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M. Cathleen Kaveny

Notre Dame Law School, M.Cathleen.Kaveny.1@nd.edu

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RELIGIOUS CLAIMS AND THE DYNAMICS OF ARGUMENT

*M. Cathleen Kaveny**

This Article investigates the questions whether and when religious claims may enter into public debate about important political issues by considering the purposes of argument in the public square. These purposes include: (1) argument as self-disclosure; (2) argument as persuasion; and (3) argument as bulwark against engagement with the ideas of others. The Article argues that restrictions on the use of religious claims in public deliberations and discussion impede the legitimate functions of public argument as self-disclosing and persuasive activities. In contrast, such restrictions contribute to the use of argument as bulwark, which is arguably destructive to public deliberation in a pluralistic society.

For many of us living educated, middle and upper-class lives in the United States at the end of the twentieth century, the problem is not that we belong to no community whose values and commitments give meaning and structure to our days. It is rather that we seem to belong to too many communities, each vying for our attention and competing for our loyalty. We belong to religious groups, whose sacred texts and rituals instruct and sustain our views about the ultimate meaning and purpose of human life. At the same time, we are citizens of a highly pluralistic democratic republic, prohibited by its Constitution from taking a stand upon the merits of such views. We are family members, professionals, and participants in a wide variety of voluntary organizations ranging from Alcoholics Anonymous to the National Rifle Association.

At times, we have all found it difficult to convince persons with whom we share one facet of our lives of the merit of a conviction or an obligation arising from another sphere. We may be bound by ties of blood or marriage to persons who do not share our religious beliefs; we may have co-religionists who cannot understand what it means for us to honor our professional obligations; we may work

* M. Cathleen Kaveny is an associate professor at Notre Dame Law School, with a current appointment in the Department of Theology.

with people who wonder why we cannot in good conscience perform certain actions desired by our clients and permitted by the laws of our government. In such circumstances, it is tempting to operate with a set of compartmentalized selves, each with its distinct framework of values, that may be brought sequentially to bear as we move from one sphere of our lives to another. It is all too easy to ignore the vexing questions of how and whether we may draw upon the language and commitments intrinsic to one of the groups to which we belong in dealing with the problems facing another group.

How and when should believers use their religious beliefs in thinking or talking about matters of public concern? How, in other words, do we negotiate the differing vocabularies and commitments of the various communities to which we belong when considering a matter of importance to all of them? Did Abraham Lincoln and Martin Luther King, Jr. act appropriately when they invoked Christian religious considerations to support emancipation and civil rights?

Do those whose opposition to legalized abortion or the death penalty is rooted in the conviction that every member of the human family bears the image and likeness of God act appropriately when they cast their ballots accordingly? What about when they draw upon such images or arguments organized around them in their attempts to convince their fellow citizens to do likewise? Does it matter if their fellow citizens are also fellow believers, and the conversation is taking place in the parish hall? Does it matter if that conversation includes many of the same people, but the location is now the town hall? Are the anti-death penalty activists' attempts at political advocacy more justifiable if they cast their opposition to such practices in the language of Humean sympathy, Kantian deontology, or Millian utilitarianism rather than in theological terms?

These questions have generated great interest among both scholars of political theory and legal scholars focusing on the relationship of religion and law in a constitutional democracy such as the United States. Even those scholars who explicitly recognize the contributions that religious belief can make to the broader culture have expressed a deep wariness of encouraging free appeal to religious warrants in the public debate about the political structure of society, particularly the debate pertaining to the scope of its constitutional guarantees and the framework of its coercive laws. For example, both Kent Greenawalt and John Rawls have taken pains to emphasize the broad role that religious belief (and other comprehensive worldviews) can play in broader cultural discussions about the nature of civil society.¹

1. KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* 152 (1995); JOHN RAWLS, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765,

Nonetheless, both Greenawalt (in *Religious Convictions and Political Choice*) and Rawls (in *Political Liberalism*) have emphasized that in the vast majority of conversations affecting the basic political structure of society, citizens should put forward their arguments in generally acceptable terms, not in terms that are rooted in specific traditions of belief.² While both theorists recognize that their crite-

768 (1997).

2. In his 1997 *University of Chicago Law Review* article, *The Idea of Public Reason Revisited*, John Rawls appears to have altered the views he takes in *POLITICAL LIBERALISM* in several ways. JOHN RAWLS, *POLITICAL LIBERALISM* (1993). In my view, the most significant differences are the following: (1) In *Political Liberalism*, it generally appears as if there is one political conception of justice, which is supported by an overlapping consensus of comprehensive worldviews (although Rawls does not demand agreement "down to the last details of the principles defining its content," RAWLS, *POLITICAL LIBERALISM*, at 226, and at other points speaks of "a class of liberal conceptions that vary within a certain more or less narrow range," *id.* at 164). In contrast, in *The Idea of Public Reason Revisited*, he speaks more definitively of "a family of political conceptions of justice," each of which is generated by a *reasonable* comprehensive worldview. Rawls, *supra* note 1, at 773 (emphasis added). (2) In *Political Liberalism*, the notion of the overlapping consensus plays a very prominent role, since it generates the content of the political conception of justice. RAWLS, *POLITICAL LIBERALISM*, at 134. Moreover, it appears as if the overlapping consensus of comprehensive doctrines can be determined empirically or by sociological study; the content of the consensus in a political context depends heavily on what comprehensive doctrines happen to hold sway in that context. In *The Idea of Public Reason Revisited*, the contribution of the overlapping consensus is diminished, since every reasonable comprehensive doctrine is permitted (a) to generate its own reasonable political conception of justice and (b) to present itself fully in the public square, as long as it is willing at some point to explain how its positions are supported by a reasonable political conception of justice. Rawls, *supra* note 1, at 784. However, in the article, the role of the notion of "reasonable" as a limitation on comprehensive doctrines approved for admission to the public discourse is correspondingly increased. *Id.* Since proponents of comprehensive doctrines can present their unfiltered conceptions of justice in the public square and rely on them in their own deliberations about fundamental issues of justice, it is particularly important in Rawls' revised schema that they be reasonable. (3) Most importantly for this essay, Rawls revises the circumstances in which full-blown comprehensive worldviews can be presented in the public square on fundamental political matters. *Id.* As stated below in the text, in *Political Liberalism*, Rawls contemplates the introduction of elements of comprehensive worldviews not entailed by the political conception of justice only in exceptional circumstances. RAWLS, *POLITICAL LIBERALISM*, at 247. In the article, adherents are free to introduce all elements of their comprehensive worldviews into the public square, subject to the *proviso* that "in due course proper political reasons—and not reasons given solely by comprehensive doctrines—are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support." Rawls, *supra* note 1, at 784. In his own terminology, in *Political Liberalism*, Rawls writes of the "inclusive view" of public reason, that allows comprehensive worldviews into the discussion when necessary to "strengthen the ideal of public reason itself." RAWLS, *POLITICAL LIBERALISM*, at 247. In contrast, in the article he speaks of the "wide view" of public reason, which allows comprehensive worldviews into the discussion subject to the "proviso." Rawls, *supra* note 1, at 783-84.

