

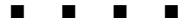
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Paul W. Kahn: Putting Liberalism in Its Place

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## INTRODUCTION



# PUTTING LIBERALISM IN ITS PLACE

Every age has its own point of access to ethical and political deliberation. For us, that point is the problem of cultural pluralism. Lacking a conviction in the absolute truth of our own beliefs and practices, we are uncertain how to respond to those who live by different norms. We are all too aware that such differences exist, as we interact with cultures that put different values on life and death, family and society, religion and the state, men and women. We constantly confront the question of whether some of the practices supported by these values are beyond the limits of our own commitment to a liberal moral philosophy and a political practice of tolerance. We worry about moral cowardice when we fail to respond critically, and about cultural imperialism when we do respond. The problem is both theoretical and practical: theoretical, when we struggle to find a form of reasoning that can occupy a position between a discredited claim to universal moral truth and an incapacitating moral relativism; practical, when we must decide how to respond to groups and individuals that offend our own values.

### THE CHALLENGE OF CULTURAL PLURALISM

The problem of cultural pluralism has both an internal and an external face. Internally, we confront cultural differences within our own society. These differences arise only in part from the historical legacy of waves of immigrants who brought diverse traditions to the nation-building project. More importantly, differences arise because of contemporary critiques of traditional practice and beliefs. These critiques purport to expose the manner in which the traditions carry forward

entrenched status relationships. Is the traditional family, for example, a cultural inheritance to be treasured and preserved, or does it perpetuate gendered role differentiation and patriarchal values that should be rejected? Is religion a source of values to be protected or of irrationality to be cabined? Is ethnicity a legitimate or an illegitimate source of political difference? Confronting this internal pluralism, we wonder how much normative difference can be absorbed by a single political culture and what common principles can hold together a multicultural society.<sup>1</sup>

Externally, it is difficult to find any area of the world with which we do not interact, and about whose customs and practices we can express either ignorance or indifference. In fact, the larger the degree of dissonance between a foreign culture's values and our own, the more likely those practices will come to our attention. Differences between ourselves and others are not mere matters of degree or of interpretation of common standards. Rather, we have radically different understandings of the appropriate social norms and, consequently, very different expectations of politics. Europeans may be drawing together in a common political and moral order, but much of the rest of the world, from Africa to Asia, is following other patterns of order—or disorder. These cultural differences are deeply entwined with differences in material circumstances as well as political organization. Since these material and organizational differences are not likely to decrease as populations increase under conditions of material scarcity, it would be futile to try to disentangle cultural from material differences.<sup>2</sup> Each inevitably shapes and is shaped by the other.

Aware that Western aspirations for a single global order are not universally accepted, we are thrown back again on the question of difference. We are forced to think critically about our own claims for universal norms. We are no longer quite so confident of the status of our own truths. We find Islamic states today—and even a Jewish state—but we do not find Christian states. The contemporary truths

<sup>1</sup> Compare, e.g., K. Karst, "The Bonds of American Nationhood," 21 *Cardozo L. Rev.* 1141 (2000), with S. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1996).

<sup>2</sup> See R. Kaplan, *The Coming Anarchy: Shattering the Dreams of the Post-Cold War* (2000).

of the West are procedural and economic: the rule of law, democracy, and free markets. We wonder whether any of these constitutes adequate grounds for rejecting the moral truths of others. We appeal to the idea of human rights—“It is the law,” we say—but beneath the legal rhetoric we find disagreement about the nature of the individual and his or her relationship to the community. Disagreement, we fear, may go all the way down.<sup>3</sup>

Western states, including our own, have traditionally been quite willing to force people to comply with moral truth. The theoretical project, in the form of theological and philosophical inquiry, was to defend and elaborate that truth. Once the truth was grasped, there was no more difficulty in making it compulsory than there was in making individuals follow the rules of mathematics. As long as the good and the true were believed to be one and the same, moral science had the same status as natural science. Even as tolerant a country as our own has a past marked by little toleration for deep religious difference (consider the treatment, at various times, of Mormons, Catholics, and Muslims), for claims of racial and gender equality, or for the beliefs of non-Western immigrants and Native Americans.

Yet forcing people to follow our truths has never been our only strategy for dealing with difference. Across a broad domain, we have tolerated difference. Toleration for some religious differences is deeply embedded in American history. Free speech, too, rests on a principle of liberal tolerance for difference. Intolerance appears at the margins of a field of tolerance. Those margins have moved substantially over the course of our history.

Within our own community, we reach a rough compromise between the universal and the particular. Compromise is possible because the background values of the culture are not widely or deeply opposed. As a matter of law, we protect certain fundamental rights. Individuals and groups are free to live as they wish, as long as they respect fundamental norms protective of individual dignity. This still leaves a wide range within which ordinary political forces, as well as individuals, make choices among competing norms. At times, certain values or norms become so important that they shift from the domain of choice

<sup>3</sup> See M. Ignatieff, *Human Rights as Politics and Idolatry* 54–55 (2001).

to that of constitutional law; that is, they are taken out of the ongoing political and moral debate and protected as a matter of fundamental law. This, for example, was the process marked by *Roe v. Wade* with respect to the right to choose an abortion.

The most difficult internal clashes that we confront tend to emerge from minority religious groups outside of this broad value consensus. With respect to these groups, we inevitably feel a double-pull: an instinct toward charitable toleration—it seems to cost us little to tolerate difference—and an opposite impulse toward the universalization of norms. When the Amish will not send their children to high school, or when Seventh-Day Adventists say they need unemployment compensation because they cannot accept jobs that require Saturday work, the Supreme Court has generally been willing to grant exemptions.<sup>4</sup> Recently, however, it has inclined in the opposite direction, toward universalization.<sup>5</sup> Even then, Congress has generally responded in the opposite way.<sup>6</sup> Our own liberal political culture, in these cases, is uncertain where to draw the line between uniformity and toleration.

Even when it costs little, the toleration of such group difference is always precarious. A shift of perspective from the adults to the children in these groups, or from the group's relationship to the dominant culture to its relationship to dissident minorities within its own geographic reach, is likely to produce just the opposite reactions even in a broadly tolerant community. We want to protect the right of the child to choose his or her own cultural community or of minorities to their own choice of lifestyle.<sup>7</sup> We reason that if we do not protect the rights of the individual against the group here, we will do so nowhere.

