

CIVILITY TO GRACIOUSNESS: VAN DER WALT AND RAWLS

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ABSTRACT

Johan van der Walt finds the essence of the concept of liberal democratic law to lie in an uprootedness of law “from life.” He connects that finding to a modern experience of life fundamentally divided. Division of life occurs both at the societal level, as a fact of visionary pluralism, and at the personal level, as an experience of deep-set inner conflicts of passions and motivations. The path to law-from-life uprooting from the experience of external social division may be the more obvious; the path there from the experience of internal conflict may be the more interesting. The two paths join at a crucial place reserved by Van der Walt for indispensable moments of “sacrifice” – or, better, “gift;” or, still better, “graciousness” – in the liberal democratic experience of law. We ask here whether that is also the place of “civility” (in the lexicon of John Rawls), where the conception of liberal democratic law put forth by Rawls in his philosophy of political liberalism may be seen to meet up with the thought of Van der Walt.

KEYWORDS

John Rawls, Johan van der Walt, political liberalism, liberal principle of legitimacy, duty of civility, relative autonomy of law.

INTRODUCTION

A law “*not rooted in life*”: There, in that idea, you have the very essence, as it seems to me, of Johan van der Walt’s distillation – his liberation, one might say – of the ethereal vapour of liberal democratic law from the metaphysical mash-up whose history his latest book so vividly recollects.¹ That’s at any rate the element in the extract that has called forth the response that follows.

¹ See Johan van der Walt, *The Concept of Liberal Democratic Law* (New York, Abingdon: Routledge, 2020) 226, 247 (hereinafter referred to as “*Concept*”).

Intimately connected by Johan to that element, as in some loose sense its proximate cause, is a modern experience of life itself asunder.² If the *telos* – the potentiality – of law is service to life (and what else could it be, asks Johan³), then what follows for him is not (as you might suppose) that law should be rooted in life. The inference must rather be the opposite because, explains Johan, the “life that requires legal service is never one, but always two or more, always fundamentally divided . . . and separated from itself.”⁴ A law to serve a life thus fragmented cannot, then, be rooted in life. “Yes and no,” will be my response. It depends on how widely and thinly we will spread the mantle of “life.”

I do get the idea; at least I am pretty sure I do. Johan writes in *Concept* from the theoretical heights, presenting readers with an amazing topographical-cum-archeological grand sweep of main features in the terrain below. We standing below on that terrain, coming to Johan’s grand conspectus from our own current preoccupations here, will likely have our differing expansions for these telescopically regarded divisions, separations, and paths of connection. My own recent preoccupation has been with the political-liberal constitutional conception of John Rawls.⁵ From Johan’s scattered references to Rawls in *Concept*⁶ and from closely related recent work of his,⁷ I think he will not find completely misguided my suggestions here of a Rawlsian frame for his thought (and of his thought’s

² I beg indulgence for my informal style of address to Professor Van der Walt in this paper. In the wake of twenty-five years of friendship channeled in sometimes quite intense intellectual exchange, nothing else will come naturally.

³ “What purpose . . . can [law] be expected to serve?” “[T]he answer must be clear: life, nothing but life.” *Concept*, 226.

⁴ *Ibid.*

⁵ I cite some instances here for readers looking for back-up for the highly compressed renditions of Rawlsian thought on view below. See, e.g., Frank I. Michelman, “The Question of Constitutional Fidelity: Rawls on the Reason of Constitutional Courts,” in *Public Reason and Courts*, ed. Silje A. Langvatn, Mattias Kumm, & Wojciech Sadurski (Cambridge, Cambridge University Press, 2020) 90; Frank I. Michelman, “Political-Liberal Legitimacy and the Question of Judicial Restraint,” *Jus Cogens* 1, no. 1 (2019): 59; Frank I. Michelman, “‘Constitution (Written or Unwritten): Legitimacy and Legality in the Thought of John Rawls,” *Ratio Juris* 31, no. 4 (December 2018): 379; Frank I. Michelman, “Human Rights and Constitutional Rights: A Proceduralizing Function for Substantive Constitutional Law?,” in *Human Rights, Democracy, and Legitimacy in a World of Disorder*, ed. Silja Voenecky & Gerald Neuman (Cambridge, Cambridge University Press, 2018) 73.

