uniqueness of Rawls's political liberalism, for past theories of justice were wedded, in one way or another, to comprehensive doctrines as their material source. Yet this is a mistaken assessment of the role of comprehensive doctrines in Rawls's thought. In fact, there is an intimate and necessary relationship between comprehensive doctrines and Rawls's theory of political liberalism.

If there were no comprehensive doctrines at all, which is difficult even to imagine, political liberalism would be superfluous, even meaningless. We must remember that political liberalism owes its very origin in great part to the plurality of incompatible

19. See *id.* at 4 n.4 ("A comprehensive doctrine . . . is distinct from a political conception of justice, since it applies to *all* subjects and its virtues cover *all* parts of life." (emphasis added)). Rawls makes an important qualification to this characterization by noting that some comprehensive doctrines are incompletely or "partially comprehensive." *Id.* at 175. Rawls also supposes that "the comprehensive doctrines of most people are not fully comprehensive, and this allows scope for the development of an independent allegiance to the political conception that helps to bring about a consensus." *Id.* at 168.

20. *Id.* at xlii.

21. *Id.* at 14 (internal quotations omitted).

22. *Id.*

comprehensive doctrines and the absence of any moral authority to pronounce one of them as true.²³ Moreover, there is the great practical necessity of achieving the sought after “overlapping consensus” on Rawls’s freestanding conception of justice. Without comprehensive doctrines, that consensus would have no place or perspective from which to emerge; there would be no overlapping consensus necessary, for by hypothesis, no differences in values and beliefs would exist. But if there are no comprehensive doctrines, this would contradict the obvious fact of pluralism on matters religious, moral, and philosophical, which was the original motivation for Rawls’s attempt to transform his theory of justice into a freestanding conception. It is therefore necessary to keep in mind that for Rawls, the choice of the freestanding political conception is made from some content-rich perspective, which is the perspective of individuals and groups divided by their commitment to comprehensive doctrines.²⁴

Rawls did not make explicit use of the idea of a comprehensive doctrine until well after *Theory* was published.²⁵ Key essays in the 1980s touched on the “serious problem” with *Theory* that Rawls came to acknowledge and which *Political Liberalism* was meant to resolve.²⁶ What was this “serious problem” that Rawls saw in his earlier and justly famous work on justice? The short answer is that Rawls came to see *Theory* as being attached to a comprehensive doctrine, one among many such doctrines. This brought into question the “stability” of justice as fairness, which I shall attempt to explain.

Anyone familiar with *Theory* may be puzzled by the idea that it could be thought of as dependent upon a comprehensive doctrine, i.e., a doctrine that could not be shared by all because many persons are actually committed to competing and incompatible comprehensive doctrines. After all, *Theory* seemed to be freestanding in many important respects. Its device of the “original position”²⁷ enabled those occupying that hypothetical stance to deliberate about the principles of justice free of their biases of class, gender, race, religion, and the like. The original position device made vivid to them (and to us) the stringent demands of justice, which merited the designation of “justice as fairness” because it put those deliberators (you and me) behind a “veil of ignorance” that shielded us from awareness of our

23. *Id.* at 97 (“[G]iven the fact of reasonable pluralism, citizens cannot agree on any moral authority . . .”).

24. *See, e.g., id.* at 168-69.

25. That the idea of comprehensive doctrines was, in important respects, at least implicit in *Theory* can be seen within the central concepts of justice as fairness and the original position, the latter being a device to eliminate knowledge of persons’ comprehensive commitments so that they may not be drawn upon when making the choice of principles of justice.

26. *See* Rawls, *Political Liberalism*, *supra* note 7, at xvii-xix. For Rawls’s discussion of his work leading up to *Political Liberalism*, *see id.* at xv-xx.

27. *See* Rawls, *A Theory of Justice*, *supra* note 4, §§ 20-30, at 102-05.

particular commitments of a philosophical, moral, or religious nature—precisely the kind of commitments that result from adherence to comprehensive doctrines. Moreover, the original position forced us to choose for everyone, as there was no way in which we could tailor the principles of justice to accommodate our own proclivities and biases.²⁸

In what sense, then, was *Theory* itself a comprehensive doctrine among many others? In Part III of *Theory* Rawls raised the question of the stability of justice as fairness. By the term “stability” Rawls was referring to the capacity of his theory to win support and remain stable over time, which is certainly an important consideration. For no matter how elegant a theory of justice may be, if it is not congruent with stability it is bound to be defective.²⁹

The “serious problem”³⁰ that Rawls later saw in his account of stability in *Theory* concerned his linking justice as fairness to a comprehensive doctrine that embraced a number of values on the basis of which all citizens (or so he then thought) could endorse his conception of justice and live their lives in commitment to it. Based on those values, all citizens would see justice as fairness as constituting a well-ordered society.³¹ But, as Rawls came to realize,

[t]he fact of a plurality of reasonable but incompatible comprehensive doctrines—the fact of reasonable pluralism—shows that, as used in *Theory*, the idea of a well-ordered society of justice as fairness is unrealistic. This is because it is inconsistent with realizing its own principles under the best of foreseeable conditions.³²

What were the values that constituted the comprehensive doctrine in which *Theory* was embedded? Many of the topics in Part III of *Theory* could be cited as constitutive elements of the comprehensive doctrine that was inimical to the achievement of the political conception of justice that he proposed in *Political Liberalism*. For example, his account of stability itself invoked the work of J.S. Mill,³³ the account of moral autonomy was laced with Kantian themes,³⁴ as was his discussion of the concept of human sociality and social union.³⁵ The presence of these and other characteristics in Rawls’s account of the stability of justice as fairness therefore constituted a dependence on a comprehensive doctrine that not all persons could be expected to share. For example, his account of moral autonomy will likely be

28. *Id.*

29. *Id.* § 2, at 6.

30. See Rawls, *Political Liberalism*, *supra* note 7, at xviii.

31. *Id.*

32. *Id.* at xix.

33. Rawls, *A Theory of Justice*, *supra* note 4, § 76, at 439-40.

34. *Id.* § 44, at 251-58.

35. *Id.* § 79, at 459 n.4.

unacceptable to those persons who are committed to a comprehensive religious or moral doctrine that rejects moral autonomy as a value.³⁶ But one should not draw from this the conclusion that Rawls's substantive theory of justice has undergone dramatic changes in *Political Liberalism*. Removing the inconsistency in his account of stability in *Theory* still allowed him to "take the structure and content of *Theory* to remain substantially the same."³⁷

Thus, while it is certainly true that Rawls's critique of comprehensive doctrines entailed a major change in his thought, the core of his theory remained intact. One might simply say that the form of his theory changed whereas the substance did not.

B. Comprehensive Doctrines in Contemporary Controversies

The "serious problem" that Rawls saw in *Theory* has analogues in several contemporary controversies. A very brief sketch of them will further illustrate the significance and extent of Rawls's distinction between comprehensive doctrines and a political conception of justice.

1. The Ten Commandments Controversy

The recent controversy over the presence of a display of the Ten Commandments in the Alabama Supreme Court implicates at least a partially comprehensive religious doctrine at the heart of the matter.³⁸ The central question is whether the state of Alabama, in allowing the Ten Commandments to be displayed in a public place, violates the Establishment Clause³⁹ by giving tacit approval and recognition to a conventional religious symbol that figures in one or another comprehensive religious doctrine. In the language of constitutional law, does the state thereby violate the "wall of separation" between church and state?⁴⁰

I have no intention to try to answer that question here. But I do want to suggest that a freestanding conception of justice in Rawls's sense may well preclude allowing the display of the Ten Commandments in public places, such as the Alabama Supreme Court. The argument for exclusion would be based on the principle that any religious content that is allowed to figure in the public

36. See Rawls, *Political Liberalism*, *supra* note 7, at xlv ("Many citizens of faith reject moral autonomy as part of their way of life.")

37. Rawls, *Political Liberalism*, *supra* note 7, at xviii.

38. See *Alabama Justices Order Ten Commandments Removed*, N.Y. Times, Aug. 21, 2003, at A1; see also Jeffrey Gettleman, *He'd Do It Again, Says the 'Ten Commandments Judge'*, N.Y. Times, Nov. 13, 2003, at A18.

39. U.S. Const. amend. I.

40. For a critical appraisal of the historical basis of the separation of church and state, see, for example, Philip Hamburger, *Separation of Church and State* 38 (2002) (arguing that the separation of church and state doctrine in constitutional law does not have historical roots in the First Amendment).

commitments of the state necessarily implicates the elements of a comprehensive doctrine that is unacceptable to many people who do not believe in the Ten Commandments for whatever reason. A commitment by the state to a comprehensive doctrine constitutes an impediment to securing an overlapping consensus on a political conception of justice from adherents to comprehensive doctrines in which the Ten Commandments simply have no place.⁴¹

2. The Gay-Rights Controversy

A second example of a comprehensive doctrine entering the public sphere of justice concerns the dispute over granting equal rights to homosexuals, including the right to marry. Part II discusses the merits of a proposed constitutional amendment to define marriage as a union of a man and a woman, which would wholly preclude the right to same-sex marriage. This section, however, pursues more limited aims by very briefly commenting on a recent Vatican document opposing same-sex rights⁴² and then discussing Justice Antonin Scalia's dissenting opinion in the Supreme Court's gay rights decision, *Lawrence v. Texas*.⁴³

The Vatican's statement in the *Considerations* document is a paradigmatic example of a comprehensive doctrine. Its opposition to same-sex unions is firmly based on multiple sources, including a theory of natural law, divine revelation, and church teachings and encyclicals on the nature of Christian marriage. Although addressed to the public, it argues from within the framework of Catholic moral and social doctrine. It claims to express the natural moral truth about marriage in its opposition to the approval or legalization of same-sex unions. Rawls's conception of political justice would not question the truth claims of the Vatican's position, for Rawls's concern is to formulate a politically freestanding theory on which all reasonable comprehensive doctrines can agree from the perspective of their own doctrines.⁴⁴

41. A similar question is posed by the words "under God" in the Pledge of Allegiance, a question which the Supreme Court will address in a case to be argued in the 2003 term. See Linda Greenhouse, *Supreme Court to Consider Case on 'Under God' in Pledge to Flag*, N.Y. Times, Oct. 15, 2003, at A1. A comprehensive doctrine was likewise at issue in a recent Italian court decision that ordered crucifixes removed from a public school. See Associated Press, *Vatican Rebukes Judge for Ban on Crucifixes*, N.Y. Times, Oct. 28, 2003, at A14.

42. See Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons*, June 3, 2003, at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html [hereinafter *Considerations*].

43. 123 S. Ct. 2472, 2488 (2003) (striking a Texas law banning sodomy as unconstitutional as applied and, further, overruling *Bowers v. Hardwick*).

44. See Rawls, *Political Liberalism*, *supra* note 7, at 94.

Given the inflexible position enunciated in the Vatican's *Considerations* document, it may be difficult for the Church to support a political conception of justice like Rawls's, at least if that conception endorses same-sex relations as a matter of freestanding political principle. It may be that, when faced with the pluralism of comprehensive doctrines in the contemporary world, the Church prefers to press its claim to possessing the truth without engaging in the search for an overlapping consensus with the many other comprehensive doctrines on a political conception of justice.

One of the most striking things about Justice Scalia's dissenting opinion in *Lawrence* is his defense of the precedent that the *Lawrence* majority overruled, *Bowers v. Hardwick*.⁴⁵ In defending *Bowers*, Scalia appeared wholly supportive of that decision's holding that the prevailing morality of the Georgia electorate had been a sufficient basis to justify making sodomy a criminal offense.⁴⁶ From a Rawlsian point of view, one might initially think that Scalia simply invoked an ingredient of the public political values that are central to political liberalism.⁴⁷ But the morality invoked in *Bowers* and defended by Scalia in dissent in *Lawrence* is a bare-bones datum that is presented without reference to supporting public reasons. Moreover, that morality is deeply contested throughout the nation, much more so now than at the time *Bowers* was decided.

Justice White, who wrote for the Court in *Bowers*, noted that in 1961 every state had criminal sanctions against homosexual conduct.⁴⁸ Yet when *Bowers* was handed down in 1986, only twenty-four states had anti-homosexual laws in effect.⁴⁹ Justice White did not address the significance of that shift in American morality regarding same-sex conduct. By 2003, however, when *Lawrence* was decided, the number of states banning sodomy had dwindled to thirteen. Thus, between 1961 and 2003, thirty-seven states had, either through judicial decisions or legislative repeals, abandoned their anti-homosexual laws. That would seem to constitute significant evidence relevant to the claim that the morality opposing same-sex relations had been reduced to a distinct minority view in America. Justice Scalia's dissent takes no account of this dramatic change.

