

A Rhetorician's View of Religious Speech in Civic Argument

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I. INTRODUCTION

Philosophers in the liberal political tradition have been troubled by the role of religious speech in democratic civic arguments at least since Locke.¹ What troubles them most, however, is not really religious speech. It is that all their responses to the problem of religious speech, without exception, force them to wrestle with the fact that democratic civic arguments are rhetorical and that it is the rhetorical nature of its civic arguments that gives to democracy its unique and precious value as a form of government.

Democracy and rhetoric share a trust in argument. It is a trust in what persuades us as we are and not as we should be. This is not a trust of all that is human, but of this aspect of our humanity. It is individual because we are. In persuasion, each of us retains an ultimate authority, cosmological if you like, to say no to any offered argument. This final

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1. See JOHN LOCKE, A LETTER CONCERNING TOLERATION, *reprinted in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION (Ian Shapiro ed., Yale Univ. Press 2003) (1689). I will use the term "civic argument" rather than the more common "conversation" to make it clear that what is being described is essentially political argument broadly construed. In political argument, competing goals are pursued and decisions must be made. Civic argument, of course, goes on against a backdrop of many other discourses not directed towards justification for the use of the state's authority.

authority to withhold assent makes us, each of us, mysterious.² In a democracy, as in rhetoric, *all* preferences are undemocratically held.

The rule of law within, and the justifications for, a democracy depend upon respect for this mystery. Because each of us is mysterious, all voices in a democracy should be heard, each equal to the other, in all matters of social importance to the practical extent that they can be given our need to make decisions and to make them timely. Other principles that democracy and rhetoric serve, like freedom and equality, are not foundational to either but are subordinate to this trust and the respect it mandates. Trust in democracy as in rhetoric, as a recognition of the given meaning of each individual life, is morally prior to these principles or any other moralities of conduct. We can say, then, with Wittgenstein, that in a democracy, as in rhetoric, “suicide is . . . the elementary sin.”³

Because a democracy is a rhetorical community, the ways in which we are alike and what may or may not be shared among us, including modes of speech and sources of authority, are discovered and rediscovered through persuasion over time. What is or is not “accessible” or “intelligible” or “publicly comprehensible” through speech can never be more than a sociological claim about the current dominance or prevalence of certain modes of speech and thought. It can never be normative. For democracy, founded on our difference, has no part to play in the relentless and ultimately disrespectful insistence upon sameness that drives all liberal theories.

All this, as you can readily see, is terribly awkward for philosophy in the liberal political tradition. It is an awkwardness most revealed in the consideration of religious speech in democratic civic argument, and it is to this subject that we will now turn. In what follows, I will first examine and reject liberal political methods of addressing the question of religious speech in civic argument, all of which depend upon norms external to the argument that are then excluded from it. Next, in proposing a method that relies only upon the constitutive norms of civic argument itself, I will offer a description of civic argument as rhetoric, examine the risks of religious rhetoric in this civic argument, and examine the constitutive norms of civic argument. I will see if the constitutive norms of civic argument are sufficient restraints upon religious rhetoric such that

2. The most interesting and important version of this argument I have read is found in JOSEPH VINING, *THE SONG SPARROW AND THE CHILD: CLAIMS OF SCIENCE AND HUMANITY* 15–21 (2004). Professor Vining is not as interested as I am in political applications of the argument. There are issues of epistemology at work in this. Essentially, any honestly held epistemological grounds for rejecting an argument are deemed as reasonably held in democratic civic argument, as in all rhetoric, for such is its nature.

3. LUDWIG WITTGENSTEIN, *NOTEBOOKS 1914–1916* 91 (G.H. von Wright & G.E.M. Anscombe eds., G.E.M. Anscombe trans., 2d ed. 1979).

reliance upon external norms is not only not required but cannot be justified in a democracy. Finally, I will conclude with a brief assessment of the tension between religion and the constitutive requirements of civic argument in a democracy.

II. LIBERAL METHODS OF ADDRESSING RELIGIOUS SPEECH

Liberal political philosophers have offered a variety of methods for coping with the awkwardness that democracy, as a rhetorical community, presents that burden, rather than trust, religious speech. These methods, however, fall into the same general patterns and all fail for the same reason: They depend upon antecedently given norms that are to be excluded from democratic civic argument in a very non-rhetorical manner. First, there are claims of neutral grounds for the burdening of religious speech that can always be revealed as not neutral but that require strong normative commitments. Those making claims of neutrality—either general claims towards any commitment to the good or specific claims toward religion—typically ignore, exclude, or underappreciate what can be seen as rather ordinary religiously based concerns about the appropriate valuing of autonomy, choice, and authority. These concerns are the concerns that would have best revealed the hidden normative commitments within each claim of neutrality.

Let me give two examples, one specific and one general, selected because they are central in the arguments of two authors who have been zealous in revealing these non-neutral commitments: Stanley Fish and Stanley Hauerwas.

Stanley Fish cites *Mozert v. Hawkins*, brought by a Christian mother who objected, on establishment-of-religion grounds, to her sixth-grade child being assigned a text that “aimed at fostering a broad tolerance for all of man’s diversity” by “expos[ing] readers to a variety of religious beliefs, without attempting to suggest that one is better than another.”⁴ The mother lost. The superintendent’s winning argument was that the mother “misunderst[ood] the fact that exposure to something does not constitute teaching, indoctrination, . . . or promotion of the thing exposed.”⁵ Stanley Fish argues:

But what the superintendent and the judges who agreed with him fail to understand in their turn is that the distinction between exposure and indoctrination is an artifact of the very liberalism [the mother] rejects. That is, the distinction only makes sense if you as-

4. *Mozert v. Hawkins County Pub. Sch.*, 582 F. Supp. 201, 202 (E.D. Tenn. 1984), *rev'd*, 765 F.2d 75 (6th Cir. 1985).

5. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1063 (6th Cir. 1987).

sume, first, that the mind is a cognitive machine that can always draw back from the ideas presented to it and assess them by independent rational criteria; second, that this is what the mind, if it is working properly, is supposed to do; and, third, that a conviction held in any other way, held in conformity with authority rather than as the conclusion of a process of critical reasoning, is not a conviction worth having.⁶

He goes on:

When [this mother] hears someone invoke the distinction between exposure and indoctrination, it doesn't sound to her like common sense but rather the presumptuousness and arrogant attempt of a nonbeliever to prescribe for her the conditions and the nature of her belief.⁷

In my second, more general example, Stanley Hauerwas makes the same point in memorable fashion:

[L]iberalism can be characterized as the presumption that you should have no story other than the story you chose when you had no story. A society constituted to produce people who get to choose their stories cannot help but be caught in a perpetual double-think. For what it cannot acknowledge is that we did not choose the story that we should have no story except the story we chose when we had no story.⁸

With examples like these we can understand the difficulty, and perhaps the impossibility, of finding some neutral ground for judging or even mediating among different conceptions of the good with respect to religion. Indeed, the very idea that neutral grounds exist for this difference is itself a conception of the good with respect to religion.⁹

6. STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* 157 (1999). One way of understanding this is to recognize that liberalism, in the form Dean Fish is describing it, believes that obedience is somehow not autonomous or, if autonomous, does not merit the status of rational choice. This is revealed in the difficulty that liberalism has in distinguishing between the authoritarian and the authoritative.

7. *Id.* The problem for the mother is nicely captured in the old Anglican joke about the priest who would start his sermons with: "As Jesus said, and *rightfully* so."

8. Stanley Hauerwas, *Christian Practice and the Practice of Law in a World Without Foundations*, 44 *MERCER L. REV.* 743, 748 (1993).

9. As is implicit in this objection, it is impossible to distinguish neutrally between the good and religion, as some philosophers attempt, because there are no general conceptions of the good that are not, in some fashion, specific religious commitments. So, for example, from the perspective of the mother of the sixth grader in the text, suggesting that our moral lives should be guided by intuitionist's principles is a suggestion that her moral life should be the same as others, at least at an operative level, but her claim is that it should not because she is subject to an authority that does not find its source in human conduct or thought. There are, of course, theological responses to this. That is the point: The responses are theological.

The first and by far the most common method of dealing with arguments like those of the sixth grader's mother is to consider them as simply beyond the pale. I chose this expression because its etymology reminds us that what is being done here is to dismiss certain people as being unworthy of consideration; putting them, that is, outside the communal fence unless they change. This is something rhetoric would never permit on any terms other than its own.

The second method is indistinguishable from the first, once the first is seen for what it is. This method accepts that neutrality is impossible in these matters and offers shared general commitments to the good derived from some design procedure (excluding from the determination of the good, ironically given our history, any consideration of religion in the formulation). These normative commitments are either so minimal as to do no real work or so tied to a broadly shared, deep, maximal morality as to beg the question in the sense that one wonders why democracy, founded as it is on an assumption about our differences, is necessary if we agree on so very much.¹⁰ Of course, when the ties to a maximal morality are revealed for what they are, the problem for which shared general commitments were a neat solution only returns. For it is never clear why the thin commitments derived from design procedures should be preferred to the thick ones, there to be determined in civic argument. As Michael Walzer puts it, "[W]e march for awhile together, and then we return to our own parades."¹¹ And when we return to our own parades in a democracy, we are back to rhetoric.

The third and slyest of methods—the hardest, that is, to see as more of the same—seems to involve no antecedently given norms, no pre-

10. Intuitionist approaches, like Robert Audi's, see, e.g., ROBERT AUDI, *THE GOOD IN THE RIGHT: A THEORY OF INTUITION AND INTRINSIC VALUE* (Princeton U. Press 2004) (it is characteristic of Professor Audi to blur dividing lines and it is also courageous), can be thought of as halfway houses between what rhetoric and what philosophy require. Professor Audi, as rhetorician, has us trusting our intuitions, intuitions that, in a democracy, would be manifested in civic argument. Professor Audi, as philosopher, asks us to do what Michael Walzer describes in another context as "correct[ing] our intuitions by reference to the model we construct out of those same intuitions." MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 17 (1987). So the real trusting turns out to be in the models and not, as rhetoric would have it, the thick descriptions of our intuitions we would call upon for civic argument. We can see this in operation in the example Audi offers of police brutality. It may very well be, as Professor Audi argues, that the operative agreement we have on the wrongness of this is an example of intuitionist principles at work. When we do not engage in some form of social practical wisdom, as intuitionists would have us do, we attempt to put this agreement into operation in determining through civic argument what we mean by "brutality" and what we mean by "police," and what we should do about it, that is, in all the cases that make a difference, but in a rhetoric that recognizes no difference between intuitionist's principles and any other argument other than as determined by their persuasiveness in civic argument.

11. MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* 11 (1994).

argument principles, no settled outcome requirements, but rather only conditions for morally acceptable civic argument or “deliberation.” In application, however, these moral conditions for acceptable civic argument always deprive the argument of its rhetorical nature. That is their purpose. For what these “rules of engagement” offer, like the other methods, is a way of life that restrains through rationality the risks of rhetoric—the risks, that is, of trusting persuasion. Again, I call upon Michael Walzer: “Men and women who acknowledge each other’s equality, claim the rights of free speech, and practice the virtues of tolerance and mutual respect, don’t leap from the philosopher’s mind like Athena from the head of Zeus.”¹²

All three of these methods draw upon principles (freedom, equality), distinctions (the religious from the moral, the moral from the political, the religious from the political), and descriptions (secularity, accessibility, intelligibility, public comprehensibility, and, indeed, the word “public” itself) to burden religious speech. The meaning of these principles, distinctions, and descriptions, and thus the basis for the restraint on rhetoric they provide, is always found in sources external to democratic civic argument. In other words (words including a metaphor I will draw upon again near the end of my paper), they all depend upon knowledge about how the rhetorical game is supposed to come out and insistence that it be played by citizens in such a manner so that it comes out no other way. They are all methods, then, that start with a given ideal and design people to fit it rather than, as democracy and rhetoric both require, the other way around. Simply and ungraciously put, they are all philosophical evasions to avoid the trust in persuasion that rhetoric and democracy require.