⁶ See, e.g., *Concept*, 3, 5, 64, 178.

⁷ See Johan van der Walt, “The Gift of Time and the Hour of Sacrifice: A Philosophical-Anthropological Analysis of the Deep Difference between Political Liberal and Populist Politics,” in *Law’s Sacrifice: Approaching the Problem of Sacrifice in Law, Literature, and Philosophy*, ed. Brian W. Nail and Jeffrey A. Ellsworth (New York, Abingdon: Routledge, 2019) 113.

impact on my own take on Rawls). I am less sure about how far beyond that his endorsement might or might not go. Johan tells us he has in near-term view an article of his own on this very topic, so my offering here might serve as a warmup for that.⁸

One further preliminary word, on the matter of divided life. I understand Johan to be positing division along not just one axis but two of them. One is external, as we might say, the axis along which are strung out differences among persons and groups of deep-set orientations to the world and to society. The other is internal, a sundering within individual personalities of passions, perceptions, valuations and resulting motivations. (An example would be the personal experience of “fundamental contradiction” posed by Duncan Kennedy.⁹) The path from externally divided life to law-from-life uprooting may be the more obvious;¹⁰ the path there from internally sundered personal life may be the more interesting. The two paths join, I am going to suggest, at a crucial place reserved by Johan, elsewhere in his work if not so visibly in this current book, for indispensable moments of “sacrifice” – or, better, “gift;” or, still better, “graciousness” – in the liberal democratic experience of law.¹¹

In what follows, I will propose a series of Rawlsian-theoretic instantiations of the ideas of life externally divided, of life internally conflicted, of the hiving off of law from life, and of the corresponding indispensability to that law of the moment of graciousness or gift. Here in a nutshell are those instantiations: *for life externally divided*, a posited social fact “of pluralism” – that is, of the inevitable inhabitation of any approximately free society by a plurality of conflicting metaphysical, moral, and religious “comprehensive views”;¹² *for life internally conflicted*, a morally

⁸ See *Concept*, xiii.

⁹ See *ibid.*, 223.

¹⁰ Johan states it quite explicitly. A law that tried to track a life imagined as whole and undivided, he writes, would “lose its ability and claim to serve the concerns of all parties to the dispute.” *Concept*, 226.

¹¹ See Johan van der Walt, *Law and Sacrifice: Toward a Post Apartheid Theory of Law* (London: Birkbeck Law Press, 2005); Van der Walt, “Gift of Time.”

¹² See John Rawls, *Political Liberalism (With a New Introduction and the “Reply to Habermas”)* (New York: Columbia University Press, 1996) 36-37 (positing a “fact of reasonable pluralism”); *ibid.*, xviii (taking as a premise that “a plurality of reasonable yet incompatible doctrines is the normal result of the exercise of human reason within [a] framework of . . . free institutions”).

motivated citizen's simultaneous impulses to act politically in the cause of true justice and to join in cooperation with free and equal others "on terms all can accept;"¹³ *for the uprootedness of law from life*, the political-liberal ideal of a law "freestanding" from comprehensive views¹⁴ – thus, a *positive* law, fixed by political events of legislation, under terms of validation themselves answering to "political" reasons exclusively;¹⁵ *for the indispensable moment of graciousness or gift*, a call to "civility."¹⁶

SEPARATION OF LAW FROM LIFE, IN THE CONSTITUTIONAL-LEGAL CONCEPTION OF JOHN RAWLS

Rawls starts from a connection he draws between two fundamental political ideas of the constitutional-democratic tradition: that of the political constituency as a severalty of persons each endowed with powers of moral agency and a higher-order interest in their exercise, and that of society as a scheme of cooperation among persons thus endowed.¹⁷ "Reasonable" such persons, Rawls posits, living within the political tradition of constitutional democracy, "desire a social world in which they, as free and equal, can cooperate with others on terms all can accept."¹⁸

But then how, Rawls most urgently seeks to know, "is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?"¹⁹ If, Rawls asks, "the fact of reasonable pluralism always characterizes democratic societies," then "in the light of what reasons and values [...] can [free

¹³ Rawls, *Political Liberalism*, 50. "The zeal to embody the whole truth in politics," writes Rawls, "is incompatible with an idea of public reason that belongs with democratic citizenship." John Rawls, "The Idea of Public Reason Revisited," *University of Chicago Law Review* 64, no. 3 (Summer, 1997): 765, 767.