Yet even without that massive shift in moral sentiment, there still remains the crucial point that moral opposition to homosexuality is, at a minimum, entangled with a (partially) comprehensive doctrine. Such a doctrine entails comprehensive values on the nature, purpose,

45. 478 U.S. 186 (1986), *overruled by Lawrence*, 123 S. Ct. at 2472 (validating a Georgia anti-sodomy law substantially similar to that struck down in *Lawrence*).

46. *See Lawrence*, 123 S. Ct. at 2490 (Scalia, J., dissenting); *Bowers*, 478 U.S. at 196.

47. *See, e.g., Rawls, Political Liberalism, supra* note 7, at 236 n.23.

48. *Bowers*, 478 U.S. at 193.

49. *Id.* at 193-94.

and value of sexuality, marriage, procreation, and the family. Because those values are framed and linked together in support of heterosexuality, the resulting comprehensive doctrine entails negative values with respect to same-sex acts, relationships, and homosexual marriage. Whether true or false, a comprehensive doctrine like that is arguably excluded from the domain of the political, which requires public reasons for curtailing liberties.

C. *Comprehensive Doctrines and Human Rights*

Rawls's distinction between comprehensive doctrines and a freestanding conception of political justice was in significant respects implicit in the work that preceded and eventually culminated in the U.N. Universal Declaration of Human Rights. The process that led to the Declaration suggests that the drafters of that document attempted to avoid reliance on comprehensive doctrines. Indeed, one major U.N. contributor to the theoretical bases of human rights, Jacques Maritain, who, as an independent philosopher, wrote extensively on natural law, nevertheless emphasized the importance of putting philosophy and theory aside in the U.N.'s joint effort to achieve a statement on human rights that had universal appeal to the member states of the U.N.

In late 1948 the United Nations General Assembly, meeting in Paris, voted to adopt the Universal Declaration of Human Rights. It was a monumental achievement that gave birth to the human rights era. The Declaration had been drafted and re-drafted over a two-year period by the U.N. Human Rights Commission. Chaired by Eleanor Roosevelt, the Commission was composed of a distinguished group of internationally recognized scholars and diplomats from various parts of the world. At numerous junctures in their debates and deliberations, questions arose concerning the foundations of human rights. One persistent question was whether such rights could be said to be universal in scope. If they were universal, that raised the further question of whether and how the content of human rights could vary from culture to culture and from religion to religion throughout the world. In short, were there some things that were universally wrong to do to persons, no matter the culture or religion that was dominant in a particular country? And were there some things that were universally required of nations and peoples to do or provide for all persons, no matter a country's culture, religion, or dominant philosophy?

What follows is a brief review of the nature of the background assumptions informing the Commission's deliberations and debates leading up to the final adoption by the U.N. General Assembly of the Universal Declaration of Human Rights.⁵⁰ My primary concern is

50. For the account of the deliberations of the Human Rights Commission, see

with how the members of the Human Rights Commission avoided, or attempted to avoid, cultural and religious bias to achieve the claimed universality of the Declaration. In Rawls's terminology, were they trying to avoid reliance on particular comprehensive doctrines?

The U.N. approach to articulating a list of universal human rights relied on a committee of no more than a dozen or so U.N. delegates. Often the drafting and re-drafting of what came to be called the Universal Declaration was done by three or four of those delegates, with Eleanor Roosevelt serving as chair without participating herself in the actual drafting and editing, yet performing the indispensable functions of gatekeeper and critic, offering moral and intellectual support as well as challenges and inspiration to the Commission's ongoing work. We might call this the "committee approach" to defining human rights, an approach that certainly has its advantages within the U.N. context of respect for global diversity. Given the make-up of the United Nations, it was virtually inevitable that a committee composed of members from diverse cultural and religious traditions would draft the Universal Declaration in order to guarantee, as much as possible, a sense of balance, fairness and universal representation when the Declaration was presented to the General Assembly in Paris.⁵¹

The Commission's concern for fairness in identifying and articulating universal human rights was certainly essential and crucial to their work being acceptable to the members of the U.N. General Assembly. The fact that the General Assembly ultimately voted to endorse the Universal Declaration without a single dissenting vote is some evidence that the Declaration was perceived as fair to all without favoring a particular culture, philosophy, or religion. In that sense, the Declaration was, at least in principle, "freestanding," independent of particular comprehensive doctrines. To the extent that it was independent of moral, philosophical, and religious foundations, the Commission's achievement invites comparison with Rawls's conceptions of justice as fairness and political liberalism. Indeed, it is quite possible that Rawls's work could have provided a better rationale and a more secure justification for human rights than what was achieved with the Commission's "committee approach." Had *Theory* or *The Law of Peoples*⁵² been available decades earlier, Rawls might very well have been invited to join the U.N.'s Education, Social, and Cultural Organization ("UNESCO") advisory committee

Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and The Universal Declaration of Human Rights* (2001).

51. Whether the make-up of the Commission was sufficiently representative of world cultures is a question beyond the scope of this Article.

52. It is in *The Law of Peoples*, *supra* note 11, that Rawls applies his notion of "justice as fairness" to questions of human rights. This, too, is beyond the scope of this Article.

of experts on the theoretical bases of human rights. There is, however, a certain paradox contained in that suggestion, as explained below.

As noted earlier, one of the main endeavors of the Commission was to put philosophy aside on the assumption that no one philosophy would or could be acceptable to all members of the U.N. General Assembly (nor, for that matter, to the dozen or so delegates who made up the body of the Human Rights Commission). To turn to Rawls, an eminent American philosopher, and to rely on his theory of justice as fairness, had it been available in 1948, would likely have been quite contrary to the spirit of the Commission's thinking. But the paradox is removed if Rawls's attempt to "democratize" philosophy is successful, that is, if his theory of justice is independent of any particular comprehensive doctrine, such as we find in particular religions—Judaism, Catholicism, or Islam, for example—or in various philosophies, such as those of Aristotle, Kant, or Marx. Each of these religions and philosophies conflicts with one another in many ways (although, of course, they may have many shared values). But because they are comprehensive doctrines in competition with others, they are, as a consequence, unacceptable from the standpoint of universality, which is precisely what the Human Rights Commission endeavored to achieve. Here I will focus on the difficult problems of universality and its apparent antithesis, cultural and philosophical relativism, which the Commission members confronted time and again.

The U.N. Charter had mentioned human rights several times in its Preamble and in several of the Charter's Articles, but it did not state what they were, much less give an account of their actual or virtual universality throughout the world. That would be the task of the U.N. Human Rights Commission. To complete this task, the Commission had to confront head-on a formidable challenge, which Glendon describes as follows:

Was it really possible for a fledgling organization to produce a document acceptable to delegates from all the countries in a constantly expanding United Nations? By 1948, when the Declaration was put to a vote, the United Nations had fifty-eight member states containing four-fifths of the world's population—twenty-two from the Americas, sixteen from Europe, five from Asia, eight from the Near and Middle East, four from Africa, and three from Oceania. Could any values be said to be common to all of them? What did it mean to speak of certain rights as universal?⁵³

Thus the U.N.'s immaturity and cultural breadth seemed likely to stymie any proposed resolution which purported to define human values.

53. Glendon, *supra* note 50, at 50 (citation omitted).

As Glendon notes, the UNESCO organization foresaw these very questions arising and accordingly sought advice from a number of distinguished philosophers, including French philosopher Jacques Maritain, the American philosopher Richard McKeon of the University of Chicago, and Cambridge University political historian E.H. Carr, who chaired the panel that was known as the Committee on the Theoretical Bases of Human Rights. "The philosophers' group began its work in March [of 1947] by sending a questionnaire to statesmen and scholars around the world—including such notables as Mohandas Gandhi, Pierre Teilhard de Chardin, Benedetto Croce, Aldous Huxley, and Salvador de Madariaga—soliciting their views on the idea of a universal declaration of human rights."⁵⁴ The Committee's report was later published, along with the questionnaire and many of the responses.⁵⁵

Maritain contributed to this volume and also wrote its introduction,⁵⁶ in which he expressed a fairly hopeful outlook for human rights universality. Here it should be pointed out that Maritain himself was a highly respected Thomist philosopher (an exponent of the thought of the thirteenth century philosopher and theologian St. Thomas Aquinas) and a noted defender of the theory of natural law. In his role as an independent philosopher, Maritain would surely have explained the origin and justification of human rights from within the natural law tradition.⁵⁷ However, in his UNESCO essay, he recognized that that tradition was not acceptable to all "men who come from the four corners of the globe and who not only belong to different cultures and civilisations, but are of antagonistic spiritual associations and schools of thought."⁵⁸ He emphasized that the goal of the UNESCO philosophers and thinkers was to achieve an agreement, not on the basis of a shared philosophy, which was wholly unrealistic, but on the basis of shared practical goals. While it was unrealistic to expect agreement on "the same conception of the world, of man and of knowledge," it was possible, he thought, to achieve consensus on "the affirmation of a single body of beliefs for guidance in action."⁵⁹

Maritain's explanation of how this agreement on a "single body of beliefs" could be achieved seemed to require the abandonment, or at least the putting aside and bracketing, of philosophical positions and analysis. For Maritain, philosophy, at least in this context, needed to

54. *Id.* at 51.

55. *Human Rights: Comments and Interpretations* (UNESCO ed., 1949) [hereinafter *Human Rights*]. This source was a symposium edited by UNESCO with an Introduction by Jacques Maritain.

56. *Id.* at 9. *Human Rights* contains thirty-two responses to the UNESCO questionnaire; others were received but not published.

57. See, e.g., Jacques Maritain, *Man and the State* (1951).

58. Jacques Maritain, *Introduction to Human Rights*, *supra* note 55, at 10.

59. *Id.*

turn away from speculation and first principles in order to focus on the practical issue of deciding what members of diverse cultures and belief systems could *reasonably* affirm in light of “the lessons of experience and history.”⁶⁰ Again and again, Maritain emphasized that questions of truth must be put aside in favor of “practical convictions” and common “principles of actions.”⁶¹ When human rights are our concern, the approach must be “pragmatic” rather than theoretical. Despite their differences, those committed to diverse philosophies and systems of thought can nevertheless achieve a “convergence in practice” in the enumeration of human rights.⁶²

Maritain’s explanation for this “convergence” postulates that ethical concepts precede and govern systems of moral philosophy, such systems being the product of sustained reflection. Indeed, Maritain asserts:

[T]here is a kind of plant-like formation and growth of moral knowledge and moral feeling, in itself independent of philosophic systems and the rational justifications they propound, [so that] while all these systems quarrel over the why and wherefore, yet in their practical conclusions they prescribe rules of behavior which are in the main and for all practical purposes identical for a given age and culture. . . .⁶³

While Maritain’s commitment to put philosophy aside was quite defensible in the context of defining human rights, it would seem, however, that this focus on the conditions of universal agreement is itself a most important philosophical task, perhaps one of the most exalted tasks of political philosophy. That task is to recognize the limitations of one’s own philosophical perspective; to take into consideration the contrary perspectives of those who embrace different philosophical principles and values; to realize that one’s “truth” and the other’s “truth” are not likely to be reconciled; and then, most importantly, to work together with those “others” to achieve a common ground, a core of agreement—based on that “plant-like formation and growth of moral knowledge”—on what is needed, in Rawls’s terminology, for achieving an “overlapping consensus”⁶⁴ on justice in national and international contexts.

60. *Id.* at 14. I emphasize “reasonably” in order to suggest a comparison with Rawls’s own emphasis on the “reasonable” in his discussion of political liberalism. See Rawls, *Political Liberalism*, *supra* note 7, at 48-54.

61. Again, the comparison with Rawls is apropos. See Rawls, *Political Liberalism*, *supra* note 7, at 94 (arguing that truth is not the aim of political liberalism in the context of a plurality of comprehensive doctrines).

62. Maritain, *supra* note 58, at 11-12.

63. *Id.* at 12. Maritain’s position here is similar in some respects to Rawls’s discussion of the moral sentiments in *Theory*, *supra* note 4, § 73, at 420, as well as to his notion of “reflective equilibrium,” *id.* § 9, at 40.