ria for public argument cannot be imposed by law, they nonetheless maintain that ideal citizens will honor and abide by them. In *Religious Convictions and Political Choice*, Greenawalt holds that in most cases, citizens should not make arguments based upon their own religious beliefs in the process of persuading others to accept their position on such matters of public import, despite the fact that they themselves may be justified in holding the position for religious reasons.³ "Though reliance on religious convictions may be appropriate in these settings [dealing with controversial political issues], argument in religious terms is often an inapt form of public dialogue."⁴ In *Political Liberalism*, John Rawls argues that when engaging in public discourse about fundamental political questions (i.e., those involving constitutional essentials and questions of basic justice), citizens must restrain themselves in two ways.⁵ First, with respect to substantive questions of justice, they must not appeal to comprehensive religious or philosophical doctrines, but to a political conception of justice that is intelligible and defensible apart from any particular comprehensive doctrine.⁶ Second, with respect to the method of inquiry regarding constitutional essentials and basic justice, they are to appeal only to "presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial."⁷

Thus both Greenawalt and Rawls (in *Political Liberalism*) contemplate that in the vast majority of circumstances, political discussion should take place in terms that do not depend on any particular religious or other comprehensive worldview. Nonetheless, both contemplate that there may be exceptional circumstances where this may not be the case, which are triggered by the failure of public reason. In his first book on this topic, Greenawalt argues that it is impossible and unfair to expect believers to leave aside their distinctive religious premises in their own deliberations about many of the most controversial issues of political society, including borderline questions status (e.g., the status of fetuses and animals), the relative weight of competing moral standards and objectives, and complex factual judgments (e.g., welfare assistance, punishment, and military policy).⁸ Greenawalt does not explicitly authorize believers

3. KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 12 (1988) [hereinafter GREENAWALT, *RELIGIOUS CONVICTIONS*].

4. *Id.*

5. RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 224.

6. *Id.* at 226. It is, however, supported by an overlapping consensus of reasonable comprehensive doctrines, each of which endorses the political conception from its own point of view. *Id.* at 134.

7. *Id.* at 224.

8. *See generally* GREENAWALT, *RELIGIOUS CONVICTIONS*, *supra* note 3, at chs. 6-9. In his second book, he clarifies that the use of comprehensive worldviews in deliberation is not limited to these difficult cases. He writes that

to refer to their distinctive premises in public political discussion even in such cases.⁹ However, it would be impossible for him not to expect that they would do so under such circumstances, because of the undeniable importance of these questions to the structure of our political life itself. In *Political Liberalism*, Rawls would also accept the introduction of distinctive elements of comprehensive worldview in circumstances in which their adherents “do so in ways that strengthen the ideal of public reason itself.”¹⁰ He gives two examples that might arise in more or less well-ordered society such as our own: first, there can be circumstances in which participants in a heated debate (e.g., regarding governmental aid to parochial schools) introduce their comprehensive worldviews in order to demonstrate to each other their good-faith commitment to fundamental political values.¹¹ Second, a society may be struggling with “profound division over constitutional essentials,” such as arose with respect to abolition and slavery.¹² In these circumstances, the introduction of comprehensive worldviews can underline the importance of the matter at stake and contribute to their proper resolution.

“comprehensive views and nonaccessible grounds can appropriately figure in resolution of the broad range of political issues that ordinary citizens face.” *Id.* at 160. Nevertheless, in my view, he does not greatly expand the role of distinctively religious warrants in public *discussion*. It is true that he would not place limitations on the use of religious discourse by ordinary citizens in advocating political positions—not because they have a positive moral right to support their positions in those terms, but because no one is likely to care much about their reasoning process.

Except within small communities, [ordinary citizens] cannot expect that legislators will personally read their letters, or that anyone will engage thoughtfully with the ideas expressed. For this reason, citizens need not worry much about how they express themselves, so long as the grounds leading to their decisions are consistent with basic premises of liberal democracy that they accept.

Id.

Once a citizen does have significant influence, Greenawalt asks them to observe the restraints of public reason. He calls these influential members of the community “quasi-public citizens”; they are those who “consistently engage in analysis and advocacy of positions on political issues” such as media commentators, editors, presidents of large corporations, and some law professors. *Id.* According to Greenawalt, “they appropriately state grounds for positions that lie in public reason when they address the entire public on particular political issues.” *Id.* Significantly, when ordinary citizens engage in broader public advocacy, he asks them to obey the norms of public reason, although he recognizes that it is not as important in their case as in that of quasi-public citizens. It is important to note that despite the fact that he considers them quasi-public citizens as well, Greenawalt explicitly exempts religious leaders from this standard of behavior. He addresses their situation in a separate chapter.

9. See generally GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 3, at chs. 6-9.

10. RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 247.

11. *Id.* at 248.

12. *Id.*

Needless to say, the positions advocated by Rawls or Greenawalt can be questioned on a number of fronts. For example, what makes an argument religious—or indebted to a comprehensive religious or philosophical scheme—rather than appropriately public for the purposes of this debate on the political conception of justice? Is it the actual structure of the argument? Is it the argument's pre-suppositions? Is it the argument's historical roots? Moreover, how is the definition of "religious" or other distinctively controversial worldviews for purpose of their limitation in public discussion related to the purpose of that limitation? For example, in denying a constitutional right to assisted suicide, the Supreme Court appealed to the historical practices of our country, which demonstrates strong disapproval of taking one's own life.¹³ By itself, appeals to history are not religiously-based arguments. But what of the fact that the history describes a prohibition generated in a time where religion and politics were far more radically intertwined, and which almost certainly was originally motivated by religious concerns? If one point of limiting political discussion to public reasons is to insure civic peace, then is it not likely that the source of the argument in a distinctively religious claim will generate resentment among non-believers who continue to be bound by its force?

While these and other questions merit exploration, I shall not attempt to deal with them here. Instead, I shall focus on what I take to be a far more striking problem of the current discussion of religious arguments in the public square—namely, the fact that it has generally proceeded without paying careful enough attention to the actual subject matter at hand: argument. What are people actually doing when they make arguments to one another? What goals are they trying to accomplish? How does the structure of the argument advance or impede their goals? Curiously enough, many theorists of public reason fail to address these fundamental questions relating to the nature and purpose of political argument. Instead, they develop their approaches on the basis of a concept of argumentation that is rather abstract and purposeless; it reflects the timbre of the seminar room rather than the political meeting hall. In the academy, after all, often there is no purpose beyond the argument itself; a good argument or discussion is its own *telos*. In the broader political community, however, an argument has a more practical character; it is a means to an end. As lawyers know very well, it is a tool that is used to accomplish the objectives of the one making the argument.