I do not wish to be misunderstood here. I am not at all suggesting that we should try harder with any of the methods I have just described (although I believe the second one is the best of the three). It is necessary to depend upon some antecedently given norms in any determination of what democracy requires of us. For democracy has some purposes, as does rhetoric, and these purposes, however they might be described, will require some conformity to some antecedently given norms; such is the nature of purposes. The question is not whether these exist, but which commitments—and which restraints derived from those commitments—does democracy as a rhetorical community actually require? Which, that is, are justified in their own rhetorical terms? And is the burdening of religious speech one of these? But these are not the questions any of these three methods were designed to answer. For they all

12. *Id.* at 12.

simply assume that the risks of rhetoric are far too grave to be trusted to whatever restraints rhetoric itself might offer. In order to examine both parts of this assumption, the risks of rhetoric and its own restraints, we need first to examine the forms and methods of democratic civic argument to understand what liberal philosophy wishes to control and why.

III. THE RHETORICAL NATURE OF CIVIC ARGUMENTS

*“Running against the limits of language?
Language is, after all, not a cage.”¹³*

Civic arguments are not just exchanges of rational argument. Anyone entering a civic argument thinking so would be at a significant civic disadvantage. In civic argument, we do not attempt to *convince* by rational argument, but instead attempt to *persuade* by any form of argument that humans might find persuasive. What we seek in civic argument is not conviction, but *assent*. In seeking assent, the persuasiveness, even of what is accepted as rational argument, is never considered separately from character and motivation—not just the character and motivation of the one offering the argument but also of those upon whom the argument depends for its reported facts and of those to whom the listener turns for helpful assessments of the argument’s persuasiveness. So essentially, what one presents as persuasive in *any* civic argument is never just the argument but always himself or herself and those upon whom he or she depends.¹⁴ Even absolutist, fundamentalist, or revelationist arguments are inescapably biographical in this sense and are offered to others in civic argument as such. Right now I am offering this as descriptive of civic argument, but in a rhetorical community this is as it should be. So it is not just descriptive; it is part of democracy’s moral claim.

People who present themselves in this way in civic arguments typically do not come to it with an open mind. They most often come seeking assent to their previously determined positions. We may enter civic argument with all of our individuality intact. But we do so as individuals who find our identities, primarily, in the mediating associations to which each of us owes allegiance and to which each to some degree submits his

13. LUDWIG WITTGENSTEIN AND THE VIENNA CIRCLE 117 (Brian McGuinness ed., Joachim Schulte & Brian McGuinness trans., Blackwell Publ’g 2005).

14. Of course, those not using arguments that are accepted as rational may lose some of the persuasiveness of their character. This is one of many pragmatic reasons why democratic civic argument tends towards that which is accepted as rational argument, but it is not a reason I need. In rhetorical terms, the only thing distinguishing rational argument from other forms of argument in this analysis would be whatever persuasiveness it might have. There is no claim, then, that current pragmatics are how it should be, at least no claim that rhetoric alone provides.

or her autonomy in order to have an identity.¹⁵ In civic argument, we come, in large measure, to speak these identities.¹⁶ When we are persuaded by others in civic argument, we are typically surprised by it.

Since each of us entering a civic argument has some sense that this is the case, each of us is pragmatically moved towards using those forms and methods of argument that are most likely to surprise. This surprise, in complex arguments, can often come as immanent critique. But the most prevalent, and perhaps the most persuasive, of these forms is aesthetic arguments, arguments in the nature of further descriptions. These are the most prevalent in civic argument because civic arguments, interesting ones at least, are almost always ethical disputes and we tend to talk about ethical matters by showing rather than by explaining. We do so, I think, because we know, with Wittgenstein, that “[i]f [we] needed a theory in order to explain to another the essence of the ethical, the ethical would have no value at all.”¹⁷ Perhaps the most persuasive of these methods is metaphor because metaphor necessarily draws upon that which we already know. The metaphors that persuade may come from the speaker, as they do, for example, in the parables. Metaphoric persuasion may come just as readily from intimations in which the speaker says more to the listener than he or she knows because of metaphors of which he or she is ignorant or, at least, not fully aware.

For pragmatic reasons, civic arguments are mostly personal, mostly aesthetic, mostly metaphoric, and seek to surprise the listener into assent.

15. In religious speech, even from absolutists, fundamentalists, or revelationists, there are always matters that are shared among these identities, including the language or languages in which the argument is conducted. The Amish, for example, must know what a computer is to reject its use and the determination of what it is, that is, how it is to be described for the purposes of argument, is itself likely to be on shared grounds. Similarly, all accounts of revelation depend upon some shared understanding of what it means for something to be revealed. When offered as civic argument, claims of revelation depend for their persuasiveness not just upon a shared conception of the god or gods who reveal, and his, her, or their authority, but upon an implicit argument about discernment of revelation—a particular argument, that is, about placing reliability upon particular reports of particular revelations and their particular interpretation and so forth, all of which opens up the argument to much that will be shared. It is necessary for the one offering the claim of revelation to distinguish it from competing revelatory claims, including disingenuous ones. In other words, and obviously, we are all, or almost all, bound to a shared, if thin, culture without which persuasiveness would be impossible. I do not mean to dismiss such arguments from my account, and they could be important for some. I do not, however, wish to make them central to it, because the primary point is not what shared grounds persuasion requires but that it is only persuasion that can do this requiring in democratic civic arguments.

16. These identities may or may not themselves require restraints upon civic argument for moral or other reasons. It is not, however, a requirement of rhetoric that they do. Pragmatically, I suppose, to argue in civic argument in a way that violates one’s own identity would seldom be persuasive, so rhetoric does, in this sense, reinforce these identities and whatever restraints they may require.

17. LUDWIG WITTGENSTEIN AND THE VIENNA CIRCLE, *supra* note 13, at 116–17.

They are not only this, of course. I have emphasized those aspects of civic argument that best serve my purposes because they are the aspects most ignored in other accounts. They are ignored because they are the tools still readily available to us to persuade even when what might be called rational deliberation is not possible. If I am right about this description, however, it means that we do not need to enter into civic argument with any motivation other than to persuade others. We need to be willing to listen to be able to persuade, of course, but this is listening for the pragmatic purpose of persuasion.

