Can a Pluralistic Commonwealth Endure?
The Political Problem of Religious Pluralism and Why Philosophers Can't Solve It. By Thaddeus J. Kozinski

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INTRODUCTION: WHAT IS A COMMONWEALTH?

Over two thousand years ago, the Roman orator, senator, and philosopher Cicero defined a commonwealth as: "the concern of a people, but a people is not any group of men assembled in any way, but an assemblage of some size associated with one another through agreement on law and community of interest."[1] This definition includes three critical elements: (1) a collection of people of some minimal number, (2) an agreement on law, and (3) a common interest. In this review of Thaddeus Kozinski's masterful book, I will ask whether the United States of America as currently constituted meets Cicero's definition of a commonwealth or is merely a "group of men assembled." The United States is clearly a collection of a sufficiently large number of people. I will assume there exists at least a minimal common interest in promoting basic economic welfare. Therefore, I will focus upon the middle element, whether there is a sufficient agreement on law.

The phrase translated as "agreement on law" is the Latin phrase "*consensus juris.*" *Juris* comes from the Latin *jus*, a polyvalent term possessing meanings beyond the simple English word "law."[2] The penumbra of meanings surrounding *jus* includes: "law, justice, right, rights, procedures of justice, just behavior,

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1. MARCUS TULLIUS CICERO, *On the Commonwealth*, *in* ON THE COMMONWEALTH AND ON THE LAWS bk.1, para. 39a, at 18 (James E.G. Zetzel ed., Cambridge Univ. Press 1999).

2. *See* Kenneth Pennington, *Lex Naturalis and Ius Naturale*, 68 THE JURIST 569, 573 (2008).

court, regulations, power, authority."[3] *Jus* also has the "connotation of 'justice'—that is, the broader principles of equity or morality which a legal system is supposed to embody."[4] This rich word is distinguished from the Latin word *lex*, also rendered in English as law, but with a more specific meaning than *jus*. It refers merely to written rules adopted by a constitutionally approved legislative authority. Thus, when Cicero requires a consensus on *jus,* he is referring to a consensus more entrenched than a mere agreement on specific laws of a polity. The term *jus* implies a deeper consensus on justice itself. Such a consensus embodies an agreement on the very nature and purpose of law and its relation to right, equity, and justice.

For Cicero this fundamental consensus on *jus* is established not by the mere opinions of men coinciding: "[W]e are born for justice and . . . justice is established *not by opinion but by nature*."[5] This consensus is not something that shifts with the opinions of men but is constituted by nature.[6] The consensus is a given, not a product of human consensus building. Cicero is not so naïve as to think that every person will always agree with the natural consensus on justice. "That is impossible," he says:

> but so that [first principles] will have the approval of those who believe that all right and honorable things are desirable on their own account, and that either nothing at all should be considered good unless it is praiseworthy in itself or at least that nothing should be considered a great good except what can truly be praised on its own account.[7]

Cicero admits there will be some plurality of opinions on the nature of the core principles of law and justice. Yet, notwithstanding some disagreement, to remain a commonwealth there must be an approval of first principles as desirable "on their own account" and not because of an agreement of opinion.[8] Political authority must go about on the basis of this consensus "making commonwealths sound, establishing justice and making all people healthy."[9] Without such a sharing of core principles of justice, a commonwealth of laws is not possible.

Dr. Kozinski undertakes to examine the presumption that a political system can be created and endure without such a deep consensus, or in other words, can exist in the midst of a broad pluralism of opinions on fundamental first

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3. CICERO, *Text and Translation*, *in* ON THE COMMONWEALTH AND ON THE LAWS, *supra* note 1, at xxxvi, xl.

4. *Id.*

5. CICERO, *On the Laws*, *in* ON THE COMMONWEALTH AND ON THE LAWS, *supra* note 1, bk. 1, para. 28, at 115.

6. The Latin text can be rendered literally as "justice is to be constituted not by opinion but by nature" (*neque opinione sed natura constitutum esse ius*).

7. CICERO, *supra* note 5, bk. 1, para. 37, at 118–19.

8. *See id*.

9. *Id.*

principles of law and justice. Although he does not phrase it in this way, Dr. Kozinski asks whether it is possible to sustain a commonwealth, and hence a legal system, without the middle term in Cicero's definition, a consensus on the very nature of law. This question is of critical importance for jurisprudence because if no commonwealth exists then there is no law in the proper sense.[10] If a deep pluralism as to first principles is not a sound basis of a commonwealth, the implications for what purports to be a system of justice and law in our country are profound.

Dr. Kozinski considers this fundamental question through a detailed analysis of the writings of three major figures in twentieth century political philosophy: John Rawls, Jacques Maritain, and Alasdair MacIntyre. After a brief introduction, the book is divided into three parts, each dedicated to one of these political philosophers. Within each section, Dr. Kozinski dedicates one chapter to the synthesis of each one's political philosophy with respect to the question of pluralism. In the second chapter of each section, Dr. Kozinski presents a critique of the applicable philosopher's answer to the question of pluralism. The structure of the book is also cumulative; it is not a mere anthology of three separate thinkers' analyses. The critique of Rawls is integrated into the explanation of Maritain's political philosophy, and the critique of Maritain is integrated into the explanation of MacIntyre's thought.