64. For the concept of an “overlapping consensus,” see Rawls, *Political Liberalism*, *supra* note 7, at 133.

As the foregoing discussion suggests, there are important similarities and parallels between the work of the U.N. Committee on the Theoretical Bases of Human Rights and Rawls's theoretical approach to rights within a politically liberal society. First and foremost, both the Committee and Rawls endeavored to avoid reliance on a comprehensive doctrine. Second, and relatedly, neither the Committee nor Rawls started with some putatively indubitable foundational truth from which rights might be derived; in this way, both Rawls and the Committee appear to adopt an anti-foundationalist standpoint inasmuch as any particular foundation they might adopt would inevitably be controversial. Third, Rawls and the Committee eschewed deep and abstruse philosophy, in great part because both wished to achieve the greatest degree of agreement. For Rawls, that agreement concerned the political conception of justice; for the Committee, it was the Universal Declaration of Human Rights. Fourth, while both concentrated on theoretical considerations, their theorizing was geared toward achieving practical agreement within a context of a pluralism of belief in matters of philosophy, religion, and morality.

If examined at greater length, the parallel achievements of Rawls and the Committee would reveal several important differences.⁶⁵ Nonetheless there are many ways in which their separate paths displayed common concerns: to avoid reliance on comprehensive doctrines and robust understandings of natural law or natural rights in order to define a defensible understanding of rights, whether human or national. We must eventually determine how this relates to the amendment power provided by the U.S. Constitution, which I will touch on in one of the scenarios discussed in Part IV.

II. RAWLS ON UNCONSTITUTIONAL AMENDMENTS

In his discussion of the role of the Supreme Court as the exemplar of public reason,⁶⁶ Rawls argues that there are limits to what can be a valid amendment to the Constitution. For Rawls, this is so even when the procedures that the Constitution provides for amendment are fully and correctly followed. Although his view on this issue may not be representative of the consensus among American constitutional lawyers and scholars, there are some who, like Rawls, have taken the position that there are at least implicit substantive limits on the power

65. To clarify, the above account of the similarities between the work of the Human Rights Commission and Rawls's work on justice obviously ignores many details in both the Commission's Universal Declaration and Rawls's mature work on human rights in *The Law of Peoples*, *supra* note 11, details that would reveal significant differences in their respective results. My focus is on certain common approaches to rights in their respective works.

66. Rawls, *Political Liberalism*, *supra* note 7, at 231.

to amend the Constitution.⁶⁷ What is meant by “substantive limits”? For the moment, suffice it to say that it refers to constraints on changes to the content of the Constitution; constraints arising from existing core freedoms set forth in that document, especially in the Bill of Rights or those imposed by long-standing traditions; or constraints resulting from a principled understanding of the purposes and aims of the Constitution and the amending power set forth therein.

But first we should note what the Constitution says in regard to this issue. Article V of the Constitution lays down the required procedures for amendment. It provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;

Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its consent, shall be deprived of its equal Suffrage in the Senate.⁶⁸

One notable feature of Article V is the exceptions it sets forth to the amendment power. Specifically, Article V forbade an amendment that would stop the African slave trade prior to 1808. Further, but without time limitations, Article V disallows an amendment depriving a state, without its consent, of its equal representation in the Senate. The Framers made just these two exceptions—one temporary and one permanent exception—to the amendment power conferred upon the people, the states, and the Congress. One could certainly argue, with due allowance made for those exceptions, that Article V therefore permits any amendment to the Constitution that is secured by means of following the procedures of Article V.⁶⁹ By its terms, at least,

67. See, e.g., Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 163 (Sanford Levinson ed., 1995). For an extensive and insightful review of the essays collected in *Responding to Imperfection*, see Frank I. Michelman, *Thirteen Easy Pieces*, 93 Mich. L. Rev. 1297 (1995).

68. U.S. Const. art. V.

69. Some theorists maintain that Article V is the exclusive means for amending the Constitution. See, e.g., David R. Dow, *The Plain Meaning of Article V*, in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 117 (Sanford Levinson ed., 1995). Other theorists, such as Bruce Ackerman and Akhil Reed Amar, go further and argue that amendments outside Article V's

Article V itself does not preclude any substance from forming part of an amendment. Although this is very probably the canonical understanding of Article V for most American lawyers,⁷⁰ it is not at all Rawls's position. What, then, explains Rawls's opposition to the near-absolute freedom of the amendment power, which Article V, having enumerated and entrenched two exceptions to that power, would appear to allow?

Consider the kind of hypothetical amendments that raise this issue for Rawls. He questions "whether an amendment to repeal the First Amendment, say, and to make a particular religion the state religion with all the consequences of that, or to repeal the Fourteenth Amendment with its equal protection of the laws, must be accepted by the Court as a valid amendment."⁷¹ What reasons, Rawls asks, might the Court have for holding such amendments invalid, even when they are the product of careful and complete adherence to the stringent supermajority procedures set forth in Article V? The principal reason that Rawls gives is the nature and purposes of amendments, which he characterizes in terms of the actual amendments that have been made a part of our Constitution. These purposes, he says, include adjusting and broadening constitutional values and removing weaknesses and defects of the original document. Rawls's fuller explanation is worth citing:

Consider the following reasons: an amendment is not merely a change. One idea of an amendment is to adjust basic constitutional values to changing political and social circumstances, or to incorporate into the constitution a broader and more inclusive understanding of those values. The three amendments related to the Civil War all do this, as does the Nineteenth Amendment granting women the vote; and the Equal Rights Amendment attempted the same. At the Founding there was the blatant contradiction between the idea of equality in the Declaration of Independence and the Constitution and chattel slavery of a subjugated race; there were also property qualifications for voting and women were denied the suffrage altogether. Historically those amendments brought the Constitution more in line with its original promise. Another idea of amendment is to adapt basic institutions in order to remove weaknesses that come to light in subsequent constitutional practice. Thus, with the exception of the Eighteenth, the other amendments concern either the institutional design of

provisions either have occurred or are possible. See Bruce Ackerman, *We the People: Foundations* (1991); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457 (1994). This latter kind of amendment is for the most part beyond the scope of this Article.

70. See, e.g., Bruce Ackerman, *We The People: Transformations* 92 (1998).

71. Rawls, *Political Liberalism*, *supra* note 7, at 238. Rawls here refers to Ackerman, *supra* note 69, at 319-22, where Ackerman suggests that the Court must look upon the amendment under discussion as valid. See *Political Liberalism*, *supra* note 7, at 238 n.25.

government, witness the Twenty-second, which allows the president to serve only two terms; or certain basic matters of policy, witness the Sixteenth, which grants Congress the power to levy income taxes. Such has been the role of amendments.⁷²

This account of the past role of amendments is surely persuasive. Of course, it may not be applicable to recent amendment proposals or to the basis of future amendments in circumstances we cannot now imagine. But putting aside questions pertaining to the future until later, consider how Rawls's views might apply to recent and controversial amendment proposals, some of which may go beyond the limited purposes Rawls lists for valid amendments. It should be noted that none of these amendments has been adopted and may never be adopted, but they indicate the kind of amendments that are frequently proposed in the Congress and therefore present test cases for the criteria Rawls defends for acceptable amendments.

A. *Recent and Current Proposals for Amendments*

1. The Flag Amendment

In the wake of Supreme Court decisions that struck down laws designed to prohibit the burning of the American flag,⁷³ amendments were soon introduced in Congress to give the States and Congress the authority to ban the physical desecration of the flag.⁷⁴ One significant argument against the constitutionality of the flag-burning amendment was based on the contention that First Amendment free speech rights are natural rights retained by the people, and that repeal of the First Amendment would therefore have been unenforceable and unconstitutional.⁷⁵ From Rawls's perspective, however, such an argument would likely depend upon and derive from a comprehensive doctrine because of the argument's reliance on natural rights; in that way the argument would therefore exceed the boundaries of a political theory of justice and likely be perceived as unacceptable from the perspective of political liberalism. While that is an argument we can understand from within the scope of Rawls's mature work, it does

72. Rawls, *Political Liberalism*, *supra* note 7, at 238-39 (citations omitted).

73. See *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

74. For relevant commentary, see, for example, John R. Vile, *The Case Against Implicit Limits on the Constitutional Amending Process*, in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 191, 202-13 (Sanford Levinson ed., 1995); Murray Dry, *Flag Burning and the Constitution*, 1990 *Sup. Ct. Rev.* 69; Robert J. Goldstein, *The Great 1989-1990 Flag Flap: An Historical, Political, and Legal Analysis*, 45 *U. Miami L. Rev.* 19 (1990); Mark Tushnet, *The Flag-Burning Episode: An Essay on the Constitution*, 61 *U. Colo. L. Rev.* 39 (1990).

75. See Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 *Yale L.J.* 1073 (1991) (arguing that the flag-burning amendment was unconstitutional because it violated natural rights retained by the people).

not necessarily endorse the constitutionality of a flag amendment, for such an amendment arguably abridges First Amendment free speech rights. Rather than looking upon First Amendment free speech rights as natural rights, which rest upon a comprehensive doctrine, a political conception of free speech might interpret flag desecration as a form of protected symbolic expression, which is the position taken by the Court in *Texas v. Johnson*.⁷⁶ Rawls would likely oppose a flag-burning amendment on that ground. But would the Court be justified in invalidating a flag amendment that removes flag desecration from the purview of First Amendment free speech rights, when that is the will of a supermajority of the Congress and the States?

2. The Marriage Amendment

Another example of current controversial amendments concerns proposals in recent years to amend the Constitution so as to define marriage as a union of two persons of the opposite sex.⁷⁷ After the Court's recent decision in *Lawrence v. Texas*,⁷⁸ more advocacy for a "marriage amendment" is inevitable in light of fears that the *Lawrence* case has paved the way for the so-called next step in "the homosexual agenda,"⁷⁹ which is same-sex marriage. Those fears were arguably validated in the more recent decision of the Massachusetts Supreme Judicial Court's decision on November 18, 2003.⁸⁰ That decision held that same-sex couples have a constitutional right under the Massachusetts constitution to the benefits of civil marriage,⁸¹ making it even more likely that opponents of same-sex marriage will seek a constitutional amendment to ban same-sex marriage.⁸²

Whatever the merits of a marriage amendment may be, from a Rawlsian perspective it is very likely that such an amendment is another instance of a comprehensive doctrine invading the freestanding sphere of the political. This is so to the extent that the case against homosexual marriage tends to be based on such factors as

76. 491 U.S. at 402 (vacating defendant's conviction under Texas law banning flag-burning).

77. The Alliance for Marriage is one organization that is currently engaged in advocacy for a federal marriage amendment. See Alliance for Marriage, at <http://www.allianceformarriage.org> (last visited Feb. 2, 2004).

78. 123 S. Ct. 2472 (2003).

79. *Id.* at 2496 (Scalia, J., dissenting).

80. See Linda Greenhouse, *Supreme Court Paved Way for Marriage Ruling with Sodom Law Decision*, N.Y. Times, Nov. 19, 2003, at A24.

81. See Pam Belluck, *Marriage by Gays Gains Big Victory in Massachusetts*, N.Y. Times, Nov. 19, 2003, at A1. As of this writing in mid-February of 2004, the Massachusetts legislature is holding a constitutional convention to discuss whether to counteract the Supreme Judicial Court's ruling authorizing gay marriage.

82. See Adam Nagourney, *A Thorny Issue for 2004 Race*, N.Y. Times, Nov. 19, 2003, at A1.

tradition, status quo morality, and above all on natural law.⁸³ But Rawls makes no attempt to decide the issue.⁸⁴

Although Rawls's notion of a comprehensive doctrine may be relevant to criticizing a marriage amendment, would such an amendment also transgress the limited purposes that he had argued are characteristic of the twenty-seven amendments to the Constitution?⁸⁵ There are good reasons for thinking a marriage amendment would go beyond those criteria. For example, no amendment to the Constitution has singled out a particular class of persons and denied its members important rights that all others enjoy. On the contrary, the amendments concerned with individual rights have either proscribed their abridgement or conferred rights upon groups that had been previously denied those rights, as with blacks in the Fourteenth and women in the Nineteenth Amendments.

One can certainly argue that given the evidence of the genetic origins of sexual orientation, as is now widely agreed to be the case, sexual orientation may be no more of a basis for discrimination than is race, gender, or other immutable characteristics. But whether same-sex conduct and relationships are purely a matter of choice or a more or less fixed orientation would appear irrelevant to the principle that all persons should have equal liberty of conscience and be treated as equal moral agents. The full exercise of the two moral powers that, for Rawls, are definitive of moral personality—the capacity for having a sense of justice and the capacity for choosing a conception of one's good⁸⁶—require liberty of conscience. Without liberty of conscience and “the liberty to fall into error and to make mistakes,” one is deprived of the “social conditions necessary for the development and exercise” of the capacity for a conception of a person's good.⁸⁷

3. The Human Life Amendment

A third example of highly controversial proposals for a constitutional amendment is the so-called human life amendment, which has been advocated by various groups since *Roe v. Wade*⁸⁸ legalized abortion. In general, this amendment would define the fetus as a human being and therefore pave the way for proscribing abortion in all the States. It is unclear how Rawls would regard such an

83. See John Rawls, *The Idea of Public Reason Revisited*, in John Rawls: Collected Papers 573, 587 (Samuel Freeman ed., 1999) (stating that appeals “against same-sex marriages, as within the government's legitimate interest in the family, would reflect religious or comprehensive moral doctrines”).

