John Rawls's theory of public reason is clearly reflected in the opinions and logic of the United States Supreme Court, especially when arbitrating the clash between church and state in Rehnquist-era First Amendment cases. This article's impressive command of Rawls's theory lays the groundwork for closely-argued readings of the Rehnquist Court's decisions.

Rawls's Theory of Public Reason in First Amendment Cases of the Rehnquist Court

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In *Political Liberalism*, John Rawls addresses the problem of the many different religious, moral, and philosophical belief systems present in our democracy. He asks, "How is it possible for those affirming a comprehensive doctrine, religious or nonreligious, and in particular doctrines based on religious authority, such as the Church or the Bible, also to hold a reasonable political conception of justice that supports a constitutional democratic society?"[2] Rawls introduces the idea of public reason as an answer to this critical question. Although he sketches an incomplete picture of the practical application of public reason, it may nevertheless be applied to our society because Rawls claims to have extracted his theory from our democratic regime.[3]

In the United States, the tension between these individual belief systems and the political idea of justice surfaces when the Supreme Court considers constitutional questions regarding appropriate church-state relationships, namely, First Amendment Establishment and Free Exercise questions. It is my endeavor to explore this practical application of Rawls's theory. I agree with Rawls that the epitome of public reason is found in the judicial branch.[4] Thus, there is no public reason higher than the Supreme

Court. Because of this, I will examine how the High Court under Rehnquist has reflected Rawlsian-style public reason.[5]

I offer a case study of three particular opinions that address the church-state tension. In each instance, the Rehnquist court offers Rawlsian kinds of public reason as justification for their rulings, which link answers to constitutional questions with the Constitution itself.[6] Cases I have chosen to include in my analysis include *Lee v. Weisman* (1992), *Rosenberger v. University of Virginia* (1995), and *Locke v. Davey* (2004). First, however, I will lay the groundwork for the kinds of public reason given by the Court by offering an overview of political liberalism and its purpose, explaining how a political conception is formed, describing the role of constitutionalism in connection with the political conception, and finally, explaining the role of public reason by connecting its importance to the Supreme Court with the U.S. political conception.

Political Liberalism and the Conception of Justice

Political liberalism, according to Rawls, is the overall political system in which many belief systems flourish. The task of political liberalism is to establish some standard for political justice in light of these vastly differing "comprehensive doctrines" related to justice and the Good. This is accomplished by upholding certain unchangeable principles of justice. These principles are formed by an overlapping consensus—a middle ground of commonly held political values—between different comprehensive doctrines. A constitution arises in this middle ground, providing a framework for disputes to be solved based upon these commonly held principles of justice.[7] Within political liberalism, Rawls envisions that the framework for justice should find a "reasonable public basis of justification on such questions."[8] Political liberalism meets its objective when law is executed in such a way that citizens consider its application legitimate.

Political liberalism looks to establish a "political conception of justice as a freestanding view. It offers no specific metaphysical or epistemological doctrine beyond what is implied by the political conception itself."[9] On this limited political conception of justice, constitutionalism, public reason, and interpretation of the

Supreme Court stand. Rather than offering an exclusive grand theory of how life and the state *ought* to function given their respective ends, a political conception of justice tries to implement justice as a process, given the many reasonable but incompatible belief systems it represents. Essentially, the political conception is a "guiding framework of deliberation and reflection which helps us reach political agreement on at least the constitutional essentials and the basic questions of justice," and its purpose is to narrow "the gap between the conscientious convictions of those who accept the basic ideas of a constitutional regime."[10]

The basic virtues which comprise the political conception are the same underlying virtues that later form constitutions. Rawls lists tolerance, willingness to compromise, reasonableness, and fairness as a few of these virtues. It is essential for these fundamental virtues to pervade society so that constitutionalism may be formed. These virtues form a type of "political capital" and a high public good.[11] Although he does not state every value of our own society's political conception, Rawls points to the Constitution and its Preamble as the primary framework of the political conception, thereby reflecting the most basic, underlying values of the political conception. Thus, to evaluate the political conception, we must consider constitutions and their application to cases through public reason.[12]