<sup>4</sup> See *Wisconsin v. Yoder* 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>5</sup> See *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990) (refusing to exempt religious use of peyote from state laws of general applicability). For an earlier example of the same tension, but with movement in the opposite direction, compare *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), and *West Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943). All of these cases are discussed in chap. 2 *infra*.

<sup>6</sup> See the Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb et seq. This act was, in turn, declared unconstitutional by the Supreme Court. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>7</sup> See, e.g., *Yoder*, 406 U.S. at 244 (Douglas, J., dissenting) (arguing that Amish children have cognizable interests that may depart from those of their parents).

A tolerance based on respect for choice easily becomes a reverse image of itself: intolerance for the actual choices made.

Theoretical approaches to the problems of cultural pluralism reflect a similar conceptual *aporia* between universalism and tolerance as competing first principles. We can articulate a set of universal values and supporting norms, against which cultural practices and belief systems are to be measured. This is the approach pursued by contemporary advocates of human-rights law. Alternatively, we can begin from the perception of difference among groups. The intuition of difference is no less fundamental than that of commonality. This is the approach of those who perceive in human rights discourse a neocolonial, Western enterprise.<sup>8</sup>

Each approach, when released from the practical compromises of an ongoing enterprise, can push to an extreme. Pursuing the fundamental dignity and equality of each individual, claims of human rights can proliferate endlessly. In response to every need—food, health, work, education, and well-being more generally—some group is willing to formulate a claim of right. On the other hand, an approach that begins from the perception of difference can quickly dissolve into an extreme moral relativism. In this extreme form, there is no foundation from which one can gain sufficient purchase to make any compelling criticism of different cultures. Every criticism is thought to rest on a particular community's values; there is no way to make cross-cultural comparisons of value. To condemn another's practices is simply to produce a kind of tautological affirmation of one's own values.

Moral relativism, however, offers no more support for tolerance than for intolerance. From the fact of difference, nothing follows about whether to accept it or reject it. There may be no common ground upon which to justify condemnation, but neither is there a common ground upon which to justify acceptance.<sup>9</sup> Intervention may be an imposition of one's own values, but failure to intervene may be a violation of those values. For this reason, the same classical system

<sup>8</sup> See, e.g., Bangkok Declaration, adopted at the World Human Rights Conference Regional Preparatory Meeting (1993); M. Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights," 42 *Harv. Int'l. L.J.* 201 (2001).

<sup>9</sup> See e.g., R. Rorty, "Human Rights, Rationality, and Sentimentality," in *On Human Rights: The Oxford Amnesty Lectures* 111 (S. Shute and S. Hurley, eds., 1995).

of international law that made state sovereignty a fundamental norm placed no legal constraint on the decisions of states to go to war. War and peace were matters of sovereign choice. The move from recognition of difference to intervention was not a large move at all.<sup>10</sup> Neither the universal nor the particular seems firm ground from which theory can direct practice.

Multiculturalism would not pose a problem if the plurality of values could simply be aggregated—like adding another wing to a museum. The problem of cultural difference is not like that of difference among cuisines, in which each culture values some distinct set of flavors and tastes. Rather, different cultures affirm values that others reject. Some reject what others insist upon as a matter of right—for example, gender equality. Affirmation and rejection are not abstractions. They invoke passions and these passions run into each other, sometimes in a violent way. Societies may be defined by their hatreds as much as by their attachments.

It is often difficult for Americans to know how to react to these social hatreds. Not only our religious traditions but also our political culture pursues a practice of proselytizing. Other people never appear as permanently alien; they appear instead as the object for our efforts at conversion. Of course, we have had—and still have—our own hatreds. Nevertheless, that history of hatred tends to be understood within a narrative of progressive toleration, accepting the hated group into the political community or into that larger community of nations with which we maintain friendly relations. We try to distinguish a people, capable of redemption, from its leadership, lost to evil. Our enemies regularly become our allies—for example, the Japanese and the Germans for the last generation, and today, the Russians.

Our contemporary missionaries preach democracy, free markets, and the rule of law—all institutions founded on our belief in the equality and liberty of every person. This dogged commitment to a universal community is a product of both our Christian and Enlightenment tra-

<sup>10</sup> This political antinomy had an epistemic reflection in the practice of ethnography, which formally suggested political indifference across boundaries, but posed a danger of offering ideological support for colonial exploitation. See A. Riles, “The Empty Place: Legal Formalities and the Cultural State,” in *The Place of Law* (A. Sarat, ed., 2002).

ditions. We experience this commitment simultaneously as a kind of open-ended love and as a faith in the capacity of each individual to enter a rational debate that will result in mutual agreement. No one, we believe, is beyond conversion to our values. When we dream of a global order, we project our own values onto it. We do not imagine that the global community of the future will be led by an Islamic cleric.

Other cultures do not necessarily share this proselytizing attitude toward the alien other. They do not pursue a universal mission of either love or reason. Difference, for them, may not be understood as a problem to be overcome, but as a border establishing identity. Ours, after all, is an era marked by the simultaneous, but opposing, development of globalization and ethnic nationalism. From the latter perspective, Western universalism may appear as yet another form of cultural imperialism. For the West, the story of colonialism was one of Christian proselytizing and the progress of civilization; it was simultaneously a project of imperial destruction.<sup>11</sup>

We can retreat in the face of these problems to our own traditions and the limits of our own community. That community is now defined by those who accept our truths; that is, those who accept the conditions that limit the domain of tolerable difference. But this strategy just returns us to the very practical problem from which we started: the problem of cultural pluralism.<sup>12</sup> Normative systems are plural because there is no agreement about the substantive or procedural bases upon which they are constructed. Individual moral autonomy may be a bedrock first principle for us and an immoral denial of the primacy of a community of faith for others.

Are we forced to say either too much or too little? As long as we focus on difference itself, we cannot solve the problem. We will alternate between a rhetoric of the universal and a rhetoric of the particular, each of which can collapse into the other. Proving yet again that liberalism follows from a certain understanding of the autonomy of

<sup>11</sup> For a skeptical view of statements of Christian ends, see A. Hochschild, *King Leopold's Ghost* (1999); see also, E. Said, *Reflections on Exile and Other Essays* 411, 429 (2000).