Consequently, in this Paper I would like to look at the question of what role religiously based arguments in the public square should play from a different angle; focusing not on the meaning of religion,

13. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

or the nature of the political community, but on the purpose of argument.¹⁴ It is my hope that careful attention to the actual *function* and *use* of argumentation to persuade others of a particular viewpoint may yield a more nuanced understanding of how religious warrants should be used by believing individuals when arguing in their capacity as citizens. What, then, are the reasons that two or more individuals might enter into a discussion about fundamental and controversial issues of public morality, such as universal health care, physician assisted suicide, or abortion? I believe that there are at least three distinct purposes that could motivate such a discussion that can be summarized as follows: (1) argument as mutual self-disclosure; (2) argument as persuasive tool; and (3) argument as bulwark. They are explored in more detail below.

I. ARGUMENT AS MUTUAL SELF-DISCLOSURE

If we enter into a *frank* discussion about whether physician-assisted suicide should be legally permissible, we embark upon a process that will allow our conversation partners to learn a great deal about us. In making our arguments, we will give strong clues as to what we believe to be the "worth" or "value" of human life and the proper deference due to individual choice. In the conversation, we will probably disclose whether we believe the process of suffering and dying has any intrinsic meaning. In evaluating the likelihood that patients will experience pressure to choose death from physicians or family members, we will reveal something of our basic views about the goodness or evil at the heart of human nature. The process of self-disclosure inevitably entails risk. We may have difficulty expressing how our primary conceptual framework can illuminate a particular issue; we may find ourselves unable to give persuasive answers to the questions posed by an audience to whom that framework is largely alien. Those engaging in argument as self-disclosure can find the process distressing and threatening in at least two ways. First, our inability to articulate our deeply held positions in a powerful manner may make us feel as if we have in some way failed the community that has nourished and protected them. Second, we may find ourselves facing a skeptical or even hostile response from our conversation partners. If we also stand in some type of communal relation with them, such a response may tear at our self-identity, making us feel as if various pieces of ourselves are at war with one another.

Consequently, if we are members of two or more communities, it is often safer to couch our arguments in the language predominant

14. See MICHAEL J. PERRY, *LOVE & POWER, THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS*, 44-47 (1991) (analyzing the purposes of argument in the public square).

in the group to whom we are speaking, even if our own primary ways of thinking about the question are more indebted to another group to which we belong. For example, when discussing controversial issues in the company of fellow physicians, it may be easier for a Christian doctor to speak the language of beneficence, non-maleficence, autonomy, and justice¹⁵ rather than to invoke the corporal works of mercy. Similarly, when asked to speak to a convention of insurance executives, a physician morally at home in the language of secular bioethics may present his or her position in the language of cost-benefit analysis and medical loss ratios.

Many of us who belong to two or more communities have become adept at translating positions held on grounds indebted to the conceptual framework of one community into language more familiar to the other. Yet, if we have led our conversation partners to believe that we are providing them with our real reasons for holding a given position, this process of translation may undermine a fundamental purpose of argument as self-disclosure. In fact, under some circumstances, it may be outright deceptive. By engaging in the process of translation, we may find ourselves mounting an argument for a position without at all disclosing our real reasons for holding it. The very fact that we have entered into an ostensibly frank discussion on a given issue strongly implies that if the arguments we put forth are refuted, there is at least some possibility that we will change our minds. But that may not be the case. Very often, we will simply search for a more effective translation. If our conversation partners are also engaging in this process of translation before putting forward their own views on a contested issue, we may end up with a situation of mutual deception rather than mutual self-disclosure.

Does this conception of argument as self-disclosure have any implications for how we should understand the role of religious belief in conversations about the public good? I believe that it does. In *Religion in Public Life: A Dilemma for Democracy*, Ronald Thiemann argues that there are three norms that participants in conversations about the public realm should strive to meet: public accessibility, mutual respect among citizens who differ about matters of public import, and moral integrity in the way that we hold and advance our own positions on such matters.¹⁶ Thiemann draws heavily on the ideas of Greenawalt and Rawls's *Political Liberalism* in developing his own position. Nonetheless, I will argue that if his norm of public accessibility is interpreted in ways that too closely track

15. These categories are taken from one of the most well-known and well-respected texts in medical ethics, TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* (4th ed. 1994).

16. RONALD THIEMANN, *RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY* 135-41 (1996).

their approaches to this question (as described above), then it may impede the implementation of his norms of mutual respect and moral integrity.

According to Thiemann, the norm of mutual respect is a necessary extension of Madison's norm of mutual tolerance.¹⁷ Mutual respect goes beyond tolerance in that it directs citizens to "grant to those with whom they disagree the same consideration that they themselves would hope to receive."¹⁸ He suggests that in effect, it is the Golden Rule standard applied to argumentative interchange.¹⁹ For Thiemann, "[c]itizens who manifest the virtue of mutual respect acknowledge the moral agency of those with whom they disagree and thereby treat their arguments as grounded not simply in personal preference or self-interest but in genuine moral conviction."²⁰ The hallmark of mutual respect is the ability to acknowledge the moral force of an argument with which one disagrees; its goal is to ensure that citizens remain open to persuasion.

How is mutual respect best fostered? By encouraging citizens to translate their viewpoints into the generally accessible language of the public square, or by facilitating their willingness to embark upon the hard work of explaining their judgments about matters of public concern in the terms that they actually believe to justify those judgments? I believe that the latter course is the better one. In order to understand why, we need to distinguish between two concepts of respect. First, there is a "basic" notion of respect, in which we honor persons for being autonomous agents, or children of God, etc. "Basic respect" should be accorded to *everyone* in a democratic republic, no matter what positions they hold or their warrants for holding them. Second, there is a "thick" conception of respect, which honors the integrity and virtue of others, despite the fact that their primary moral commitments are significantly different from one's own. This type of respect, which is what I believe Thiemann is concerned with, cannot be a right. It must be earned. What, concretely, does the process of granting or denying "thick" respect entail?

At the very least, before we decide to accord someone "thick" respect, we need to attempt to view the moral universe from her perspective. We need to understand how her views on various positions hang together, as well as the ideals and fears that animate such views. Before we grant that respect, we must see that it is possible to live a morally coherent life within the framework she has adopted. Furthermore, we must find some significant aspect of it which is worthy of admiration. Sometimes that may take a little

17. *Id.* at 136-37.

18. *Id.* at 136.

19. *See id.*

20. *Id.*

perseverance. For example, in a hypothetical conversation with an enthusiastic citizen of a society modeled on ancient Sparta, we may discover that something in her notion of honor resonates with our own moral commitments, despite the fact that we do not place the same weight on that virtue, or interpret it in precisely the same way. Thus the process of granting "thick" respect requires that we not only allow, but encourage each other to make our respective positions intelligible within the moral framework from which they take their strength. In contrast, if we require each other to translate our positions into the language of public reason, the coherence and power that should command our respect may be lost in the translation.²¹

The conception of "thick" respect just described is intimately connected with *moral integrity*, which is Thiemann's third and final norm for public discourse.²² He contends that moral integrity has three fundamental components.²³ It is demonstrated in *consistency of speech*, so that we do not maintain one position before one audience and take another position before a different audience.²⁴ It is also manifest in *consistency between speech and action*, so that we do not simply give lip service to our moral convictions, but act upon them in an appropriate manner.²⁵ Finally, moral integrity can be seen in *integrity of principle*, which leads us to apply the same moral principles across the whole range of cases to which they apply, not only to the cases which appeal to us.²⁶

How do we judge whether our fellow citizens hold particular views regarding issues of public import with moral integrity? How do they make similar judgments about us? We are all likely to have a solid basis for making such an evaluation only if we help each other understand the real reasons for our actions. If we put too much pressure on our conversation partners to translate their deepest moral commitments into another moral language, then the integrity of their positions may be hidden from view. For example, when Judge John Noonan's views are abstracted from their home in Catholic social teaching and mapped onto the dichotomous "liberal versus conservative" worldview favored by the American media, his concern for well-being of the vulnerable terminally-ill may appear to

21. Rawls writes: "Citizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines." Rawls, *supra* note 1, at 766. It is not clear to me why this is the case, nor why presenting a public face of a distinctive public conception of justice rooted in a comprehensive doctrine is likely to facilitate mutual understanding.