¹⁴ See, e.g., Rawls, *Political Liberalism*, 12.

¹⁵ Compare *Concept*, 241: "Liberal democratic . . . legislation is not the actualisation or teleological fulfilment . . . of anyone's truth, but the compromise that constantly displaces, dislodges and uproots all comprehensive truth claims."

¹⁶ See, e.g., Rawls, "Public Reason Revisited," 769-70 (speaking of an "intrinsically moral duty" of "civility" incumbent on liberal democratic citizens).

¹⁷ See Rawls, *Political Liberalism*, 13-14, 18-19; John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: 2001, Harvard University Press), 18-19.

¹⁸ Rawls, *Political Liberalism*, at 50.

¹⁹ *Ibid.*, xx.

and equal] citizens *legitimately* exercise . . . over one another” the coercive powers of political rule – majorities over minorities – meaning by “legitimately” in such a way “that each can reasonably justify his or her political decisions to everyone?”²⁰

Rawls calls that “*the* problem of political liberalism.”²¹ His way of posing it already, as you see, presupposes that a democratic form of government will have to be a part of the answer. A major next step comes as what Rawls names “the liberal principle of legitimacy,” and that step takes us deep into the concept of law. Subject to variations of wording that do not reach to our concerns here, the principle reads as follows:

Our exercise of political power is proper and hence justifiable [among citizens free and equal] only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy.²²

The LPL (as we may familiarly call it) presents us with an institutional object-class, “constitution,” of which some members do and some do not, in certain essential respects, meet a test of hypothetical reasonable acceptability to everyone reasonable. (We’ll come below to filling in “reasonable.”) The LPL then lets justification ride on the back of an actual constitution that meets the test. By hypothesis, in a well-ordered democratic society, the constitution actually now in force in the country does meet the test; it is, as we shall say, a “justification-worthy” constitution. Majorities justify to protesting dissenters their exertions of political power by pointing to the justification-worthy constitution-in-force, with which those exertions can be seen to comply. The supreme court acts as institutional guarantor of that extant constitutional pact, to which officials and citizens point by way of justification for their votes and other political actions.²³

I continue now with the sense in which the resulting body of law-in-force is uprooted (“freestanding”) from the kinds of ideational totalities or frameworks, of outlooks and orientations to the world and society, we might mean to include here

²⁰ Rawls, *Justice as Fairness*, 40-41 (emphasis supplied); Rawls, “Public Reason Revisited,” 770.

²¹ Rawls, *Political Liberalism* xx (emphasis supplied).

²² *Ibid.*, 217; see *ibid.*, 237; Rawls, *Justice as Fairness*, 41.

²³ See Rawls, *Political Liberalism*, 233.

under “life.” Essential in a liberally justification-worthy constitution is a ledger of guaranteed basic liberties. That ledger has to satisfy a Goldilocks demand: not too thick and not too thin. It must be thin enough to stop short of foreclosure of questions of make-or-break import to some citizens, over which reasonable citizens divide, but still thick enough to say enough about matters people care deeply about to support the claims of citizens to each other of the worthiness of any conforming regime for continued support. The liberties will have to be cast, then, at accommodating levels of abstraction.²⁴ (Think of the names of the liberties on the list Rawls provides to accompany his proposed first principle of justice as fairness: “freedom of thought and liberty of conscience;” “the political liberties and freedom of association;” “freedoms specified by the liberty and integrity of the person;” “rights and liberties covered by the rule of law.”²⁵)

Rawls maintains that some possible constitutional text can say enough without saying too much. Soon below I will be taking us through a set of conceived-as-possible political-sociological conditions that I take to be sustaining this belief in Rawls’s thought. First, though, I need to rush us at lightning speed through the resulting picture of constitutional-legal content, argument, and administration that by my understanding Rawls has in view.²⁶ The named basic liberties are none of them to be taken as non-regulable. The constitutionally essential guarantee is to each person of an equal right with others to “a fully adequate scheme of equal basic liberties which is compatible with a similar scheme for all.”²⁷ The keyword there is “scheme.” The guarantee is for a configuration of liberties in which, while no liberty is restricted except for the sake of the whole configuration of equal liberties, all of the liberties are subject to legislative adjustment as required for the configuration as a whole.