84. *Id.* at 587 n.38.

85. Rawls, *Political Liberalism*, *supra* note 7, at 238-39.

86. See Rawls, *A Theory of Justice*, *supra* note 4, at 442.

87. Rawls, *Political Liberalism*, *supra* note 7, at 313; see also Michelman, *supra* note 1, at 410-14.

88. 410 U.S. 113 (1973).

amendment. But in light of his original remarks on abortion within his discussion of public reason,⁸⁹ he would likely oppose the amendment, but not necessarily think it unconstitutional, as it may not constitute a “constitutional breakdown” as clearly as he thinks the amendment repealing the First Amendment would. Indeed, in light of his more extended remarks on abortion in his introduction to the paperback edition of *Political Liberalism*,⁹⁰ Rawls appears to leave the question to be determined by a reasonable balance of political values, without taking a hard and fast position on to what outcome that reasonable balance would lead.⁹¹ By contrast, Ronald Dworkin would surely argue that a human life amendment would constitute a major mistake in understanding individual freedom and the role of the State.⁹²

4. The Foreign-Born Citizens Amendment

In contrast to the three foregoing instances of proposed amendments, a fourth example is the quite recent and perhaps somewhat less controversial proposal to permit foreign-born citizens to qualify for the Office of the President provided they have been residents and citizens of the United States for a stated number of years—for example, twenty or more years.⁹³ Assuming that the purpose of the amendment is to adjust the Constitution to include a broader understanding of the qualifications of foreign-born citizens, then the amendment arguably falls within Rawls’s list of valid purposes. In support of the amendment proposal, one could argue that today’s circumstances are arguably far different from those of the Framers, when fears of foreigners becoming President in the early decades of the Nation were more understandable and perhaps well-grounded.

89. See Rawls, *Political Liberalism*, *supra* note 7, at 243 n.32 (suggesting that a reasonable balance of political values may support a woman’s right to abortion in the first trimester).

90. *Id.* at lv-lvi n.31.

91. See also John Rawls, *Commonwealth Interview with John Rawls*, in *Collected Papers* 616, 618 (Samuel Freeman ed., 1999) (expressing no opinion as to whether “things would have gone better or worse if the Court had not made [the] decision [it made in *Roe v. Wade*]”).

92. See Ronald Dworkin, *Life’s Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (1993) (arguing that the abortion controversy is over competing understandings of the intrinsic value of life on which government should not take a position).

93. See Editorial, *A Constitutional Anachronism*, *N.Y. Times*, Sept. 6, 2003, at A10 (suggesting that the Constitution should be amended pursuant to present proposals now before the Congress to permit foreign-born citizens to be eligible for the Office of the President).

B. *Rawls's Rationale for Opposing Amendments Repealing Constitutional Essentials*

Let us return now to the type of amendment Rawls considers objectionable. According to Rawls, amendments are not meant to dismantle the structure of the Constitution or repeal constitutional essentials, such as the First Amendment Establishment Clause. Rather, their primary function is to adjust, broaden, improve, and correct what is already contained in the Constitution. In this light, what should the Court do or say in regard to the hypothetical amendment that repeals the First Amendment's Establishment Clause or the Fourteenth Amendment's Equal Protection Clause? Rawls explains his position:

The Court could say, then, that an amendment to repeal the First Amendment and replace it with its opposite fundamentally contradicts the constitutional tradition of the oldest democratic regime in the world. It is therefore invalid. Does this mean that the Bill of Rights and the other amendments are entrenched? Well, they are entrenched in the sense of being validated by long historical practice. They may be amended in the ways mentioned above but not simply repealed and reversed. Should that happen, and it is not inconceivable that the exercise of political power might take that turn, that would be constitutional breakdown, or revolution in the proper sense, and not a valid amendment of the constitution. The successful practice of its ideas and principles over two centuries place restrictions on what can now count as an amendment, whatever was true at the beginning.⁹⁴

Again, Rawls's reasoning is surely persuasive. But we should notice that Rawls is not here invoking the perennial conflict between legal positivism and natural law, and taking the side of the latter in repudiating amendments that repeal core constitutional freedoms. Rather, he cites long-standing tradition and the successful practice of the Constitution's principles and values over the course of our history in defense of those core freedoms.⁹⁵ It is on that basis that Rawls characterizes the repeal of the Clauses at issue as a "constitutional breakdown" or "revolution."⁹⁶ But if longstanding tradition and practice immunize core constitutional freedoms from repeal, that

94. Rawls, *Political Liberalism*, *supra* note 7, at 239 (citations omitted).

95. See Solum, *supra* note 1, at 576 (stating that for Rawls it is "legal practice and not natural law that immunizes the freedoms of speech and religion from the amendment process").

96. See Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 *Chi.-Kent L. Rev.* 619, 663 (1994) (characterizing repeal of the First Amendment as "constitutional suicide, the destruction of the most fundamental features of a democratic society") [hereinafter Freeman, *Democratic Constitution*]; see also Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 *Phil. & Pub. Aff.* 3, 42 (1992) [hereinafter Freeman, *Original Meaning*] (describing the same as a "constitutional breakdown").

introduces a barrier into Article V that is plainly absent from its text and perhaps even contrary to its spirit. Moreover, deciding when and where to apply that barrier to amendments poses great difficulties. Some of our long-standing traditions and practices have been abandoned precisely through the amendment process, the Civil War Amendments and the Nineteenth Amendment being notable examples. Of course, Rawls looks upon those amendments as examples of “incorporat[ing] into the constitution a broader and more inclusive understanding of [constitutional] values.”⁹⁷ Perhaps that indicates the inherent ambiguity in the appeal to American traditions and practices.

One can easily expand on Rawls’s opposition to “radical” amendments. For example, in light of the obvious reality of a “pluralism” of comprehensive doctrines in our society—the very pluralism that led Rawls to transform *Theory* into *Political Liberalism*—the repeal of the First or Fourteenth Amendment would necessarily do great damage to the continued existence of that pluralism. From Rawls’s perspective, repealing the Establishment Clause and endangering liberty of conscience introduces an unreasonable comprehensive doctrine into the very core of our constitutional framework,⁹⁸ completely reversing central aspects of our constitutional traditions.

C. Views in Support of Rawls’s Position

Given the foregoing considerations, it is not surprising that others concur with Rawls’s view that some constitutional amendments that are proposed and ratified in accordance with the procedural requirements of Article V may nonetheless be invalid and require the Supreme Court to reject them. What follows is a summary of a few of the arguments that are parallel to Rawls’s own thinking on invalid constitutional amendments.

1. Walter F. Murphy

Over the course of many years Walter F. Murphy has argued forcefully in several articles for a position that is similar to Rawls’s.⁹⁹ Murphy certainly recognizes the need for and validity of constitutional change; he could hardly do otherwise. Indeed, at the outset of *Merlin’s Memory* Murphy quotes the words of Noah Webster: “The very attempt to make *perpetual* constitutions, is the assumption of a right to controul the opinions of future generations; and to legislate

97. Rawls, *Political Liberalism*, *supra* note 7, at 238.

98. *Id.* at 59 (distinguishing unreasonable comprehensive doctrines from reasonable ones).

99. *See, e.g.*, Murphy, *supra* note 67, at 163 n.3 (citing other articles where he has written on substantive limits to the amending power).

for those over whom we have as little authority as we have over a nation in Asia.”¹⁰⁰ Murphy also cites Edmund Burke, “the prophet of conservatism,” to the same effect: “[A] state without the means of some change is without the means of its own conservation.”¹⁰¹

Yet change *tout court* is not the issue; it is rather the kind of change proposed for the Constitution. As Murphy says, “some change is not the same as any change.”¹⁰² According to Murphy, change must be evaluated in terms of norms governing “the political desirability, the procedural propriety, or the substantive legitimacy of any specific proposal for change.”¹⁰³ Suppose, for example, that the people decide to abolish constitutional democracy in return for a charismatic leader’s promise of prosperity in a time of a severe economic downturn. Although the people *can* agree to such a transformation, Murphy asks: “May a people who accepted constitutional democracy democratically or constitutionally authorize such a political transmutation? May the new system validly claim to draw its authority from the consent of the governed?”¹⁰⁴ Murphy thinks not, and for a variety of reasons, all of which, according to him, point to the necessity for substantive limitations on the amending power.

Textual Limits. There are arguably explicit textual prohibitions on certain kinds of changes.¹⁰⁵ For example, Murphy notes that the First Amendment can be seen as prohibiting its own repeal by an Act of Congress, because the text of the First Amendment clearly states that Congress shall make no law abridging freedoms enumerated therein.¹⁰⁶ That argument, however, may be overcome by other considerations, noted by Murphy.¹⁰⁷

Semantic Meaning. There is the semantic argument that the word *amend* means correcting or improving, not deconstructing, reconstructing, or replacing and abandoning the fundamental principles of the Constitution.¹⁰⁸ “[V]alid amendments can operate only within the existing political system; they cannot . . . replace the polity.”¹⁰⁹

Normative Constraints. The normative theory embedded in the Constitution imposes prohibitions on the amending power. “Any

100. *Id.* at 163 (citing Noah Webster, *Bills of Rights*, in *Collection of Essays and Fugitive Writings on Moral, Historical, Political and Literary Subjects* 47 (1790)).

101. *Id.* at 168 (citing Edmund Burke, *Reflections on the Revolution in France* 19-20 (Dutton 1910) (1790)).

102. *Id.*

103. *Id.*

104. *Id.* at 175.

105. *Id.*

106. *Id.* at 175-76 n.40.

107. *Id.*; see also Michelman, *supra* note 67, at 1304 n.29 (arguing that this textual interpretation of the First Amendment is not a “compelling argument”).

108. Murphy, *supra* note 67, at 176-77.

109. *Id.* at 177.

change that would transform the polity into a political system that was totalitarian, or even so authoritarian as not to allow a wide space for human freedom, would be illegitimate, no matter how pure the procedures and widespread the public support.”¹¹⁰

Natural Law and Natural Rights. Because the Preamble to the Constitution includes the important aim of establishing justice, and because “American tradition implants the nation’s founding document, the Declaration of Independence, into the larger Constitution, natural rights impose binding standards on public officials.”¹¹¹ Thus, “[w]hatever one’s opinion of the intellectual worth of natural law and natural rights, the text of the supreme law of the land recognizes and protects them.”¹¹²

Each of Murphy’s points are certainly relevant to establishing credible grounds for limiting the amending power. Each one is also controversial, of course, and may not be decisive or convincing, all things considered.¹¹³ For example, following Sotirios A. Barber, Murphy recognizes that “a full commitment to reason allows only a provisional commitment to constitutional democracy because we must be open to rational persuasion about the moral necessity, or at least desirability, of systemic transformation of the polity.”¹¹⁴ For Murphy, a constitutional democracy would permit a radical transformation, but only to a “system that would enlarge reason’s empire or strengthen its reign.”¹¹⁵ I will draw upon these last points in the Conclusion to this Article.

2. Stephen Macedo and Samuel Freeman

Like Murphy, Stephen Macedo and Samuel Freeman also argue against the view that Article V procedures will *ipso facto* guarantee the validity of constitutional amendments. Macedo’s position¹¹⁶ is similar to Rawls’s; in fact Rawls cites Macedo’s work with approval.¹¹⁷ In effect, Macedo argues that parts of the Constitution are more

110. *Id.* at 179. For an argument that questions the cogency of Murphy’s position on this point, see Michelman, *supra* note 67, at 1306 & n.35.

111. Murphy, *supra* note 67, at 180-81.

112. *Id.*

113. For critical analysis of Murphy’s position, see John R. Vile, *The Case Against Implicit Limits on the Constitutional Amending Process, in* Responding to Imperfection: The Theory and Practice of Constitutional Amendment 191, 196-201 (Sanford Levinson ed., 1995). “To empower the courts not simply to review the procedures whereby amendments were adopted but also to void amendments on the basis of their substantive content would surely threaten the notion of a government founded on the consent of the governed.” *Id.* at 198.