Constitutionalism

Constitutionalism is an essential component of democratic regimes, and by it public reasons are offered to answer political questions of justice. Constitutionalism codifies the rudimentary political conception, and leads to a more refined political conception. Rawls acknowledges that "to find a complete political conception we need to identify a class of fundamental questions for which the conception's political values yield reasonable answers."[13] This structure is found in constitutional essentials that meet the following two criteria: fundamental principles for the general structure of government and the political process, and equal basic rights and liberties of citizenship.[14]

Essentially, constitutions of a democratic society play one of two roles. The first is a structural or procedural role, or the

political process. Rawls also maintains it is highly important for these procedures to remain consistent throughout society and history, changing only for a great benefit of justice and the political good. The second role is a substantive role that includes equal basic rights and liberties. These entail ideals such as liberty of conscience, freedom of association, political rights of freedom of speech and religion, voting, and running for office. Upon the foundations of these rights the Supreme Court uses public reason to answer questions of political justice to interpret the Constitution. Rawls concludes that while there is strong agreement among citizens as to constitutional essentials and political procedures of justice, public reason will maintain political and social cooperation throughout society.[15]

Public Reason

Rawls explains public reason as the sorts of arguments offered in the political arena that are considered at least reasonable by citizens from many comprehensive doctrines. Most importantly, public reason is the only valid mechanism of the court in deciding constitutional questions. He states: "the court's role is not merely defensive but to give due and continuing effect to public reason by serving as its institutional exemplar. This means that, first, public reason is the sole reason the court exercises" and that the court has "no other values than the political."[16] In fact, Rawls uses the Supreme Court as a litmus test for valid public reason: if our argument would sound reasonable rather than outrageous in the form of a Supreme Court opinion, then it is likely a valid public reason.[17] (Public reasons, by extension, are specific instances of decisions which meet this standard of acceptance across many comprehensive doctrines.)

It is absolutely essential that public reason be composed of a liberal political conception that includes "besides its principles of justice, guidelines of inquiry that specify ways of reasoning and criteria for the kinds of information relevant for political questions."[18] Here, Rawls refers not to the most basic values that form the initial political conception, but only to the various political values later admissible within it, or those of public reason. Practically speaking, questions of public reason are not the sort of grand

questions about the legitimacy of the Constitution itself, but rather of whether laws or actions conform to the pre-established Constitution and the political conception.

Rawls provides guidelines for justices or judges in interpreting the political conception to answer constitutional questions. He relates that the best constitutional interpretation will both examine the specific constitutional question and appeal to the values inherent in the political conception. Obviously, justices may not appeal to their own moral traditions and comprehensive doctrines (or anyone else's) as this would blatantly violate the very point of political liberalism. Rather, they appeal to the political conception as "values that they believe in good faith, as the duty of civility requires, that all citizens as reasonable and rational might reasonably be expected to endorse."[19]

Rawls lists five aspects of public reason as guidelines for justices to follow when formulating public reasons and interpreting the constitution. Justices must consider:

1) the fundamental *political* questions involved in the specific constitutional question;
2) the persons to whom the question applies (government officials and candidates for public office);
3) the broader context of the specific constitutional question situated within the values of the political conception as a whole;
4) the practical application of their interpretation of the values of the political conceptions upon the law; and
5) whether citizens would agree upon the Court's interpretation of principles based upon the citizens' understanding of the values of the political conception.[20]

By these guidelines, constitutional questions may be evaluated.

These aspects of public reason are particularly easy to identify in Supreme Court opinions, although there may be controversy at any one of these five levels (and especially at the fourth and fifth levels). Specifically, Supreme Court cases questioning the balance of religious freedom and government influence test the usefulness of public reason. In American Constitutional law, conflicts between the political conception and the comprehensive

doctrines that form it rely upon interpretation of the first two clauses of the First Amendment, which state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…"[21] These two clauses are referred to as the Establishment Clause and the Free Exercise Clause, respectively. It is primarily the interpretation of these two clauses by means of public reason with which the following cases are concerned.

Lee v. Weisman, 1992

Circumstances and Conflict

In a highly controversial case reflecting the public clash of several comprehensive doctrines, the Court relied heavily upon precedent statutes and tests to rule against clergy-led prayers at middle school and high school graduations in a 5:4 decision. Understanding the background is vital to the understanding of the Court's reasoning.