<sup>12</sup> A good example is Huntington, *The Clash of Civilizations*, which begins by looking at geopolitical conflict, but is led to a critique of cultural pluralism within the United States.

the moral subject is hardly a convincing argument to those who accept neither that view of the subject nor the primacy of reason among the possible forms of argument. But for those who find that autonomy an obvious and undeniable first principle, no claims by the other—whether the parishioner, the communitarian or the multiculturalist—will shake that faith.

If arguments from first principles will always come too late because there is no agreement on these principles, how can we make any progress? Instead of searching for resources that are not already marked by their own culturally contingent character, we must directly confront the contingent character of our own position. Our ambition must be to create a space from within which to assess our own normative beliefs and practices, which include, but are hardly exhausted by, liberalism. This is not a neutral space from which to judge others, nor a space from within which we can pursue a program of reform. Its end is neither to make others like ourselves nor to remake ourselves. Rather, it is a space of suspended commitments from which to apprehend the self. Cultural pluralism is not a problem to be solved, as if we could finally articulate the *right* set of universal values or the appropriate scope of the particular. It is, instead, a warning that normative inquiry can no longer take the form of proscription, but must turn to self-exploration.<sup>13</sup>

### CULTURAL STUDY AND LIBERALISM

Cultural difference is such a prominent problem today because it presses against some of the most basic assumptions of our own broadly liberal culture. My ambition is to expose these assumptions and show how they fail to account for central aspects of our experience of ourselves and of our relationship to the political community. The assumptions within which liberalism operates generate the familiar oppositions that have dominated modern political theory, including that between the universal and the particular, the public and the private, and reason and interest. None of these oppositions can be resolved

<sup>13</sup> I have developed this conception of self-exploration in P. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (2000).

on its own terms. Part I of my inquiry exposes the structure of these oppositions, explains why they arise, and the particular content they assume in modern American political culture. Part II investigates what the debate framed by these oppositions leaves out or fails to see.

Most of all, liberalism fails to see the way in which citizens committed to American political culture occupy a meaningful world. It fails to see what I will describe as the erotic foundations of modern political life. We cannot understand the character of the relationship between self and polity without first understanding love. To understand love, however, we need to explore the character of the will in dimensions that are beyond the imagination of liberal thought. This linking of will to love, and both to meaning, expresses the Christian inheritance of our political tradition. This is Christianity not as a source of religious doctrine but as a form of understanding of self and community. Much of this study is an effort to explore the way in which our political life draws as much upon the Christian tradition of love and will as on the Enlightenment tradition of reason. Modern American political practices and beliefs have achieved a kind of stable synthesis of these two sources. That stability, I will argue in the conclusion, is under considerable stress today as the erotic conception of the citizen's body is displaced by a more plastic and disembodied conception of a subject who locates the self in a variety of networked relationships: economic, informational, and communicative. Many of the tensions in contemporary political life, and particularly the tension between the United States and its European allies, arise from the fact that Americans generally remain embedded in a modern conception of the citizen and the nation-state in an increasingly postmodern world.

To understand our own political culture, we need to begin by putting liberalism in its proper place. To put liberalism in its proper place, I need to emphasize, is not to put liberalism down or to dismiss its norms. I take for granted that most of my readers share—as I do—a commitment to basic liberal values. These include respect for the dignity and equality of individuals, a skepticism toward fixed hierarchies, broad acceptance of diverse social groupings whether religious or ethnic, a demand for representative government limited by a doctrine of individual rights embodied in a rule of law administered by courts, and a general sense of the need for well-regulated markets to satisfy

material wants. These liberal values do not, however, explain the conditions that bind a community into one sustained historical project. They do not explain why citizens will put survival of a particular political community ahead of their own survival.

Liberal theorists tend to take the political community as given and set out to construct the rules that should operate within that community. Rather than look to the origins of the particular community, they are more likely to look to an original position that is a kind of pre-political abstraction. The same failure to attend to the unity of the particular historical community leads many liberals—not just theoreticians—uncritically to accept the global reach of liberal norms, whether of legal rights or market transactions. All individuals, not just citizens, should live under conditions of equality and autonomy; all should have their rights respected and all should be able to participate in open markets and in the institutions of governance. The boundaries of the state often appear as a problem to be overcome.

To put liberalism in its proper place is to take up the question of the nature of the unity of the political community—in particular, of our political community. It is to turn from the rules of governance to the character of political meaning. Charles Taylor usefully labels this distinction as advocacy versus ontology.<sup>14</sup> Taylor notes that to criticize liberalism's understanding of the nature of the subject (the ontological perspective) does not commit one to a similar criticism of liberal politics (the advocacy perspective). In his terms, this is a work in political ontology. Yet the distinction is not without problems and offers only a rough approximation of the scope of the inquiry.

First, the terms suggest a kind of priority for the ontological, as if here we deal with the real or essential, while advocacy deals with the contingent or incidental. This is not a helpful way to understand the distinction. Liberalism generally ignores certain forms of commitment and beliefs, but they are no more real than that which it does see. At best, we are talking about different kinds of necessity, not an ontological priority in these different perspectives. We live our lives within symbolic domains; we never get beyond the categories of our own imaginations, whether we are speaking of who we are or what we

<sup>14</sup> See C. Taylor, "Cross-Purposes: The Liberal-Communitarian Debate," in *Liberalism and the Moral Life* 159 (N. Rosenblum, ed., 1989).

should do. Second, the distinction is consistently transgressed in both directions. Beliefs about the character of the subject and about policies reciprocally affect each other. The pursuit of liberal norms as a matter of advocacy may really have a tendency to build citizen character in the way liberals conceive of the self—as an autonomous subject who applies reason to individual choices. Conversely, belief that community relationships are constitutive of individual identity may lead to the advocacy of traditional values. My argument is not that the ontological character of the subject undermines the liberal project, but that the range of our beliefs and commitments is broader than the liberal project perceives. Third, the ontological, as I treat it, is better understood as the product of history than of being. We find ourselves with a certain range of possibilities because we are the bearers of particular historical traditions. While I do argue for some very abstract categories of self-understanding, the content of these categories is always a function of history. Ontology and genealogy are not separate inquiries.