114. Murphy, *supra* note 67, at 189 (referring to Sotirios A. Barber, *The Constitution of Judicial Power* 60-61, 186-87, 232-34 & n.265 (1984)).

115. *Id.*

116. See Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* 182-83 (1990).

117. Rawls, *Political Liberalism*, *supra* note 7, at 238 & n.26.

fundamental than other provisions, and an amendment that repealed fundamental constitutional freedoms would be “unintelligible and revolting from the perspective of the Constitution as a whole.”¹¹⁸ Thus, according to Macedo, “the first freedoms of speech and the press, the requirement of warrants for police searches, the right to confront witnesses, and to a trial by jury, even the elaborate procedures required to amend the Constitution, all these provisions and more represent basic structural commitments to institutionalizing a process of free and reasonable self-government.”¹¹⁹ Consequently, “[a]n amendment which sought to expunge that basic commitment and to wipe out basic political and personal freedoms intrinsic to reasonable self-government suggests a desire to revolutionize rather than correct and amend . . . and so it would properly be held by the Supreme Court to be a nullity.”¹²⁰

Two of Macedo’s contentions are troublesome. First, he may be implying that the Constitution protects freedoms “intrinsic to reasonable self-government” under all social and economic circumstances, both now and in the future. But that strong claim would be virtually impossible to support with convincing arguments. For one thing, future contingencies may require us to revise whatever view we now hold about which freedoms are intrinsic to the Constitution and to reasonable self-government. Second, he assumes without argument that it is part of the role of the Supreme Court to exercise judicial review of the substantive content of amendments. Of course, on this second point Rawls’s position is no different. But as discussed below, there are persuasive reasons that arguably explain the Court’s refusal to exercise oversight of the substantive content of validly ratified constitutional amendments.¹²¹

Unlike Macedo, who wrote of the problem under discussion before *Political Liberalism* was published, Samuel Freeman directly addresses Rawls’s opposition to amendments repealing core constitutional freedoms.¹²² Freeman concedes that Rawls here embraces a “radical idea,”¹²³ the idea, namely, “that not everything enacted according to Article V procedures constitutes a valid amendment to the constitution.”¹²⁴ For example, First Amendment freedoms of religion, speech, and assembly identify the most basic of the democratic liberties—liberty of conscience and freedom of thought:

118. Macedo, *supra* note 116, at 183.

119. *Id.* (internal quotations omitted).

120. *Id.*

121. See *infra* notes 139-44 and accompanying text.

122. Freeman, *Democratic Constitution*, *supra* note 96.

123. *Id.* at 662.

124. *Id.*

Without freedom of thought, inquiry, and discussion, public reasoning about the constitution and *democracy itself* would not be possible. For the sovereign people to attempt to give up these liberties for the sake of other values is not a legitimate *amendment* to the constitution. It is constitutional suicide, the destruction of the most fundamental features of a *democratic* society. These basic liberties are then “inalienable,” to use the eighteenth century term; they cannot be bartered away. As such they are constitutionally entrenched.¹²⁵

Freeman’s remarks are germane to the discussion of the basis of equality in Part III below, which returns to the subject of democracy and its importance to Rawls’s position on the amendment issue.

3. William F. Harris II

William Harris offers an extended reflection on constitutional change in his book *The Interpretable Constitution*.¹²⁶ Chapter 4, “Revising the Constitutional Polity: The Limits of Textual Amendability,” is devoted entirely to the subject. It is complex, original, and in many respects a profound reflection on the subject. In many ways, however, the earlier chapters in his book bear importantly on the amendability issue. Here it is possible only to summarize a few of his ideas on constitutional change.

From one perspective, the position Harris develops can be used in support of Rawls’s claims on acceptable amendments; but there is another side to Harris’s thought that allows for radical change. On the one hand, Harris argues that “[t]he solidity of the constitutional world rests on the possibility of other constitutional worlds, or revised versions of the present one, being brought into being in its place.”¹²⁷ On the other, he argues that the form, design, or wholeness of the constitutional document must be respected and left intact. For the Federalists, at least, the meaning of the Constitution’s text “was to be found in the character of its *project*, not in its *sentences*.”¹²⁸ Accordingly, Article V should not be viewed as a freestanding provision, for “one provision of the document should not be interpreted so as to destroy the whole text.”¹²⁹ As far as the use of Article V is concerned, any change or amendment, according to Harris, “must continue to make sense *within* the preexisting scheme of constitutional meaning.”¹³⁰ Harris’s position is obviously congruent with Rawls’s.

Harris presents a double-stranded view of constitutional change by

125. *Id.* at 663 (emphases added).

126. Harris, *supra*, note 9.

127. *Id.* at 166.

128. *Id.* at 172.

129. *Id.*

130. *Id.* at 183.

making a distinction between amendments that employ the procedures of Article V, and a more or less complete revolution of the constitutional polity by the action of the sovereign people. Whatever changes that come about through the use of Article V must be in conformity with the “wholeness” of the Constitution; on the other hand, the whole people, in virtue of their ultimate sovereignty, may suspend “the system by which it was previously represented. The theological equivalent would be to say that the immediate actuality of divine power . . . would return the universe to the original void for a new beginning.”¹³¹ Harris puts the distinction crisply:

The verification of the sovereign constitution maker is precisely in its capacity to remake what it has made, *when it acts as sovereign*, on a view of its whole enterprise—and only then. But in the practical Article V amending process, when the *machinery* of government is acting as the *agent* of the people in its sovereign capacity, the notion of limits not only makes sense; it is necessary.¹³²

Much remains to be said about Harris’s positions on constitutional change, but in light of the foregoing, it can be said that his understanding of Article V is supportive of Rawls’s view on the limits of Article V.

D. Views Opposing Rawls’s Position

1. Jed Rubenfeld and Christopher L. Eisgruber

Theorists who appear to oppose Rawls’s position on the limits to constitutional amendment do so on more categorical grounds, emphasizing what amounts to a virtual absolute freedom conferred by Article V. Among these theorists are Jed Rubenfeld¹³³ and Christopher L. Eisgruber.¹³⁴ Although Rubenfeld defends a theory of commitment to constitutional values over time, he nevertheless argues that,

[t]he very principle that gives the Constitution legitimate authority—the principle of self-government over time—requires that a nation be able to reject any part of a constitution whose commitments are no longer the people’s own. Thus written constitutionalism requires a process not only of popular constitution-writing, but also of popular constitution-rewriting.¹³⁵

Rubenfeld goes so far as to state, in clear opposition to a position such as Rawls’s, that “constitutionalism *always* permits the possibility

131. *Id.* at 184 n.14.

132. *Id.* at 193.

133. Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (2001).

134. Christopher L. Eisgruber, *Constitutional Self-Government* (2001).

135. Rubenfeld, *supra* note 133, at 174.

of legitimate rupture, of a revolutionary process of popular rewriting that takes place, in part or in whole, outside every existing political institution.¹³⁶ Thus, from Rubinfeld's perspective, it would appear that the long-standing traditions, principles and practices emphasized in Rawls's position do not constitute a bar to radical changes via Article V.

Similarly, Eisgruber, referring to Article V, argues that "[a] constitutional procedure that enables people to entrench good rules and institutions will also enable them to entrench bad rules and institutions. A people must have the freedom to make controversial political choices, and that freedom will necessarily entail the freedom to choose badly."¹³⁷ But whether the people's freedom to choose badly includes the freedom to decide to abolish their future freedom to choose is questionable. Harris, for example, argues that "[t]he only constraint on the constitution maker, as on any sovereign, is that this people must always act so as to preserve and fulfill its sovereignty—framing its mandates generally and abstractly, and maintaining its capacity to rethink the constitutional order as a whole."¹³⁸ This conflict between Eisgruber and Harris is important, but it may be resolved in Part V below, where an attempt is made to reconcile two contrasting strands of Rawls's thought, which are parallel to the claims made above by Eisgruber and Harris.

2. Walter Dellinger and Judicial Review

One response to the claims of Rawls, Murphy, Freeman, and Macedo—that repealing a core constitutional freedom, such as the First Amendment Establishment Clause, would be tantamount to revolution or a constitutional breakdown—is found in Walter Dellinger's discussion of the amendment issues that surfaced in controversies over the Equal Rights Amendment.¹³⁹ Although Dellinger was there concerned mainly with *process* questions, such as the appropriateness of judicial review of contested issues about valid ratifications and rescission of ratifications, he made an important point about substance. For the framers of the Constitution, meeting in Philadelphia in 1787,

[t]he formal amendment process set forth in article V represents a domestication of the right to revolution. Article V maintains the spirit of 1776—the right of the people to alter or abolish an inadequate government. But the manner of the right's exercise is circumscribed. Change is permitted, but only through the modes

136. *Id.* (emphasis added).

137. Eisgruber, *supra* note 134, at 120.

138. Harris, *supra* note 9, at 203.

139. Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386 (1983).

specifically sanctioned in the charter of government itself. Article V is thus a very conservative rendering of the right of revolution.¹⁴⁰

Needless to say, if Dellinger is correct that Article V provides for an orderly and constitutional means of effectuating a revolution, then the serious reservations of Rawls, Freeman, and others about "constitutional breakdown" and "revolution" may be somewhat beside the point, because the Framers themselves, according to Dellinger, were arguably anticipating, and providing a peaceful means of responding to, the very conditions where actual breakdown and revolution might otherwise occur.

Elsewhere Dellinger also provides a reason for rejecting the Supreme Court's exercise of judicial review of the substance of constitutional amendments: "Judicial review of the merits of proposed amendments is illegitimate for the simple reason that the Constitution places virtually no limits on the content of amendments. With two express exceptions, Congress is constitutionally free to propose, and the states to ratify, any amendment whatsoever."¹⁴¹ Like Rawls, Dellinger acknowledges that "the Constitution taken as a whole stands for certain enduring principles, and [that] one can construct meaningful arguments that a particular proposed amendment is inconsistent with those principles."¹⁴² That seems to be at least part of the basis for Rawls's opposition to certain radical amendment proposals, the fact that they are inconsistent with important principles and values contained in the historical Constitution.¹⁴³ Nonetheless, Dellinger claims that "arguments about the political wisdom of proposed amendments are only arguments; they can never be translated into judicial rules of positive law that confine the ultimate discretion of the proposing Congress and the ratifying legislatures."¹⁴⁴

What Dellinger may have in mind in speaking of the inability to translate arguments against proposed amendments into positive rules

140. *Id.* at 431 (citation omitted). *But see* Michael Parenti, *The Constitution as an Elitist Document*, in *How Democratic is the Constitution* 39, 47 n.18 (Robert A. Goldwin & William A. Schambra eds., 1980) (arguing that the Constitution was designed to preserve an undemocratic class structure, making sweeping changes almost impossible). *See also* Dellinger, *supra* note 139, at 431 n.235 (commenting on Parenti's position).

141. Walter Dellinger, *Constitutional Politics: A Rejoinder*, 97 *Harv. L. Rev.* 446, 447-48 (1983) (citations omitted) (responding to Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 *Harv. L. Rev.* 433 (1983)); *see id.* at 448 n.14 (citing William Frierson, *Amending the Constitution of the United States*, 33 *Harv. L. Rev.* 659, 661 (1920) ("With this enumeration of the matters which the convention thought necessary to withdraw from the amending power, it would seem to be impossible to infer an intention that any other restrictions were intended to be placed upon the character of amendments that might be adopted.")).

142. *Id.* at 448.

143. Rawls, *Political Liberalism*, *supra* note 7, at 238-39.

144. Dellinger, *supra* note 141, at 448.

of law is, among other things, our obvious inability to foresee, understand, and evaluate the totality of circumstances that would recommend the proposal and ratification of amendments at some future time. To be sure, the framers of Article V foreclosed two possible amendments within the body of Article V. But those entrenched provisions were arguably required simply to assure the ratification of the Constitution itself, not to foreclose other kinds of change in the future.

