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SANDEL ON RELIGION IN THE PUBLIC SQUARE

HUGH BAXTER*

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INTRODUCTION

In the final chapter of *Justice*, Sandel calls for a “new politics of the common good,”¹ which he presents as an alternative to John Rawls’s idea of public reason. Sandel calls “misguided” Rawls’s search for “principles of justice that are neutral among competing conceptions of the good life.”² According to Sandel, “[i]t is not always possible to define our rights and duties without taking up substantive moral questions; and even when it’s possible it may not be desirable.”³ In taking up these moral questions, Sandel writes, we must allow specifically religious convictions and reasons into the sphere of public political debate.

With these arguments, Sandel joins a debate prompted in significant part by Rawls’s 1993 work, *Political Liberalism*. In this paper I first criticize Sandel’s characterization of Rawls’s views, then suggest two more particular questions about the role of religion that Sandel’s “new politics” needs to address.

I. RAWLS AND THE LIMITS OF PUBLIC REASON

The central premise of Rawls’s political liberalism is what he calls “reasonable pluralism” – that free societies are necessarily divided by “reasonable but incompatible comprehensive doctrines.”⁴ By “comprehensive” doctrines, Rawls means those that “include conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole.”⁵

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¹ MICHAEL J. SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* 263 (2009).

² *Id.* at 220.

³ *Id.*

⁴ JOHN RAWLS, *POLITICAL LIBERALISM*, at xvii (expanded ed. 2005).

⁵ *Id.* at 13.

Religious conceptions are not the only examples of comprehensive doctrines, but they are particularly clear ones.⁶

Rawls responds to reasonable pluralism by seeking what he calls a “freestanding” political conception: that is, a conception of justice that doesn’t depend upon any particular comprehensive doctrine.⁷ In Rawls’s metaphor, this freestanding political conception can fit like a “module” into the comprehensive doctrine of each citizen.⁸ In this way, Rawls argues, we can perhaps attain an “overlapping consensus” over a political conception of justice despite enduring and reasonable disagreement over comprehensive views.⁹

In *Political Liberalism*, Rawls introduced the idea of “public reason” as a society’s rules for organizing and regulating its public political debate.¹⁰ He emphasized the constraints that public reason places on the kinds of arguments that may be offered in public debate.¹¹ With regard to “constitutional essentials” and “matters of basic justice,”¹² Rawls maintained in *Political Liberalism* that “political values alone” are to be invoked – that is, values from a freestanding political conception and not a comprehensive doctrine.¹³ These “limits of public reason” apply to “citizens when they engage in political advocacy in the public forum,” or to citizens when they vote on fundamental matters.¹⁴ They apply, further, to candidates, to “political parties,” and to any

⁶ See, e.g., *id.* at 205, 224-25, 311. As specific examples of non-religious comprehensive doctrines, Rawls mentions utilitarianism and the “reasonable liberalism[] of Kant.” *Id.* at 37; see also *id.* at 13, 135, 170-71.

⁷ *Id.* at xxx, 10, 12, 144.

⁸ E.g., *id.* at 12.

⁹ For Rawls’s account of an “overlapping consensus,” see *id.* at 133-72.

¹⁰ *Id.* at 213 (“Public reason is characteristic of a democratic people: it is the reason of its citizens, of those sharing the status of equal citizenship.”).

¹¹ See *id.* at 213-22. Public reason also has a positive side. Rawls refers, for example, to the facilitative “guidelines and rules” of “public inquiry.” *Id.* at 162.

¹² Rawls defines these as (1) principles specifying “the general structure of government and the political process,” including the various legislative, executive, and judicial powers, together with “the scope of majority rule”; and (2) “equal basic rights and liberties of citizenship,” e.g., “the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law.” *Id.* at 227. From these Rawls distinguishes other “political questions” – which may be “most” political questions – e.g., “much [of] tax legislation and many laws regulating property,” environmental protection laws, and provisions for “museums and the arts.” *Id.* at 214; see also *id.* at 244-45 (mentioning problems, arguably fundamental, that he has not addressed: duties to future generations, international law questions, health care, protection of animals and nature).

¹³ *Id.* at 214. In non-fundamental matters, the limits of public reason do not necessarily apply. See, e.g., *id.* at 244-46.