Rather than speak of advocacy and ontology with respect to the political subject, I will speak of the rule of law and political sovereignty. The rule of law is the normative ideal of a liberal politics: it guarantees individual rights against the state, organizes and limits the exercise of state power, and provides the conditions for market transactions. Issues of advocacy concern the content and character of the norms given expression and life in the rule of law. Rights, markets, and limited government are transnational norms. The liberal discourse of law easily becomes a universal discourse, that is, the rule of law is not bound to a particular political space. Political sovereignty, on the other hand, is always bound to a particular community temporally and geographically. Claims of sovereignty reflect a community's understanding of itself as embodying a distinct set of meanings that are substantive not formal, realized at a particular historical moment, and limited to members. Traditionally, sovereignty was thought to precede law in two senses: first, the sovereign is the source of law; and second, sovereignty defines a political community, establishing the jurisdictional reach of law.<sup>15</sup> This is the sense in which sovereignty was thought an “ontological” condition of law.

<sup>15</sup> This conception of the relationship of sovereignty to law raises particular problems for international law. See P. Kahn, “American Hegemony and International

Contemporary liberal thought—particularly in the form of the human rights movement—has challenged both of these ontological claims: law is to be freed from sovereignty. But we will never understand the character of the American rule of law without first understanding the way in which it is embedded in a conception of popular sovereignty. More importantly, we will not understand the way in which the nation-state presents itself to the citizen as an ultimate value, that is, one for which the citizen may be asked to sacrifice his or her life. Liberal thought, as well as liberal politics, believes claims for sacrifice are exterior to the purposes and functions of a legitimate political arrangement—a kind of unfortunate, historical accident. I will argue that recognition of the possibility of sacrifice is at the base of our experience of the political and an adequate theory of our political beliefs must offer an explanation of sacrifice.

To speak of sovereignty—in the American case, popular sovereignty—is to speak of a relationship of meaning between the citizen and the community considered as a unified, historical subject. Our liberalism operates within this politics of meaning, but liberal theory lacks the conceptual tools by which to grasp this context. It lacks these tools because of its broad privileging of reason. It believes that political commitments as well as political order can and should be the products of reason. If not literally the products of reason, still our political arrangements should be tested against the standards of reason. Reason may grasp the content of the social contract, but it cannot grasp the erotic character of the experience of political meaning. Attachment to the political community is a matter not of contract but of love. That which we will do for love cannot always find its measure in justice. I do not mean to substitute a politics of sacrifice and love for one of reason and contract; this is not a work in advocacy. Rather, our politics already is one of love and sacrifice; reason finds its place within this experience of self and polity.

A religious analogy can help to clarify the distinction between law and sovereignty. In the Judeo-Christian tradition, God speaks the world into being. There is a difference between God's speaking and

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Law—Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order,” 1 *Chi. J. Int'l Law* 1 (2000).

what it is that He says. To understand the religious experience of the world, we cannot simply dismiss the belief that it is God who spoke; we cannot concentrate only on the content of that speech. For Americans, the polity has its origin in the speech of the popular sovereign. That the sovereign speaks a language of the liberal rule of law does not mean that we can ignore the belief that it is the sovereign who speaks. Liberal theorists generally do just that: they focus on the content of the speech, that is, on what it is the sovereign said or should say. They do not reflect on the significance of the belief that it is the popular sovereign who does the speaking. If the idea of popular sovereignty arises at all, it tends to be equated with majority rule. That conception, however, is hardly adequate to the transhistorical idea of a people creating and maintaining itself. Voting is only a particular act, while participation in the popular sovereign is constitutive of the citizen's self-understanding.

In considering the problems of cultural pluralism, we have been the prisoners of liberalism. The approach of liberalism to difference has been to assume that the thinner the normative standard, the more universal its claim. We will have greater success in understanding the significance of cultural conflict if we start from the opposite end. A thicker description of our own normative order will put us in a better position from which to evaluate difference. Gaining this understanding of ourselves will not tell us directly what to do, as if the problem of theory is to work out a practical calculus of tolerance. But self-awareness is a necessary condition of avoiding the cultural imperialist's mistakes of the past—mistakes made even with the best of intentions—as well as the mistakes of that particular form of academic imperialist: the liberal theorist.

#### THE LIMITS OF THE LIBERAL SELF

While there is no single theory of liberalism, theories in the tradition share a core set of assumptions about the individual, the role of the polity, and the manner of constructing rules for both. Different liberal philosophers interpret these assumptions differently, and they assign different weights to different aspects of this core. Still, none would place faith above reason in the construction of public norms; none

would affirm that some individuals are worth less than others; and all agree that individuals must be relatively free to set for themselves their own conception of the good. Liberal theorists believe in the primacy of autonomous individuals who share a capacity for rational deliberation but do not necessarily share a common set of interests. For most liberal theorists, the autonomous individual always has the capacity to redefine the relationship to his or her culture.<sup>16</sup> Of course, a liberal state need not support equally every individual's conception of the good, and liberal theorists disagree on the appropriate limits of state recognition and support of these diverse conceptions.

Apart from their commitment to autonomy and dignity, liberal theorists also see a world of individuals competing under conditions of moderate scarcity to satisfy their own interests.<sup>17</sup> Scarcity means that individuals of necessity share a common world; they must regulate themselves and deal with others. Unless individuals can take up the perspective of reason, which means temporarily to bracket one's own immediate interests as a source of direction for the will, there will be only competition and chaos. To bracket interest and pursue the common perspective of reason is not, however, to abandon the self. For reason expresses that virtue of the self most emphasized by the modern, liberal theorist. Reason supports autonomy, dignity, and public deliberation, on the one hand, and the liberal philosopher's pursuit of theory, on the other. The centrality of reason means that liberal practice and liberal theory are continuous activities.