We do not need to enter into civic argument willing to be persuaded as if our beliefs were held tentatively and were matters of personal and autonomous choice.¹⁸ For it is our own beliefs, our own unshakeable beliefs, that come from authority no longer of our own choosing, that are frequently the source of our surprise and upon which both aesthetic and metaphoric arguments work.¹⁹ These beliefs themselves can be offered up to others as civic argument, even in their revelatory form. And like all others, they will be validated or invalidated for democratic purposes by whether or not they prompt assent.²⁰

In civic arguments, as I have described them, no one can know in advance of the argument, and on either side of it, what *will or will not* persuade, including religious speech. While this is offered now as descriptive, it too is part of democracy's moral claim. For rhetoric, *in its recognition of our mystery*, seeks to hold on to this uncertainty about us by permitting no prior judgments about that which *should or should not* persuade us.

18. There is a measure of respect for other persons in the listening required to persuade, but it is not a respect for what they now think. As anyone seeks to persuade, he or she seeks to know that which will persuade, to know the opposing positions in order to counter them, and, thus, seeks to know the other and this, too, can be seen as some measure of respect. Such respect, however, is the respect civic argument requires and is far removed from any general requirement of mutual respect.

19. In civic argument as I have described it, it is not only clear that religious claims are not impassable but the most useful information that you could provide to someone who is trying to persuade you, especially if the persuasion is the surprise of what the religious commitment seems to entail. The trick for the one trying to gain assent is to know enough and to be good enough to use the information.

20. Arguments from revelation, on this understanding of democratic civic argument, are far less disturbing than they otherwise might be and not just because of what must be shared for there to be arguments from revelation at all. *See supra* note 15. Any revelation offered as an argument is an acknowledgment of the need for assent of the other and the need, even in the face of revelation, to persuade. Furthermore, not even a revelation speaks itself unflinchingly to others so there is always an issue of understanding. As others have noted, even the most dogmatic of speakers will react to an extreme characterization of his or her own view.

IV. THE RISKS OF RELIGIOUS RHETORIC

Although some surely will, most liberal political philosophers should not want to quarrel with me too much about this description of democratic civic argument for it will seem to them all too real. Instead, their response to it should be: “Left to its own devices, civic democratic argument *is* something like this and, because it is, it will not do.” For these philosophers, civic argument as I have described it is far too risky. Unless restrained, it invites a chaotic politics which, in turn, invites force. As for religious speech, my description only makes it abundantly clear to them why it must be burdened, for we all know how dangerous unrestrained religious speech is to any democracy. This argument has enormous emotional appeal, especially among academics, for democratic civic argument seems so strident, so raucous, so cacophonous, so careless, and—well, as Christopher Lasch spent much of his life pointing out—so working class, especially when it takes a religious turn.

Despite this appeal, however, we *do not* all know how dangerous unrestrained religious speech is. Therefore, arguments about its risks have to be offered, and they have been. I cannot, I hope you will agree, review all the arguments in this form that have been offered as justification for burdening religious speech. I can say, I believe, that they all take at least one of three forms: religious speech is too *divisive* (representing all consequentialist concerns with religious speech), too *rude* (representing all virtue concerns with the same²¹), or too *unfair* (representing concerns that are usually, but not always, deontological concerns) to be permitted without restraint. Now, I would like to examine the first two and reserve consideration of the third.

The *divisiveness* argument finds one of its clearest expressions in the work of Professor Robert Audi: “If I am coerced,” he says—we should read this as referring to any law restricting my autonomy—

on grounds that cannot motivate me, as a rational informed person, to do the thing in question, I cannot come to identify with the deed and will tend to resent having to do it. Even if the deed in fact *is* my obligation, where only esoteric knowledge—say, through revelation that only initiated people experience—can show that it is, I

21. I do not intend to diminish virtue concerns by representing them with the social vice of rudeness. In the Southern States, including my own, it is common for children to be told by their mothers, as I was, that there is “no excuse for rudeness.” I always took this to be a serious moral argument. Here, the argument is that religious speech, because it is rude, is a violation of the good citizenship that is an internal good of democracy. Violations of the requirements of good citizenship are their own harm but they also create a risk for democracy because it depends in a wide variety of ways upon this internal good.

will tend to resent the coercion. This kind of basis of coercion breeds alienation.²²

To avoid this risk of alienation, religiously grounded arguments that would encourage the passing of coercive measure must be burdened. The form the burden takes in Professor Audi's work may be as mild as it is complex (whether it is mild or not is much debated), but this mildness is deceptive. For all moral claims, even those made solely on pain of the loss of civic virtue, as this one is, tend to show up as civil arguments in democracies, and especially, as legal arguments. We should take this burdening very seriously, as I believe most ordinary citizens in the United States, people who tend to overreact to any burden placed on their speech, would.²³

22. ROBERT AUDI, *RELIGIOUS COMMITMENT AND SECULAR REASON* 67 (Cambridge Univ. Press 2000).

23. One frequent argument offered against Professor Audi is the deleterious effect his burdening will have on those of us who are religious. See, e.g., PAUL J. WEITHMAN, *RELIGION AND THE OBLIGATIONS OF CITIZENSHIP* 152–60 (2002). We do not need to inquire into this here except to say that if virtue requires you to make and be motivated by secular arguments when arguing toward restrictions on autonomy, over time you will become more secular as you attempt to reconcile your making of secular arguments with what was before a primary self identity as a religious person. There need be no bad faith in this. If a speaker accepts that religious arguments can only be made in these circumstances, virtuously, when combined with secular arguments that also motivate you, as Professor Audi requires, and no other arguments are so burdened, that speaker would, over time, come to think of religious arguments as suspect and tend toward offering only secular arguments. We become what we pretend to be for the sake of civility. In fact, virtue theory, I believe, depends to some extent upon this being the case. We do not need to inquire further, however, because if democracy, in fact, requires such harm to religious people, it simply requires such harm, and those of us who are religious should watch out for it, as we already do. My claim here is that it does not require *these* harms, whatever their extent might be. But, of course, religious people should watch out for them nevertheless. I offer a thought or two about this in the concluding sections. Democracy, I think, has less demonic potential than other institutions because of its unique openness to that which is not itself—an openness that trust in that which persuades with its recognition of mystery seeks to maintain. It still, however, has demonic potential. Many Christian scholars have reacted to Audi by insisting that democratic virtues must be consistent with Christianity. This reaction is an interesting confirmation of Stanley Hauerwas' frequent claim that the church in the United States has lost its ability to tell the state that it is the state by being an alternative community to it and has because it believes that the task of Christianity is to make democracy work.

