RELIGIOUS ARGUMENT, FREE SPEECH THEORY, AND DEMOCRATIC DYNAMISM

*Gregory P. Magarian**

I don't want no commies in my car.
No Christians either.[1]

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1 REPO MAN (Edge City 1984) (Bud (Harry Dean Stanton) to Otto (Emilio Estevez)).

INTRODUCTION

What is the normatively proper role in public political debate for arguments grounded in religion or similar conscientious beliefs? Political and legal theorists continue to clash over this issue, and the 2008 national election demonstrated its practical importance and contentious nature. During the presidential campaign, Democratic candidate Barack Obama had to address concerns about the politics and theology of his pastor, Reverend Jeremiah Wright,[2] and Republican hopeful Mitt Romney had to address concerns about his membership in the Church of Jesus Christ of Latter-day Saints (LDS).[3] The LDS Church played a leading role in passing a California initiative that banned same-sex marriage,[4] and U.S. Catholic bishops urged parishioners to support candidates who embraced Catholic positions on key social issues, principally abortion.[5] Casting a long shadow over the election were the nation's two ongoing wars in the Muslim nations of Afghanistan and Iraq, which also implicated policy toward the Jewish state of Israel. All of these issues, to varying degrees, inspired arguments grounded in religious belief and/or antipathy. Such arguments, even in an era of declining religiosity in the United States,[6] implicate the normative propriety of religious argument. No normative constraint could ever bleach our political debate of all religious advocacy. Norms operate as amorphous vectors, not as precise endpoints. Even so, normative standards can exert a powerful influence over public discourse. If broadly accepted norms of public political debate urged constraints on religious argument, then opponents of a position advanced in religious terms would feel justified in decry-

2 *See* Senator Barack Obama, Address at the National Constitution Center: A More Perfect Union 1, 2–6 (Mar. 18, 2008) (transcript available at http://www.c-span.org/Content/PDF/obama_031808.pdf).

3 *See* Mitt Romney, Address at the George Bush Presidential Library: Faith in America, American Rhetoric 1, 2 (Dec. 6, 2007) (transcript available at http://www.americanrhetoric.com/speeches/PDFFiles/Mitt%20Romney%20-%20Faith%20in%20America.pdf).

4 *See infra* notes 91–95 and accompanying text. R

5 *See infra* notes 99–101 and accompanying text. R

6 The 2008 American Religious Identification Survey (ARIS) reveals that 15% of U.S. residents self-identify as having no religious affiliation, up from 8.2% in 1990, while the percentage of self-identified Christians has fallen during the same period from 86.2% to 76%. *See* Barry A. Kosmin & Ariela Keysar, *American Religious Identification Summary Survey (ARIS 2008)*, AM. RELIGIOUS IDENTIFICATION SURV., 1, 3 (Mar. 2009), http://www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf.

ing the religious argument as out of bounds, rather than addressing its merits; media outlets would see less need to include overtly religious arguments in reporting on political controversies; and religious believers who wished to argue politics on religious grounds would have strong reason to doubt the ethics and efficacy of doing so.

The normative question of religious argument in public political debate has sharply divided leading political theorists. On the restrictive side of the debate stand such liberal thinkers as Robert Audi, Kent Greenawalt, and John Rawls. Each of these theorists has contended that religious argument undermines the stability and cohesiveness of liberal democracy and that liberal norms of public political debate should therefore constrain religious argument. Most restrictive theorists embrace some version of what Rawls calls the "public reason" principle, which requires religious believers to cast their religiously grounded arguments in terms accessible to the secular polity.[7] On the opposing, permissive side of the debate stand such religious liberty advocates as Stephen Carter, Michael McConnell, and Michael Perry. These theorists maintain that norms of public political debate should fully admit religious argument. To restrict religious argument, in their view, singles out religious belief for unfair and unwarranted constraint while denying believers full participation in democratic politics.[8] Despite their ultimate disagreement, most restrictive and permissive theorists share a foundational assumption: religious argument's admissibility or nonadmissibility to public political debate should depend largely on whether or not religious argument poses any serious danger to the integrity or stability of liberal democracy.