My concern in this book is not to elaborate the rich variations on these themes that liberal philosophers have pursued with great creativity—especially since the publication in 1971 of John Rawls's *A Theory of Justice*. Rawls himself struggled to refine his position over the years. While the refinements may improve the theory, they do not improve on his first book's translation of the liberal core of the culture into a philosophical position. *A Theory of Justice* reached a kind of "reflec-

<sup>16</sup> But see C. Larmore, *The Morals of Modernity*, chap. 7 (1996) (arguing that political liberalism must not take a position on the capacity for individual self-definition). In general, however, even those varieties of liberalism concerned with the importance of culture insist on the need for an exit option. See, e.g., W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* 152–53 (1995).

<sup>17</sup> See, e.g., B. Ackerman, *Social Justice in the Liberal State* 31–33 (1980); J. Rawls, *A Theory of Justice* 127 (1971) (on moderate scarcity); D. Hume, *A Treatise on Human Nature* 486–88 (L. A. Selby-Bigge, ed., [1739] 1951) (on the circumstances of justice.)

tive equilibrium” with the broadly intuited norms of our liberal culture.<sup>18</sup> For that reason, it remains the most important work in political theory of the last fifty years. Many of my examples of liberal attitudes will, therefore, be drawn from Rawls, supplemented by other prominent liberal theorists, including Habermas and Ackerman. All three stand squarely in the Enlightenment tradition, with its faith in reason’s capacity to generate a just public order. All three are particularly concerned with the role of reason as public discourse in the liberal polity.

Liberal theory aims to set forth the course of reasonable deliberation that autonomous individuals should pursue in order to give institutional structure and procedural coherence to a common political life. Modern liberal theorists, such as Rawls, Habermas, and Ackerman, often support their claims to normative objectivity by modeling an ideal discourse. Each believes that if he can properly set the conditions of this discourse, then all rational beings will agree with the results.<sup>19</sup> The universal character of the norms that emerge is, therefore, limited only by the particularity of the conditions within which the discourse proceeds. The more generally applicable those conditions, the more universal the norms. Again, this is not the only form of contemporary liberal theory, but it is the dominant form. That, I hope to show, is because it resonates with broadly accepted beliefs about the role of reason in the life of the individual and the state.

Liberalism is a political view that rests on a moral epistemology. It combines a theory of reason and a conception of interest to construct a political world divided between the private and the public. My ambition is to put liberalism in its place by juxtaposing to it other normative strands of our culture that I hope the reader will sympathetically recognize. It is, in other words, to shift the point of reflective equilibrium in a way that allows us better to comprehend the place of liberalism in our self-understanding. My most fundamental claim is that liberalism lacks an adequate conception of the will. This may seem a

<sup>18</sup> See Rawls, *Theory of Justice* at 48–51 (on reflective equilibrium).

<sup>19</sup> See *ibid* 138 (“To say that a certain conception of justice would be chosen in the original position is equivalent to saying that rational deliberation satisfying certain conditions and restrictions would reach a certain conclusion.”); J. Habermas, *Knowledge and Human Interests* 284 (J. Shapiro, trans., 1971) (collective life must be organized “according to the principle that the validity of every norm of political consequence be made dependent on a consensus arrived at in communication free from domination”); B. Ackerman, *Social Justice in the Liberal State* 4–12 (1980).

strange claim, given that so much of liberalism is built around a model of contract—the social contract, as well as market contracts. Contract, after all, seems to be nothing other than a formalization and stabilization of the individual’s will. Liberalism does indeed model its understanding of the will on the paradigm of contract. But this is just the problem. The liberal will is fundamentally without content. When we speak of the social contract, the content of the will comes from reason. When we speak of market contracts, that content comes from interest. The liberal will is a kind of second-order faculty, affirming a relationship either to an object or to others that has its source and justification in these faculties of reason and interest. On this view, the will attaches to the products of reason or the objects of desire, but has nothing of its own to add.<sup>20</sup>

Opposed to this liberal idea of an empty will is a tradition in which the will refers to an experience that combines the universal quality of reason and the particularity of interest, but which is not reducible to either. Reason leads us beyond our particularity to a domain of abstract ideas in which the uniqueness of the self is either irrelevant or a distraction. Interest, on the other hand, leads us in just the opposite direction: our interests have no truth apart from our particularity. Like interest, will is linked to the individual, finite being. There is no abstract or universal will. But will is not exhausted in the particularity of the individual. The will is the faculty by which, or through which, we understand ourselves as participants in a meaningful world. This is not a world of abstract ideas, but rather one in which ideas are always attached to particular subjects. The domain of this conception of the will is history, which refers equally to a meaningful past and a significant future; it is neither the timelessness of reason, nor the present of interest.

We are most familiar with this conception of the will in its Christian form: the will is the faculty that makes possible the experience of

<sup>20</sup> See R. Flathman, *Willful Liberalism: Voluntarism and Individuality in Political Theory and Practice* 145 (1992). (“Difficult as it is to find postmedieval philosophers who do not regularly employ the term *will* and its cognates in discussing human action, officially or programmatically many of them treat it as no more than a name for other (putatively?) more tangible things such as desires, intentions, or dispositions, or they seek to banish it altogether.”)

grace. This is the will as a capacity to experience an ultimate or transcendent value as an historical experience in the world. Neither reason nor interest provides access to a world that shows itself as an image and product of the divine. Through the will we do not transcend the world, yet we find ourselves in a world of transcendent value. In our own revolutionary-constitutional tradition, we project this conception of the will onto the popular sovereign. The sovereign will, we say, is the source of law, and indeed of the nation itself. To identify with the popular sovereign is to understand the self in and through will. It is to read the self—quite literally the finite body—as a point of access to, and expression of, the nation, which confronts us as an ultimate value. This is never a matter of abstract reason or of the particularity of interest. Neither can account for our sense of the nation as a unique historical actor, nor of ourselves as participants in this political project that has both a privileged past and a necessary future.

The experience of the will is of the idea become flesh, or of the body as the expression of an idea. For the will, the body is a point of revelation of a meaning that simultaneously defines the self and is greater than the self. Thus, will is intimately connected to love. In love, the body appears neither as end nor as means, but an instantiation of meaning. Love locates the infinite in the particular; love expresses a faith in a world that embodies a transcendent meaning. This is why Plato can describe love as *daimon*, mediating between the gods and the merely mortal.<sup>21</sup> The world constructed by the will is miraculous; it is one in which every object can take on an infinite value. This is a world of faith, which liberal theory sees only as a threat to the order of reason. While liberal theory would cabin faith within the domain of the private, this cannot be true of the faith that holds together the public world of politics.