Another argument against Professor Audi's position is that those wishing to use religious arguments on one side of most important political issues will be burdened by requirements of good citizenship while those on the other side will not. In the typical examples of political issues driven by strong moral concerns, e.g., physician-assisted suicide, abortion, restrictions on homosexual marriages or other sexual activities, pornography, and so forth, I could, as a religious person use unburdened religious argument *against* coercive laws in political conversations about any of these, but I could not do the same on the other side. I could, for example, argue without burden, as I would, that socially coercive use of the Pledge of Allegiance when it contains the words "under God" is blasphemy. I could not, however, without suffering a burden, use religious arguments on the other side because to do so would be arguing for a coercive use of the Pledge. In fact, Professor Audi says that religious arguments offered *against* governmental coercion are fully consistent with liberal democracy, need not be burdened, and are to be encouraged. AUDI, *supra* note 22, at 75–77.

Many laws, and many forms of civic arguments encouraging them, might cause resentment among some citizens, and resentment always breeds some alienation. It is not at all clear why this particular resentment is entitled to greater weight. You will occasionally see divisiveness arguments that do claim, typically on historical grounds, that there is something uniquely divisive about religious speech. But I have never seen in any of the divisiveness arguments, historical, psychological, or empirical, support for the claim that religious speech causes more resentment than do other arguments *in a democracy*. It could be that the resentment caused by religious speech is more justified than others, but if so, its justification would have to be in terms of what should and what should not be expected in civic argument. This, however, is the question resentment was supposed to answer.

My primary complaint with the divisiveness concern is not this, however. My primary complaint is that the divisiveness of religious argument, whatever it might be, is never measured against the divisiveness of burdening religious speech. Would it be more alienating to a Jew, for example, to offer Sunday closing laws entirely on religious grounds with which he is in complete disagreement or to burden his own religiously grounded objections to physician assisted suicides? My guess is that it would be the latter. For what most determines our willingness to accept political outcomes with which we disagree is the extent and meaningfulness of our participation in the civic argument about those outcomes. In other words, we are such story-telling animals that we will be most wed-

We can see, then, that in political conversations about these primarily moral concerns, this difference favors certain religions over others, at least in this place time. Of course, the current religions favored by his approach may change if we look outside these typical issues and consider others, such as environmental restrictions on property use, use of taxes for governmental support of the poor, or recognition of animal rights. There is, however, a consistent substantive pattern here. What is really being preferred in Professor Audi's approach are those churches most closely aligned with libertarianism, like Anabaptists religions such as the Mennonites. Notice, as well, that the flip side of this is that certain forms of Christianity are far more likely to be burdened than others, especially those which read the New Testament as essentially a divinely initiated political campaign. Liberation theologies, for example, because they favor coercive measures that disrupt the status quo (and thus reveal what Liberationists argue are the questionable moral and theological assumptions behind our use of the word liberty), would get the shortest shrift in Professor Audi's approach. The objection here is not that Professor Audi's approach neatly favors those religions from which, for *their* own reasons, liberal democracy has the least to fear. This might be expected. The objection is that it favors any particular religious approach at all. For, if so, Professor Audi is offering an understanding of the good citizen running counter to his own egalitarian principle. This is the principle announcing that no religion is to be favored in the deliberations of a liberal democracy. I suppose Professor Audi could just accept this as a discriminatory effect but not a discriminatory intent. I doubt, however, that many would agree that religions favoring what have come to be right-wing, Chicago-style, libertarian principles, with their essentially anti-government bent, are somehow entitled to favored status in democratic civic argument.

ded to those cultures in which our stories are best heard whether or not they are persuasive.²⁴ So, it is not at all clear whether religious speech in democratic civic argument is really divisive; if it is, to what extent it is; and whether whatever divisiveness it may have can be eliminated by methods that are not themselves more divisive.

The wrongness of religious speech in civic argument, according to the *rudeness* argument, is not to be measured by its consequences. It is, instead, simply rude. A good citizen would not act this way. This argument derives much of its persuasiveness from its truth in other social settings, social situations, that is, when it is inappropriate—in a Jane Austen sort of way—to raise religious issues. The virtues of those settings, however, are not the same as those of civic argument, as Miss Austen knew, and surely one virtue of a good citizen would be the practical wisdom to discern the difference. When we do examine the virtues of current civic argument, we find something of far greater importance. Who is acting rudely in civic argument: one who is offering to another in argument that which is most important to him, although not shared with the other, or the one who is refusing, on some condition, to listen? Surely it is the latter.²⁵ In current civic argument, one of the qualities most admired by those who themselves do civic argument well is an ability to listen.²⁶

24. There is a corrupted form of this argument, and a corrupting image used to describe it, common and popular in American jurisprudence, concerning justifications for the First Amendment. This argument is known as the “safety valve” justification. See Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 *YALE L. REV.* 877, 885 (1963). See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970) for a far better version of it. The image, and often the argument, suggests that more speech is the best way to pacify dissidents, i.e., let them blow off steam in a harmless fashion.

25. Now, of course, it could be that they are both being rude, but I think not. What appears rude in religious speech is, I think, something else. We sense that people have an obligation to defend positions they are offering as civic arguments. Admittedly, this can be difficult in religious speech. For example, someone offering a position on some issue derived strictly from her religious view would be entitled to say, when asked to defend it, something like: I can’t explain, but I know it is true. This is not rude, but it can be annoying. There is, however, nothing unique about religion in this because we have a large number of commitments personally grounded in way we cannot explain to others who do not share them. Commitments, for example, that seem to depend upon the other having had the same experiences or are derived from aesthetic appreciation. It may be that we tend to think of religious speech as doing this more than other commitments do, but perhaps this is because religious matters cut so quickly to our groundings or, perhaps it is because interlocutors, for whatever reason, want more from them, or perhaps it is because the refusal of the other to assent on religious grounds forces recognition of our position as itself a “belief.” In any case, the description I have offered in the text of civic argument was intended to suggest that we can say more than we know in civic argument and often do. “I can’t explain” is not the end of the conversation if the conversation is really rhetorical persuasion.