Traditionally, school principals within the Providence, Rhode Island, public school system invited clergy members of various faith traditions to offer an invocation and benediction as a part of middle school and high school graduation ceremonies. As a part of this process, school officials normally provided invited clergy with a pamphlet, "Guidelines for Civic Occasions," assembled by the National Conference of Christians and Jews, to guide their formation of nonsectarian prayers. These were to be composed with "inclusiveness and sensitivity" to avoid alienating or offending attendees.[22]

In June of 1989, petitioner Deborah Weisman was to graduate from Nathan Bishop Middle School, which is a part of the Providence, Rhode Island, public school district. Deborah's father Daniel Weisman objected to the traditional graduation prayers. Despite this opposition, school principal Robert E. Lee still invited Rabbi Leslie Gutterman of the Temple Beth El in Providence to offer prayers at the commencement exercises. Rabbi Gutterman accepted the invitation and offered the following benediction:

> O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement. Happy families give

> thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them. The graduates now need strength and guidance for the future; help them understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: to do justly, to love mercy, to walk humbly. We give thanks to You, Lord, for keeping us alive, sustaining us, and allowing us to reach this special, happy occasion. AMEN.[23]

Deborah and her family attended the ceremony and were present for the prayers. In July, Daniel Weisman filed a complaint on behalf of his daughter pursuing a permanent injunction against petitioners and various Providence public school officials from extending clergy invitations to offer graduation prayers. By the time of the Supreme Court ruling, Deborah was enrolled as a student at Classical High School, another public school in Providence, whose graduation ceremony would likely include the offering of prayers as well.[24]

In response to the action, the school board argued that participation in the graduation ceremony is optional, and students may choose to express dissent either by choosing to not actively participate in the prayer or by opting out of the ceremony altogether. Since the students are offered a choice, no coercion is involved, and the Establishment Clause is upheld.

Opinion and Analysis

In writing for the majority, Justice Kennedy rejected the "choice" argument of the dissent. Instead, the Court reaffirmed the *Lemon* test, a series of criteria used to decide if an action establishes religion, and favored a "strict neutrality" interpretation of the Establishment clause which "requires not merely a secular purpose for legislation but bars all laws that either aid or hinder religion."[25] Further, the Court drew out values of the political conception, particularly when considering the coercion argument, to argue for a broad interpretation of the Establishment Clause. In doing so, the Court offered public

reasons for their method of interpretation that are consistent with the ideals of political liberalism.

Prior to the ruling, the Bush administration had submitted a brief to the Court petitioning to abandon the precedent of the *Lemon* test, requesting that the Court "jettison the framework erected by *Lemon* in circumstances where, as here, the practice under assault is a non-coercive, ceremonial acknowledgement of the heritage of a deeply religious people."[26] However, the Court rejected this appeal to reconsider *Lemon* and instead used it as an instrument of public reason to interpret the First Amendment. They note that "government involvement with religious activity [at the graduation ceremony] in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."[27]

With a view to public reason, the Court recognized that assuming the "deeply religious" nature of the nation assumes a particular kind of comprehensive doctrine—a purely religious one. Since the political conception is not comprised of solely religious comprehensive doctrines, the Bush petition failed on these grounds. In the words of the Court, "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."[28] Thus, the Court appealed to an inherent political value of fairness: there should be a balance between both the Free Exercise and Establishment Clauses, and one should not be favored above another. By rejecting the claim of their own personal morality and religious ideals or those of another, the Court members sought neutrality in their decision.[29]

In similar fashion, the Court not only argued that clergy-led prayers infuse religion into the political sector, but also offered the reason that advising the clergy how to structure non-sectarian prayers infuses the state into religion. They claimed "that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."[30] The Court concluded that the preservation and transmission of religious beliefs and practices should be delegated to the private sphere where practitioners are guaranteed state protection of their freedom.[31] By forcing the prayers to conform to a particular civil standard, the state subjected

the comprehensive doctrine to the overlapping consensus such that it actually changed the expression of the comprehensive doctrine. Imposing civil standards on a particular religion violates the order of the political conception. Thus, the Court used public reasons to provide an interpretation of the Constitution that fits well with the constitution and justifies it with the political conception in accordance with Rawls's idea of political liberalism.[32] From this reasoning, the Court declared that the non-establishment principle is violated on both religious and political ends.