Religion, politics, and love all demand an understanding of the will that is simply unavailable in the liberal tradition. The reason at the center of liberalism rapidly becomes a demand that one's actions and one's demands be reasonable.<sup>22</sup> Reasonable means moderate and

<sup>21</sup> See Plato, *Symposium* 202E.

<sup>22</sup> One sees this movement quite literally in Rawls. In 1971, he claims that his work is “a part of a theory of rational decision” (*A Theory of Justice* at 16). Twenty years

reciprocal: one must offer fair terms of cooperation to others, which requires a willingness to abide by a common set of standards. A will in thrall to the infinite is not easily bound by the reasonable. Neither religious belief nor love is reasonable. Neither, in the end, are our political practices. They too are founded on faith. In all of these cases, we are claimed in ways that cannot be contained by the reasonable.

Politics, even the politics of a liberal state, remains a deeply erotic phenomenon. The state makes a claim upon us that we perceive as one of ultimate meaning. Quite literally, we can be conscripted by the state: it can demand of us that we sacrifice the self for the maintenance of the political community. To comprehend this experience, we need more than the philosopher's conception of reason, and more than the economist's conception of interest. Indeed, we will need more than the communitarian's idea of community: not just any community can demand sacrifice. We will have to trace the way in which the history of the popular sovereign has displaced, while borrowing from, the revelatory character of the Judeo-Christian God. We will have to examine as well the erotic character of the political.

To understand what is at stake for us in the current controversy over multiculturalism, we must confront some very *unliberal* experiences of the self and the polity. This is not a work for the faint-hearted liberal who lacks the ability to push him or herself beyond the polite boundaries of rational discourse, on the one hand, and the individualism of interest on the other. My aim is to bring us face to face with an idea of the politics of the will that presents an ultimate value and demands of us that we be willing to sacrifice. I want to bring liberalism back into touch with our forgotten ultimates, and in the process offer a thicker description of our own ethical and political practices. A liberal conception of interest must be set within a richer understanding of love, just as the liberal conception of politics as contract must be set within an understanding of politics as sacrifice. Love and sacrifice are the terms within which we conduct a meaningful life. Politics hardly exhausts the domain of love and sacrifice, but it does compete with other understandings of the self within love's domain.

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later, he disavows this claim, saying now that his effort is only to provide "an account of reasonable principles of justice" (J. Rawls, *Political Liberalism* at 53n.7 [1993]).

Contemporary liberal theorists might respond that their position is political, not metaphysical, and that the liberalism of a political order hardly exhausts the set of values that individuals find compelling.<sup>23</sup> There are two problems with this position. First, liberal political theory is narrower than our liberal culture. Liberal theory is attractive because it emphasizes core elements of the liberal culture—for example, a commitment to reason and individual autonomy. While careful theory pushes no further than it believes it can justify, liberals generally push those same values much further. Liberal theory may try to avoid a comprehensive liberalism, but liberals do not. Second, liberal theorists are generally content not to explore the other values—that is, nonliberal values—for which they leave room. But these values are just as much a part of our political life as are liberal values. Failure to explore these other political values will leave us with a distorted image of the character of our commitment to the political.

I hope to plot the shape of the world of meaning that I find all around me.<sup>24</sup> To do so, I draw on a wide variety of sources—myth, literature, history, law, and political theory. Some may object that those sources include the thought of that most illiberal of political philosophers, Carl Schmitt. Schmitt's categories of friend and enemy, as well as his insistence on the autonomy of the political, are useful tools in exploring those aspects of political experience that are beyond the reach of liberalism. Liberal theorists have been so concerned with the problem of internal coercion—that is, the government's exercise of force against citizens—that they have failed to focus on the ways in which our politics remains deeply enmeshed in war and the threat of war.<sup>25</sup> Citizens understand themselves not just in terms of a legal order

<sup>23</sup> See J. Rawls, "Justice as Fairness: Political not Metaphysical," 14 *Philosophy and Public Affairs* 223 (1985); but compare S. Okun, "Reply," in *Is Multiculturalism Bad for Women?* 129–30 (J. Cohen et al., eds., 1999).

<sup>24</sup> Personally, I have little taste for the politics of faith and sacrifice that I believe to be constitutive of an American culture of popular sovereignty. My own beliefs in this regard, however, are as irrelevant to the analysis as my own religious beliefs are to understanding the nature of Christian or Jewish faith.

<sup>25</sup> Contemporary theorists who have appealed to Schmitt have tried to "tame" his friend-enemy distinction into a description of opposition within a democratic debate, that is, they have tried to deploy Schmitt within liberalism's preferred model of politics as speech. See, e.g., C. Mouffe, *The Democratic Paradox* (2000). My appropriation

of rights, but also as potential instruments of state violence against others—or targets of that violence from others. This is all the more evident today when many believe that it is our liberalism that has made us the political enemy of various terrorist groups around the world.

By bringing liberalism into contact with Schmitt, I mean not to undermine liberal practices, but rather to expand our horizon of understanding. Schmitt can be read as celebrating a violent politics, which he took to be a more authentic experience than ordinary political practices. I think our politics continues to demand sacrifice, and it is all too often violent. I don't, however, celebrate these aspects of our experience. Nevertheless, I do insist that we confront the character of our political faith. Our faith in popular sovereignty does not make us indifferent to the liberal content of the rule of law. Law and popular sovereignty exist in a reciprocal relationship. Our faith in the popular sovereign is to some extent a function of the law it speaks. Were the law to appear to us regularly to violate our deepest moral commitments, we could lose faith in the popular sovereign. Something like this was true for those radical abolitionists who declared the Constitution to be a "covenant with death and an agreement with hell."<sup>26</sup> On the other hand, our faith in popular sovereignty makes us broadly tolerant of a legal order that never quite meets our moral standards.