26. There are complexities here ignored in the text. What I am suggesting here is something sociological. Those who do civic argument well admire those who listen well. But what, then, is the practice or practices in which this is a virtue? Civic argument, as I have described it, if it is a prac-

Such an ability to listen is admirable, for what democracy in its purest form offers to each of us is recognition. It is good to remember in this context that the complaint the colonists had against King George was not that he governed without their consent; it was that he had refused to listen to their petitions. The historical uniqueness of the liberal democracy these colonists created, prompted by the resentment they felt at not being heard, was that the recognition it provided to each citizen was not one that needed to be earned. It was to be given to all in an identity unshaped by any predefined public role, including religious ones. This ideal is an ideal of rhetoric. It said, to everyone, you have an audience. It is no wonder then that being an audience for others is admired in democratic civic argument.

In this brief review, I think we can say, at a minimum, that descriptions of the risk that religious speech creates in democratic civic argument—remembering I have not yet considered the *fairness* argument—are going to be difficult; and, because they are, it will be very difficult to assess the seriousness of these risks. Assessing the seriousness of these risks, however, is something that those seeking to burden religious speech must do. Their claims all depend upon the risks being high enough that whatever restraints are to be found within democratic civic argument itself are not adequate to the task.²⁷

tice at all, is a narrow one of rhetoric and those who listen well would be admired because doing so makes them more persuasive for a variety of obvious reasons. There are, of course, ways of admiring listening that do not turn upon the persuasive advantage it provides. These ways, however, do not arise within civic argument itself but come from those mediating associations we bring to it. Some will admire listening, some will not, and civic argument itself offers no basis for distinguishing between the two other than on persuasiveness. Nevertheless, the fact that listening well is currently admired in civic argument is a strong argument against burdening speech rather than asking more of those who listen.

27. There are, once again, complexities here that I am ignoring. Put in its most straightforward form, my argument is that external restraints upon democratic civic argument, such as the burdening of religious speech, violate its foundational trust and are not justified because the risks of this trust have not been assessed and because the internal restraints of rhetoric are more demanding than those who make the argument for external restraints have recognized. The ignored complexity is found in the assumed ability to distinguish external from internal restraints. Some restraints that could be described as internal are not required by democratic civic argument's constitutive rules but by its relationship to practices. Thus, if democratic civic argument was perceived as too unfair, even when played in accordance with its own rules, it would lose the support needed for its own maintenance. I do not think we need to get in to this complexity, for whether these considerations are described as internal or external, they still depend upon some assessment of the risks involved and some consideration of the extent to which those risks are already addressed by constitutive rules. So, in most part, but certainly not entirely, they would be much the same. In any event, if liberal political philosophers were to start talking in these terms, much of what I have argued for here would have been accomplished. I have written more extensively on this issue, in the context of understanding the ethics of the practice of law, in Jack L. Sammons, "Cheater!": *The Central Moral Admonition of Legal Ethics, Games, Lusory Attitudes, Internal Perspectives, and Justice*, 39 IDAHO L. REV. 273 (2003). I hesitate to send you there because what you will find might prove to be my own undoing

V. RHETORIC'S OWN RESTRAINTS

It is time at last to get to the questions I argued we should have been considering all along: Which restraints upon argument does democracy as a rhetorical community actually require? Which, that is, are justified on rhetoric's own terms? And is the burdening of religious speech one of these? I make no claim of neutrality in trying to answer these questions. Instead, I seek to find commitments, and the restraints derived from them, in no source other than the requirements of rhetoric itself. If there is a conception of the good offered here, it should be one implicit in rhetoric alone. Thus, the only restraints that could pass muster are the constitutive restraints of democratic civic argument. Again, in briefest summary of the argument to this point: we have found no other restraints consistent with democracy's foundational trust in persuasion and the recognition of personal mystery this trust requires, nor any risks this trust creates, at least not yet, that would justify looking elsewhere.

What I am trying to do is very difficult for an obvious reason: anyone coming to this task would bring his own personal commitments to those norms he values most. I fear, then, that I am doomed to fail at the task I have set for myself and that my failure will be obvious to you. But in this context failure is not such a bad thing. For what I am attempting to do is, and must be, part of an ongoing task within democracy as I have described it. Constitutive restraints, like any others, are never static, and the ongoing inquiry into them is, for democracy, also constitutive of it. This is a work in progress because it always must be a work in progress if I am to be consistent with my own argument.

Some things are basic. Democratic civic argument requires those offering civic arguments to seek the assent of others through rhetorical persuasion. We may seek assent for confirmation, but primarily we do so to prevail. What "prevail" means here, and returning to my long postponed metaphor, is that the winner of the game of democratic civic ar-

in this paper. Whether it is or not will turn on whether democracy can be considered a tradition, other than a tradition of rhetoric. For a variety of reason, I think it cannot. In short form, the argument goes like this: Democracy is a form of government, not a way of life. What the American founders agreed upon, for example, was form, not substance. About that they had enormous disagreement. As a form of government, democracy requires commitments to the good, but those that it requires it does so with rhetoric. Thus, the tradition that democracy is, if it is a tradition at all, is of rhetoric. The excellences of democracy, the ideal of the good citizen it provides, and so forth, are all to be found in rhetoric, and they are limited in this way. This is not to say that there are not other traditions that can be associated, culturally, with democracy. It is certainly not to say that other traditions cannot become dominant within the civic argument of democracy. It is to say that none of those are it. There is a difference then between being an American, for example, and being a democrat. It is this difference that gets blurred in much of the literature. These, however, must be subjects for development at another time even though some will rightly think they are central to my argument here.

gument gets a justification for the use of the coercive power of the state that others should accept. They should accept this in the same manner that those who play other games should accept the outcome of their games, acceptance conditioned only on the game being played in accordance with constitutive rules.²⁸ What those entering the game of democratic civic argument might want to achieve through winning, some desired state of affairs, does not matter to the game as long as the justification for the coercion used in achieving these states of affairs is a result of winning the game. It is impossible both to win a game and to violate one of its constitutive rules.²⁹

So what then are the constitutive rules or restraints? It would be foolish and unnecessary to try to lay all of them out in even the most summary of fashion. All we need to determine for our purposes is whether a burdening of religious speech is one of them. It will be useful, however, to describe some which can then be used for comparison.