¹⁴ *Id.* at 215.

“other groups who support” candidates.¹⁵ Of course the limits of public reason apply also to officials in their conduct of public business.

That was the conception Rawls presented in the original 1993 edition of *Political Liberalism*. And that is the conception Sandel now attributes to Rawls. As Sandel presents Rawls’s views: “In debating justice and rights, we should set aside our personal moral and religious convictions and argue from the standpoint of a ‘political conception of the person,’ independent of any particular loyalties, attachments, or conception of the good life.”¹⁶ And further: “Not only may government not endorse a particular conception of the good; citizens may not even introduce their moral and religious convictions into public debate about justice and rights.”¹⁷

The main problem with Sandel’s characterization is that four years after *Political Liberalism*, Rawls changed his account of public reason, amending it to make public political discussion much more open to comprehensive doctrines, including specifically religious reasons.¹⁸ In his 1997 essay, *The Idea of Public Reason Revisited*,¹⁹ reprinted in the later editions of *Political Liberalism*, Rawls introduced his famous “proviso”:

[R]easonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, provided that in due course proper political reasons – and not reasons given solely by comprehensive doctrines – are presented that are sufficient to support whatever the comprehensive doctrines are said to support.²⁰

One might well think this proviso insufficiently inclusive of religious reasons and religious citizens. But even so, a characterization of Rawls’s views on public reason should acknowledge the proviso and the shift it marks from Rawls’s earlier views in *Political Liberalism*. I think that is true even of a book, like Sandel’s *Justice*, that addresses a wider, generally educated audience and not just Rawls specialists. The differences between Rawls’s and Sandel’s views, while significant, are less than Sandel’s presentation would suggest.

Sandel is of course aware of Rawls’s proviso; indeed his ongoing conversations with Rawls between the original publication of *Political Liberalism* and *The Idea of Public Reason Revisited* likely were one important

¹⁵ *Id.* They do not apply either to personal deliberation about politics or to political discussion within voluntary associations.

¹⁶ SANDEL, *supra* note 1, at 248.

¹⁷ *Id.*

¹⁸ Sandel’s characterization also omits important details of Rawls’s views in *Political Liberalism*. See RAWLS, *supra* note 4, at 247-52 (describing circumstances in which comprehensive views might be introduced as a sort of repair work in a society that is sharply divided).

¹⁹ John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

²⁰ RAWLS, *supra* note 4, at 462.

reason Rawls modified his views.²¹ My point is simply that the reader of Sandel's book should be apprised of Rawls's final position on the subject.

II. OPEN QUESTIONS CONCERNING THE "POLITICS OF THE COMMON GOOD"

Sandel acknowledges that his idea of a new "kind of political discourse" is not yet "fully worked out."²² I want to suggest a few questions he should address about the inclusion of religious reasons in that political discourse.

One question is whether public officials should be subject to obligations more stringent than those that apply to private citizens. Sandel doesn't reject this position definitively, but he doesn't endorse it either. As the exemplar of the liberal neutrality he criticizes, Sandel selects President Kennedy's 1960 speech that declared his Catholic faith a purely private matter. That faith, Kennedy assured the public, "would have no bearing on his public responsibilities."²³ Kennedy's speech, Sandel writes critically, "reflected a public philosophy," exemplified in Rawls's 1971 *Theory of Justice*, "that government should be neutral on moral and religious questions" so as to allow each individual the freedom to choose "his or her own conception of the good life."²⁴ Although Sandel also acknowledges what he calls a "legitimate worry" about an "entanglement" of politics in "moral and religious disputes," he doesn't clearly indicate a difference between public officials' obligations and those of ordinary citizens with respect to religion's role in politics.²⁵

As Sandel of course knows, the First Amendment of the United States Constitution, with its prohibition on "an establishment of religion," limits the degree and kind of "entanglement" between politics and religion.²⁶ I don't read Sandel's sketch of his morally committed politics, with his praise for

²¹ See, e.g., Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1776-94 (1994) (book review) (discussing Rawls's proviso).

²² SANDEL, *supra* note 1, at 261.

²³ *Id.* at 244.

²⁴ *Id.* at 246.