Additionally, the Court argued on the assumption of basic political values of freedom of conscience, freedom of expression, and equal application of the law to all citizens, all of which Rawls refers to as basic values implicit in democratic society and in the First and Fourteenth Amendments of our Constitution.[33] From these assumptions, the Court placed a high premium on the right to protest, so the Court examined the actual circumstances and methods by which Deborah could offer her dissent, if indeed such means existed. The Court concluded, however, that "the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction."[34]

Adding to this, to respectfully refrain from the prayer would require respectful silence, but such would be the very manner of observing the prayer. Respectfully objecting to the prayer alone would be logistically impossible, aside from creating a public disturbance, which the Court did not consider to be a reasonable alternative. Furthermore, the Court examined the suggestion that dissent may be expressed by opting out of the ceremonies altogether. They argued that the public culture dictates high school graduation to be one the most momentous occasions of a person's life. It would be highly unreasonable to expect a student to opt out of graduation entirely. Law, they argued, reaches beyond formalism, and claiming that a teenager has a realistic choice not to attend graduation "is formalism in the extreme."[35]

Finally, the Court operated from these assumptions and constitutional principles of the political conception to argue that students are subtly coerced by the religious tradition as adolescents

who are easily susceptible to peer pressure in matters of social convention. Since graduation is essentially a compulsory event, to say that participation is voluntary "is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high."[36] Thus, the Court gave deference to social science data distinguishing between the mental and emotional capacities of adolescents and adults. This consideration of scientific data into the Court's perception of coercion is consistent with Rawls's public reason. Specifically, the "values of public reason not only include the appropriate use of the fundamental concepts of judgment . . . but also the virtues of reasonableness and fair-mindedness as shown in . . . accepting the methods and conclusions of science when not controversial."[37]

Ultimately, the Court used the "political conception of justice [to cover] the fundamental questions addressed by the highest law and [to set] out the political values in terms of which they can be decided."[38] Given these assumptions and public reasons offered from the political conception, the Court established that, in its view, the only reasonable alternative would not be to expect students to forego graduation but to declare clergy-led prayers at graduation ceremonies unconstitutional.

Rosenberger v. University of Virginia, 1995

Circumstances and Controversy

In *Rosenberger*, the Court examined the constitutionality of a complex set of circumstances which questioned whether the University of Virginia could use Student Activities Funds (SAFs) to reimburse student publications that espouse a particular religious view. In 1990, student Ronald Rosenberger along with several fellow students at the University of Virginia formed Wide Awake Productions (WAP), a student organization publishing a journal focusing on religious and philosophical expression. The founders' mission was straightforward: "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means."[39]

At the University of Virginia, student organizations may solicit money from the Student Activities Fund after meeting

certain criteria. First, they must register as a Contracted Independent Organization (CIO), which also allows access to university facilities. In order to do this, prospective CIOs must register their constitutions with the university, promising not to discriminate in their membership. Having met this provision, organizations seeking funds must fall into one of several categories before they may apply for SAF support. One such category is "student news, information, opinion, entertainment, or academic communications media groups."[40] WAP was one of fifteen such groups during the 1990-1991 academic year. The university stipulates, though, that religious activities are excluded from these funds, with religious activity being defined as one that "primarily promotes or manifest[s] a particular belie[f] in or about a deity or an ultimate reality."[41]

Wide Awake Productions registered as a CIO after its formation, and as a student news and opinion group, qualified for SAF support. Here, the Court notes an important fact in the case: "had it been a 'religious organization,' WAP would not have been accorded CIO status,…[and] a 'religious organization' is 'an organization whose purpose is to practice devotion to an acknowledged ultimate reality or deity.'"[42] By granting it CIO status the University of Virginia clearly did not identify WAF as such a religious organization and made it eligible to receive these funds.

Shortly after gaining CIO status, WAP applied for the SAF to pay its printer $5,862 in publication costs. Their request was denied, however, on the grounds that it *was* a religious organization that asserted a particular belief about a deity and ultimate reality. In response, WAP petitioned officials at the University, and when this had no positive effect, they brought their action before the Court. Though both the District and Circuit Court sided with the university's claim that endorsing WAP's religious activities constituted an establishment of religion, the Supreme Court reversed the decision of the lower court.