This Article contends that normative insights from free speech theory can illuminate the normative debate over religious argument and should lead us to embrace the outcome, but not the reasoning, urged by the permissive theorists. The normative question of religious argument does not implicate First Amendment free speech law. Free speech theorists, however, have thought hard about the normatively optimal shape and scope of public political debate. Two distinct but related debates in free speech theory bear on the normative question of religious argument. First, the dispute about whether religious argument existentially threatens liberal democracy closely parallels the controversy over Communist political advocacy that dominated First Amendment discourse for much of the twentieth century. Sec-

7 *See infra* notes 16–48 and accompanying text (discussing the restrictive position). R

8 *See infra* notes 49–71 and accompanying text (discussing the permissive position). R

ond, the appeal to political stability that animates restrictive theorists' concerns about religious argument implicates familiar questions about how free speech norms and doctrines should balance values of political stability, consensus, and cohesion against values of political dissension, diversity, and dynamism. The best insights from these two strands of free speech theory turn the familiar terms of the debate over religious argument upside down: liberal norms of political debate should welcome even the most provocative religious arguments precisely because such arguments challenge and destabilize the prevailing liberal order. The same insights also compel an important corollary: liberal norms of public political debate should freely admit substantive criticisms of religious doctrine and belief.

Part I of this Article describes and critiques the existing normative dispute over religious argument in public political debate. I first explain how both restrictive and permissive theorists predicate their arguments on hospitable premises about whether and how religious argument threatens liberal democracy. I then advance a qualified version of the restrictive premise that some forms of religious argument may, in fact, significantly threaten liberal democracy. The final subpart of Part I criticizes permissive theorists for ignoring this potential threat. The remainder of the Article critiques and ultimately rejects the restrictive theorists' move from recognizing the potential dangers of religious argument to advocating normative constraints on religious argument. Part II links the question of religious argument to two normative debates in free speech theory. The first subpart examines the last century's theoretical and legal debate over the proper treatment of Communist advocacy, finding a strong parallel between the reasons advanced for suppressing Communist speech and the reasons advanced for placing normative constraints on religious argument in public political debate. The second subpart situates the normative question of religious argument within a persistent debate about the competing demands of political stability and political dynamism in shaping public discourse. These discussions of free speech theory reflect courts' and legal scholars' cogent thinking, in the concrete domain of constitutional politics, about the same factors that animate the normative question of religious argument.

Part III contends that the best normative insights we can draw from the free speech debates over Communist advocacy and the stability-dynamism dynamic should lead us to reject normative constraints on religious argument in public political debate. These free speech insights, which the restrictive theorists have failed to appreciate, reframe the case for admitting religious argument into public political debate. Our best understanding of expressive freedom, as reflected in

the First Amendment's fragile but persistent protection of Communist and other "subversive" speech, counsels against any normative constraint on religious argument. Moreover, broad normative considerations and particular characteristics of religious argument favor admitting religious argument into public political debate in order to promote democratic dynamism. The final subpart of the Article presents an important, novel corollary claim that may trouble political liberals and religious liberty advocates alike. The same insights from free speech theory that counsel against normative constraints on religious argument should also lead us to admit freely into public political debate substantive criticism of religious arguments and underlying religious beliefs.

I. THE PROBLEM OF RELIGIOUS ARGUMENT IN PUBLIC POLITICAL DEBATE

This Article considers what I will call the normative question of religious argument. The inquiry is normative—how *should* we, as ethical members of a political community, treat religious argument in democratic political debate?—and not doctrinal.[9] Following the most common practice among advocates of normative constraints, I generally use the term *religion* to encompass all comprehensive, conscientious belief systems, whether theistic or not. My concern extends only to *political* debate, particularly debate about how public officials should exercise the state's coercive authority, and not to discussions of broad moral and ethical issues that may form the backdrop for policy debates.[10] Likewise, the question concerns *public* political debate—the processes by which members of the political community engage

9 Leading restrictive theorists explicitly reject constraints on the legal right to advance religious arguments freely. *See* JOHN RAWLS, POLITICAL LIBERALISM 217 (expanded ed. 2005) (framing the argument in terms of "a moral, not a legal, duty" imposed by "the ideal of citizenship"); Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677, 700 (1993) (distinguishing "civic virtue" from "civil (or other) rights"). The Supreme Court has held repeatedly that the Free Speech Clause provides strong protection for religious expression. *See infra* notes 179–83 and accompanying text. R