E. *A Question of Time?*

In evaluating Rawls's position, perhaps some will say, in his defense, that we must remember that he was considering a radical idea that originated with Ackerman's hypothesis of a "Christianity Amendment," an extreme example of a constitutional amendment that is so diametrically opposed to our present constitutional tradition as to be almost unthinkable today.¹⁴⁵ Yet Rawls himself took it seriously; as he said, "it is not inconceivable that the exercise of political power might take that turn."¹⁴⁶

Indeed, Rawls's worry may seem all the more tenable when we consider the growth and political influence of religious fundamentalism in contemporary America and elsewhere in the world. The recent and unsuccessful attempt to maintain a display of the Ten Commandments in the lobby of the Alabama Supreme Court in violation of a federal court order to remove the display suggests that the separation of church and state is not in grave danger.¹⁴⁷ It is not difficult, however, to imagine the gradual growth over the course of years or decades of a build-up of popular support for a much more extensive integration of law and religion. When we consider the feasibility of a Christianity (or Islamic) Amendment synchronically, across time, the danger may not be perceived as readily as it might be if we looked at these things diachronically, over a longer course of time. The difficulty with that longer stretch of time, of course, is that the longer it is the more we lose perspective and understanding. Two periods of consciousness—the present in relation to the past, or the present in relation to the future—are very difficult to span. But when we are dealing with the past we know something about that past from abundant sources of information. The future, on the other hand, never quite *is*; what we know about the future is at best a matter of conjecture.

Perhaps that conclusion counsels greater respect for the decisions of future generations of citizens, reminding us that present convictions and circumstances within the status quo are not and cannot be the

145. See Ackerman, *supra* note 70, at 14.

146. Rawls, *Political Liberalism*, *supra* note 7, at 239.

147. See *supra* note 38 and accompanying text.

only measures of the constitutionality of an amendment. Thus (so the argument would run) the First Amendment, the Equal Protection Clause, or any number of other core rights or freedoms now protected, are vulnerable wherever convictions and circumstances have changed dramatically, particularly within the distant and contingent future. Given where we stand today in our constitutional democracy, it is nearly impossible for us to imagine the moral, philosophical, and religious doctrines that may prevail 100 or 200 years from now. Perhaps even more importantly for present purposes, the problem with imagining or predicting the central values and the social and economic circumstances of the future, along with their implications for our fundamental law, is even more acute, as those values and circumstances will depend on a far greater number of variables. Consider, for example, the impact of a dramatic and severe decline of social and economic conditions. Such a decline could be so devastating as to require drastic and unprecedented limitations or repeal of many of the equal liberties. We cannot know the combination of conditions that would lead to a repeal of the Establishment or Equal Protection Clauses, but because we cannot, that may constitute a sufficient condition for not foreclosing that remote possibility in advance. After exploring Rawls's position on the basis of equality in Part III and how the Court might decide in Part IV, I return to the above points in Part V.

III. RAWLS ON THE BASIS OF EQUALITY

There is another approach to the issue discussed in the foregoing part that may yield a sounder and more attractive defense of Rawls's position on the amendment issue. We have been assuming that the amendment under review would repeal such core freedoms as the Establishment Clause or the Equal Protection Clause. In either event the fundamental equality of citizens in our constitutional democracy would be dramatically affected. In Rawls's terminology, those amendments would violate the "basis of equality." What is meant by the basis of equality? Rawls has two different explanations of this concept, one in *Theory*¹⁴⁸ and another in *Political Liberalism*.¹⁴⁹ Distinguishing them will further illuminate the main difference between Rawls's two major works.

A. *The Basis of Equality in A Theory of Justice*

Rawls gives an account of the basis of equality in *Theory* that explains "the features of human beings in virtue of which they are to be treated in accordance with the principles of justice."¹⁵⁰ The

148. See Rawls, *A Theory of Justice*, *supra* note 4, § 77, at 441.

149. See Rawls, *Political Liberalism*, *supra* note 7, at 19, 79-81, 109-10.

150. Rawls, *A Theory of Justice*, *supra* note 4, § 77, at 441.

underlying question concerns “what sorts of beings are owed the guarantees of justice.”¹⁵¹ Rawls explains:

The natural answer seems to be that it is precisely the moral persons who are entitled to equal justice. Moral persons are distinguished by two features: first they are capable of having (and are assumed to have) a conception of their good (as expressed by a rational plan of life); and second they are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree.¹⁵²

Thus, in *Theory*, moral personality is a potentiality that is ordinarily realized by human beings, and this potentiality for moral personality Rawls regards as the foundation of and “a sufficient condition for being entitled to equal justice.”¹⁵³ If human beings did not possess these two moral powers or capacities, presumably they would not be entitled to equal justice. But because human beings do (normally) possess these capacities, then “[t]his fact can be used to interpret the concept of natural rights.”¹⁵⁴ Rawls explains his reference to natural rights:

For one thing, it explains why it is appropriate to call by this name the rights that justice protects. These claims depend solely on certain natural attributes the presence of which can be ascertained by natural reason pursuing common sense methods of inquiry. The existence of these attributes *and the claims based upon them* is established independently from social conventions and legal norms.¹⁵⁵

It is the presence of these attributes in human beings that entitles them to make claims based on these attributes. For Rawls, it is thus natural for us to seek justice, to make claims based upon our nature, our natural attributes. Arguably, it is even our responsibility to make claims that we believe are justly derived from our natural attributes. It is also natural for us to challenge conventions and taboos that are inconsistent with or contrary to the claims we sincerely believe are naturally or reasonably derived from these natural attributes. Rawls’s founding of equality and justice upon natural attributes of persons, and his association of the concept of natural rights with this foundation, implies that a great many rights derive from the two moral capacities he attributes to persons. Indeed, it opens the door to a palace of rights that *Theory* never attempted to identify or define. There is a ready explanation for that: Rawls’s immediate concerns

151. *Id.* at 442.

152. *Id.*

153. *Id.*

154. *Id.* at 442 n.30.

155. *Id.* (emphasis added).

were simply more fundamental and foundational to the underlying theory of justice itself.

Thus, a person's capacities for a sense of justice and a conception of the good do not conclude the rendering of justice, but identify its natural starting point. To be meaningful, a person's natural capacities necessarily include an indefinite number of claims that derive from and depend upon those defining human capacities. Otherwise, the presence of the two powers Rawls identifies is illusory and opaque: They would fail to have real consequences and would not qualify the force of the claims persons may make about the justice and the goodness of the fundamental decisions that define their lifeways. If we are to take rights seriously, we must therefore attend to the comprehensive dimensions and the more extensive implications of our moral powers to give justice and define, pursue, and revise our conceptions of the good.

We might pause to note Ronald Dworkin's comments on Rawls's use of the term "natural rights." Dworkin was the first to identify Rawls's method as constructivist.¹⁵⁶ He also noted the natural rights foundations of Rawls's theory, even though it was a term Dworkin avoided in describing that theory "because it has, for many people, disqualifying metaphysical associations."¹⁵⁷ Such people "think that natural rights are supposed to be spectral attributes worn by primitive men like amulets, which they carry into civilization to ward off tyranny."¹⁵⁸ But within the constructive model:

[T]he assumption of natural rights is not a metaphysically ambitious one. It requires no more than the hypothesis that the best political program, within the sense of that model, is one that takes the protection of certain individual choices as fundamental, and not properly subordinated to any goal or duty or combination of these.¹⁵⁹

For Dworkin, Rawls's assumption of natural rights therefore does not involve a dubious ontology—at least no more dubious than the fundamental concepts that direct utilitarian theories of justice.

Thus, from Dworkin's perspective, Rawls's 'deep theory' renders rights natural rather than the long-term outcome of custom or explicit legislation. Natural or fundamental rights are the independent grounds for assessing the justice of custom and legislation. We can,

156. See Rawls, *Political Liberalism*, *supra* note 7, at 91 & n.1 (citing Ronald Dworkin, *Taking Rights Seriously* 159-68 (1978)).

157. Ronald Dworkin, *Taking Rights Seriously* 176 (1978). For similar reasons, Dworkin has avoided use of the natural law label. *But see* Ronald Dworkin, "Natural" *Law Revisited*, 34 U. Fla. L. Rev. 165 (1982) (reluctantly adopting the label of "naturalism" in describing his theory of adjudication).

158. Dworkin, *supra* note 157, at 176.

159. *Id.* at 176-77.

Dworkin says, test this theory of natural rights by examining “its power to unite and explain our political convictions.”¹⁶⁰

To avoid the conclusion that *Theory* was a strong and explicit defense of natural rights, it is helpful to note that the only place Rawls refers to natural rights as applying to his theory is in a single footnote within his discussion of the “basis of equality,” which occurred well over 400 pages into *Theory*.¹⁶¹ Yet he does refer to the concept of natural rights in that one footnote. But any claim that arises from our moral personality’s natural attributes (the two moral powers), “the presence of which can be ascertained by natural reason pursuing common sense methods of inquiry,”¹⁶² is not, to repeat Dworkin’s phrase, a “metaphysically ambitious one.”

If, as Rawls holds, “the capacity for moral personality is a sufficient condition for being entitled to equal justice,”¹⁶³ and if core constitutional freedoms such as free speech, equality, free exercise of religion, and the like, are based on claims that implicate the two natural capacities known by those “common sense methods of inquiry,”¹⁶⁴ then we have a further and perhaps deeper explanation for Rawls’s opposition to amendments that would repeal the First Amendment or the Equal Protection Clause. Such amendments would violate the basis of equality by infringing on the exercise of the two moral powers, the two natural capacities that in significant respects define us as persons. From this perspective, those amendments would not only constitute a “constitutional breakdown” or “revolution,” but a dismantling of human persons as they are known by means of Rawls’s “common sense methods of inquiry.”

Does Rawls’s account of equality have parallels in the law? Arguably one finds evidence of his natural rights account of equality in many of the decisions of the Supreme Court, some of which antedate the appearance of *Theory*. One outstanding example is Justice Douglas’s majority opinion in *Griswold v. Connecticut*,¹⁶⁵ which established the constitutional right of privacy in the course of holding that married persons have a right to use birth control devices and receive medical counseling concerning their use. In writing about the marital right of privacy, Justice Douglas ended his opinion with these words: “We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.”¹⁶⁶ His opinion bristles with overtones of a natural right to

160. *Id.* at 177.

161. Rawls, A Theory of Justice, *supra* note 4, at 442 n.30.

162. *Id.*

163. *Id.* at 442.

164. *Id.* at 442 n.30.

165. 381 U.S. 479 (1965).

166. *Id.* at 486.

make fundamental decisions analogous to the one at issue in *Griswold*.¹⁶⁷

Writing for the Court several years after *Griswold* in *Eisenstadt v. Baird*,¹⁶⁸ Justice Brennan characterized the right of privacy more broadly: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹⁶⁹ That language, of course, foreshadowed the decision of the Court the following term in *Roe v. Wade*,¹⁷⁰ where the Court endorsed the proposition that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹⁷¹

Those three decisions are examples of situations where persons—married couples, single persons, and pregnant women—exercise their moral powers by giving voice to their natural capacity for a sense of justice and a conception of their good. We cannot claim that Rawls's early work influenced the Court's holdings in those cases. The point is rather that we can look to Rawlsian ideas to better understand those and many other decisions of the Court. We might, for example, rewrite the *Griswold* rationale for marital privacy in sexual matters to reflect the idea that the underlying claim for privacy justly and reasonably arises from persons' natural moral powers to seek justice and express their firm sense of their good, which no state should be allowed to deny except for extraordinary and grave reasons. Likewise, we can appreciate the great importance of the right to choose abortion to a pregnant woman for the same reasons. The state may well encourage a woman so situated to exercise responsibility in making her decision, but not go as far as to coerce the decision.¹⁷²

The foregoing account of the basis of equality in *Theory* may appeal to philosophers just as it did to Rawls in his early work. But because it is more a matter of philosophical argument than constitutional analysis, it is doubtful that the majority of constitutional lawyers would accept this account as a basis for limiting the substantive content of constitutional amendments. Moreover, Rawls's account of the basis of equality in *Theory* seems to be part of a comprehensive

167. As one scholar noted, shortly after *Griswold* was handed down, "[t]he Jesuit magazine *America* noted the irony of some of the justices essentially having to rely on 'higher law' or 'natural law' derivations in order to strike down a law that the church for so many decades had defended on quite different but similarly labeled 'natural law' grounds." David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* 256-57 (1994).

168. 405 U.S. 438 (1972) (extending the right of privacy concerning the use of contraceptives to single persons).

169. *Id.* at 453 (citations omitted).

170. 410 U.S. 113 (1973).

171. *Id.* at 153.

172. See generally Dworkin, *supra* note 92; see also *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

doctrine inasmuch as it grounds itself on a theory of natural rights, even in the limited way in which Rawls embraces that theory. To the degree that Rawls departs from that comprehensive doctrine and substitutes another explanation for the basis of equality in *Political Liberalism*, we should consider putting aside the earlier account and examine his new rationale. For one thing, it may be more acceptable to constitutional lawyers and even influence the Court's decision if ever it is faced with an amendment repealing the core constitutional values that Rawls was concerned would be unjustly eroded.