Dr. Kozinski defines the central question of his study in its opening lines:

> Is it possible to articulate a defensible, coherent, and sound philosophical model that, embodied politically, could serve as a morally acceptable and stable grounding for the nation-states of the contemporary, western, pluralistic West, states in which citizens subscribe to rival and irreconcilable comprehensive doctrines?[11]

As we have seen, Cicero would answer this question with a resounding no. A commonwealth, a political community of laws, cannot exist without a *consensus juris*. Cicero requires agreement on fundamental philosophical principles from his philosophically pluralist discussion partners[12] before proceeding to explain the details of the ideal set of laws.[13] Yet, post-Enlightenment philosophy has attempted to argue that a just commonwealth can be formed in the midst of even more fundamental disagreement than existed between an Epicurean and a Stoic. Dr. Kozinski calls this "*deep* pluralism," with its "ever-increasing number of not only diverse but also irreconcilable worldviews, both secular and religious."[14]

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10. *See, e.g.*, THOMAS AQUINAS, SUMMA THEOLOGICA pt.1 of 2d pt., Q.90, art. 2–3 (Fathers of the Eng. Dom. Prov. Trans., 1947) (1265–1274) (including within the definition of law the requirement that it be a rule for the common good of a political community and not merely for an individual).

11. THADDEUS J. KOZINSKI, THE POLITICAL PROBLEM OF RELIGIOUS PLURALISM: AND WHY PHILOSOPHERS CAN'T SOLVE IT xxi (2010).

12. Including an Epicurean. *See* CICERO, *supra* note 5, bk.1, para. 21, at 112.

13. *See id.* bk.1, para. 16, at 110.

14. KOZINSKI, *supra* note 11, at xxi.

Throughout the book, Dr. Kozinski demonstrates the serious philosophical problems that inhere in an attempt to build a commonwealth on the sands of deep pluralism. Yet, as we shall observe, he seems to leave the reader wondering what the alternative to this failed attempt would be.

I. DECONSTRUCTING JOHN RAWLS' OVERLAPPING CONSENSUS

The first philosopher whose thought is dissected is John Rawls. Dr. Kozinski characterizes Rawls' doctrine as one purporting to be ontologically neutral. Rawls claims to be merely performing a descriptive function, not making metaphysical claims. Dr. Kozinski characterizes Rawls' claim as advocating a theory of political liberalism—a freestanding, purely political overlapping consensus of political reasonableness. Yet, once the depths of Rawls' theory are mined, it turns out that he fails in truly separating political claims from the philosophical and metaphysical, and his freestanding consensus is not as freestanding as Rawls claims.

As a post-Enlightenment philosopher, Rawls shares the epistemological skepticism born of that era. Clearly modern states comprise people holding irreconcilable comprehensive doctrines—complete worldviews. Politics is not capable of assessing the truth of any claims these comprehensive doctrines make since it has a more limited, practical application, the maintenance of an overlapping consensus of reasonable political commitments. Dr. Kozinski summarizes Rawls' theory of the pluralist state thus:

> With citizens fundamentally opposed in their understanding of religious, philosophical, and moral matters, the basis for political unity, stability, and justification in such a society could not be a shared understanding in these matters. However, because the pluralism is "reasonable," there can be a fundamental consensus among these differing comprehensive doctrines upon which a political order can be unified, stabilized, and justified, a consensus on shared *political*, as opposed to *comprehensive*, values.[15]

Despite Rawls' assertions of being philosophically, and especially metaphysically, neutral, as well as prescribing only a practical political consensus, Dr. Kozinski sniffs out the metaphysical presuppositions smuggled into Rawls' practical consensus through the adjective "reasonable." As Dr. Kozinski notes, Rawls' overlapping consensus that underlies the just political order is only open to either (1) those with "reasonable" comprehensive doctrines or (2) those with unreasonable comprehensive doctrines who agree to limit their public participation in politics to reasonable positions, thus privatizing their unreasonable beliefs.[16]

But this assertion begs the question, "what is reasonable?" Dr. Kozinski

15. *Id.* at 13.
16. *Id.* at 26.

abstracts from Rawls' works the following meta-idea that provides for a circularity of definition: Public political culture possesses the absolute and exclusive authority to determine the commonly held conception of justice that is the focus of any overlapping consensus.[17] This meta-idea is the first and greatest commandment of Rawls' philosophy. Its acceptance is a *sine qua non* of participation in politics. If one's comprehensive doctrine does not justify the meta-idea, then that is fine with Rawls. The citizen, however, withholds assent to it upon pain of becoming "unreasonable," the sentence for which is banishment from political participation. The conclusion Dr. Kozinski reaches is that, notwithstanding Rawls' purported liberal broadmindedness in permitting people to retain whatever comprehensive doctrines they choose, we "must adjure any foundation for political unity other than that which can, and in fact is, unifying us, namely, the public political culture of the particular liberal democracy in which we live."[18] As the poet Alexander Pope quipped: "[o]ne truth is clear, 'Whatever *is*, is *right*'"[19]

Rawls avoids justifying his meta-idea on philosophical and metaphysical grounds because he denies he is speaking philosophically. He attempts to separate politics from philosophy and deems all he says non-philosophical, thus dodging the challenge to prove his meta-idea. He can simply take the current liberal democracy with the pluralism underlying it as a given fact.[20]