10 Drawing this distinction can prove difficult in practice. *See* KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 152 (1995) (discussing difficulty in distinguishing "general cultural interplay of comprehensive views" from "narrower debates over particular political issues"); Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259, 274–77 (1989) (arguing, as to the related matter of normative constraints on religious institutions' political activities, that restrictive norms should err on the side of classifying controversies as moral rather than political); David Hollenbach, *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877, 889–90 (1993) (suggesting the difficulty

with the political community at large—and does not encompass political discussions within faith communities or other nonpublic settings.[11] The normative question of religious argument, as this Article conceives it, addresses political rhetoric, not underlying justifications. Even on the terrain of norms, as opposed to law, any effort to restrain the sources of individuals' political positions would improperly interfere with the conscientious processes that shape their policy views.[12] At the same time, my conception does encompass a matter that others have at times treated as distinct: whether religious arguments can form a proper basis for a political decision by a member of the political community.[13] Finally, I consider the question of religious argument as it applies to ordinary members of the political community,[14] not necessarily to legislators or other public officials.[15]

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in practice of shielding political debate from broader moral and ethical considerations, including religious views).

11 *See* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 768 (1997) ("The idea of public reason does not apply to the background culture [of civil society] . . . ."); *see also* GREENAWALT, *supra* note 10, at 152 ("[W]e need to think about any principle of self-restraint with the clear understanding that any norm that people keep their comprehensive views to themselves is wholly unacceptable."). R

12 *See* Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 152 (2004) [hereinafter Magarian, *Public-Private*] (urging First Amendment protection for "a zone of individual conscience that allows people to evaluate information, formulate ideas, and participate meaningfully in democratic processes"); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 394 (2008) (conceptualizing intellectual privacy as a precondition for expressive freedom). As I have noted elsewhere, "[r]eligious identity and experience can go far toward shaping a person's or group's democratic participation." Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 257 (2007) [hereinafter Magarian, *Colliding Interests*].

13 *See* GREENAWALT, *supra* note 10, at 160 (endorsing a broad normative allowance for citizens to make religiously grounded judgments about political issues); Michael J. Perry, *Liberal Democracy and Religious Morality*, 48 DEPAUL L. REV. 1, 3 (1998) (distinguishing the question of presenting religious arguments in public political debate from the question of basing political choices on religious grounds). R

14 I presume an expansive view of membership in the political community that does not entail legal citizenship or the right to vote, neither of which seems to me important for determining norms (or legal protections) for participation in public political debate. *Cf.* Alexander Meiklejohn, *The Limits of Congressional Authority: Freedom and the People*, NATION, Dec. 13, 1953, *reprinted in* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 101, 119 (1965) ("[U]nhindered expression must be open to noncitizens, to resident aliens, to writers and speakers of other nations, to anyone, past or present, who has something to say which may have significance for a citizen who is thinking of the welfare of this nation.").

15 The question whether legislators or judges properly may act based on their religious beliefs has generated a vital literature of its own. *See* GREENAWALT, *supra*

Observing these conceptual boundaries, and necessarily eliding a great deal of nuance, I divide participants in the normative debate over religious argument into two camps: restrictive and permissive. A striking feature of the debate is the path that most advocates on both sides follow from an assessment of religious argument's danger for democracy to a conclusion about the proper normative place of religious argument in public political debate. As the first subpart of this Part illustrates, restrictive theorists contend that religious argument seriously threatens to undermine liberal democracy and therefore should be disfavored, while permissive theorists see no threat and thus no basis for restriction. The second subpart of this Part defends a qualified version of the restrictive premise that at least some forms of religious argument threaten to undermine liberal democracy by promoting illegitimate justifications for government action and/or destabilizing public political debate. Thus, the final subpart faults permissive theorists' premise that religious argument carries no danger for liberal democracy and accordingly rejects the dominant formulation of the permissive case against normative constraints on religious argument.