Now, obviously (examples will spring to mind), instances of such adjustment will from time to time give rise to hard cases of constitutional law: Has the extant legislation got this right? Owing to a conspiracy of causes to be set out as part of the sociological picture coming below, citizens responding in good faith to such

²⁴ See Rawls, *Political Liberalism*, 232 (“The principled expression of higher law is to be widely supported,” and so “it is best not to burden it with many details and qualifications.”).

²⁵ Rawls, *Political Liberalism*, 291.

²⁶ For more fully adequate treatments, see the writings listed in note 5. I perhaps should underline “by my understanding;” not all treatments of Rawls’s ideas of the workings of liberal constitutional law would be in accord with my account herein.

²⁷ See Rawls, *Political Liberalism*, 291.

cases cannot be expected always to agree on which or whose plausible claim to protection must yield to which or whose conflicting plausible claim. Citizens so motivated can, though, come closer to wide agreement on an outer bound of reasonability in the legislative resolutions of such conflicts. And they could come closer still to a convergence on trust in some public institution, such as a supreme court, to arrive at judgments respecting the outer bounds of reasonability that will be sufficiently reliable, enough of the time, to keep the system stable (“for the right reasons,” as Rawls would say²⁸) without undue strains of commitment. The job of the Rawlsian supreme court correspondingly will be to decide such cases by application of a standard of “at-least” reasonability to challenged legislation, without presuming to dictate to the country what the judges themselves would regard as “the most reasonable” solutions to intra-schematic problems.²⁹ Both the judges and the citizens are thus expected to sustain an internal division between own settled conviction and the moral demand for political toleration. Whatever strains of commitment result (and some will), Rawlsian citizens live with them.

That is, as I said, a highly compacted (and possibly controversial) reduction of a longer, more complicated story. It should suffice to support the question to which I now turn, that of the sociological premises that by my understanding lie back of the Rawlsian constitution-centered response (the LPL) to the problem of political liberalism, that is, of the possibility of a just and stable political order among free and equal citizens under pluralism (= externally divided Johanian “life.”).

RAWLSIAN REALISTIC UTOPIAN POLITICAL SOCIOLOGY

Rawls’s liberal principle of legitimacy envisages a society of free and equal citizens conducting their politics in mutually accredited submission to a publicly established framework law (“constitution”) – finding that framework law, as they do, sufficiently complete (“thick”) to give justificatory cover to all of all the laws and policies issuing from it, while still thin enough to be, for that purpose,

²⁸ See, e.g., Rawls, *Political Liberalism*, xxxix-xl.

²⁹ See Michelman, “Constitutional Fidelity,” 108-09, 111-12; Michelman, “Judicial Restraint,” 67-68, 72-73.

acceptable to all in line with principles and ideals variously held by each. That seems a tall order, the possibility of the fulfillment of which would depend on a sociological milieu in which are combined a number of special cognitive, motivational, and communicative elements – a “realistic utopia,” Rawls would have called it, “taking men as they are and laws as they might be.”³⁰ Realistically conceivable, Rawls says, the envisaged state of society must be, because only then practically pursuable or arguably worth pursuit.³¹ “Until we bring ourselves to conceive how this could happen,” he writes, “it can’t happen.”³² (Is that already too much concession to law’s dependence on life to suit Johan?) I offer here a compressed wrap-up of special motivational features in a Rawlsian realistic utopian liberal society, limiting them to four: (1) a political conception of the reasonable, (2) allowance for burdens of judgment, (3) liberal toleration or the idea of the “at-least reasonable,” and (4) a call to civility.

a political conception of the reasonable

It is clear from the start that Rawls is not talking of a constitutional framework for which we are to expect wholehearted acceptance by literally everyone in sight. We will come back soon to concerns for an omitted remainder. For now, we simply understand that political reasonability is, for Rawls, already a distillation of “basic ideas implicit in the public political culture of a democratic society.”³³ (Is that already more rootedness in life than Johan’s distilled concept can accept? But isn’t Johan’s, like Rawls’s, offered up as a concept of *liberal-democratic* law? We return at the end to these questions.)