Dr. Kozinski's coined term "meta-idea" perfectly captures his critique of Rawls. By transferring the justification for the authoritative banishing of "unreasonable" citizens from the political community to the realm of obvious, undisputable fact, Rawls' political system rests upon a critical assertion that he can avoid ever having to defend. The meta-idea is never openly engaged in his arguments because it exists only in the shadowy world of a meta-idea. Though Dr. Kozinski does not draw this parallel, he exposes the same hypocrisy in Rawls as exists in John Locke's *Essay on Toleration*. Locke, while arguing for toleration of all religious views, excludes two views from the broad toleration: Catholics and Protestants whose comprehensive doctrines (to use Rawls' phrase) do not include Locke's version of latitudinarian Anglicanism, or what Locke calls "papists" and "fanatics."[21] Like Locke before him, Rawls deals with philosophical critiques of his reasonable pluralism and overlapping consensus by simply excluding the critics from his overlapping consensus as "unreasonable," or to use Locke's term, "fanatics."

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17. *Id.* at 27.

18. *Id.*

19. ALEXANDER POPE, AN ESSAY ON MAN ep. 1, l.294 (1794) (emphasis added), *available at* http://www.gutenberg.org/files/2428/2428-h/2428-h.htm.

20. KOZINSKI, *supra* note 11, at 27 (describing Rawls' justification of the meta-idea as simply claiming it is an "obvious fact").

21. JOHN LOCKE, *An Essay on Toleration*, *in* POLITICAL ESSAYS 134, 151 (Mark Goldie ed., Cambridge Univ. Press 1997) (1667); *see also* CHRISTOPHER A. FERRARA, LIBERTY, THE GOD THAT FAILED: POLICING THE SACRED AND CONSTRUCTING THE MYTHS OF THE SECULAR STATE FROM LOCKE TO OBAMA 92–94 (2012).

As Dr. Kozinski points out, Rawls does not deny the fact of the exclusivity of his political system: some people will be excluded. Rawls' claim, one Dr. Kozinski skillfully rebuts, is that Rawls excludes nobody for metaphysical reasons, that is, reasons involving any particular comprehensive doctrine.[22] Notwithstanding protestations of metaphysical neutrality, Rawls is committed to a comprehensive doctrine that he demands all citizens accept or be excluded from debate. His comprehensive doctrine is the meta-idea, the circularity of justification that the currently reigning liberal democracy has the absolute authority to define reasonableness as only those doctrines which support the reigning liberal democracy. By the end of the second chapter, Dr. Kozinski leaves Rawls' argument in tatters. He confronts head-on Rawls' smuggled metaphysics and demonstrates how the unjustified meta-idea leads to an unjustified political system of overlapping consensus as well as an unjustified account of the history producing it. Dr. Kozinski ends his treatment of Rawls by proving that Rawls' conclusions do not:

> simply involve recognizing some indisputable social "facts," but require[] making disputable judgments about and offering debatable interpretations of what may be indisputable social facts, judgments and interpretations that presuppose a number of debatable and controversial *philosophical* premises; yet, such premises are strictly excluded from the public political culture as well as Rawls's philosophical project itself.[23]

In listing some of these "debatable and controversial" judgments embedded in Rawls' project, Dr. Kozinski includes one that seems to admit that democratic society does not meet Cicero's definition of a commonwealth—or political community—quoted in the beginning of this review:

> Thus I believe that a democratic society is and cannot be a community, where by a community I mean a body of persons united in affirming the same comprehensive or partially comprehensive doctrine. The fact of reasonable pluralism, which characterizes a society with free institutions, makes this impossible.[24]

Thus, although Rawls claims to be separating out a liberal democracy as a freestanding political system independent of philosophy, he simultaneously denies to it the status of a political community under Cicero's definition at all. This is because the consensus on a comprehensive doctrine that Cicero insists

22. *See* KOZINSKI, *supra* note 11, at 29.

23. *Id.* at 32.

24. *Id.* (quoting JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 3 (Erin Kelly ed., Harvard Univ. Press 2001)).

upon before discussing the laws of a political community[25]—as the agreement on the foundation for and nature of *jus* in his definition of a commonwealth—is utterly excluded from Rawls' reasonable pluralism. Rawls allows freestanding political debate so long as that debate excludes the very foundation of the commonwealth itself.

II. JACQUES MARITAIN: RIGHTS WITHOUT A THEORY OF JUSTICE

Dr. Kozinski transitions from Rawls' meta-idea to Jacques Maritain's Christian Charter by placing Maritain in historical context. This context has two different dimensions. First, Dr. Kozinski argues that our understanding of Maritain's Christianized democracy is dependent upon Maritain's view of history.[26] While regretting in a certain sense the passing of the sacral age, the institution of Christendom, Maritain celebrates the positive results of its demise. Unlike the nineteenth century Popes who condemned post-Enlightenment secular states which separated the Church from the State,[27] Maritain believes that no period of history can be condemned—neither the ideological unity of the sacral age of Christendom nor the religious disunity of the modern secular State.[28] This historical attitude results in what Dr. Kozinski calls a "moral ambivalence of history."[29] The ideological unity of Christendom was a good according to Maritain, and its loss in the modern world is tragic. Yet the modern world is also good, despite this tragedy, because the ideological unity of Christendom could only be sustained by employing coercion and oppression in its defense.[30] In light of this understanding of history, Dr. Kozinski interprets Maritain's project as an attempt to establish a morally justified political unity without the ideological unity of Christendom. Yet Maritain's historical ambivalence is symptomatic of a philosophical ambivalence within Maritain's project.