22. THIEMANN, *supra* note 16, at 137.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

rest uneasily with his antipathy toward harsh immigration laws and an expansive use of the death penalty.²⁷ To appreciate Judge Noonan's moral integrity—which encompasses his judicial integrity—one has to take the time and effort to enter into the framework that supports it. Thus, Thiemann's norm of moral integrity, no less than his norm of mutual respect, may be in some tension with the norm of public accessibility.

Two particularly difficult issues remain. First, in his *University of Chicago Law Review* article, Rawls explicitly allows that adherents of reasonable comprehensive worldviews may enter the debate about fundamental political issues, provided that they in due course show how their position is justified by their "political conception of justice."²⁸ He also acknowledges that persons may seek to speak in the public square not in order to engage in argument about political matters, but to demonstrate how their worldviews support public reason.²⁹ Rawls's position in this article raises an important issue for my own argument: Is the fact that one's comprehensive worldview is "reasonable" either necessary or sufficient to gain "thick" respect on my terms? In my view, Rawlsian reasonableness is neither necessary nor sufficient for "thick" respect. More specifically, I believe that we can find a "reasonable" worldview so impoverished and incoherent, or implausible in its basic assumptions about the nature and purpose of human life, that we find very little to admire about its adherents, despite the fact that we do not consider them to be political threats. Conversely, we can find much to admire about, and to learn from, a worldview that does not accept the Rawlsian constraints on public discussion. Being a member of a pluralistic society is complicated; the normative judgments that we make about one another admit of no easy algorithm.

Second, can the fact that an individual advocates a particular position on a given issue of morality or public policy suffice in and of itself to render him or her ineligible for "thick" respect?³⁰ It is diffi-

27. Ronald Dworkin, *Politics, Death, and Nature*, 6 HEALTH MATRIX 201, 211 (1996).

28. Rawls, *supra* note 1, at 776.

29. *Id.* at 786.

30. Needless to say, the answer to this question will depend in part upon how broadly or narrowly one defines the position at stake. If a position is defined very broadly, to include one's reasons for holding it, we are more likely to be able to say that it precludes the possibility of thick respect in and of itself. For example, it is not difficult to conclude that the person who holds the following position does not deserve "thick" respect: "We should drastically curtail immigration to the United States because we are a superior people whose strength will be diluted if we allow inferior people from other nations to live among us." In contrast, it is more difficult to say that someone who holds a position described as "the United States should drastically curtail immigration" is *per se* ineligible for "thick" respect. Morally respectable reasons may support

cult to preclude an affirmative answer to this question in extreme cases, such as a person who advocates a repeal of the Thirteenth, Fourteenth, and Fifteenth Amendments in order to reinstate the enslavement of African-Americans. Developing appropriate criteria to identify such cases will be extremely difficult. Nonetheless, it is clear that this sort of *per se* disqualification from eligibility for respect happens more frequently than necessary in contemporary discussions of controversial issues. How then should we combat it? From a practical perspective, to adopt Rawls's and Greenawalt's views about when arguments grounded in particular religious or moral traditions may properly be introduced into the public square may be exactly the wrong approach.

Generally speaking, Rawls (in *Political Liberalism*) and Greenawalt suggest that religious considerations may be inserted into the public discussion only with respect to highly controversial political issues that cannot be settled solely on the basis of public reason.³¹ Yet the foregoing discussion of argument as self-revelation suggests that this may be the *least productive* time to introduce arguments not accessible to all participants in the debate.

For those who seek a liberal society that embraces rather than transcends pluralism, the best use of religiously based arguments may be to show how they support basic, widely shared commitments of our society. Suppose that adherents of particular moral world views make vigorous use of argument as self-disclosure in the public square. They attempt to explain forthrightly to their fellow citizens how their particular convictions support deeply embedded ideals such as the equality of all human beings, the dignity of work, etc. It is at least possible that such efforts may foster the development of mutual respect in a "thick" sense. We are all more disposed to listen to arguments that support positions with which we agree, even if those arguments make use of premises that seem alien to us. As a consequence, we may develop a more complete understanding of our fellow citizens, thereby finding it easier to recognize their moral integrity. Furthermore, if we make a practice of defending our common practices from the perspective of our differing world views, it will be easier to contextualize the issues on which we do disagree. Under such circumstances, there might be less risk that particular religious traditions will be perceived as mysterious forces ineluctably linked with one side or another in neuralgic social debates in our increasingly pluralistic society.

this position, such as a belief that we have a prior obligation to take care of the poor and suffering persons already living among us.

31. GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 3, at 7; RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 9-10.

II. ARGUMENT AS A TOOL OF PERSUASION

The second aspect of argument that I want to consider is its use as a tool of persuasion. This function, of course, is the most commonly associated with argument; generally speaking, we argue in order to persuade someone else to believe or to act in a particular way. But how exactly does argument work for this purpose? More specifically, what do we mean by persuasion, why is it important, and to whom should it be addressed?

First, it is crucial to keep in mind that "persuasion" is an intentional activity, engaged in by the persuader in order to achieve a concrete purpose in a concrete situation. For example, suppose we are citizen-activists who want to pass a referendum on health care reform at the state elections. What, exactly, would be the goals of our efforts to use argument as a persuasive tool? Depending upon the nature and degree of our commitment, we could desire to achieve any one of the following three goals:

(1) Get our conversation partners to vote for, rather than against, the referendum come election day;

(2) Get our conversation partners to vote for the referendum *because* they believe that the health care reform proposal embodied in it is a good idea;

(3) Get our conversation partners to vote for, rather than against, the referendum because they believe that it is a good idea *for the same reasons* that we believe it is a good idea.

Now, the tactics that we will employ in my efforts at persuasion will very much depend upon which of the foregoing goals we adopt. For example, if our aim is simply to elicit support for the referendum in any way that we can, we may introduce considerations that are *extrinsic* to the debate about its merits. If we learn that our conversation partners have political objectives of their own, we might inform them that if they give us their support on the health care referendum, we will happily lend our votes to their favorite political program. If we are unscrupulous about means, we might threaten to unveil a particularly sensitive secret from their past endeavors unless they guarantee us their votes.