²⁵ *Id.*

²⁶ Sandel's use of the word "entanglement" may be a reference to the *Lemon* test, which the Supreme Court often has applied (or at least invoked) in Establishment Clause cases. Under the original formulation of the test, a challenged governmental action will be invalidated unless it satisfies each of the following criteria: (1) it must have a secular purpose; (2) its "primary effect" must neither advance nor inhibit religion; and (3) it must not create an "excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The Court's decision in *Agostini v. Felton* revised the test, treating entanglement not as a separate inquiry but as one of three factors to be considered in determining unconstitutional effect. *Agostini v. Felton*, 521 U.S. 203, 232 (1997). Although *Lemon* hasn't formally been overruled, in recent years the Court often has employed instead the "endorsement" test, abandoning reference to forbidden "entanglement." See *id.* at 235.

then-candidate Obama's invocation of religion, to threaten action inconsistent with the Constitution.²⁷

But aside from the question whether Sandel's proposals violate the Constitution as judicially interpreted and enforced, one might ask also whether he shouldn't acknowledge an obligation of officials, and perhaps candidates as well, to speak in a secular language when they seek to justify their policy proposals or carry out governmental decisions. The great German philosopher Jürgen Habermas makes just this claim, even as he rejects as too restrictive Rawls's rules (proviso included) for ordinary citizens in public debate. Habermas writes that the liberal state must expect citizens "to recognize the principle that exercise of political authority must be neutral toward competing worldviews. Every citizen must know and accept that only secular reasons count beyond the institutional threshold separating the informal public sphere from parliaments, courts, ministries, and administrations."²⁸

As formulated, Habermas's "institutional translation proviso," as he calls it, distinguishes between religious and secular comprehensive views: only religious reasons must be screened out in the sphere of policy formulation and decision. While Habermas has left some questions unanswered – for example, whether his proviso would require exclusively secular reasons of candidates as well as of officials – the line he draws for officials seems to me appropriate for a pluralist democratic society. Sandel doesn't endorse such a principle, but as I read his text he has left the matter open.

Habermas's institutional translation proviso would seem attractive to Sandel in its application to ordinary citizens. Habermas notes the asymmetry of the burden that Rawls's proviso imposes: "[Rawls's] translation proviso for religious reasons and the institutional precedence of secular over religious reasons demand that religious citizens make an effort to learn and adapt that

²⁷ Sandel praises then-candidate Obama for understanding and speaking to "the moral and spiritual yearning" in America. Obama is right, Sandel says, to counsel progressives not to "abandon the field of religious discourse." SANDEL, *supra* note 1, at 250 (quoting Barack Obama, Keynote Address at Call to Renewal Conference (June 28, 2006) [hereinafter Obama, Call to Renewal], available at <http://www.nytimes.com/2006/06/28/us/politics/2006obamaspeech.html>). Sandel further cites approvingly Obama's 2006 criticism of a 2004 campaign remark about the role of religion in politics; in 2004 he had maintained that because he was running to be senator and not minister, he shouldn't impose his own religious views. SANDEL, *supra* note 1, at 245 (citing *supra*, Obama, Call to Renewal). Two years later, Obama called his previous remark "the typically liberal response" and said that progressives should not "forfeit the imagery and terminology through which millions of Americans understand both their personal morality and social justice." *Id.* Obama went on to note that great American reformers of the past "were not only motivated by faith, but repeatedly used religious language to argue for their cause." *Id.* at 246 (quoting *supra*, Obama, Call to Renewal).

²⁸ JÜRGEN HABERMAS, *Religion in the Public Sphere: Cognitive Presuppositions for the "Public Use of Reason" by Religious and Secular Citizens*, in BETWEEN NATURALISM AND RELIGION: PHILOSOPHICAL ESSAYS 114, 130 (Ciaran Cronin trans., 2008).