Secondly, Dr. Kozinski portrays Maritain's optimism for achieving such a goal as a product of the World War II experience. Maritain believed the horrors of this war gave birth to a fruit, a "[w]idespread agreement about practical goods and values."[31] From such a statement we might understand Maritain's project as one attempting to reestablish agreement about the nature of justice as

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25. CICERO, *supra* note 5, bk. 1, para. 18–54, at 111–25 (describing the comprehensive doctrine of Cicero that places the source of justice in human nature).

26. KOZINSKI, *supra* note 11, at 49–55.

27. *See, e.g.*, PIUS IX, THE SYLLABUS OF ERRORS (1864); LEO XIII, IMMORTALE DEI (1885), LIBERTAS PRAESTANTISSIMUM (1888); GRAVES DE COMMUNI RE (1901).

28. KOZINSKI, *supra* note 11, at 52.

29. *Id.* at 51.

30. *Id.* Although Dr. Kozinski does not dwell on this observation, Maritain makes this assertion without offering significant historical proof. He merely asserts that the Ciceronian consensus in the sacral age was maintained by violence. Yet, Cicero does not suggest that such a consensus must be held together by violence. The underlying assumption of *On the Commonwealth* is that such a consensus simply exists. The fact that a consensus existed in the sacral age is insufficient to prove it was established and maintained only by force.

31. *Id.* at 49.

the prerequisite to the Ciceronian commonwealth. This conclusion would be mistaken. The word "practical" will be shown to be an important qualification leading to ambivalence concerning the foundations of this new agreement.

Dr. Kozinski demonstrates through his careful reading of Maritain that the agreement Maritain works toward is not as philosophically or theologically deep as we might think. In contrast to Rawls, who claimed not to be advocating a foundationalist political philosophy— but who smuggled foundationalism into his overlapping consensus—Maritain does claim that his democratic charter is philosophically grounded.[32] Rather than grounding his political philosophy in theoretical agreement about the comprehensive doctrine that justifies the modern democratic state, Maritain argues for agreement about practical goods from a natural law understanding of the dignity of the human person. Dr. Kozinski summarizes this foundational principle of Maritain's thought thus:

> Since the natural law is based on the intrinsic, teleological order of human nature, it can be known by all, and can thus serve as a solid and just foundation for the rights and liberties that are supposed to structure the just, religiously pluralistic political order.[33]

We might add to the end of this sentence "without requiring agreement on the nature and origin of that natural law." Upon deeper reflection, Dr. Kozinski demonstrates that Maritain believes this teleology is the basis of the legal order of rights and liberties but without requiring any consensus concerning this teleology. Maritain permits a lack of agreement about the causes of liberal democratic society and requires only agreement about its effects, a series of rights.

Dr. Kozinski draws out a contradiction in Maritain's thought. Maritain argues, I would say fruitlessly, that modern democracy and political pluralism can be given a moral foundation in the principles of natural law, which he reduces to one concept, the nature of the human person. Despite grounding the pluralistic political order in a natural law (and even a supernatural law), Maritain admitted that the vast majority of citizens "do not accept the *natural* foundation for these values and institutions in the natural law."[34] Thus Maritain argues that, notwithstanding the opposite historical example of Christendom and the teaching of the nineteenth century Popes, Thomistic philosophy morally justifies the pluralist state. Yet, the majority of citizens do not accept Thomism in particular, and Catholic philosophy in general, and thus this comprehensive doctrine, although theoretically justifying modern democracies, cannot in fact serve as a public justification for the majority of citizens. St. Thomas Aquinas was even more pessimistic than Maritain or Dr. Kozinski about people's ability to know the

32. *Id.* at 57.
33. *Id.* at 60.
34. *Id.* at 61.

truths of the natural law. In his *Summa Theologica*, St. Thomas Aquinas argues that it is impossible for people to attain even their natural end by means of the natural law as a result of the wounding of nature after the Fall.[35] St. Thomas teaches that all the powers of the soul have been rendered "destitute of their proper order . . . which destitution is called a wounding of nature."[36] In one of his last works, he goes so far as to claim that the natural law has been destroyed (*destructa erat*) in us by the Fall.[37]

Notwithstanding St. Thomas' pessimism about Man's ability to know the natural law without the aid of the Divine law,[38] Maritain believes that he can build a morally justified political system by separating the theoretical grounding of the natural law from its practical conclusions, certain legal rights. As Dr. Kozinski explains, Maritain's thought requires "the separation of one's comprehensive doctrine from the public political justification of the state."[39] Although Catholicism and Thomism provide the only comprehensive *Opera Omnia* doctrine that can justify Maritain's democratic charter for modern governments, citizens do not have to accept this comprehensive doctrine's provision of a theoretical foundation. They can agree to share in the practical political conclusions about the dignity of human beings and the rights and obligations that flow from that dignity. As Dr. Kozinski explains:

> Now although for Maritain scholastic thought is the only philosophical tradition that can coherently ground the democratic charter in theory—because the charter and scholasticism are, respectively, the practical and theoretical branches of the same spiritual Gospel tree, as it were—it is not necessary for modern man to be grafted onto this tree, that is to become scholastic or even to profess Christian belief, in order to give a full and intelligible assent to the charter and its moral values. This is because the fundamental insight upon which the charter is built, the dignity of the human person and the rights and liberties this dignity entails, is an insight now commonly held by even scholasticism-ignorant and Gospel eschewing modern man.[40]

Citizens need not be grafted onto Maritain's metaphysical tree because they currently hold a homogeneous, practical political philosophy constituting an agreement about human rights. It is this practical consensus on human rights that makes modern pluralism possible. Such a practical arrangement is possible for Maritain only by separating the theoretical justification for such rights from

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35. AQUINAS, *supra* note 10, pt. 1 of 2d pt., Q.109, art. 2 ("But in the state of corrupt nature, man falls short of what he could do by his nature, so that he is unable to fulfill it by his own natural powers.").

36. *Id*. at pt. 1 of 2d pt., Q.85, art. 3.

37. THOMAS AQUINAS, *Duobus Praeceptis Charitatis*, Prologue, *in* OPERA OMNIA 26 (Roberto Busa, S.J. ed., 1980) (author's translation).

38. *See id.*

39. KOZINSKI, *supra* note 11, at 83.

40. *Id.* at 95.

this practical agreement.

Dr. Kozinski succinctly summarizes Maritain's cleavage of the theoretical and practical thus:

> [I]n the democratic charter a majority of the citizens need not be Thomists or Christians, and . . . the state need not endorse the true, Thomistic and Christian interpretation of rights; for, as long as the actual rights of human beings are upheld and promoted by the state in *practice*, as long as the theoretically diversified but practically homogeneous *democratic* faith is held to be publicly authoritative, the truth of the citizens justificatory theories is politically irrelevant . . . .[41]

Put in terms of the Ciceronian tradition, Maritain rejects the need for an agreement about the nature of *jus* as long as there is agreement about the practical rights produced by the law. Yet Cicero requires not an agreement about particular laws or rights (*juris*) but rather agreement about the nature of law itself (*jus*).

This attempt to reconcile Thomism with post-Enlightenment thought, the Church to the world,[42] ends up rendering Maritain's democratic charter very similar in practice to Rawls' overlapping consensus. Throughout the two chapters dedicated to Maritain, Dr. Kozinski draws out instances where, notwithstanding their radically different metaphysical and theological differences, Rawls and Maritain reach the same practical conclusions.[43] Both thinkers accept a state of deep pluralism with each individual using his own comprehensive doctrine to privately ground the secular state—Rawls' conclusions resulting in an agnostic overlapping consensus based on reasonable pluralism and Maritain's in a democratic charter professing a creed of freedom based on the dignity of the human person, without agreement on the source of that very dignity.

Dr. Kozinski presents a devastating critique of Maritain's attempt to separate theoretical and practical agreement. Maritain's democratic charter rests on a homogeneous consensus, on the practical level, that the state should foster human rights without agreement on the theoretical grounding of those rights. Yet it is precisely this theoretical level that gives content to the meaning of those rights. Without a Ciceronian consensus about the comprehensive doctrine underlying them, can the practical agreement about what these rights actually mean be sustained? Dr. Kozinski cites several examples that seem to suggest that it cannot endure:

> [I]n light of the public acceptance of the modern "rights" to abortion, divorce and same-sex marriage, that is from the Christian perspective, the obvious *distortion* of rights, we must ask whether the particular theoretical interpreta-

41. *Id.* at 104–05.
42. *See id.* at 93.
43. *See, e.g.*, *id.* at 54–55, 73, 75, 82, 119–20.

> tion of rights given by the state authorities or the individual citizen is truly irrelevant to political practice. Rights are now given, in virtually all secular democratic regimes, a publicly authoritative interpretation that is difficult to reconcile with Thomism in particular and Christianity in general.[44]

This question brings us back again to Cicero's definition of a Commonwealth which first requires an agreement on the nature of *jus* itself. As Dr. Kozinski discovers, Maritain's separation of the theoretical and the practical leads to an inversion of justice and rights. Whereas rights should be determined in accordance with the nature of justice (the theoretical determines the practical), for Maritain, rights determine the nature of justice (the practical determines the theoretical).[45] Unlike Cicero's insistence that the most basic things, the eternal law and the nature of justice, must be accepted before describing particular civil laws, Maritain's philosophy as explicated by Dr. Kozinski requires an agreement on the practical rights the state will uphold. From these rights individual citizens can develop and hold differing comprehensive doctrines about the nature of justice. Yet this separation of theory and practice separates the determining content of those rights from the rights themselves. Cicero rejected a mere practical agreement among practitioners of the law as a solid foundation for law itself, which can only come from the deep consensus on *jus*:

> I think that there have been very eminent men in our state who have made it their business to interpret the law to the people and to give opinions, but although they have made great claims they have been occupied in small matters. What is as grand as the law of a state [*jus civitatis*]? What is so trivial as the function of the jurists, necessary as it be to the people? I don't believe that the men who were in charge of this function were ignorant of universal law (*universi iuris*), but they have only explored what they call the civil law to the extent that they wanted to provide it to the people; that, however, is as slight intellectually as it is necessary in practical matters.[46]

Yet Maritain hopes to build a Christian Democracy merely on these practical matters. It turns out that Maritain's democratic charter is a new form of Christendom, but it is Christendom without Christ.[47] It results in an apparent agreement over a list of rights but without a real agreement about the meaning and origin of those rights.