However, if our aim is to get our conversation partners to vote for the referendum because they believe its program for health care reform is a *good idea*, we need to adduce arguments that are *intrinsically* related to its merits, that show why the proposal is a good idea in and of itself. It is important that those arguments be convincing to *our conversation partners*. Whether they are the way that we ourselves think about the matter is generally irrelevant to the task of persuasion. If we know that we are talking to utilitarians, we will attempt to mount an argument for the proposal that stresses overall improvement to societal health and decreased spending on health care; if we are talking to liberation theologians, we will point out how the poor are disproportionately disadvantaged by the cur-

rent system.

Finally, the third and most ambitious aim of persuasive argument is to convince our conversation partners to hold the same position on a particular question *for the same reasons* that we do. This process has two-steps. First, we need to convince our conversation partners that the *reasons* we want to deploy are solid. This task may be rather difficult if those reasons are entirely foreign to them. Second, we need to convince our conversation partners that the reasons we have put forth in fact support the particular position we wish to advocate.

We can gain some insight into the mechanics of this process by drawing upon several insights developed by William Werpehowski in an article entitled *Ad Hoc Apologetics*.³² As its title suggests, the goal of the article is to explain how Christians might go about persuading non-believers to accept fundamental Christian claims about various aspects of human existence.³³ Werpehowski understands religious belief not primarily as a private "internal" experience, but as a communally based cultural-linguistic framework that shapes the way believers understand and experience the world.³⁴ Consequently, his account of apologetics functions as a general account of how we go about persuading others to accept fundamental elements of our own moral world view when they subscribe to a very different way of understanding the moral universe.³⁵

Werpehowski observes that the first step in the apologetic process is to establish areas of common ground with our conversation partners.³⁶ Such areas could include particular beliefs about what is right or wrong to do in specific situations.³⁷ Next, we attempt to show how the broad conceptual framework available to us through our participation in a community of faith provides a more coherent and fruitful explanation of the beliefs we have in common than do any of the alternatives. As Werpehowski notes, the apologetic process is necessarily "cumulative in character;"³⁸ no one adopts a new moral world view simply because it provides a better account of one or two commonly recognized dilemmas. Moreover, it is complicated by the fact that what counts as evidence for a particular framework of meaning may only be appreciated as such from within that framework.³⁹ It is further complicated by the fact that the true test of a comprehensive framework is a matter of practice, not theory: ul-

32. William Werpehowski, *Ad Hoc Apologetics*, 66 J. RELIGION 282 (1986).

33. *Id.* at 285.

34. *Id.* at 300.

35. *Id.* at 301.

36. *Id.* at 287.

37. *Id.*

38. *Id.*

39. *Id.* at 288.

timately, the believability of such a framework is demonstrated by the fruitfulness of life conducted according to its tenets.⁴⁰

Werpehowski's account does not minimize the challenges involved in the process of convincing others to adopt fundamental elements of our world view as their own.⁴¹ He notes, for example, that "matters concerning how one should live may demand, for the purposes of assessment, a consistency and tenacity of commitment that often sees 'counter-evidence' as temptation."⁴² Yet as difficult as it is to convince our conversation partners to alter their fundamental moral framework, the challenges posed by the third type of persuasive argument presently under discussion are significantly greater. Persuading others to hold a particular position *for the very same reasons that we do* requires us not only to convince them to adopt our moral framework, but also to succeed in a second argumentative step: We need to convince our conversation partners that this framework yields a particular judgment about a matter of public import (e.g., our hypothetical referendum on health care reform). These two steps may not be entirely isolated from one another. Persons who realize that adopting a particular world view may commit them to specific positions about which they have great reservations may count that fact as a reason to retain their present outlook. Thus Werpehowski's analysis offers us another reason to reject Rawls's and Greenawalt's view that distinctively religious arguments should be reserved for controversial issues that are not resolvable on the basis of public reason. He shows that if we hope to persuade others of our deepest convictions about moral reality, our first aim must be to show how they offer a coherent account of a range of important *non-controversial* beliefs that we hold in common.⁴³

More generally, the foregoing discussion of the inner logic of all three types of persuasive argumentation also calls into question the usefulness of using public reason to the exclusion of particular religious or moral frameworks. Since the goal of persuasive argumentation is to convince our conversation partners, the key is to draw upon the framework that they will find persuasive—whatever that framework is.

However, this conclusion sharply points us to some of the concerns animating recent scholarly attempts to restrict the use of specifically religious claims in public dialogue. Assume, for example, that we live in a state where eighty percent of the voting population is devoutly evangelical. The analysis of argument as persuasion de-

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

veloped above suggests that if we want to convince them to vote for our hypothetical health reform referendum, we should construct an argument that draws heavily upon Christian scriptures. Furthermore, if our ultimate objective is simply to win the vote, then it is a pragmatically defensible strategy to ignore the other twenty percent of the voters in order to focus time and money upon the eighty percent majority. Despite its effectiveness, many of us, I believe, would find this strategy rather troubling. It may be instructive to reflect upon the precise nature of our objections. I believe that they are both procedural and substantive in nature.

First, we are concerned about the *process* of the argumentative strategy. It appears that the views of a segment of the community are simply discounted because they do not accord with the dominant moral framework. It is doubtful, however, that the remedy for this problem is for citizen-activists to couch their claims in a hybrid "public" language that avoids all explicit use of religious concepts. If the real impetus for the political stance at issue continues to be rooted in faith, such "translation" efforts may do nothing more than mask the nature and source of the disagreement. Ideally, the twenty percent of the population who do not share the beliefs of the majority should speak up.⁴⁴ By asking why *they* should support the policy, and articulating how they view the question in their own terms, members of the minority group will prompt representatives of the majority to respond to their concerns. The moral obligation that might take shape here would bind persons discussing matters of public policy to *hear* and *attempt to respond* to the particular, expressed concerns of their fellow citizens, even if their political program would succeed without so doing.

The procedural problem identified in the preceding paragraph may point to a deeper, substantive problem. Suppose a group of religiously motivated citizens want to enact a state law prohibiting homosexual parents from getting custody of their children.⁴⁵ They might forthrightly decide to cast their arguments in terms of the religious reasons that actually prompted their action. On the other hand, if they are more politically astute, they might draw upon "publicly accessible" reasons to make their case, by asserting that such custody arrangements might cause uncertain harm to chil-

44. I do not wish to minimize the hostility that such a minority group might face in making their objections. For reasons outlined in the body of the text, however, I do not believe that the solution is for everyone to translate their claims into a "public" moral language. It is the hostility that poses the moral problem, and that must be combated in a straightforward way.

45. See Sanford Levinson, *Abstinence and Exclusion: What Does Liberalism Demand of the Religiously Oriented (Would Be) Judge?*, in RELIGION AND CONTEMPORARY LIBERALISM 81 (Paul J. Wiethman ed., 1997) (discussing an analogous case involving a state court judge).

dren's psychosexual development, etc. Would those who object to the role of religious discourse in the public realm actually be satisfied by the group's shift in moral terminology, or does their difficulty run deeper? It seems to me that their real objection is not one of procedure, but one of substantive justice. They ultimately ask whether it is *just* for some participants in a pluralist democracy to rely upon a pattern of reasoning alien to a minority of citizens in making public policy that is objectionable to that minority.