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note 10, at 161–63 (contending that legislators have greater duty than ordinary citizens to avoid reliance on religious reasons); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1611–33 (1993) (construing the Establishment Clause as invalidating laws based on express, predominantly religious justifications); Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts—and Second Thoughts—on* Love and Power, 30 SAN DIEGO L. REV. 703, 723–26 (1993) (considering whether legislators or judges should forego reliance on religious belief in making public decisions). R

Jeremy Waldron argues that a proper understanding of democratic self-government forecloses any effort to distinguish citizens from public officials in assessing proper grounds for arguments and decisions about political issues. *See* Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 SAN DIEGO L. REV. 817, 827–29 (1993). I share Waldron's commitment to the ideal of self-government, and I reject a formalistic account of the public-private distinction. *See* Magarian, *Public-Private*, *supra* note 12, at 135–50 (reconceptualizing the public-private distinction to serve democratic ends). I also recognize that referenda and initiatives blur the line between citizens and public officials. Even so, I cannot agree that officials lack any distinctive obligations under the Constitution. Instead, I believe normative judgments should drive our legal system's assignment of constitutional obligations and rights. *See id.* at 150–72 (articulating and defending a normatively grounded conception of the public-private distinction in the context of First Amendment free speech rights). The Establishment Clause of the First Amendment provides one substantial normative basis for holding government officials to obligations that other members of the political community do not generally share. R

A. Logical Consistency in the Competing Positions

Adherents of the competing restrictive and permissive positions on the normative question of religious argument do not break down along neat divisions of substantive politics, befitting a controversy that implicates the deep preconditions of public political debate rather than its immediate outcomes. My account of the competing positions focuses on one important aspect of their disagreement: the relationship between the belief that religious argument threatens liberal democracy and the tendency to advocate normative constraints on religious argument. With limited exceptions, positions on the normative propriety of religious argument in public political debate arrive at one of two bottom lines: (1) religious argument poses some significant threat to liberal democracy, and therefore liberal norms should restrict religious arguments in public political debate; or (2) religious argument poses no meaningful threat to liberal democracy, and therefore liberal norms should fully admit religious arguments into public political debate.

1. The Restrictive Position: From Danger to Normative Constraint

The most prominent version of the restrictive position on the normative question of religious argument emerges from John Rawls's theory of public reason. Rawls contends that citizens in a liberal democracy generally should base public arguments about fundamental political matters on what he labels "public reasons."[16] By "public reasons" he means "the plain truths now widely accepted, or available, to citizens generally."[17] This category excludes religious reasons, but Rawls makes clear that it also excludes "comprehensive nonreligious doctrines" that make moral rather than political claims.[18] Rawls relaxes his public reason principle by allowing citizens to offer nonpublic reasons—including religious reasons—for policy positions, as long as "in due course" they supplement those reasons with fully sufficient public reasons.[19] He maintains, however, that citizens in a lib-

16 Rawls advocates the public reason principle for "constitutional essentials and questions of basic justice." RAWLS, *supra* note 9, at 214–15. By "constitutional essentials" he means foundational questions such as the scope of the right to vote and the extent of constitutionally protected liberties. *See id.* at 214 (describing matters subject to the public reason principle). R

17 *Id.* at 225.

18 Rawls, *supra* note 11, at 775; *see also* GREENAWALT, *supra* note 10, at 72–84 (discussing problems raised by political arguments grounded in nonreligious comprehensive doctrines). R

19 *See* RAWLS, *supra* note 9, at li–lii. Other restrictive theorists similarly allow for religious arguments in public political debate, so long as those arguments augment R

eral democracy should resist the impulse to base public political arguments on their underlying comprehensive doctrines, in order "to establish a basis of political reasoning that all can share as free and equal citizens."[20] Other leading liberal theorists have advanced distinctive variations on the same essential idea. Robert Audi's version of the restrictive principle focuses on specifically religious expression,[21] with the aim of preserving an appropriate separation of church and state for a free and democratic society.[22] Kent Greenawalt more modestly contends that citizens generally should emphasize public reasons when debating political issues in public settings[23] because people necessarily base their religious and other comprehensive convictions on idiosyncratic personal experiences that foreclose any interpersonal basis of evaluation.[24] Bruce Ackerman, without specific reference to religious argument, similarly argues that citizens should "put the moral ideals that divide us off the conversational agenda of the liberal state."[25]