III. MACINTYRE: REUNITING THEORY IN PRACTICE THROUGH CRAFT WITHIN A PROBLEMATIC NATION-STATE

Dr. Kozinski posits that Alasdair MacIntyre's tradition constituted rationality

44. *Id.* at 105.
45. *See id.* at 107–08.
46. CICERO, *supra* note 1, bk.1, para. 14, at 109–10.
47. KOZINSKI, *supra* note 11, at 97.

in opposition to both Rawls and Maritain. Unlike both of them, who leave outside the practical political forum citizens' comprehensive theoretical doctrines, MacIntyre insists on the interdependence of theory and practice.[48] Both Rawls and Maritain separate theory and practice in order to defend the modern political *status quo*. MacIntyre is no apologist or polemicist for contemporary political pluralism rooted in pragmatism. He offers a critique which Dr. Kozinski calls more radical than that of Karl Marx.[49] This radical critique of Liberalism exposes how its erroneous theory, rooted in epistemological skepticism, gives birth to a practice which makes the modern debates over moral principles intractable.[50] Since Liberalism professes an ambivalence towards all (or *parce* Rawls, all reasonable) moral positions, it eliminates any practice for resolving these confrontations.[51] "Thus, all morally significant meaning is reduced to individualist expression of a purely idiosyncratic character."[52]

According to Dr. Kozinski's reading of MacIntyre, this flawed epistemological practice has consequences for the way people understand government. Since these moral disagreements are interminable, the political ruler must step outside his role as an individual with his own emotivist inspired moral system. He is transformed from a ruler into a manager. Dr. Kozinski describes the rise of such managerial bureaucratic government thus:

> Instead of choosing a particular moral standpoint from which to think and act, the manger treats "ends as given, as outside his scope; his concern is with technique, with effectiveness in transforming raw materials into final products, unskilled labor into skilled labor, investment into profits." Thus . . . politics is to be under the care of the manger, who, at the level of the state, is the bureaucrat.[53]

MacIntyre unveils the consequence of Maritain's mere practical agreement: the rise of the bureaucratic state which is committed merely to the practice of the practical.

As an alternative to the oppressive suppression of a common end of civil government enforced by the managerial practices born of Liberalism, Dr. Kozinski examines MacIntyre's epistemological alternative, tradition constituted rationality. Through Dr. Kozinski's explication of tradition constituted rationality, we can come to understand MacIntyre's hostility to the cleavage between theory and practice. For at the root of MacIntyre's Aristotelianism is a symbiotic harmony between universal abstraction and practice. For MacIntyre,

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48. *See id.* at 132.
49. *See id.*
50. *See id.* at 133.
51. *See id.*
52. *See id*. at 136.
53. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEOLOGY 30 (2d ed. 1984), *quoted in* KOZINSKI, *supra* note 11, at 137.

the root of Aristotle's practice is to avoid both "abstract universalism and relativistic particularism."[54]

Moral enquiry undertaken within a tradition is the nexus for achieving this balance between theory and practice "for it is only through a *particular* tradition that we can properly apprehend *universal* truth."[55] Moral enquiry within a tradition allows the discovery of real universals through the dialectical examination of particular instances of those universals within the tradition. This practice of rational enquiry is a form of craft in which the practice of moral enquiry within the tradition is passed on from one generation to the next.[56] Critically important for the functioning of a tradition of enquiry is authority, specifically the authority of metaphysical and theological truth.[57] Yet these foundations are not abstract ideas held by autonomous individuals; they serve as a foundation for a tradition as a community of enquiry in which rational discourse is centered on the dependence of rational beings on each other.[58] Unlike Liberalism, which posits no agreement on ends, authoritative metaphysics and theology provide the tradition with fixed ends, thereby permitting communal reasoning concerning the best means to attain those ends.[59]

MacIntyre's tradition constituted rationality produces a unique understanding of politics that results in his rejection of the modern nation-state as a properly political community. Since politics is premised on a tradition containing authoritative principles leading to agreed goods, MacIntyre concludes a political community can only flourish in small communities, not in the modern, conglomerate nation-state.[60] In contrast to Rawls and Maritain, MacIntyre does not justify the modern state but rather rejects its legitimacy, going so far as calling Thomism the "enemy" of the modern nation-state.[61] As a result, MacIntyre, unlike Rawls in theory and Maritain in practice, maintains the necessity of a Ciceronian agreement about the nature of *jus* to form a commonwealth. Yet MacIntyre rejects completely the proposition that the modern nation-state is capable of ever becoming a true commonwealth because it is incapable of forming such a consensus. More surprisingly, it is unlikely he would consider his small, tradition-constituted communities to be Ciceronian commonwealths either.