As a first and most basic idea: liberal normative individualism. In the tradition to which Rawls is appealing, the ultimate concern of political morality is respect and regard for each individual as a “self-authenticating source of valid claims.”³⁴ While of course the Rawlsian basic liberties encompass communicative and associational freedoms, it is *to each person* (not party, lineage, class, sect,

³⁰ Compare John Rawls, *The Law of Peoples* (Cambridge MA: Harvard University Press, 1999) 13 (following the lead of J.-J. Rousseau)

³¹ See Rawls, *Political Liberalism*, lx-lxii.

³² John Rawls, “Justice as Fairness: Political Not Metaphysical,” *Philosophy and Public Affairs* (14 no. 3 (Summer, 1985): 223, 231.

³³ Rawls, *Political Liberalism* 43.

³⁴ Rawls, *Political Liberalism* 32. See above text at note 17 on a political conception of persons as individual moral agents.

chatroom, or “view”) that Rawls’s first principle of justice as fairness assigns the equal right to a fully adequate scheme of liberties including those.

The next three political-liberal basic ideas all depend from that first one.

As a second basic idea: political justification. Among a population of citizens free, equal, and divided by a pluralism of comprehensive views, a question always impends of the justification by majorities to minorities of contested exertions of political power. From this precept of political reasonability comes, as already explained, the constitution-centered liberal principle of legitimacy.

As a third basic idea: deflection to framework. Justification then takes the proceduralistic form of appeal to a “constitution,” a framework law in a two-level legal system. This sort of deflection – of justificatory explanation from the ground level of policy choice to a more abstracted framework level – is our necessary recourse in response to the problem of democratic political justification, among free and equal citizens, in conditions of pluralism.

To put the point another way: When democratic citizens present to one another their justifications for support of controversial ground-level laws and policies, they state them necessarily (implicitly when not explicitly) in the proceduralistic form: *this action or policy has gained the duly expressed support of a current democratic majority and falls within bounds of what some at-least reasonable constitution for a constitutional democracy at our time and place would prescribe or permit.*

As a fourth basic idea: extenuation of authorship of the laws by their addressees. Required for a constituency of citizens free and equal is a lawmaking framework by which those who will be subject to force of the ground-level laws can sufficiently count themselves as authors of those laws. Your and my sufficient links of authorship of the ground-level laws can be given by our concurrences, actual or reasonably ascribable, on a constitutional-framework pact that constrains and directs the aims and outcomes of subordinate legislation, not in full detail but still substantially enough so as (along with whatever further participation by us in

daily politics our constitution may provide) to render us thereby sufficiently responsible for that legislation.³⁵

burdens of judgment

Those four basic ideas, extractable as they may be from a tradition of constitutional democracy, do not yet suffice to generate a uniquely well-defined scheme of constitutional essentials. Their combination does not yet explain how any *given* script – any commonly and publicly legible script – of constitutional essentials or basic liberties can become the object of willing acceptance across the wide spectrum of citizens divided by comprehensive views. By the understanding of Rawls, there will still, within the circle of the politically reasonable, remain conflicts over the articulation, naming, and application of the component items in a scheme of essentials for a justificatory load-bearing constitution.

That will be owing, in part, to the inconvenient social fact Rawls tables under the head of “burdens of judgment.” As explained by Rawls, the burdens include (a) difficulties in assessing evidence, (b) disagreement over weights to be assigned to competing considerations, (c) ambiguities in political and moral concepts, (d) conflicts arising from different life experiences and perspectives, (e) incommensurability of relevant competing considerations, and (f) the difficulty of accommodating all recognized goods in a single political system.³⁶ And among these burdens, whether as a separate item or an overall aggravating factor, we can further include a raw social fact of a pluralism, in any modern free society, of comprehensive views.