While the structure of Schmitt's theory of the political offers a useful set of concepts, the content of his theory is not similarly useful. He believed that sovereignty had to be based on some prepolitical conception of a people's substantive homogeneity. The recent rise in ethnic nationalism is surely a warning that there are still real dangers in this direction. But American political experience has been directly to the contrary. Here, the popular sovereign brings itself into existence in the distinctly political acts of revolution and constitutional construction. Our conception of popular sovereignty has had to be adequate to a nation of diverse immigrant groups and diverse faiths. For Americans, popular sovereignty is always linked to the rule of law. Indeed, apart from revolution, the only act of which the popular sovereign is capable

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of Schmitt is more radical. Politics, I argue in chap. 6, is not just speech, but the action that succeeds speech.

<sup>26</sup> See William Lloyd Garrison, Resolution adopted by the Antislavery Society, Jan. 27, 1843.

is the making of law. Conversely, all law must show itself, directly or indirectly, as the speech of the popular sovereign. Without that, what purports to be law is only “action under the color of law”; it is unconstitutional. More than theory is at stake here, for if we allow liberalism to block our view of this political experience of popular sovereignty, we will not comprehend the nature of the law in what may be an emerging American Empire. Nor will we understand our deepest disagreements with our old European friends or our new enemies.<sup>27</sup>

### WHAT IS TO COME

My project necessarily moves back and forth between the abstract and the concrete, between theoretical structure and cultural practice. This is an advantage the legal theorist has over the political philosopher: to study law is to study ideas as they are actually used to structure the polity and resolve controversies. The judicial opinion is always a set of ideas embedded in a particular context. Each shapes the other; each sets the conditions for the possibility of the other.<sup>28</sup> From the perspective of the legal scholar, much of political theory has about it a disturbing abstractness. The close connection between liberalism and liberal theory seems to unleash the theoretician to imagine ever more refined conceptions of political justice, as if the point of scholarship were to get the rules right. But, as I will argue in chapter 6, political life is much more than a set of rules: it is a practice of life and death. Life and death continue to hang over American political life, but they remain far out of sight in the work of contemporary political theory. They are, however, very much on view in constitutional law. To study constitutional jurisprudence is to come face to face with claims of national security, of compelling national interest, of the power of the state in both its external and internal dimensions.

I am aware that my argument is not easy to follow. Our liberalism is a cultural practice drawing on a vast amount of conceptual material—philosophical and theological—that is itself a part of a larger, Western

<sup>27</sup> See Kahn, “American Hegemony.”

<sup>28</sup> See R. Dworkin, *Law’s Empire* 225–28 (1986) (on legal interpretation as deploying both moral theory and contextualized “fit”).

cultural practice. It is also a response to very specific historical conditions. I explore the historically contingent character of that which appears to be a priori truth for us: the autonomous character of the individual, the privileged place of reason, and a government that respects the distinction between the private and the public. These elements have a history as well as a conceptual shape. The broad character of the inquiry, its historical sweep, and its crossing of genres—history, law, religion, literature, and philosophy—are as likely to frustrate as to fascinate the reader. I hope that these diverse forms of inquiry all work to provide support for a few common themes. I have tried to hold the argument together by providing summaries at the start of each section, in the conclusion, and in the sketch of the argument that immediately follows.

Part I applies the methodological techniques of cultural study to our liberalism: its conceptual architecture must be mapped; a genealogy of its central categories must be developed.<sup>29</sup> Chapter 1 explores the conceptual architecture of liberalism by examining the debate between liberal theorists and their communitarian critics over the last generation. To understand the world within which liberalism is *a* possibility, we have to understand the conceptual architecture of liberalism *and* its critics. The multiculturalists have succeeded the communitarians in the role of critics. Together, communitarianism and liberalism took up two sides of a single antinomy of meaning, which understands the subject as simultaneously bound to and transcending context. Liberals systematically privilege one side of this antinomy; communitarians the other. The same antinomy is at issue today in the debate with the multiculturalists. Chapter 1 aims to show that this debate is not open to a resolution on its own terms; each side is irretrievably bound to the others. The antinomy, I argue, is rooted in the in the very structure of language.

Chapter 2 offers a genealogy of the practice of American liberalism. I explore the resources out of which American liberalism is constructed and demonstrate that these actually support two different forms of liberalism: a liberalism of faith and a liberalism of speech.

<sup>29</sup> I have discussed this methodology in detail in P. Kahn, *The Cultural Study of Law: Reconstructing the Legal Scholarship* 41–43 (1999).

These point in quite different directions: one privileges the private, the other the public; one privileges the particularism of faith, the other the universalism of reason. American legal and political culture has never resolved the deep tension between these forms. Our ambiguous attitude toward difference—shifting between tolerance and universalism—reflects this deeper ambiguity in our liberalism. This chapter also traces the way in which American liberalism has had to maintain an awkward relationship with an experience of our politics as a source of ultimate value. Liberalism has served as a kind of creed. Every creed derives its symbolic energy not from its specific content, but from the identification of the individual with the underlying social reality. As Americans, we are liberal. It is not because we are liberal that we are Americans.

The method of chapters 1 and 2 is designed to illuminate from within “the historical a priori”—a concept I borrow from Michel Foucault.<sup>30</sup> Bernard Williams gives voice to this same methodological ambition when he writes of an inquiry into freedom:

[T]hese various conceptions or understandings of freedom, including the ones we need for ourselves, involve a complex historical deposit. . . . That contingent historical deposit, which makes freedom what it now is, cannot be contained in anything that could be called a definition. It is the same here as it is with other values: philosophy, or as we might say a priori anthropology, can construct a core or skeleton, or basic structure to the value, but both what it has variously become, and what we now need it to be, must be a function of actual history.<sup>31</sup>

When he speaks of “a priori anthropology” constructing a “core,” he is referring to what I have termed “architectural inquiry.” That, however, will not get us to the cultural phenomena of interest. For that, we have to take up what he calls “the contingent historical deposit,” or what I have called “genealogy”—the methodological point is the same.

<sup>30</sup> See M. Foucault, *The Order of Things* xx–xxii (1970); *The Archaeology of Knowledge* 127 (A. Smith, trans., 1972).

<sup>31</sup> B. Williams, “From Freedom to Liberty: The Construction of a Political Value,” 30 *Philosophy and Public Affairs* 3, 4 (2001).