Dr. Kozinski's critique of MacIntyre's political philosophy can be summarized thus: it fails, but unlike Rawls' and Maritain's "it is not *bound* to fail."[62] The fatal flaw in the former thinkers' philosophy is their acceptance of heteroge-

54. *See* KOZINSKI, *supra* note 11, at 146.
55. *Id*. at 151.
56. *See id*. at 158–60.
57. *See id*. at 159–60.
58. *See id*. at 158–63.
59. *See id*. at 164–65.
60. *See id*. at 165–81.
61. *See id*. at 179.
62. *Id.* at 189.

neous political communities lacking any basic commitment to the metaphysical grounding and the ultimate ends of political activity. MacIntyre is committed to the necessity of homogenous, tradition-constituted communities of virtue as a *sine qua non* of politics. Yet, MacIntyre adds a novel necessary condition to the constitution of such a community: it must be small and local.

Although Dr. Kozinski notes that this requirement is not contained in Aquinas, his critique could be made more forcefully. It is not merely that Aquinas does not advocate the small and local as the exclusive locus of political activity, there is evidence that he positively considered larger political entities as capable of the type of tradition-constituted political process advocated by MacIntyre. Aquinas examines the application of Aristotle's politics of the self-sufficient perfect society not only to small local communities, villages, and cities, but also kingdoms, provinces, and the Empire.[63] Although Aquinas certainly has much to say about the relationships among, and the limitations upon, the jurisdiction exercised by these larger communities, he certainly assumes that proper political activity (i.e., oriented to the common good) is possible on the scale of kingdoms, provinces, and even the Empire. The requirement of small and local insisted upon by MacIntyre is clearly un-Thomistic.

Although MacIntyre rejects the legitimacy of the nation-state as a morally grounded political community, he is not an anarchist. He does not call for the abolition of the nation-state. He accepts its existence and acknowledges some of the good it can do; he merely denies its status as a truly political community.[64] If the nation-state is not the morally grounded political community, one might conclude that MacIntyre's small communities of virtue are. Yet, as Dr. Kozinski demonstrates, MacIntyre denies to these the attributes of a true political community as well.[65] According to MacIntyre, the local communities of virtue are not self-sufficient and lack lawmaking authority, the fundamental characteristic of a political community.[66] As a result, the nation-state is incapable of being a morally grounded political community acting as custodian of the common good; the local tradition-constituted communities—although morally capable of caring for the common good—lack the elements of political activity to make them capable of doing so. In Dr. Kozinski's words, the result is that MacIntyre "offers Aristotelianism without a polis."[67] The world is deemed bereft of any political community truly worthy of the name.

At this point, Dr. Kozinski's analysis would benefit from a deeper examination of the concept of the imperfect and perfect community that has been at the

63. *See* Nicholas Aroney, *Subsidiarity, Federalism, and the Best Constitution: Aquinas on City, Province, and Empire*, 26 L. & PHIL. 161, 165–66 (2007).

64. *See* KOZINSKI, *supra* note 11, at 190–93.

65. *See id*. at 193–95.

66. *See id.*

67. *Id*. at 194.

center of Aristotelian political philosophy in the Aquinian tradition.[68] A deeper analysis of these types of communities would demonstrate more precisely why MacIntyre's search for a true political community fails. The nation-state fails as a perfect community because it is not united in a common good. The local communities fail because MacIntyre considers them not to be self-sufficient, which is Aristotle's *sine qua non* for a perfect political community.[69] Yet, each of these communities could overcome the obstacle preventing their attaining political perfection. The nation-state could become a perfect community if it settled on a common good. So too could the smaller communities if they attained a greater degree of self-sufficiency.

Dr. Kozinski brilliantly identifies the deadly result of this destruction of any truly political community, a re-establishment of the Liberalism MacIntyre deplores. Since the tradition-constituted communities are not self-sufficient, they need some form of state to provide necessary elements such as security. Yet, the tradition-constituted communities lack self-sufficiency in another more important way.

According to MacIntyre, traditions need interaction with other rival traditions to perfect themselves.[70] Conflict among rival traditions appears as an essential element of MacIntyre's theory.[71] MacIntyre thus ends up advocating a form of pluralism. The only difference from Rawls and Maritain is that MacIntyre's is not a pluralism of individuals governed by a purportedly neutral state, but rather a pluralism of traditions governed by a purportedly neutral state. Dr. Kozinski draws out this conclusion by comparing MacIntyre's political conclusions to a new form of Liberalism, Pragmatic Liberalism.[72] Like MacIntyre, various proponents of Pragmatic Liberalism transform the universal abstraction of Liberalism (common to Rawls and Maritain) into a tradition of its own. This comparison with Pragmatic Liberalism demonstrates the ultimate failure of MacIntyre's philosophy to solve the problem of religious pluralism. Due to his commitment to conflicting traditions, MacIntyre ends up advocating merely a different form of the pluralism reigning today, a pluralism of traditions.

Although finding MacIntyre to have the most complete political philosophy of the three writers considered, ultimately Dr. Kozinski concludes that MacIntyre's lack of theological commitments and judgments on a scale larger than a

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68. *See, e.g.*, Brian M. McCall, *The Corporation as Imperfect Society* 36 DEL. J. CORP. L. 509, 525–28 (2011) (discussing the definition of these two terms).

69. THOMAS AQUINAS, 1 COMMENTARY ON ARISTOTLE'S *POLITICS* 5 (Richard J. Regan trans., 2007) ("And the perfect association . . . is the political community, now complete, having a self-sufficient end . . . . Therefore, the political community was instituted for the sake of protecting life and exists to promote the good life."); "[Aristotle] shows that the good to which the political community is directed is the supreme human good." *Id.* at 7. "[I]t follows that a communal society is the more perfect to the extent that it is sufficient in providing for life's necessities." THOMAS AQUINAS, 1 SELECTED POLITICAL WRITINGS bk. 1, ch. 1, at 9 (A.P. D' Entrèves ed., J.G. Dawson trans., 1974).