To begin to meet the sting from the social fact of the burdens of judgment, political reasonability must itself be understood to include an appreciation of that fact. “The reasonable” includes, as a “basic aspect,” Rawls says, a willingness “to recognize the burdens of judgment and to accept their consequences for the use of public reason in directing the legitimate exercise of public power in a constitutional regime.”³⁷ Reasonable persons, writes Rawls,

³⁵ Agreement on “constitutional essentials and matters of basic justice” can suffice, Rawls suggests, for democratic political justification. “As long as there is rough agreement [there], fair social cooperation among citizens can, we hope, be maintained.” Rawls, *Justice as Fairness*, 41.

³⁶ See Rawls, *Political Liberalism*, 54-58.

³⁷ *Ibid.*, 54.

recognize and accept the consequences of the burdens of judgment, which leads to the idea of reasonable toleration in a democratic society. . . . They know that in political life unanimity can rarely if ever be expected, so a reasonable democratic constitution must include majority or other plurality voting procedures in order to reach decisions.”³⁸

liberal toleration: the idea of the at-least reasonable

And that, then, will open, in the judgments of the reasonable respecting a given constitution’s moral supportability, the space for a finding of “at-least” reasonable (“reasonable enough,” as one might say). Importantly, the idea here is not that you and I yield on our respective judgments of right and wrong, correct and mistaken, choices for the applied substantive-directive content for a constitution. It is rather that, retaining those judgments, we nevertheless find it right to join with expectations of compliance with the constitution in force (and so with its compliant, subordinate laws), which we judge to be (within limits) substantively faulty.³⁹ Find it, I emphasize, not just expedient but *right* to do this (such insistence would be crucial for Rawls), *given* the place occupied, in your and my schemes of political-moral values, by those of social cooperation on fair terms among free and equal citizens – or what Rawls calls “the very great values of the political [which] are not easily overridden.”⁴⁰

“civility”

Put together the social fact of pluralism with the liberal-leaning slant of the political conception of the reasonable (“implicit in the culture of a democratic society”), add the tack-ons about burdens of judgment and toleration, and still there is no prospect for a set of intelligibly defined constitutional essentials that can win literally everyone’s acceptance when put to the proof of application to hard cases. A conception of liberal democratic law along Rawlsian lines accordingly must face the prospect of an excluded remainder of citizens. While

³⁸ Rawls, “Public Reason Revisited,” 805.

³⁹ See again, here, my compressed account above of the conduct of the constitutional politics of a Rawlsian well-ordered society.

⁴⁰ See Rawls, *Political Liberalism*, 168-69, 218.

Rawls hopes and expects that the number of the excluded and the severity of their subjection might be held down by an emergence over time of what he calls an overlapping consensus of reasonable comprehensive views on a liberally plausible set of constitutional essentials (an aspect of his argument we cannot pause over here), he does not suggest that could ever bring to zero the number of the unreconciled.

To narrow the gap or ease the sting of inevitable failure, there is one further political-sociological posit we can try: that of the attribution, in our societies, of an overlapping spirit of willingness to bear the liability to just that amount and degree of concession to power – no more! – that must necessarily, at a minimum, result under any possible legal order designed for the maintenance of social cooperation. This willingness to bear would go beyond a reasonable person’s acceptance of a space for reasonable disagreement; it would operate in a gap of concession that this reasonability cannot cover. It would do so by compounding your and my reasonability in allowing for that space with the additional moral weight for us of the very fact of our fellow citizens by democratic processes having taken the measures they have. Impersonal reasonability thus would slide to interpersonal civic fellowship. From the cerebral detachment of reasonability we would pass to the committed act of “sacrifice” – or, better (more recently says Johan), of “gift.”⁴¹ Or maybe better still (my suggestion) of *magnanimity*, and maybe it is Henry David Thoreau who nailed the point most memorably of all:

“Man recognizes laws little enforced, and he condescends to obey them. In the moment when he feels his superiority to them as compulsory, he, as it were, courteously reenacts them but to obey them.”⁴²

What I have just named “magnanimity,” Johan has most recently called “graciousness.”⁴³ (He traces the thought’s inspiration to Saint Paul, not Thoreau.⁴⁴) What is more interesting for us, Johan expressly suggests the matching of his thought in this regard to Rawlsian “civility.”⁴⁵ Now, that’s not so entirely innocent

⁴¹ See Van der Walt, “Gift of Time,” 115 (preferring gift to sacrifice as a hallmark of idealized liberal politics).