I said earlier that we do not enter democratic civic argument with any motivation other than to persuade. We do not, given my description of it, need to enter it willing to be persuaded. A good faith attempt to persuade, I also said, requires listening to the other to determine that which might persuade. It depends, then, on both sides being able to rely upon what is being said by the other as each attempts to persuade the other. If reliance is not merited, if either side is dismissed as simply dishonest, the game ends because no rhetorical persuasion is possible. In

28. Despite appearances to the contrary, I do understand that there is little choice about “playing the game” as a citizen in a democracy. I can decide not to seek state coercion for my religious views, and not play the game in this way, but someone else may, and unless I am successful in confronting them and the game is played legitimately, their views will be coercively imposed upon me at least until the outcome of the next playing. If I wish to argue that this imposition is unfair, this is a social argument about unfairness and it seeks coercive enforcement in the form of restricting a “freedom to.” As such, this would be an argument that could only be made within civic argument and I would, in seeking the justification civic arguments provides, need to play by the rules.

What we are trying to determine here, however, is what “legitimately” means in all this and what restraints on this coercion might be found within rhetoric itself. Beyond these restraints, the rightness of imposing one’s belief upon others would be a subject for civic argument. Now, of course, majority religious views are favored over minority views, but as we shall see, the restraints of rhetoric itself would foreclose on any religious issue, leaving the subject always open for another round of persuasion-seeking assent. Additionally, and much the same, rhetoric itself would prevent the exclusion of other religious views on any grounds other than those rhetoric provides. And, finally, in a democracy, we simply have to trust persuasion on the unfairness or the bad theology of imposing one’s religious belief on others. And bad theology it often will be, for all the major Western theisms offer some good grounds for rejecting this. The outcome we might desire is not something rhetoric can guarantee. I should add that most often the enforcement of the constitutive restraints of rhetoric will be by those who enforce them now. So, for example, the decision of the court in *Brown v. Board of Education*, 347 U.S. 483 (1954), was a self-correction of civic argument on rhetorical grounds and, I think, is best understood as such.

29. See BERNARD SUITS, *THE GRASSHOPPER: GAMES, LIFE, AND UTOPIA* 20–41 (1978) for the most interesting and enjoyable exploration of this idea I have found.

the simplest of examples, competing, dishonest politicians in a campaign cannot persuade each other, that is a given, but they also cannot *rhetorically* persuade anyone else and, when discovered, eventually lose all audiences capable (even if not willing) of being persuaded. One way, an Aristotelian way, of understanding this is to say that lying politicians are no longer seeking assent through rhetorical persuasion as democratic civic argument requires them to do.³⁰

This same form of argument supplies other constitutive restraints such as an obligation to maintain the language through which persuasion is possible; an obligation to avoid non-rhetorical coercion, bribes for example, to obtain assent; and an obligation not to exclude other players from the game on grounds other than those the game itself provides. Essentially, all these constitutive restraints forbid seeking to persuade, obtain assent, or avoid assent through means that would jeopardize the game. They are, then, restraints to be willingly accepted by players who wish to obtain the particular justification for the coercive use of state power only the game can provide.

There is one constitutive restraint, less obvious perhaps than these, that may be central to liberal philosophy's concern with religious speech. It is a constitutive restraint that the game of democratic civic argument shares with all other games: a prohibition on seeking a final outcome for the game.³¹ What it precludes is any total victory that ends the game on any issue. In democratic civic argument, seeking to use or using the justification for the coercive use of the state's power the game provides to make final any particular outcome—whether the playing was about a political issue, a political party, a common good, an ideology, or a religious belief—is inconsistent with the nature of the justification sought.³²

30. Notice that the lying politician denies to himself part of what we seek to accomplish through assent, since assent is motivated both by the desire to achieve a certain outcome in civic argument and by our need to have our views confirmed.

31. Although he does not argue it in the same manner, Michael Walzer has made this same point in an interesting way. See Michael Walzer, *Drawing the Line: Religion and Politics*, 1999 UTAH L. REV. 619, 633 (1999) ("All that separation requires is that the engaged citizens, religious and secular, be prevented in exactly the same way from achieving anything like total victory."). This claim about avoiding finality does not require that all decisions must somehow remain suspended. If this were the case, there would be no motivation for civic argument at all. Decision must be made and acted upon, but the way in which these decisions are held cannot be as a final statement on the issue.

32. There is a risk here that the prohibition on finality will become a way of returning many of those external restraints to the requirements of rhetorical democracy that I have argued are inconsistent with its own foundation. This prohibition clearly needs to be cabined in such a way that it retains substance of its own on one wall and yet does not open itself to non-rhetorical restraints on the other. Finality should be interpreted only as a violation of other constitutive restraints, that is, those finalities that are violations of the requirements of persuasion, of seeking assent, and of the mystery upon which these are grounded. Especially important would be those attempts at finality that seek to

What are the implications of these constitutive restraints for religious speech? Do they provide any grounds for burdening it? In order for this to be the case, religious speech would have to be a form of rhetorical persuasion that threatens rhetorical persuasion itself—similar to dishonesty, non-rhetorical coercion, exclusion on non-rhetorical grounds, and finality. It seems, however, that the only grounds such an analysis offers for distinguishing arguments on the basis of their substance is the last restraint mentioned, finality. Thus, as long as the argument of religious speech is not an argument toward finality in some form, there is no grounds for burdening it. Of course, some religious speech may seek finality, as other forms of speech might, and some may violate other constitutive norms. There is, however, nothing unique about religious speech in these violations, and by themselves, they offer no reason internal to democratic civic argument for distinguishing religious speech from any other.