70. *See* KOZINSKI, *supra* note 11, at 198–203.

71. *See id.* at 200.

72. *See id.* at 204–28.

local community leaves his political philosophy unnecessarily weakened.[73] Dr. Kozinski ends his book with the thesis that a "*theologically informed* tradition-constituted political philosophy, all other things being equal, would be superior to a theologically uninformed one."[74] Although MacIntyre is committed to this proposition for individual traditions, he avoids it on the level of a larger community. In short, MacIntyre recognizes the need for a consensus on the nature of *jus,* yet thinks it impossible on the scale of a nation-state.

CONCLUSION

Dr. Kozinski's work is a masterful exposition of three of the most important political philosophers of the twentieth century. His two chapters on each form an excellent introduction for the novice political philosopher as well as a detailed critique of each for the expert. Having searched out the core principles of each, Dr. Kozinski finds them all wanting in different respects. Rawls' overlapping consensus of reasonable pluralism is found to end in hypocrisy. Maritain is found to advocate Rawls' pluralist state dressed in Thomistic nomenclature, but devoid of Thomistic content. MacIntyre's critique of both Rawls and Maritain is found to be the most satisfying. Yet MacIntyre's rejection of Aristotle and Aquinas' application of their politics of the common good to a large scale law-making community leads him back again to a morally uncommitted state presiding over a pluralism of traditions. In light of these three failures, where does Dr. Kozinski's analysis lead him?

The answer to this question is the most unsatisfactory aspect of the book. Dr. Kozinski concludes that MacIntyre's commitment to a metaphysically grounded community of tradition is the answer to pluralism, a transition he describes as moving from overlapping consensus to confessional consensus.[75] The solution is to restore to Thomism the application of theologically and philosophically informed politics to modern large-scale nations. Yet, Dr. Kozinski admits such an application is not possible prior to the confessional consensus of Thomistic-Catholic political theology, something not likely to occur in our country any time soon. Unlike MacIntyre, however, Dr. Kozinski does not argue that such a transition is impossible, only implausible at the moment. Dr. Kozinski proposes a transitional political order in the interim, a *modus vivendi* that will make possible the eventual conversion of politics to this tradition.[76] This state is more than the state used by MacIntyre's local communities to get the goods they need to survive. It is a philosophically committed political order, albeit one committed to only limited principles. Dr. Kozinski does not describe such an order in satisfactory detail other than noting that it would have to be committed to trans-tradition universal principles (such as honesty, courage, generosity and

73. *See id.* at 236.
74. *See id.* at 237.
75. *See id.* at 236–37.
76. *See id.* at 237.

dialectical vulnerability) that would make dialectical engagement among the various traditions possible, leading to the embrace of Truth. He suggests that the process of establishing a Ciceronian consensus on the nature of justice may need to pass through stages of establishment involving a partial transitional consensus. Yet, Dr. Kozinski will leave unsatisfied the reader who wants to know what this *modus vivendi* would look like and how we can transition to it from the current state. All Dr. Kozinski does in the end is call upon Alasdair MacIntyre to step into the fray and use Thomistic-Catholic political theology to formulate such a system and a map for its establishment. Dr. Kozinski's book demonstrates that he does not need Alasdair MacIntyre. He has clearly mastered not only the Thomistic-Catholic tradition but also the reigning political philosophies attempting to justify liberal pluralism. Dr. Kozinski himself should enter the Ciceronian dialogue and attempt to present the case for the nature of the eternal law and justice that must be the basis of a large scale commonwealth. Upon a thorough reading of Dr. Kozinski's book, the conclusion that a system committed to deep pluralism on principle, like contemporary America, is not a true commonwealth is inescapable. Yet he holds open the hope that it could become one. In doing so he sets an agenda for much philosophical work to be done.

For jurisprudence, the lack of a true political community poses a grave challenge to the legitimacy of current law. It also proposes questions for jurists who accept Dr. Kozinski's challenge regarding what role law can play in the transitional *modus vivendi* and in the establishment of a true commonwealth rooted in a consensus of justice. As a first step in this process Cicero points to the basis of the consensus on *jus* being acceptance of a source of human nature, and hence law, beyond ourselves.

> [L]aw was not thought up by human minds; that it is not some piece of legislation by popular assemblies; but it is something eternal which rules the entire universe through the wisdom of its commands and prohibitions. Therefore . . . the first and final law is the mind of the god who compels or forbids all things by reason.[77]

Some of America's own founders proudly declared her to be "an empire of laws, and not of men."[78] Yet a mere empire of laws may lack a foundational element, a consensus among those "men" regarding the origin of those laws at its foundation, the "first and final law."

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77. *See* CICERO, *supra* note 5, bk.2, para. 8, at 132.

78. Richard Samuelson, *John Adams and the Republic of* Laws, *in* HISTORY OF AMERICAN POLITICAL THOUGHT 114 (Bryan-Paul Frost & Jeffrey Sikkenga eds., 2003) (quoting JOHN ADAMS, THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES (1776)).