Restrictive theorists typically admonish religious believers to translate their religiously grounded policy arguments into terms acces-

functionally adequate public or secular arguments. *See* GREENAWALT, *supra* note 10, at 161 (calling on citizens who participate in public political debate merely to "emphasize" public reasons); Robert Audi, *Religious Values, Political Action, and Civic Discourse*, 75 IND. L.J. 273, 279–80 (2000) (detailing normatively permissible roles for religious argument in public political debate); *see also* Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729, 747–53 (1993) (articulating and defending an inclusive ideal of public reason that admits nonpublic reasons "(1) if the nonpublic reason were the foundation for a public reason [or] (2) if the nonpublic reason were an additional sufficient justification for a policy that would be given an independent and sufficient justification a by public reason"). R

20 Rawls, *supra* note 11, at 799. R

21 *See* Audi, *supra* note 9, at 690–91 (arguing that liberal democratic norms of public political debate should require specifically secular reasons, not merely public reasons). R

22 *See* Audi, *supra* note 10, at 277–79 (describing the "principle of secular rationale," which forecloses advocacy of any governmental restriction of conduct unless the advocate can offer an adequate secular ground for the restriction (emphasis omitted)). Audi's version of the restrictive position adds to his principle of secular rationale a distinctively rigorous "principle of secular motivation," which forecloses supporting or advocating governmental restrictions on human conduct unless normatively adequate secular reasons motivate one to support a given restriction. *See id.* at 284 (emphasis omitted). R

23 *See* GREENAWALT, *supra* note 10, at 160–61. R

24 *See id.* at 24–25 (discussing concern about inaccessible reasons).

25 Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 16 (1989) (advocating a principle of "conversational restraint").

sible to nonbelievers.[26] I will refer to this admonition as the *translation imperative*. Rawls explains the translation imperative as a necessary and appropriate limitation on arguments that operate within the limited scope of liberal democratic politics.[27] He recognizes that religiously grounded arguments rendered in secular terms may appear "shallow," but he justifies that failing as serving the essential liberal democratic end of justifying coercive government action to citizens with divergent comprehensive commitments.[28] Greenawalt, anticipating the concern that the translation imperative will generate insincere political arguments, reasons that the audience for public political arguments will accept a discrepancy between grounds of underlying judgment and grounds of rhetoric as an unremarkable feature of political discourse.[29] President Obama's high-profile 2009 commencement address at the University of Notre Dame gave the translation imperative its highest-profile airing.[30] In light of many Roman Catholics' religiously grounded objections to his presence,[31] the Presi-

26 I use the term "nonbeliever" to connote a nonadherent to a particular belief or belief system under discussion, not necessarily a person who lacks religious beliefs altogether.

27 *See* RAWLS, *supra* note 9, at 242 ("As institutions and laws are always imperfect, we may view [public reason] as imperfect and in any case as falling short of the whole truth set out by our comprehensive doctrine."). R

28 *See id.* at 242–43.

29 *See* GREENAWALT, *supra* note 10, at 163–64 ("[N]o one takes the state positions as reflecting the true weight of grounds in the speaker's or writer's mind."). Other restrictive theorists have similarly called on religious believers to translate their political arguments into secular and/or public terms. *See* Greene, *supra* note 15, at 1621 (positing that translation allows nonbelievers to participate fully in political debate); Robert Justin Lipkin, *Reconstructing the Public Square*, 24 CARDOZO L. REV. 2025, 2090 (2003) (calling on citizens in a liberal democracy to translate religious and similarly "dedicated" arguments into "deliberative" terms); Richard Rorty, *Religion as Conversation-Stopper*, 3 COMMON KNOWLEDGE 1, 4–5 (1994) (arguing that the translation imperative removes from political rhetoric democratically irrelevant information about the source of one's premises). Bruce Ackerman, in contrast, expressly rejects the call to translate disagreements over comprehensive beliefs into public or secular terms, but his principle of "conversational restraint" calls upon liberal citizens to argue in noncomprehensive terms about issues that may implicate their comprehensive beliefs. *See* Ackerman, *supra* note 25, at 14–19. R R

30 *See* President Barack Obama, Commencement Address at the University of Notre Dame in South Bend, Indiana 1, 5 (May 17, 2009) [hereinafter Obama, Notre Dame Address] (transcript available at http://www.gpoaccess.gov/presdocs/2009/DCPD-200900372.pdf).