This *substantive* objection cannot be satisfied merely by prohibiting citizens from making explicit appeal to religious beliefs in arguing with one another about matters of public policy. It would also require us to *prohibit* citizens from using those beliefs in coming to form their own judgments on such matters. This goal is morally legitimate for those advocating a society whose public life is ordered around a full-blown liberal political theory. The fact that such a prohibition would be almost impossible to implement in practice might make restrictions on the speech appropriate in the public square an acceptable, less intrusive, fall back option.

However, to the more pragmatic advocates of a liberal society (*our* society) that embraces rather than transcends pluralism, such as Jeffrey Stout, the ideal is far more problematic.⁴⁶ For such revisionists, liberal society is to be valued for the way of life that it provides, not for the conceptual coherence of its foundations.⁴⁷ On a pragmatic liberal interpretation of Rawls's overlapping consensus, it cannot be justified theoretically—its elements are empirically determined, and may shift from time to time. Consequently, that consensus is unlikely to provide a framework sufficient to support careful and consistent moral reasoning—at least on difficult and controverted matters. If moral reasoning is to occur, it must take place within the richer traditions that contribute some, but not all, of their elements to the overlapping consensus.

In the end, then, we confront the fundamental problem of a democratic government. What are the limits that we are willing to place on majority decision-making in order to provide an appropriate sphere for minorities to live according to their own conceptions of the good? In a revisionist liberal society, we can no longer avoid giving a substantive answer to this question by taking refuge in procedural restrictions placed on the decision-making process of the majority. We must address the question forthrightly.

46. See generally JEFFREY STOUT, *ETHICS AFTER BABEL: THE LANGUAGES OF MORALS* 220-42 (1988). He defines "liberal society, pluralistic society" (neutral senses) as: "Name for the . . . practices and institutions invented by the North Atlantic bourgeoisie; any society whose members show considerable diversity in religious or philosophical outlook and whose institutions tolerate such diversity by ascribing certain rights to citizens." *Id.* at 302.

47. *Id.* at 220-42.

III. ARGUMENT AS BULWARK

The third and final use of argument that I would like to examine in the essay is what I call "argument as bulwark." Here, argument is used not primarily for self-revelation, or for the persuasion of others, but for self-protection or self-promotion. It is not difficult to identify examples of argument as bulwark; it frequently can be found on *Nightline* and other television opinion shows that seem to book the most extreme representatives of contested issues that they can find. Many of the "great debates" over controversial matters, familiar to anyone who has spent significant time on college campuses, may also be considered examples of this genre.

The point of argument as bulwark is not to engage others in conversation about a difficult matter of mutual concern, but to stake out and assert a protected sphere of thought or action. Speakers using argument as a bulwark attempt to give heart to the segment of the audience that already agrees with them, as well as to impress opponents and the unconvinced with the power of their commitment. The ultimate aim of such speakers is to be, and to appear to be, "a force to be reckoned with" by one's opponents.

We saw that the language of public reason may impede rather than facilitate the goals of argument used for self-disclosure, or argument understood as a persuasive tool. However, the language of public reason may serve the purposes of argument as bulwark very well, for several reasons. First, because public reason is not the first moral language of the participants in the argument, its use does not expose them to the same level of intellectual and moral vulnerability. If a particular strand of an argument based in public reason appears to be disintegrating, it can easily be replaced with another strand. The participants in the argument are not forced to rethink their substantive position, which remains safely ensconced in their primary moral framework.

Second and relatedly, persons using the language of public reason (e.g., the language of rights and utility maximization) to discuss controversial issues quickly reach the point of talking past one another. As Alasdair MacIntyre described so vividly in *After Virtue*,⁴⁸ the contemporary abortion debate endlessly pits advocates of the "right to life" against proponents of the "right to choice." Because of the superficial similarity of their moral language (both sides invoke rights talk), each side can convince itself that its position is actually responsive to the issues raised by the opposition.⁴⁹ Activists can thereby sidestep troublesome questions that would arise if they considered the issue more fully within their own respective frameworks.

More specifically, by responding to an assertion of "choice" with

48. ALASDAIR MACINTYRE, *AFTER VIRTUE* 6-21 (1981).

49. *Id.*

their imperative of "life," pro-lifers can avoid the hard jurisprudential question of how their judgments about the *morality* of abortion should be translated into *law* in this particular society. Conversely, by proffering "choice" as the response to "life," pro-choicers can play down the hard questions of how women *should exercise* their legally protected choice, and what measures the government *can* appropriately take to encourage morally appropriate choices. Thus, the use of public reason may not encourage conversation among contending practitioners of argument as bulwark. Instead, it may simply allow them to avoid confronting the most fundamental challenges to their own respective positions.

Third, in my view, public reason is often insufficiently coherent and well-developed to settle controversial issues. For example, Rawls's two attempts to use public reason to settle controversial political matters have been less than successful. In a footnote purporting to illustrate the application of public reason in *Political Liberalism*, he simply asserts his belief that "*any reasonable balance* of these three values [due respect for human life, ordered reproduction of political society over time, and the equality of women] will give women a duly qualified right to decide whether or not to end her pregnancy during the first trimester."⁵⁰ To my mind, it is impossible for anyone with even a passing acquaintance with the vigorous bioethical, legal, and political debate over all aspects of this issue over the past thirty years to consider this footnote to be anything more than an expression of Rawls's own settled perspective on the matter.⁵¹ Indeed, in *The Idea of Public Reason Revisited*, Rawls minimizes the status of this claim, stating that this footnote did indeed merely express his opinion, and was not intended as an argument about the nature of public reason.⁵² Nonetheless, in the very same article, he introduces similarly abbreviated, suggestive, and controversial remarks about the status of the traditional heterosexual family in public reason, suggesting that "if [the rights and duties of gay and lesbian persons] are consistent with orderly family life and the education of children, they are, *ceteris paribus*, fully admissible."⁵³ As demonstrated by the heated debates over gay marriage and homosexual rights between Michael Perry and Paul Weithman, on the one hand, and John Finnis, Robert George, and Gerard

50. RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 243 & n.32 (emphasis added).

51. For vigorous arguments that reasonableness does not require Rawls's position on abortion from a variety of perspectives, see MICHAEL J. PERRY, *LOVE & POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS*, 116-21 (1991) and John Finnis, *Public Reason, Abortion, and Cloning*, 32 *VAL. U. L. REV.* 361, 373-76 (1998).

52. Rawls, *supra* note 1, at 798 & n.80.

53. *Id.* at 788, n.60.