Opinion and Analysis

As with the previous Establishment Clause case, Kennedy once again wrote for the 5:4 majority. This time, however, the Court argued that the Establishment Clause was not placed in jeopardy by

the religious nature of WAP, but that by prohibiting its eligibility for student funds, the state denied WAP both its Free Speech and Free Exercise rights. Thus, the Court's reasons exemplified the balance among political values in a political conception; one or two liberties are not realized by violating one or two other political rights. In their decision, the Court provided an invaluable lesson in political liberalism and achieving justice throughout the entire political conception and not merely one aspect of it.

To assess the constitutional principles according to public reason, the Court must determine which principle or principles are truly at risk of being violated: either the Establishment Clause or the Free Exercise and Free Speech Clauses. In his chapter on "Public Reason," Rawls acknowledges that "no institutional procedure exists that cannot be abused or distorted to enact statutes violating basic constitutional democratic principles."[43] In order to circumvent this problem Rawls suggests that justices judge other "constitutional cases, practices, and traditions, and constitutionally significant historical texts" when interpreting two seemingly contradictory clauses.[44] In effect, to offer public reasons concerning the appropriate interpretation of the two, the Court must examine more fully the constitution and constitutional precedents.

First, the Court examined WAP's case on the basis of Free Speech. Specifically, the Court examined *Rosenberger* in relation to the precedent case *Lamb's Chapel v. Center Moriches Union Free School District* under which the distinction between content and viewpoint discrimination was made with respect to religion and free speech. Content discrimination, the Court acknowledged, may be allowed "if it preserves the purposes of that limited forum."[45] In *Lamb*, however, the request to use school facilities was "denied for [no other reason] than the fact that the presentation would have been from a religious viewpoint."[46] Their unanimous decision was that the refusal discriminated solely on the basis of religious viewpoint. Rather than the government endorsing the content of a particular ideology, it had merely offered an open-ended benefit in which citizens may or may not choose to participate.

Applying this to the *Rosenberger* case, the Court noted that "by the very terms of the SAF prohibition, the University does not

exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."[47] Thus, the Court used precedent to form public reasons to conclude that the university discriminates on viewpoint rather than content as a whole. This is constitutionally impermissible on the basis of the political value of Free Speech.

In addition to precedent, the Court also invoked Rawlsian-style reasoning to produce arguments that all reasonable citizens can understand and accept through the means of association. Appealing to the permission for other comprehensive doctrines through free speech, the Court drew a striking parallel to prove the university's exclusion unreasonable. The Court noted that the university's prohibition of funding publications that assert a particular belief in a deity or of an ultimate reality has vast applications and may be extended to reach beyond the commonsensical. In addition to restricting religious comprehensive doctrines, the provision could be interpreted to restrict any number of philosophical comprehensive doctrines, as well:

> Were the prohibition applied with much vigor at all, it would bar funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes…if any manifestation of beliefs in first principles disqualifies the writing, as seems to be the case, it is indeed difficult to name renowned thinkers whose writings would be accepted, save perhaps for articles disclaiming all connection to their ultimate philosophy.[48]

The point is clear. To deny one comprehensive doctrine free speech is to deny all free speech.

However, the Court also had to answer the second constitutional question of whether the Establishment Clause was being violated by funding this genre of free speech. In order to do this, the religious neutrality of the SAF support of WAP had to be confirmed since lack of state neutrality constituted an obvious violation of the Establishment Clause. Just as it considered precedent with respect to free speech, the Court also considered precedent cases with regard to establishment and neutrality. The Court referred to *Everson v. Board of Education of Ewing,* the first

case of modern Establishment Clause jurisprudence. In this opinion, the Court had cautioned against "inadvertently prohibit[ing] the government from extending its general state law benefits to all its citizens without regard to their religious belief."[49] As a side-note to strengthen the legitimacy of their public reason, the court added that they have often refused to deny free speech to religious speakers who "participate in broad-reaching government programs neutral in design on Establishment Clause grounds."[50]

From this base, the Court reasoned that neutrality is best preserved when the government provides benefits to recipients without regard to the ideological or religious viewpoints. Additionally, the Court argued for neutrality by examining the purpose of the fund itself, which was not to advance religion but to promote the free exchange of ideas, a premium of the political conception as expressed historically and in the First Amendment. Unlike *Lee v. Weisman*, which hinged on government coercion of religion, public funding of student publications, one of which happens to reflect a religious perspective, poses no threat of coercion.[51] With respect to neutrality, the Court elaborated, there is a difference "between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[52] In conclusion, then, by valuing the equal application of all laws as essential to the political conception, the Court evaluated two constitutional principles by precedent and their statutes to satisfy their role of offering public reasons for their interpretation of the Constitution by the political conception.