31 *See* Dirk Johnson, *Invitation to Obama Stirs Up Notre Dame*, N.Y. TIMES, Apr. 6, 2009, at A12 (describing some Catholics' view that President Obama's support for legal abortion rights should have disqualified him from giving the commencement address at a Catholic university).

dent focused his remarks on the imperative that citizens both maintain strong convictions and seek common ground with political opponents. He called on his audience to ground their convictions in their faith but also to embrace self-doubt humbly. "[W]ithin our vast democracy," he declared, "this doubt should remind us even as we cling to our faith to persuade through reason, through an appeal whenever we can to universal rather than parochial principles . . . ."[32]

Restrictive theorists justify their call for normative constraints on religious argument and the translation imperative on the ground that religious argument threatens liberal democracy. They posit two distinctive sorts of dangers. First, they contend that religious beliefs cannot provide adequate justifications for coercive governmental actions in conditions of democratic pluralism. Members of a liberal democratic political community should not offer religious arguments in public debate, because such arguments by definition urge improper grounds for government action. Rawls posits that a liberal democracy can legitimately exercise coercive authority "only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."[33] That limitation excludes coercive action based on comprehensive religious, or nonreligious, doctrines.[34] Audi similarly argues that the constitutional principle of church-state separation compels the constraints he advocates on offering religious arguments in public political debate for coercive laws.[35] He contends that coercive laws based on religious rationales "are plausibly seen in some cases as forcing others to

32 Obama, Notre Dame Address, *supra* note 30, at 5. R

33 RAWLS, *supra* note 9, at 217; *see also* THOMAS NAGEL, EQUALITY AND PARTIALITY 155 (1991) ("We must agree to refrain from limiting people's liberty by state action in the name of values that are deeply inadmissible in a certain way from their point of view."); Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, *in* DEMOCRACY AND DIFFERENCE 95, 100 (Seyla Benhabib ed., 1996) (positing a conception of justification reflected in an ideal political procedure, under which reasonable citizens "aim to defend and criticize institutions and programs in terms of considerations that others have reason to accept"); Solum, *supra* note 19, at 742 ("[R]easons that directly rely on [religious] premises . . . will be rejected by many as unreasonable justifications for political action."). R

34 Rawls, *supra* note 11, at 782; *see also* GREENAWALT, *supra* note 10, at 23–24 (discussing unfairness, in the sense of inappropriately grounded decisions in conditions of liberal pluralism, as a basis for objecting to certain types of political argument). R

35 *See* Audi, *supra* note 10, at 260–68, 274 (advancing a substantive theory of church-state separation as the basis for normative constraints on religious argument in public political debate). R

observe a religious standard."[36] A liberal democracy must value human autonomy, and that value precludes coercing members of the political community based on grounds they cannot accept.[37] Restrictive theorists portray coercion based on religious arguments as unfair to nonbelievers, because such coercion denies nonbelievers equal respect and regard[38] or full, fair access to the process of political decisionmaking.[39] Rawls calls the bridge between the limits of justification and the limits of debate a "duty of civility."[40]

Second, restrictive theorists maintain that religious argument undermines public political debate, and thus threatens liberal democracy, by fostering social and political instability. Religious argument, on the restrictive theorists' account, carries a distinctive capacity to inspire intolerance of opposing political viewpoints.[41] Richard Rorty portrays the restrictive position as a "happy, Jeffersonian, compromise that the Enlightenment reached with the religious,"[42] relegating religion to the private sphere in order to allow religious and nonreligious people to coexist politically.[43] Allowing religious argument in public political debate can also foster conflict between competing religious beliefs.[44] Liberal democracy, on the restrictive account, requires a secular discourse for the resolution of moral disputes in order to pre-

36 Robert Audi, *Liberal Democracy and the Place of Religion in Politics*, *in* ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE 1, 31 (1997).