B. *The Basis of Equality in Political Liberalism*

The major difference in Rawls's discussion of the basis of equality in *Political Liberalism* is the apparent absence of any reference to natural rights. Rather than claiming, as he did in *Theory*, that persons have the two moral powers as natural capacities or attributes, and relating these attributes of moral personality to a natural rights foundation,¹⁷³ in *Political Liberalism* Rawls presents a more straightforwardly political account of the two moral powers and their relation to the basis of equality. This change, of course, reflects his goal of detaching his conception of justice from any and all dependence on a comprehensive doctrine.

Before stating what Rawls says about the basis of equality in *Political Liberalism*, let us first consider a few aspects of the background and foundation for his position. For Rawls, "the fundamental organizing idea of justice as fairness . . . is that of society as a fair system of cooperation over time, from one generation to the next."¹⁷⁴ Rawls takes this idea "to be implicit in the public culture of a democratic society."¹⁷⁵ Because those who engage in these "fair terms of cooperation" in the "public culture of a democratic society" are persons, we obviously need some conception of what we mean by persons. Rawls explains:

Beginning with the ancient world, the concept of the person has been understood, in both philosophy and law, as the concept of someone who can take part in, or who can play a role in, social life, and hence exercise and respect its various rights and duties. Thus, we say that a person is someone who can be a citizen, that is, a normal and fully cooperating member of society.¹⁷⁶

Unless we accept what Rawls says here, we can make no sense of our social, legal, and political institutions, which are precisely founded upon such implicit ideas and which impute all sorts of capacities, responsibilities and liabilities to persons. And because Rawls's

173. Rawls, *A Theory of Justice*, *supra* note 4, § 77, at 442 n.30.

174. Rawls, *Political Liberalism*, *supra* note 7, at 15.

175. *Id.*

176. *Id.* at 18.

starting point is the tradition of democratic thought, he also thinks of citizens as free and equal. He explains:

The basic idea is that in virtue of their two moral powers (a capacity for a sense of justice and for a conception of the good) and the powers of reason (of judgment, thought, and inference connected with these powers), persons are free. Their having these powers to the requisite minimum degree to be fully cooperating members of society makes persons equal.¹⁷⁷

Rawls then elaborates on this, and makes the critical point I want to emphasize:

[S]ince persons can be full participants in a fair system of social cooperation, we *ascribe* to them the two moral powers connected with the elements in the idea of social cooperation [already] noted . . . : namely, a capacity for a sense of justice and a capacity for a conception of the good¹⁷⁸

Thus, instead of grounding the basis of equality on natural rights, as he did in *Theory*, Rawls now *ascribes* the two moral powers to persons in virtue of their successful democratic practices as free and equal persons over the course of generations. The logic of this reasoning is compelling: Unless we *ascribe* (impute or attribute) the two moral powers to persons, and unless persons with these powers are free and equal, we cannot explain or understand their long-standing and successful practices within a public democratic culture, to which our Constitution is committed in manifold ways. There is no deep ontology or metaphysics involved here; nor is there any attribution of natural rights to persons, as there was in the one footnote in *Theory*.¹⁷⁹ What we have is rather an example of Rawls's common sense methodology, now applied to the task of restricting his conception of justice to the political in order to achieve a "freestanding" conception of justice and thereby appeal to all reasonable comprehensive doctrines for their endorsement of an overlapping consensus on the political conception of justice.

What might this now say to constitutional lawyers, particularly with reference to hypothetical amendments that would repeal core constitutional freedoms, or establish a religion, or do away with the equal protection of the laws? It would tell them that what is at stake in adopting such amendments is the implicit understanding of persons as free and equal and to whom we necessarily "ascribe" the moral capacities to have conceptions of justice and the good, all of which underwrites the very possibility of our having a public democratic culture.

Rawls is right, at least to this extent: The amendments he opposes,

177. *Id.* at 19 (citing Rawls, *A Theory of Justice*, *supra* note 4, § 77).

178. *Id.* (emphasis added).

179. *See* Rawls, *A Theory of Justice*, *supra* note 4, § 77, at 442 n.30.

if adopted by Congress, the States, and the people, would be tantamount to a constitutional breakdown or revolution if only because they would be such radical departures from core constitutional values and principles that rest upon our understanding of democracy, persons, the basis of equality, and moral personality. We can therefore see that for Rawls much more is actually at stake than simply opposing amendments because of their departure from long-standing traditions and practices. But is Rawls also right in denying that the Court must accept the amendments as valid?¹⁸⁰ Here there is room for some disagreement. For one thing, much would obviously depend on the jurisprudential views of the then sitting Justices who would have to decide the issue.

IV. HOW MIGHT THE COURT DECIDE?

Faced with a challenge to an allegedly unconstitutional amendment, the Court would have a daunting task. It is unlikely that the Justices would agree on a single rationale for their decision. On the contrary, we can imagine several scenarios competing for the Justices' votes.

Scenario One. The Court might simply say that they have no appellate jurisdiction over the *substantive* content of an amendment, the reason being that Article V and the Constitution as a whole make no allowance for judicial oversight of such a matter. On the other hand, they would no doubt agree to adjudicate questions concerning the *procedural* correctness of the manner in which an amendment was proposed or ratified in light of provisions set forth in Article V. But procedural problems are not in issue in respect to the amendments under consideration here. It is precisely the *substance* of those amendments that causes concern for Rawls and others. In short, if the Court were dominated by textualists or narrow originalists, it might well hold, possibly with great regret, that the plain meaning of Article V allows for *any* amendment, regardless of content, apart, of course, from the one entrenched exception that survives to this day.¹⁸¹

Scenario Two. The Court may summarily decide that judicial review of the substance of amendments is simply foreclosed on the theory that these matters are nonjusticiable political questions lying beyond their jurisdiction.¹⁸²

Scenario Three. Unlikely and remote as this scenario may be, the

180. See Rawls, *Political Liberalism*, *supra* note 7, at 238 n.25 (contesting the view of Bruce Ackerman that the commitment to dualist democracy implies that the Court must accept such amendments (citation omitted)).

181. See Dow, *supra* note 69, at 117.

182. See James E. Fleming, *We the Exceptional American People*, 11 *Const. Comm.* 355, 375 n.83 (1994) (noting that the common interpretation of *Coleman v. Miller*, 307 U.S. 433 (1939), precludes review of amendments). *But see* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *Yale L.J.* 453, 492-99 (1989) (rejecting the common interpretation of *Coleman*).

Court may take the view that constitutional amendments are in any case *irrelevant*, for the good reason that if an amendment has been able to achieve the supermajority support required by Article V, then the value inscribed in that amendment was arguably already a value of the American People before its ratification.¹⁸³ The idea is that amendments are second-order phenomena that merely instantiate an already given and realized social and political value of the People. The underlying argument here would obviously need to be worked out in much greater detail.

Scenario Four. Drawing upon an insight of Professor Fleming, we might say that “the question whether the Supreme Court has authority to declare amendments (or original provisions) unconstitutional presents a case of what Hart would call uncertainty in the penumbra of the ultimate rules of recognition.”¹⁸⁴ Yet this uncertainty will not necessarily prevent a court from rendering a decision. Expanding on his meaning, Hart explains:

One form of ‘formalist’ error may perhaps just be that of thinking that every step taken by a court is covered by some general rule conferring in advance the authority to take it, so that its creative powers are *always* a form of delegated legislative power. The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success.¹⁸⁵

But Hart was obviously of two minds about the authenticity of this “success.” Indeed, his further comments (following those just cited) on this issue suggest that “success” may sometimes be illusory:

It is conceivable that the constitutional question at issue may divide society too fundamentally to permit of its disposition by a judicial decision. The issues in South Africa concerning the entrenched clauses of the South Africa Act, 1909, at one time threatened to be too divisive for legal settlement. But where less vital social issues are concerned, a very surprising piece of judicial law-making concerning the very sources of law may be calmly “swallowed”. Where this is so, it will often in *retrospect* be said, and may genuinely appear, that there always was an “inherent” power in the courts to do what they have done. Yet this may be a pious fiction, if the only evidence for it is the success of what has been done.¹⁸⁶

Scenario Five. Building on the preceding scenario and recognizing a distinction between power and legitimacy, there is the possibility that

183. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1457 (2001).

184. Fleming, *supra* note 182, at 375 (citing H.L.A. Hart, *The Concept of Law* 144-50 (1961)).

185. H.L.A. Hart, *The Concept of Law* 149 (1961).

186. *Id.* at 149-50.

the Court may use its power to achieve a result that is illegitimate, one that is not, in some sense, in accord with the rule of law, precedents, or other authority. This is something that Rawls concedes is not at all inconceivable, at least with respect to the electorate or the legislative branch.¹⁸⁷ Rawls explains:

Now admittedly, in the long run a strong majority of the electorate can eventually make the constitution conform to its political will. This is simply a fact about political power as such. There is no way around this fact, not even by entrenchment clauses that try to fix permanently the basic democratic guarantees. No institutional procedure exists that cannot be abused or distorted to enact statutes violating basic constitutional democratic principles.¹⁸⁸

The same reasons, however, arguably apply to the Supreme Court with equal force, for there is no “institutional procedure” of the Court that cannot be abused, distorted, or simply ignored. The problem here, however, is more basic: *which* Court procedure or precedent is controlling or even relevant to answering the question whether the Court should or should not invalidate a procedurally correct and ratified amendment? The answer may simply be that the Court will decide how to decide.

Scenario Six. The Court may embrace Professor Dellinger’s view¹⁸⁹ that for the 1787 Framers, Article V embodied a domestication of the right to revolution, the right of the people to alter radically or even abolish a government they reject. The argument here would say that the conservative provision of the right of revolution should therefore be shielded from judicial review and invalidation. Case closed.

Scenario Seven. Finally, the Court may hold that an amendment repealing the First Amendment or the Equal Protection Clause violates fundamental human rights set forth in the Universal Declaration of Human Rights and various other human rights instruments to which the United States is a signatory. The Universal Declaration, for example, provides in Article I that “[a]ll human beings are born free and equal in dignity and rights . . . [and] are endowed with reason and conscience.”¹⁹⁰ Article VI provides that “[e]veryone has the right to recognition everywhere as a *person* before the law.”¹⁹¹ And Article VII states, in relevant part, that all are entitled to “equal protection of the law.”¹⁹² In light of these “global” human rights, the Court may hold the amendment invalid as

187. See Rawls, *Political Liberalism*, *supra* note 7, at 239 (noting that the exercise of political power may conceivably lead to repeal of the First Amendment).

188. *Id.* at 233.

189. See *supra* text accompanying notes 139-40.

190. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., art. 1, U.N. Doc. A/810 (1948).

191. *Id.* art. 6 (emphasis added).

192. *Id.* art. 7.

inconsistent with the universal and "higher" law of the United Nations.

V. RECONCILIATION: A CAUTIOUS EYE ON THE FUTURE

To reconcile Rawls's position on unconstitutional amendments with the unknown nature of the circumstances of the future, including the decisions and values of future Americans, it may be helpful to begin by recalling that Rawls's famous two principles of justice derive from a more general conception of justice that is captured in one single principle. Rawls describes that single principle as follows:

All social values—liberty and opportunity, income and wealth, and the social bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.¹⁹³

This general one-principle theory of justice does not divide the distributive system of justice into two parts, one dealing with the equal liberties (as Rawls's first principle does), and the other with social and economic inequalities (as part of Rawls's second principle does).¹⁹⁴ Although this more general one-principle theory would allow even the basic *liberties* to be distributed unequally, so long as an unequal distribution is to everyone's advantage, Rawls's two-principle theory clearly does not allow such a trade-off of liberty for greater social and economic advantages. His "difference principle" applies only to social and economic inequalities.

Now Rawls's claim that his conception of justice (embodied in his two principles of justice) is "a special case of a more general conception of justice"¹⁹⁵ (the one-principle conception) is significant for the following reasons. First, it suggests that his own theory has as its source a reasonable approach to justice, although not the one that he thinks best. Second, this more general theory, while incorporating a broader "difference principle" that applies even to the basic liberties, has an implicit element of utilitarianism, for it arguably stands for the proposition that as long as all citizens are advantaged by an unequal distribution of basic liberties, justice is satisfied. To be sure, Rawls offers powerful arguments why this is not the best solution to the design of just institutions.¹⁹⁶ Nevertheless, the two versions of utilitarianism (average and classical utilitarianism) are on Rawls's list of alternative conceptions of justice available to the parties in the original position.¹⁹⁷ Putting aside the Egoistic

193. Rawls, *A Theory of Justice*, *supra* note 4, § 11, at 54.

194. For a statement of the two principles, see *id.* at 53.

195. *Id.* at 54.