Bradley, on the other, the limitations of public reason are not likely to resolve this issue any more than abortion. None of these participants see themselves as drawing on distinctively religious claims in mounting their arguments.⁵⁴

In some discussions, the inconclusive nature of public reason may further the purposes of those who use argument as bulwark. Frequently talking past each other, practitioners of argument as bulwark often manifest little respect for one another as conversation partners. Conveniently ignoring their own flaws in this regard, discussants can point to the incivility and unresponsiveness of their opponents as evidence of the moral worthlessness of the position they hold. Emphasizing the shrill and unproductive nature of the discussion, those using argument as bulwark can quickly convince themselves and their followers that the time for conversation is past. The next step is to suggest that victory must be pursued by other means. For some, the preferred route may be nonviolent civil disobedience. For others, it may be domestic terrorism. Needless to say, the latter route is unspeakably tragic for all of us.

IV. CONCLUDING OBSERVATIONS: THE THAUMATROPE

In this essay, I have suggested that the academic discussion of the use of distinctively religious claims (or other distinctive claims attributable to comprehensive worldviews of other sorts) is marked by a double unreality. First, it does not pay sufficient attention to the fact that argument in the public square is purposeful activity, conducted by particular people in order to achieve particular ends, which can be grouped under the categories of self-disclosure, persuasion, and bulwark. To accomplish their ends, citizens make their case over and over again, in different ways, in different terms, and to different types of people, in the chaos of the marketplace, the church hall, and the moose lodge. Unfortunately, in my view, much of the academic discussion of public reason proceeds as if participating in political discussion was more a matter of delivering our one definitive presentation in a seminar to similarly educated persons with highly similar values in a lecture room in an ivy-covered stone or brick building. In *The Idea of Public Reason Revisited*, John Rawls appears to advocate a conception of political reasoning that tracks such an approach; he admonishes us to address "citizens as citizens," and to give the same set of arguments to all

54. Two of Notre Dame Law School's journals have published symposia on the issue of gay rights including articles by these and other scholars. *See generally, Symposium on Sexual Orientation*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (1995); *Forum: Sexual Morality and the Possibility of "Same Sex Marriage,"* 42 AM. J. JURIS. 51-158 (1997).

comers.⁵⁵ But how is this possible in real political discussion, and why is it necessary, without a prior commitment to a Rawlsian anthropology?

Our fellow citizens are flesh-and-blood human beings, not one or more ideological constructs. Some are moved by reason, others by emotion; some are moved by greed, others by altruism, some are well-educated, others are not. It is *them* with whom we are called to forge a political community, not with our own idealized version of them. If we are to take our fellow citizens seriously as the people they are, why should we not address the concerns that *actually* trouble *them*, rather than the concerns by which we judge they should be troubled if they were "reasonable" according to our own lights?

Moreover, should not we worry at least a little that the demand to translate our claims into public reason is ultimately and unacceptably elitist? Very few college-educated believers are going to be able to develop a full-blown reasonable political conception of justice based in their particular reasonable comprehensive worldviews, as Rawls requires in his *University of Chicago Law Review* article.⁵⁶ A college-educated believer can easily draw upon a familiar assortment of consequentialist, deontological, and critical theoretical tools to construct an argument in appropriately public terms. However, a believer equipped with less formal education may find herself less able to carry out the necessary translation. *Her* language, the language of her heart, mind, and soul, may be the language of the Hebrew Bible, the New Testament, or the Qur'an. She may not have attended Harvard, Columbia, Wake Forest, or Notre Dame. She may not be able to, and may not ever be able to, comply with the Rawlsian "proviso." Does that mean she is to be silenced in the political debate? I find this prospect to be deeply troubling.

In my view, the general academic discussion of public reason tends to proceed as if public argument itself were its own end, to be judged solely on the basis of its intrinsic merits of coherence, completeness, and elegance. It is true that articles in academic peer-reviewed journals are judged in this fashion; however, as I learned the hard way in my first year of legal practice, legal briefs most certainly are not. The purpose of a brief is simply not the same as that of an academic article; an irate client who has lost a very important case is not likely to be much comforted by the thought that her lawyer's brief was analytically complete, rhetorically elegant, and completely fair to the position taken by her opponent. Those qualities are largely irrelevant to a client who has lost her case. I fear that much the same irrelevance marks many attempts to judge interven-

55. Rawls, *supra* note 1, at 799-800.

56. *Id.* at 765-807.

tions in the public square by criteria that are entirely unrelated to the goals for which they were formulated—guiding discussion in our own political community.

Second, just as the academic debate over public reason takes too little account of the purposeful nature of political argument, I have also suggested that it takes too little account of the purposes of its own restrictions. Why is it so important to limit the role of distinctively religious reasons (or reasons based in other comprehensive worldviews) in the public arena? In my view, Thiemann's norms of mutual respect and integrity⁵⁷ are a helpful way of specifying both the purpose and the content of the norm of public accessibility. In particular, I have argued that it is important to interpret the norm of public accessibility in ways that advance rather than impede the norms of respect and integrity. In the debate as a whole, however, there seems to be a general failure directly to correlate the nature and scope of the restriction with one's understanding of its purpose.

In the broader debate, there appears to be two general reasons for restricting the role of distinctively religious claims (or claims from other comprehensive worldviews) in the discernment and debate about important political matters.⁵⁸ The first pertains to fundamental fairness. In the views of some theorists, religious believers who base their own conclusions about matters of public concern on reasons whose force depends on the existence of a divine being, or the reliability of certain ways in which that divine being is asserted to communicate its will to human beings, are being unfair to their fellow citizens. On this view, it is not unreasonable for persons to deny the existence of God, and *a fortiori*, to contest or reject particular methods of discerning God's nature and will for humanity. For believers to base their decisions about how to order a common political life on premises that they cannot expect every reasonable person to share is deeply unjust. Importantly, the theoretical force of this argument does not depend on the relative number of "believers" and "unbelievers" in a liberal democratic society.⁵⁹

57. See generally THIEMANN, *supra* note 16.

58. See Nicholas Wolterstorff, *Why We Should Reject What Liberalism Tells Us About Speaking and Acting in Public for Religious Reasons*, in RELIGION AND CONTEMPORARY LIBERALISM 162-81 (Paul J. Weithman ed., 1997).

59. For example, another Great Awakening could convert all but one or two people in a particular state to the same religious perspective; it would nevertheless be unjust on this view to restrict the freedom of the unconverted (or the freedom of those who might wish to leave the faith) on the basis of premises that they do not unreasonably reject. I take Robert Audi to be advancing this view. Robert Audi, *The State, the Church, and the Citizen*, in RELIGION AND CONTEMPORARY LIBERALISM 38-75 (Paul J. Weithman ed., 1997). "As an advocate for laws and public policies, then, and especially those that are coercive, virtuous citizens will seek grounds of a kind that any rational adult citizen can endorse as sufficient for the purpose." *Id.* at 48.

If one maintains that it is unfair for religious believers to use their specifically religious premises in the decisions they make as citizens, which decisions forge the political framework and restrictions under which nonbelievers as well as believers will live, the fundamental focus of the restriction will be the manner in which believers themselves actually deliberate and formulate their judgment about such matters. The nature of restrictions on the way that believers frame their arguments in the public square will be a subsidiary question, flowing from and designed to enforce the fundamental focus of the restriction on thought processes.