Are these constitutive restraints adequate to the task? This is not something I can determine, for I do not believe that liberal political philosophers have assessed the seriousness of the risks of trusting persuasion. Even without this assessment, however, I can now assert that their arguments, standing alone, are not sufficient to justify looking beyond these restraints for others. And surely the burden is on them because all external restraints are themselves challenges to the trust in persuasion that, I argued, is foundational to democracy.

Have I, despite my best intentions, only reproduced the problem in another form? Is this analysis just another back door for finalizing my own commitments to what I understand to be a common good? I do not think so. The justification for constitutive restraints is different from any other justifications offered for restraint of democratic civic argument. To

exclude voices or arguments from civic argument or to make some voices more important than others in a permanent fashion. But what this means in practice, which uses of coercion, and which argument toward these, should be considered attempts at finality are themselves issues in the ongoing civic argument that is democracy. To return to the challenging example of *Mozert v. Hawkins* offered by Stanley Fish: was the state seeking finality in its requiring of comparative religious education? I think it was. It was only its assumption that such matters were already final that prevented it from seeing that this is what it was doing. By requiring the child's use of the offending reading materials, the state was attempting to preclude from future argument the idea that religion is not a matter of comparison, of autonomous choice, and of rational consideration. The two competing positions were these: At the district court, after a remand from a decision on a motion for summary judgment, the Court saw that the mother had "drawn a line, 'and it is not for us to say that the line [she] drew was an unreasonable one.'" *Mozert v. Hawkins County Pub. Sch.*, 647 F. Supp. 1194 (E.D. Tenn. 1986) (quoting *Thomas v. Review Board*, 450 U.S. 707, 715 (1981)). This was reversed at the Circuit Court because, the Court said, in our society we are required to "live and let live." *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1069 (6th Cir. 1987). We are, however, required by democracy to "live and let live" only to the extent that rhetoric demands this of us.

understand this, I want to go back to a quote from Professor Audi I used previously:

If I am coerced on grounds that cannot motivate me, as a rational informed person, to do the thing in question, I cannot come to identify with the deed and will tend to resent having to do it. Even if the deed in fact *is* my obligation, where only esoteric knowledge—say through revelation that only initiated people experience—can show that it is, I will tend to resent the coercion. This kind of basis of coercion breeds alienation.³³

The words, “[e]ven if the deed in fact *is* my obligation,” almost go unnoticed in this, but they are the crux of the matter. For what “obligation” refers to is the obligation to accept the outcome of the game if you played it and if it was played in accordance with its own constitutive rules. It is an obligation, consistent with the restraint of non-finality, to convert your dissent into future arguments within the ongoing game. Alienation and complaints about rudeness are really implicit threats not to accept the outcome of the game. As such, they are not good justifications for external restraints; they are the grumblings of those who fear their arguments will not prevail.

What then of the *fairness* argument? It was necessary to postpone consideration of fairness as an external normative restraint on democratic civic argument because, to understand the claim that it is, we needed to have in place the constitutive restraints just described. These restraints can themselves be considered matters of fairness, but they rest on different grounds from fairness writ large as it almost always is in liberal political philosophy. The nutshell form of all the constitutive restraints of democratic civic argument is: Don’t cheat! And, whatever else it may include, the justification for this, as we have already noted, is that cheating within a game denies to the cheater the victory that he seeks.

The burden on fairness in the form of an external normative restraint is to justify cheating at civic argument. General claims of fairness, as they are in the quote from Professor Audi above, are always claims that something other than the playing of the game is or should be needed to command my willing obedience to the outcome of it. They are about ways of cheating. The burden of justifying them, I believe, has yet to be met because the nature of this burden is seldom seen for what it is.

VI. CONCLUSION

There are religions that cannot play this game with integrity. The restraint of non-finality, for example, while it does not require an accep-

33. AUDI, *supra* note 22, at 67.

tance of fallibilism or pluralism, does require that the correctness of an argument be constantly reaffirmed through assent if the state's coercion of it is to be justified. For example, even if there is an amendment to the United States Constitution prohibiting abortion, the argument about abortion must be permitted to continue or the justification for enforcing the amendment is lost. (It would remain open in the legal and political context of the potential to repeal the amendment.) The authority of the church insisting that abortion be ended, then, could never be made final by not permitting opposing views to be taught, expressed, studied, lobbied, or offered as civic argument. Some religions may not be able to abide this continuation of the need for assent.

In the offer of revelations as civic arguments, for another example, there is recognition of the need for the assent of the other and, thus, the mystery of others in which democracy finds its grounding, even in the face of claimed revelations. This can be a religious faith, one that may be implicit in democracy, and it will not be acceptable to all religions because of its dependency upon a vague transcendence. In its refusal to name this mystery, democracy can steal from this mystery its substance and its authority for such religions. It need not do this, but some religions will insist that it does. These religions, along with those in the previous example, are, to some extent or another, excluded from the game if they are to be true to themselves, and they will pay a price for their integrity. They are excluded, however, on no grounds other than the game's own terms. It seems unexceptional to me to say that democracy, however open it might be even to a reexamination of its own premises, need not tolerate that which can truly threaten its own demise, including true threats to the demise of that reexamination itself. The trick, of course, is to know when threats are true. I know of no good way of doing this other than through an analysis of the constitutive restraints of democratic civic argument.

Can we hope for more than this in democratic civic argument? There is, after all, something to the condemnation of civic argument as strident, dissonant, and so forth. What most of us want is not this, but calm deliberation toward the good. Of course we can. There is nothing in what I have described that would suggest otherwise, but that "something more" is fully dependent upon those moral sources found in the mediating associations (and those many other discourses) that are part of the identities that each player brings as arguments to the game. As such, the game comes with *self-determined* and *self-imposed* restraints, not arguments about the conduct of the game itself. In some cultures, these self-determined and self-imposed restraints will be, in fact, part of a

speaker's persuasiveness; in others, they may impose a significant disadvantage. Such is the interdependent nature of our moralities.