196. *Id.* § 26, at 130; *id.* § 29, at 153.

197. *Id.* § 21, at 107.

conceptions of justice,¹⁹⁸ each of the other alternative conceptions have merit, or as Rawls says, each “has its assets and liabilities.”¹⁹⁹ Thus, while utilitarianism may not be the best solution to the problem of choice in the original position, it is one reasonable choice that is available for consideration.

Now assume that there are circumstances under which the citizens of a constitutional democracy will be led to endorse a sacrifice of their liberties for the sake of advantages or necessities that would otherwise be unavailable. In support of this assumption, it should be noted that Rawls presented his theory of justice with the proviso that it presumes a certain level of material development has been reached as a precondition for its viability.²⁰⁰ Consistent with that presumption is the possibility that a society which has satisfied that precondition in the present may one day suffer a severe setback and no longer be able to maintain its justice system, including the equal liberties and other rights which had been successfully guaranteed in the past. From this it follows that if social and economic conditions should no longer be favorable to honoring the core constitutional freedoms that Rawls and others want to protect from repealing amendments, then the People arguably act reasonably in relinquishing those freedoms in the face of dire circumstances resulting from war, famine, natural disasters, or other unknown national and world conditions that may prevail in the future.

These considerations counsel two sets of distinctions, which are different ways of highlighting the ambiguity in dealing with the question of whether or not the Supreme Court should invalidate amendments to the Constitution that repeal core constitutional freedoms. First, we must distinguish between ideal and non-ideal theory, a distinction that Rawls himself makes at the outset of *Theory*.²⁰¹ Second, we should distinguish between a view *internal* to the Constitution and a view *external* to it. I take up these distinctions in turn.

A. *Ideal vs. Non-Ideal Theory*

One of the limitations that Rawls imposes on his theory of justice is the restriction that it is limited to what he calls “ideal theory” or

198. *Id.* at 108.

199. *Id.*

200. *Id.* § 82, at 475 (“The equal liberties can be denied only when it is necessary to change the quality of civilization so that in due course everyone can enjoy these freedoms.”). The text of the 1971 edition is slightly different. *See also id.* § 39, at 217.

[I]t may be necessary to forgo part of these freedoms when this is required to transform a less fortunate society into one in which all the basic liberties can be fully enjoyed. Under conditions that cannot be changed at present, there may be no way to institute the effective exercise of these freedoms . . .

Id.

201. *Id.* § 2, at 7-8.

“strict compliance theory” as opposed to “non-ideal” or “partial compliance” theory.²⁰² Within ideal theory “[e]veryone is presumed to act justly and to do his part in upholding just institutions,” whereas non-ideal theory “studies the principles that govern how we are to deal with injustice,” comprising “such topics as the theory of punishment, the doctrine of just war, and the justification of the various ways of opposing unjust regimes, ranging from civil disobedience and conscientious objection to militant resistance and revolution.”²⁰³ Rawls’s rationale for proceeding in this way recognizes that “the problems of partial compliance theory are the pressing and urgent matters” and that they “are the things we are faced with in everyday life.” But “[t]he reason for beginning with ideal theory is that it provides . . . the only basis for the systematic grasp of these more pressing problems.”²⁰⁴

So stated, non-ideal theory depends upon ideal theory: We cannot know how to deal with injustice and non-compliance until we have answered questions concerning the nature of justice. There is a presumption here that non-ideal theory, including the nature and extent of partial compliance, will not threaten the viability of ideal theory. One might say that for Rawls the prevalence of crime and the breath and nature of war will not be such as to cripple the capacity and motivation of citizens to abide by the principles of justice.

In other respects, however, ideal theory depends upon non-ideal theory, at least upon an expanded sense of what is included in non-ideal theory. Related to and incorporated into ideal theory and its practicality is an important idea built into the assumptions of the parties in the original position hypothesis. This idea concerns what Rawls designates the “circumstances of justice,” which refer to the “normal conditions under which human cooperation is both possible and necessary.”²⁰⁵ Among the objective circumstances Rawls emphasizes “moderate scarcity,” and among the subjective ones “limited altruism.” “Thus,

the circumstances of justice obtain whenever persons put forward conflicting claims to the division of social advantages under conditions of moderate scarcity. Unless these circumstances existed there would be no occasion for the virtue of justice, just as in the absence of threats of injury to life and limb there would be no occasion for physical courage.²⁰⁶

Now that is a very important statement about what makes justice possible. If circumstances were different, for example, if either extreme scarcity or extreme abundance were characteristic of our

202. *Id.* at 8.

203. *Id.*

204. *Id.*

205. *Id.* § 22, at 109.

206. *Id.* at 110.

world instead of moderate scarcity, and if altruism were limited almost to the vanishing point instead of being merely limited, then justice, as Hume said, “would be an idle ceremonial, and could never possibly have place in the catalogue of virtues.”²⁰⁷

Rawls’s understanding of ‘ideal theory’ is therefore partially founded on a particular set of objective circumstances of the world we now live in. But of course those circumstances are subject to change, even radical change, over the course of time. In light of present world conditions wherein war and great power confrontations have the potential for causing extraordinary violence and limitless destruction, it is at least conceivable, more so than at any previous time in world history, that the circumstances of justice could undergo a radical change for individual nation-states and for the entire world. Therefore, under some circumstances the equal liberties could be abridged, and with good reason, through constitutional amendments that would otherwise constitute a revolution or breakdown in our polity. Now this conclusion, as I have already noted, is derivable from Rawls’s theory itself.

The same point of view is reflected in *The Law of Peoples*,²⁰⁸ where Rawls distinguishes two kinds of non-ideal theory. One kind concerns the conditions of noncompliance. The second kind “deals with unfavorable conditions, that is, with the conditions of societies whose historical, social, and economic circumstances make their achieving a well-ordered regime . . . difficult if not impossible. These societies [Rawls] call[s] *burdened* . . .”²⁰⁹ Of course Rawls is here speaking of the present circumstances that burden some societies. But there is no reason why a society, such as ours in the United States, or some other functioning constitutional democracy that is presently unburdened, may not become burdened in the near or distant future. Whatever the cause or causes of the future burden may be—natural, social, economic, religious, theological, or some combination thereof—the equal liberties may be restricted or denied by suitable amendments.

B. *Views Internal and External to the Constitution*

In his argument against constitutional amendments that repeal core constitutional freedoms, Rawls adopts a view of the Constitution largely from within the four corners of the document.²¹⁰ His focus is on the historical Constitution and the one that we know in terms of the body of constitutional law that has been elaborated over the course of our history. With all that as a background, Rawls takes the

207. David Hume, *An Enquiry Concerning the Principles of Morals*, in 2 *Essays Moral, Political, and Literary* 180 (T.H. Green & T.H. Grose eds., 1898).

208. See *supra* note 11 and accompanying text.

209. Rawls, *The Law of Peoples*, *supra* note 11, at 90 (footnote omitted).

210. Those authors who defend substantive limits to constitutional amendments are similar to Rawls in this respect. See *supra* Part II.C.

Constitution and its core values as given and does not consider views of the Constitution that might be generated by radically changed circumstances external to it. Given his claims about “constitutional essentials” in *Political Liberalism*,²¹¹ Rawls views liberty of conscience, the right to vote, freedom of thought and association, and other liberties as among the most important core freedoms. But in light of the argument in the preceding subsection, Rawls clearly believes that the constitutional essentials are made possible (when they are) by a background of circumstances that his theory takes for granted. Given the constancy of those background circumstances of justice, a constitutional amendment repealing core constitutional freedoms would certainly seem to constitute a “breakdown” or “revolution” from the *internal* perspective. Indeed, what else could we call it? Unless the *external* perspective provides new reasons for radical change—for a justified departure from our traditions and practices—then radical changes that repeal those traditions, practices, and values are irrational, even unthinkable. The internal perspective is therefore Rawls’s presupposition in his opposition to repeal of core constitutional freedoms. Without radical change in circumstances, a sudden repeal of those freedoms might lead us reasonably to agree with Rawls’s view that the Supreme Court should declare such repealing amendments invalid.

However, whenever Rawls concedes that limitations on liberty may be justified, he tends to contemplate a day when those limits may no longer be necessary, as when he says in *Theory* that “[t]he denial of the equal liberties can be defended only when it is essential to change the conditions of civilization so that in due course these liberties can be enjoyed.”²¹² In this sense, Rawls is thinking both within the mode of the external perspective (outside the Constitution) and within the realm of ideal theory and the fundamental law. In other words, he is looking from the unfavorable present toward a better day in the future when circumstances will eventually allow all the liberties of ideal theory to be exercised.

The fact that the Constitution has endured for over two centuries, with only twenty-seven amendments to the original document, should strike us as an amazing achievement. Those who wrote the Constitution may have hoped it would endure for centuries and continue to apply to changing circumstance with flexibility without compromise of its core values.²¹³ Of course, they could see into the

211. Rawls, *Political Liberalism*, *supra* note 7, at 227-30.

212. Rawls, *A Theory of Justice*, *supra* note 4, at 132.

213. Jefferson, however, thought that the Constitution was valid only for one generation at a time; that “[e]very constitution . . . and every law, naturally expires at the end of 19 years.” Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 Thomas Jefferson, *The Papers of Thomas Jefferson* 392 (Julian Boyd ed., 1958), cited in Rubinfeld, *supra* note 133, at 21.

future no further than we can today. Yet they made provisions for change in Article V. Apart from two exceptions—allowing the slave trade to continue until 1808 and equal representation of the States in the Senate—Article V, by its terms, left open the possibility of any change or amendment. No argument for substantive limits can ignore the plain meaning of Article V's permissive language.²¹⁴ Of course, any number of good arguments can be and have been advanced for why we should continue to maintain the core constitutional principles and values we have enjoyed for most of our constitutional history. This is especially true when there are no external factors threatening the continued exercise of those freedoms. But as Dellinger said, "arguments about the political wisdom of proposed amendments are only arguments; they can never be translated into judicial rules of positive law that confine the ultimate discretion of the proposing Congress and the ratifying legislatures."²¹⁵

The idea of "constitutional faith" may apply here in some relevant sense.²¹⁶ Just as the authors of our Constitution may be said to have expressed faith in the practical, good sense of future generations of Americans by not tying them to the convictions of the eighteenth century, so too we should have faith and trust in our descendants to deal responsibly with the presently unknown values and circumstances that will characterize the future.

CONCLUSION

From diverse perspectives, Rawls's opposition to constitutional amendments that repeal core constitutional freedoms is cogent. His critique of comprehensive doctrines and his defense of a political conception of justice offer powerful reasons to oppose repeal of the First Amendment and the establishment of a religion in its place. Such a repeal by means of a valid constitutional amendment would also be in violation of core human rights and deny the basis of equality that Rawls saw as the foundation of the equal liberties. As long as the conditions that make the exercise of the equal liberties remain feasible, Rawls's position makes eminent sense and deserves our support. But his conclusion that the Supreme Court must declare amendments that repeal core freedoms invalid is open to considerable doubt. Rawls's position becomes even more doubtful, however, when we put aside his ideal and normative theory and recall that his theory of justice is partially founded on the assumption of circumstances of justice that are favorable to the exercise of the equal liberties. A severe change or interruption in those otherwise prevailing

214. See Dow, *supra* note 69, at 117.

215. Dellinger, *supra* note 141, at 448.

216. See generally Sanford Levinson, *Constitutional Faith* (1988). I make no claim to be using the phrase "constitutional faith" compatibly with Levinson's intentions.

circumstances may well justify a suspension of the equal liberties, something Rawls provided for, as we have seen. In general, our inability to know, understand, and predict the circumstances of the future should lead us to respect our descendants, just as the authors of our Constitution appeared to respect us in setting forth the amendment provisions in Article V. As one defender of substantive limits to constitutional amendment conceded, even the fullest commitment to reason "allows only a provisional commitment to constitutional democracy because we must be open to rational persuasion about the moral necessity, or at least desirability, of systemic transformation of the polity."²¹⁷ It is tempting to think that "constitutional democracy would [thus] allow a transformation to another system that would *enlarge* reason's empire or *strengthen* its reign."²¹⁸ But we cannot even be sure of that, lacking the ability to identify, and the wisdom to know, the endless ways reason may be enlarged or strengthened.

217. Murphy, *supra* note 67, at 189 (commenting on a view stated by Sotirios A. Barber, *supra* note 114).

218. *Id.* (emphasis added).