What sort of restrictions on public discussion will channel individual discernment in the ways called for by the fairness-based reason for restricting the use of religious premises in political discernment? On the one hand, most theorists committed to this justification for the restriction seem to favor limiting the use of religious premises in public discussion. This restriction may be justified by the claim that the primary way we learn to frame our arguments about issues is by listening to others argue about them; if this is the case, it is undesirable to give believers any new ideas about how to address matters of the public square in religious terms. In fact, such theorists might maintain that the best way to insure that thinking about matters using distinctively religious premises withers and dies is to ensure that talking about them in this fashion is kept to a minimum.

But this position is not incontrovertible. Against it, one might also contend that it would be far more troublesome in the long run if religiously based thought went underground. It is impossible to control or even to identify the way in which citizens reach their own positions on matters; by controlling the conceptual terms of their public discussion, one does not necessarily force those inclined to rely on distinctively religious premises in their political deliberations to change the way they think, but merely to become more adept at translating their position into the language of liberalism. Drawing on Millian themes, one might maintain that the best way to discourage the reliance on distinctive premises is to encourage their free and honest expression—as well as the airing of vigorous criticism regarding the impropriety of giving such premises any force in deliberations about public matters.

The connection between the rationale and the scope for the restriction on the role of distinctively religious (and other comprehensive) claims is not more clearly apparent with respect to its second, more pragmatic justification.⁶⁰ Some have argued that, while it is

60. I read Kent Greenawalt as justifying the limitations he would place on the use of religious premises in arguments on political matters in the public square on these grounds:

possible for a reasonable person to maintain any one of a number of different worldviews, there is no way that any particular worldview can be decisively demonstrated to be rationally superior to the rest. The shaky epistemological status of distinctively religious premises renders their use dangerous to civic peace and friendship, at least in certain social contexts.⁶¹ The obvious focus for concern in this context would be on the use of such premises in the public debate; the invocation of a distinctly religious premise could be viewed as "fighting words," at least in a society in which there exists vigorous commitment to religious truth claims, substantial pluralism, and a number of religions whose truth claims extend to the structure of political society. Ideally, of course, suspicions of one another would be further allayed and social stability most assured, if believers could be induced to practice self-restraint regarding the use of distinctively religious premises in the course of discernment.

Suppose, however, for one reason or another, it is impossible and unfair to set limits on the use of distinctively religious premises in discernment, as Greenawalt has argued.⁶² How helpful to social peace will it be to restrain discourse in a context in which there are no (effective) attempts to restrain discernment? Is it not at least possible that such a course of action will foster a culture of suspicion, in which citizens question whether there is an ulterior motive that is not publicly accessible that drives an interlocutor's publicly accessible reflections? Is not it sometimes likely to lead to *ad hominem* attacks, in which efforts to defend positions in non-religious terms are dismissed by identifying the religious affiliation of the one making the effort?

In short, it sometimes appears as if the fundamental premise of some participants in the "public reason" debate is that the role of religion in the public square (either with respect to discernment or

Why should it matter if religious premises are shared? . . . In a very religious but extremely tolerant society, public airing of particular religious views might work well, but in actuality such discourse promotes a sense of separation between the speaker and those who do not share his religious convictions and is likely to produce religious and political divisiveness.

GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 3, at 219.

61. More specifically, in a society in which (a) many people have strong commitments to the truth of their religion that outrun the basis for rationally demonstrating to outsiders that their religion is superior; (b) there is significant religious pluralism; and (c) many of the contending religious frameworks have vigorous views on how political life should be organized; the clash of religious beliefs can be a dangerous catalyst for social division, instability, and resentment. Conversely, however, on this view, there would be no reason to limit reliance or expression of religious speech in the political realm in a social context in which either religious belief or its fervor have virtually disappeared, or there is strong religious homogeneity, or the religions that do predominate take no stand on matters of political import.

62. GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 3, at 219.

with respect to discourse) must be restricted. The reasons that they give for that restriction are only loosely related to its nature and scope. Far more effort is devoted to articulating the restriction on religion's role in the public square than on developing and defending in a systematic way the rationale for those restrictions.⁶³ When one reason for the restriction runs out (e.g., civic respect), the other is invoked (e.g., civic peace). This oscillation of reasoning is an undeniable (although not uncontroversial) hallmark of creativity and progress within the common law system. I am not at all sure, however, it should be given the same plaudits within the context of political philosophy.

Let me explain. I teach contracts to first-year law students. Early in the year we read an excerpt from Benjamin Cardozo's brilliant opinion in *Allegheny College v. National Chautauqua County Bank*,⁶⁴ in which he enforces a promise by Mary Yates Johnson to give \$5000 to Allegheny College, which was to be used for divinity students and kept in a fund named in her honor.⁶⁵ As Leon Lipson observes in his article about the case, Cardozo oscillates between an agreement with consideration theory (for which "he had a solid rule but shaky facts") and a promissory estoppel theory (for which "he had a shaky rule but (potentially) solid facts").⁶⁶ Lipson argues that "whenever [Cardozo's] argument emphasizing consideration runs thin, he moves on to promissory estoppel; whenever his hints in favor of promissory estoppel approach the edge of becoming a committed ground of decision, he veers off in the direction of the doctrine of consideration."⁶⁷ He suggests that this type oscillation of argument creating the effect of mutual reinforcement is similar to

Whatley's simile of "the optical illusion effected by that ingenious and philosophical toy called the Thaumatrope: in which two objects are painted on opposite sides of a card—for instance, a man and a horse, [or]—a bird and a cage"; the card is

63. In response to the objection that religious divisiveness is not a problem in the United States, Rawls simply asserts that it "is incorrect and sociologically faulty. For without citizens' allegiance to public reason and their honoring the duty of civility, divisions and hostilities between doctrines are bound in time to assert themselves, should they not already exist." Rawls, *supra* note 1, at 803. What is the sociological evidence for this claim? Why does Rawls think that arguing in terms of competing political conceptions of justice generated by competing comprehensive worldviews is likely to be any more conducive to public peace?

64. *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369 (1927), as excerpted in CHARLES L. KNAPP ET AL., *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 155-61 (4th ed. 1999).

65. *Id.*

66. Leon Lipson "The *Allegheny College Case*," 23 *YALE L. REP.* NO. 3, at 11 (1977), as excerpted in KNAPP, *supra* note 64, at 163.

67. *Id.* at 162.

fitted into a frame with a handle, and the two objects are, "by a sort of rapid whirl [of the handle], presented to the mind as combined in one picture—the man *on* the horse's back, the bird *in* the cage."⁶⁸

Lipson writes that Cardozo "twirled the Thaumatrope in order to give the impression that he had solid facts fitting a solid rule."⁶⁹ I wonder if, in their attempts to correlate the rationale for restricting the role of religion in the public square with the scope of the restriction, some advocates of public reason are not twirling their own Thaumatrope. If so, they might profit from Lipson's final observation about the great Cardozo's efforts in this regard: "Some lawyers think that what emerges instead is a picture of a bird on the horse's back."⁷⁰

68. *Id.* at 162-63.

69. *Id.* at 163.

70. *Id.*