Locke v. Davey, 2004

Circumstances and Conflict

In a 7-2 decision, *Locke v. Davey* allowed the Court room to use public reasons that "play in the joints" of the dual Free Exercise and Establishment clauses of the First Amendment. A rather benign state scholarship program soon met with religiously-motivated resistance to one of its criteria. In the program, Washington State established its publicly-funded Promise Scholarship Program with the obvious objective of assisting college-bound students with educational expenses that

might otherwise prevent them from pursuing a post-secondary degree. These expenses could include not only tuition but also other education-related expenses. According to the provisions of the scholarship, potential recipients must comply with academic, enrollment, and financial standards.[53] One stipulation, however, stated that the student "may not pursue a degree in theology at that institution while receiving the scholarship. . . Private institutions, including those religiously affiliated, qualify as 'eligible postsecondary institution[s]' if they are accredited by a nationally recognized accrediting body."[54]

Controversy emerged when scholarship recipient Joshua Davey chose to attend Northwest College, a private Christian college affiliated with the Assemblies of God, and to pursue a double major in pastoral ministries and business management/administration. Although it is generally regarded as the responsibility of the institution (rather than the state) to determine whether or not a degree counts as theological, there was no question that the respondent's major fell within this category. Thus, Davey's major clearly disqualified him from receiving the scholarship.

Upon his being informed of his ineligibility, Davey brought action before the court for an injunction and damages, claiming that revoking his scholarship violated both the Free Exercise and Establishment Clauses (through incorporation of the Fourteenth Amendment) and the Equal Protection Clause. Further, he contended that under *Church of Lukumi Babalu Aye, Inc. v. Hialeah, supra*, "the program is presumptively unconstitutional because it is not facially neutral with respect to religion."[55] Essentially, Davey argued that the program must not single out religious professions as disqualified from access to the scholarship when any secular profession is allowed. Doing so prevents his free exercise of religion and establishes an anti-religious atmosphere.

Opinion and Analysis

Like the previous cases, the Court relied heavily upon precedent and former statutes to strengthen the public reasons supporting its opinion. However, unlike *Rosenberger v. Weisman,* which required the Court to use public reason to distinguish how to uphold both Free Speech and the Establishment Clause, *Locke v. Davey* required the Court to "play in the joints" of the two

clauses. From the outset, the Court acknowledged that there often exists sharp tension between the religious clauses of the First Amendment, namely, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[56] At the same time, however, the Court admitted that the state may act without violating Establishment and restrict without violating Free Exercise. On this basis, the Court hinged *Locke v. Davey* on well-reasoned arguments that navigated between the values of our society's political conception of justice.[57]

In justifying the play in the joints, the Court first noted that had the scholarship program chosen to include devotional majors within the scope of its eligible applicants, there would be absolutely no violation of the Establishment Clause. This claim was made on the basis of precedent, which says that "the link between government funds and religious training is broken by the independent and private choice of recipients."[58] Washington's state constitution, however, "draws a more stringent line than is drawn by the United States Constitution" regarding establishment, going so far as to disallow indirect funding of religious education that prepares students for ministry.[59] Accordingly, the question of *Locke v. Davey* rested not on whether giving *federal* funds to individuals who pursue religious interests is an establishment of religion, but on whether the state of Washington may deny a religious category of funding without violating the Free Exercise Clause. Is an individual state antiestablishment principle in violation of the federal Free Exercise Clause?