Chapter 3 takes up the results of the inquiry into the historical a priori and asks whether they can form the basis for a stable and adequate conception of politics. It focuses on the role of reason in delineating the public order and the distinction of the private from the public. These critical elements of the liberal project are shown to fail: the discourse of reason becomes a discourse of the body; the political always seems to bridge the private and the public. The conceptual apparatus of liberalism is incommensurate with the experience of the political. Liberalism offers a theory of political order, but liberalism cannot understand the conditions of the political upon which it depends. In our political life, we affirm liberal values, but liberalism fails as a theory of politics.

Part II offers a positive account of self and politics, within which liberalism must find its place. The fundamental problem with the liberal conception of the soul is that it is far too thin an account of our own experience. Chapter 4 switches the psychological inquiry from a focus on reason to a focus on meaning—that is, meaning for us. Here, I explicitly develop an alternative theory of the will to replace the liberal conception of will as contract. This is the pivotal point of the book. Prior to this, my technique is essentially critical. From this point forward, I offer a positive account of the shape of our experience within this dimension of the will. Chapter 4 makes this transition by demonstrating that liberalism fails as a theory of politics because it substitutes contract for sacrifice.

Chapters 5 and 6 develop this richer account of ourselves and of our politics based on the idea of the will. They start not from the perspective of reason but from that of meaning. The question of meaning is inevitably a question of identity. Chapter 5 takes up the problem of individual identity, love, and chapter 6 that of collective identity, politics. Together, they develop a conception of the will as the psychological faculty that places us in a meaningful world.

Meaning, I argue, is never a matter of abstract ideas alone. Rather, it is experienced in and through the body. Meaning is not of the body, but it is certainly in the body. The body is “read” as the expression of an idea. The primary terms of this reading of ourselves involve love and politics, both of which are characterized by sacrifice. We know who we are when we know the concerns for which we are willing to

sacrifice. These are all ideas beyond the capacity of liberalism to understand or even to recognize. Nevertheless, these have been the terms within which we have lived our political lives—even as we appealed to liberal values in structuring our law and institutions. The ambition of this part is not to offer an answer to the problem of cultural difference, but to illuminate from within the character of *our own* cultural difference. Even a liberal political order is still a political order. Our liberalism must be informed by a better understanding of our politics.

Having achieved a better understanding of ourselves as political—and not just liberal—actors, I turn again to the problems of cultural pluralism in the conclusion. Here, I argue two points. First, we are presently seeing a challenge to that political self-understanding, which put sovereignty before law. Second, it is too early to know whether that challenge will succeed.

The traditional forms of political participation in the sovereign through the logic of sacrifice have been substantially challenged, if not displaced, by a politics of rights. In the last decade, there has been a kind of human rights triumphalism, marked by the emergence of new transnational institutions that are not compatible with the idea of political sovereignty, upon which the modern nation-state rested. Whether one believes this development to be good or bad, its presence is undeniable. It is part of the general movement of globalization, its legal face.

These new political formations are reciprocally linked to new understandings of the self. The network has joined with the market in opening ever further possibilities of a fluid identity, on the one hand, and a cosmopolitan conception of the self, on the other. The political rhetoric of sovereignty and sacrifice, the idea that political identity offers a source of ultimate meaning, is a language that no longer speaks to the condition of many citizens. The rule of law does, but this is law severed from its connection to sovereignty. This emerging networked self is not sufficiently bound to any single conception of the content to respond to a claim for sacrifice. Rather, individual subjectivity appears as a project—increasingly one of global dimensions. Multiculturalism, as both a descriptive and normative concept within a broadly liberal culture, occupies this space made possible by a conception and a technology of the self that can be simultaneously global and local. Cultural

pluralism as a threat to liberalism marks a deep division of attitudes toward this fluid conception of the self.

What remains wholly indeterminate, however, is whether this post-modern displacement of a politics of ultimate meaning will lead to the rise of other forms of ultimate meaning, to understand which we again need to consider the structure of eros and the will. Political forms may be more contingent than the erotic foundation upon which they build. Our increasingly depoliticized age has, for example, been marked by new investments of ultimate meanings in a child-centered ideal of the family, in fundamentalist faith, and in ethnic communities. None of these are consistent with the ideal of the liberal subject, but each may be compatible with a liberal rule of law. We are simultaneously living in an age marked by the free flow of information on the Internet and by fundamentalist faith. Contrary to the expectations of many liberals—contrary, as well, to the fears of many religious communities—the former has not undermined the latter.

It is much too early, however, to proclaim the triumph of a networked self that takes up its own subjectivity as a project carried out within a global order of law, markets, and information. The contemporary phenomenon of depoliticization may itself be coming to an end, as we find ourselves returning to a more traditional politics of friends and enemies. Symbolically, this return was marked by the attack of September 11, 2001, and the American turn to war in response. The contemporary Western state—particularly the United States—may be simultaneously undergoing an internal depoliticization and an external repoliticization. This is not a question of the scope of the “coalition of the willing,” but of a realignment of political identity that reflects—and indeed coopts—the new fluidity of the self represented by markets and networks. This new understanding of the networked self may be forced into a revitalized distinction between self and other. That very fluidity may come to define a Western subject in which we invest a politics of ultimate meaning: We are a people of the Internet. That too may be a powerful political idea, separating friends from enemies. The result will not be the death of politics, but it may very well be the end of the nation-state as we have understood it for the last two hundred years. Political meanings may remain no less vital even as the geography of the political may be shifting.

Finally a word on the scope of the inquiry. Just as it would be wrong to claim that this study illuminates universal attributes of the Western soul, it would be wrong to think the account is wholly particular to American practices and beliefs. American practices and beliefs are contingent, but they nevertheless occupy a conceptual space made possible by the broad reach of Western history, theory, and language. Much that is at stake here is similarly at stake in other modern Western states. Major themes here, however, may appear as minor themes elsewhere, and vice versa. Comparative work remains for future volumes.<sup>32</sup>

<sup>32</sup> See P. Kahn, "Comparative Constitutionalism in a New Key," 101 *U. Mich. L. Rev.* 2677 (2003).