⁴² Thus mused Thoreau, two years or so after publishing “Civil Disobedience”! Henry David Thoreau, *The Journal 1837-1861*, ed. Damion Searls (New York: New York Review of Books, 2009) 91 (journal entry for Nov. 1, 1851).

⁴³ See Van der Walt, “Gift of Time,” 142.

⁴⁴ See *Concept*, 236.

⁴⁵ See Van der Walt, “Gift of Time,” 142-43.

a move as you might think. Its effect is to take what I (*qua* follower of Rawls) had been treating up to now as a nagging, residual problem of an outlying excluded few and explode it to a constant and general condition of liberal life. For it's not then, in Johan's eye, a problematic few we are confronting, but ourselves as liberal, all of us, all of the time.

Johan's Rawls - Rawls through Johanian eyes - is "profoundly aware of the irreducible precariousness and fragility of any liberal consensus." Citizens who stick to the consensus do so in the knowledge that its terms "will often not be enforced or enforceable. Sticking to the deal therefore always remains, in some measure, a matter of groundless graciousness. The transformation of a *modus vivendi* into an overlapping consensus is never complete."⁴⁶ Johan means it is never complete *for anyone*, and he plants this idea of everyone's remainder of risk-taking "on a daily basis" squarely in the thought of John Rawls.

"Liberal democracy pivots," Johan writes, on "this gift of taking risks with others"⁴⁷ - this gift of willingness to bear, of "willingness to stick to the deal despite its imperfection."⁴⁸ In the daily normal disposition of liberal democratic citizens to submit to the laws of their country - in the very heart of the Rawlsian idea of the freestanding very great values of the political - is *always* to be found this moment of graciously lending cooperation. It is simply "what one gets when one severs the link between life and law."⁴⁹

But *is* that what it is? Can we say that the Rawlsian idea of a "public" or "political" reason, or the Rawlsian liberal quest for a law freestanding from life, are themselves an idea and a quest freestanding from life? Or are this idea and this quest not rather still enlivened through threads of connection to the culture and tradition of constitutional democracy? Justification of a political conception, Rawls has written,

is not primarily an epistemological problem. The search for reasonable grounds for reaching agreement rooted in our conception of ourselves and in our relation to society replaces the search for moral truth interpreted as fixed by a prior and independent order of objects and relations, whether natural or divine What

⁴⁶ *Ibid.*, 142.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, 143.

⁴⁹ *Concept*, 236.

justifies a conception of justice is not its being true to an order antecedent to and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us.⁵⁰

“Ourselves” . . . “our” . . . “our” . . . “for us.” It sounds pretty lively to me. If the framework laws of liberal societies are thus answerable to “us” and explicable amongst us by our history and traditions, then in what sense might the distilled liberal concept of law be said to consist in the law’s uprootedness from “life”? From *kosmos* and *physis*, yes; but from *nomos*? From the life that is externally divided, and from that which is internally conflicted, sure; but from the commitment *as liberal* to find the way to live together in harmony as free and equal persons, despite those conflicts and divisions? Can Johan, speaking of the uprootedness of law from life, possibly mean by “life” anything more or less than what Rawls calls a comprehensive view, to be regarded as a distinguishing aspect of the holder’s life but not the whole of anyone’s free life in liberalism?

It must be in its singular focus on the constant *striving toward* freestandingness from *divided* life that the liberal democratic concept of law claims its distinction from all others. On the ground of the precariousness and the humility (but not the lifelessness?) of that striving, perhaps John and Johan both can stand.

⁵⁰ John Rawls, “Kantian Constructivism in Moral Theory,” *Journal of Philosophy* 77, no. 9 (September 1980): 515, 519.