In response to this question, the Court offered a resounding "no." Rejecting Davey's claim that the scholarship is "presumptively unconstitutional because it is not facially neutral with respect to religion," the Court offered alternative public reasons that may be understood within the framework of our contemporary political conception of justice.[60] In order to do this, the Court appealed to "their knowledge of what the constitution and constitutional precedents require."[61]

In this case, determining what a constitutional precedent requires drew a distinction rather than a parallel between the two cases, and this allowed the Court to offer public reasons for their ultimate decision. Davey had likened the non-neutrality of his case to the non-neutrality of another case, *Church of Lukumi Babalu Aye, Inc. v. Hialeah, supra*. Examining the *Lukumi* case, the Court

found that the law in place had not only suppressed ritual animal sacrifices, but also prosecuted violators, even if their intent was a purely religious one. The Court found this unconstitutional because it forced religious adherents to choose between their religious beliefs and government protection. Davey, on the other hand, was merely denied scholarship funds and did not face criminal penalties or civil sanctions. Thus, the State's "disfavor of religion (if it can be called that) is of a far milder kind."[62]

Further, the Court offered a particular explanation of Free Exercise, namely, the right of citizens to participate in the political sphere without any threats to their religious beliefs.[63] Few would disagree with this assessment of Free Exercise.[64] On this assumption, the Court reasoned that since the scholarship limitation does not in any way deny actual ministers or religious believers the right to participate in the political arena, his right of Free Exercise had not been violated.

Rather than showing hostility toward religion, the Court declared that the state provision was merely a product of a view that religious education for ministry should be treated differently from education for other callings because of the nature of religious education in relationship to the First Amendment. As the Court pointed out, "training someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit."[65] This point offered the public reason that treating religious education differently is not merely an unfair exclusion of religion but also a protection of government from unnecessary involvement in religious affairs.

Locke v. Davey appears to stand on shaky ground in light of *Rosenberger's* decision to allow public funding to support religious viewpoints; in principle, the two decisions appear inconsistent. One decision mandates public funding for the religious voice while another maintains that denial of that voice is the prerogative of the state. However, the Court would argue that one key principle separates the two cases: free speech. Viewed in light of free speech, then, the ends of the two cases are different. *Locke* concerns public funding that is applied to a devotional major with the intent of furthering of the religious establishment itself (i.e., the structure of the church).[66] This differs from *Rosenberger,* in which public funding furthers free speech of an organization that

has already been classified as non-devotional by the University. The end of WAP is not nearly as direct an establishment of the religious institution as it is a student-expressed opinion for the sole purpose of furthering free speech. Had WAP been classified as a devotional organization in the first place, it would have met the same funding blockade as devotional majors in *Locke.* Thus, the Court upholds Rawls's support for the public forum of the political conception in which comprehensive doctrines may be expressed without forcing a state legislature to support one of these doctrines explicitly (since Washington's particular constitution interprets establishment much more stringently than the federal constitution). On this level, the Court was consistent.

This, then, raises the question of whether it is anti-Rawlsian to single out religious disciplines from other knowledge disciplines for exclusion from public funding. Denying theology as a knowledge discipline would, after all, support a particular comprehensive doctrine that makes a particular claim about what counts as knowledge. In *Locke,* the Court never denied theology or pastoral ministries public funding on a federal level. It did, however, allow a more specific political conception (i.e., Washington State's constitution) to define establishment more strictly.[67] The scholarship did not deny that religion or theology is a knowledge discipline. Were this true, it would have prohibited scholarship recipients from taking religion courses generally. Rather, it attempted to prevent what its political conception viewed as a direct link between the institutional church and the state. The scholarship excluded an "institution" (devotional majors) it viewed as instrumental in supporting the broader religious institution, which obviously promoted particular comprehensive doctrines. It did not exclude theology as actual knowledge or as a discipline. This was done not on the basis of defining knowledge but of defining establishment.

Conclusion

Religious freedom is a part of the American political conception that Rawls addresses directly. The possibility of tying public reason to religious belief "lies in the religious or nonreligious doctrine's understanding and accepting that, except by endorsing a reasonable constitutional democracy, there is no other way fairly to ensure the liberty of its adherents consistent

with the equal liberties of other reasonable free and equal citizens."[68] Essentially, citizens forfeit their hopes of religious unity in favor of protecting freedom of conscious and religious belief. As shown in the above opinions, the Supreme Court rules on cases of church-state interaction and the First Amendment from this understanding of the role of religion in the public forum.

Though constitutional questions of religious significance are frequent, heated, and often mistakenly argued in the public square on the basis of individual citizens' particular comprehensive doctrines, the Court must reject such reasons. Instead, Rawls's political conception of justice, codified by the Constitution, and his mechanism of public reason provide a method for resolving these conflicts of irreconcilable comprehensive doctrines. The above Rehnquist court opinions reflect such reasoning to give the extended body of law relevance and legitimacy to the entire body of citizens.