secular citizens are spared.”²⁹ Habermas would make the burdens on citizens more equal. He rejects, as inconsistent with democratic citizenship in contemporary liberal societies, a “laicist” attitude that would see “religious traditions and religious communities” as “archaic relics of premodern societies persisting into the present.”³⁰ Instead, Habermas claims that non-religious persons, in their capacity as participants in political discussion, must acknowledge that there may be “cognitive substance” in religious claims³¹ and that religious positions may be susceptible of truth.³² While the institutional translation proviso holds that only secular reasons may count in the governmental sphere of parliaments, courts, and administrations, Habermas argues that secular citizens must “participate in efforts to translate relevant contributions from the religious language into a publicly accessible language.”³³ This obligation to cooperate in translation seems compatible with Sandel’s suggestion that citizens have an obligation to “attend to [their fellows’ moral and religious convictions] more directly – sometimes by challenging and contesting them, sometimes by listening to and learning from them.”³⁴

Perhaps less congenial to Sandel, but an alternative and in my view attractive way to conceive of the relation between secular and religious citizens, is the “accountability proviso” suggested by Cristina Lafont.³⁵ She would ease the burden Rawls imposes on religious citizens, requiring neither that they frame their contributions to public political discourse in secular terms nor that they offer secular translations.³⁶ But she criticizes Habermas’s requirement that secular citizens, in their capacity as participants in public

²⁹ *Id.* at 136.

³⁰ *Id.* at 138-39. Habermas suggests that this unequal burden violates the neutrality principle of the liberal state. This claim doesn’t seem obvious to me. Habermas elsewhere invokes Rawls’s distinction between neutrality of aim and the impossible neutrality of effect. See HABERMAS, *Equal Treatment of Cultures and the Limits of Postmodern Liberalism*, in BETWEEN NATURALISM AND RELIGION: PHILOSOPHICAL ESSAYS, *supra* note 28, at 271, 282-83. Habermas needs to argue that the unequal burden on religious citizens is non-neutral in aim, not just in effect.

³¹ HABERMAS, *Religion in the Public Sphere*, *supra* note 28, at 139 (“[T]he admission of religious assertions into the political arena only makes sense if *all* citizens can be reasonably expected not to exclude the possibility that these contributions may have cognitive substance – while at the same time respecting the priority of secular reasons and the institutional translation proviso.”); *see also id.* at 142.

³² *Id.* at 131.

³³ HABERMAS, *Equal Treatment of Cultures and the Limits of Postmodern Liberalism*, *supra* note 30, at 310; *see also* HABERMAS, *Religion in the Public Sphere*, *supra* note 28, at 131-32.

³⁴ SANDEL, *supra* note 1, at 268.

³⁵ Cristina Lafont, *Religion and the Public Sphere: What Are the Deliberative Obligations of Democratic Citizenship?*, 35 PHIL. & SOC. CRITICISM 127, 132 (2009).

³⁶ *Id.* at 129-32 (offering her “more attractive” theory of mutual accountability in contrast to Rawls’s proviso).

political discussion, acknowledge the possible truth of religious beliefs.³⁷ Religious and secular citizens, Lafont argues, should be free to take any “cognitive stance” that they choose.³⁸ But in accordance with the “priority of public reasons in determining coercive policies,” she maintains, all citizens have the obligation to answer objections framed in public reasons with replies framed in public reasons.³⁹ As Lafont puts her accountability proviso:

Whenever citizens manage to cast their objections to a proposed policy in terms of reasons generally acceptable to democratic citizens (i.e. reasons based on basic democratic principles of freedom and equality, etc.), other citizens have the obligation to address and to defeat them with compelling reasons before such a coercive policy can be legitimately enforced.⁴⁰

What I am trying to suggest with this discussion of Habermas’s and Lafont’s revisions of the Rawlsian proviso is that there are a variety of positions consistent with Sandel’s general descriptions of the “politics of the common good.” Habermas, Lafont, and even Rawls believe that religious citizens may present religious arguments in the first instance, even as to fundamental political matters (“constitutional essentials and matters of basic justice,” in Rawls’s formulation). The interesting differences concern the further obligations placed on either religious or secular citizens. Sandel’s general “politics of the common good” might develop with attention to these recently presented alternatives – whether critical or favorable – as well as to the question whether public officials or candidates face more stringent restrictions on religious convictions than do ordinary citizens.

³⁷ See *id.* at 150.

³⁸ *Id.* at 141.

³⁹ *Id.* at 141-42.

⁴⁰ *Id.* at 142. Lafont makes clear that the reasons offered in reply must be “reasons generally acceptable to all democratic citizens,” that is, Rawlsian public reasons. *Id.* at 143.