Here I have addressed only the majority opinions of this Court and their public reasons, and several of these majorities are comprised of justices who fall on opposite sides of the political spectrum. But it is here that the Supreme Court is truly proven as Rawls's "exemplar of public reason."[69] If justices on either side of the political spectrum can offer justifications that count as public reason, it is proof that the objective of the Court is being accomplished—that they are successfully locating "the central range of the basic freedoms in more or less the same place."[70] Even Rawls admits that the idea of public reason does not require judges to agree with one another. It merely requires a certain standard of appealing to political values in light of constitutional precedent and, most importantly, of the constitution itself according to public reason. And this standard I believe the Court achieves.

NOTES

[1] John Rawls, *Political Liberalism*, expanded ed. (New York: Columbia University Press, 2005), 444.
[2] *Ibid.*, 490.
[3] *Ibid.*, xxix.
[4] *Ibid.*, 231.

[5] *Ibid.*, 235. Highest or "exemplar" public reason is not to be confused with "ultimate" public reason.
[6] Admittedly, it may be argued that Rawls reflects the current system more than he proposes entirely new ideas. However, since all cases I have chosen to analyze occur well after the publication of *Political Liberalism*, I obviously view the Court's *style* of reasoning partially as a result of Rawls's ideas.
[7] *Ibid.*, 486.
[8] *Ibid.*, 509.
[9] *Ibid.*, 10.
[10] *Ibid.*, 156.
[11] *Ibid.*, 157.
[12] *Ibid.*, 234.
[13] *Ibid.*, 227.
[14] *Ibid.*, 227.
[15] For brevity's sake, I eliminate Rawls's discussion of the overlapping consensus and the original position in relation to these ideas.
[16] *Ibid.*, 235.
[17] *Ibid.*, 254.
[18] *Ibid.*, 224.
[19] *Ibid.*, 236.
[20] *Ibid.*, 442.
[21] United States Constitution, First Amendment.
[22] *Lee v. Weisman*, 505 U.S. 577 (1992).
[23] *Ibid.*
[24] *Ibid.*
[25] David M. O'Brien, *Constitutional Law and Politics*, vol. 2, 5th ed. (New York: W.W. Norton & Company, 2003).
[26] *Ibid.*, 723.
[27] *Lee v. Weisman.*
[28] *Ibid.*
[29] Rawls, 236.
[30] *Ibid.*
[31] *Ibid.*
[32] Rawls, 236.
[33] *Ibid.* 139, 236; United States Constitution, 1st and 14th amendments.
[34] *Lee v. Weisman.*
[35] *Ibid.*
[36] *Ibid.*
[37] Rawls, 139.
[38] *Ibid.*, 234.
[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*

[43] Rawls, 233.
[44] *Ibid.,* 236.
[45] *Rosenberger v. University of Virginia.*
[46] *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 385 (1993).
[47] *Rosenberger v. University of Virginia.*
[48] *Ibid.*
[49] *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947).
[50] *Rosenberger v. University of Virginia.*
[51] *Ibid.*
[52] *Ibid.*
[53] *Locke v. Davey*, U.S. (2004).
[54] *Ibid.*
[55] *Ibid.*
[56] United States Constitution, First Amendment.
[57] "There is room for play in the joints." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970).
[58] *Locke v. Davey*, U.S. (2004). The broken link argument refers to cases: *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 13-14 (1993); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 487 (1986); and *Mueller v. Allen*, 463 U.S. 388, 399 – 400 (1983).
[59] *Ibid.*
[60] *Ibid.*
[61] Rawls, 236.
[62] *Locke v. Davey.*
[63] *Ibid.*
[64] Rawls, 237. Although some may interpret Free Exercise more broadly, Rawls does allow for disagreement.
[65] *Locke v. Davey.*
[66] *Ibid.*
[67] By "narrow" and "more strictly" I mean that the state's political conception is more specific than the federal constitution and its surrounding political conception. Slightly varying political conceptions from state to state, I believe Rawls would say, is consistent with the principle of federalism.
[68] Rawls, 460.
[69] *Ibid.*, 231.
[70] *Ibid.*, 237.