37 *See* Audi, *supra* note 9, at 690 ("[W]e give up autonomy only where . . . we can be expected, given adequate rationality and sufficient information, to see that we would have so acted on our own."). R

38 *See* Audi, *supra* note 19, at 274 (positing that civic virtue requires "mutual respect" on the part of citizens with different beliefs). R

39 "Basing law on an express reference to an extrahuman source of value should matter for Establishment Clause analysis because such reference effectively excludes those who don't share the relevant religious faith from meaningful participation in the political process." Greene, *supra* note 15, at 1619; *see also* Lipkin, *supra* note 29, at 2067–71 (suggesting that religious argument makes democratic debate politically inaccessible to nonbelievers). R

40 RAWLS, *supra* note 9, at 217. R

41 *See* GREENAWALT, *supra* note 10, at 24 (discussing concerns about political instability as a basis for objecting to certain types of political argument); Audi, *supra* note 36, at 31 (arguing that religious belief in opponents' "deficient" status can cause intolerance); William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 858 (1993) (contending that fears behind religion may lead believers to disregard or even persecute political opponents). R R

42 Rorty, *supra* note 29, at 2. R

43 *See id.* at 5 ("[T]he only test of a political proposal is its ability to gain assent from people who retain radically diverse ideas about the point and meaning of human life, about the path to private perfection.").

44 *See* Audi, *supra* note 36, at 50 (suggesting that religiously grounded political arguments may trigger religiously grounded responses, deepening political disputes); R

vent interdenominational strife from rending the social fabric.[45] Religiously grounded conflicts trouble restrictive theorists because they threaten to polarize political debate, deeply complicating efforts to reach political consensus.[46] "A believer who sees those who oppose or question her beliefs as aligned with the 'powers of chaos,'" writes William Marshall, "is likely to treat the public square as a battleground rather than as a forum for debate."[47] Rorty sums up these concerns when he brands religious argument "a conversation-stopper" that limits the capacity "to keep a democratic political community going."[48]

2. The Permissive Position: No Danger, No Constraint

Those who defend religious argument against calls for normative constraints generally advance the premise that religious argument poses no threat to liberal democracy. These permissive theorists emphasize the historically prominent role that religious advocacy has played in U.S. politics,[49] and they assert that religious belief and religious argument take far too many and varied forms to target for wholesale condemnation.[50] Some permissive theorists extol the

Marshall, *supra* note 41, at 859 ("Religion, if unleashed as a political force, may also lead to a particularly acrimonious divisiveness among different religions."). R

45 *See* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197–99 (1992) (construing the First Amendment's Religion Clauses as establishing a secular public moral order in order to sustain a "religious truce").

46 *See* Ackerman, *supra* note 25, at 17 (defending the principle of "conversational restraint" in public political debate on the ground that such restraint clears the way for liberal democratic citizens to "use dialogue for pragmatically productive purposes"); Audi, *supra* note 36, at 50 (contending that framing political arguments in religious terms may cause "deadlock [to] occur where compromise would have been possible"); John Rawls, *The Idea of an Overlapping Consensus*, 7 O.J.L.S. 1, 1 (1987) (emphasizing political liberalism's goal of "help[ing] ensure stability from one generation to the next"); Rorty, *supra* note 29, at 5 (emphasizing the ability of an idea to gain "consensus" from diverse parties as the test for its admission into public debate). R R R

47 Marshall, *supra* note 41, at 859. R

48 Rorty, *supra* note 29, at 3. R

49 *See* STEPHEN L. CARTER, GOD'S NAME IN VAIN 83–112 (2000) (discussing religious advocacy's role in controversies over slavery and economic regulation); RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE 145 (2d ed. 1986) (claiming intellectual kinship with "Adams, Tocqueville, Lincoln, and a host of others who understood religiously based values as the points of reference for public moral discourse"); Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 644–48 (summarizing historical contributions of religion to U.S. political discourse).

50 *See* Hollenbach, *supra* note 10, at 894–95 (noting efforts in Catholic and Protestant religious traditions to derive rational and civil arguments from religious beliefs); Perry, *supra* note 15, at 714 (conceding that "*some* styles of religious politics . . . that embody religious intolerance, religious triumphalism, or the like" can deny R R

constructive and communitarian nature of much religious belief and rhetoric.[51] David Hollenbach, for example, presents the Catholic emphasis on "the multiple forms of human relationship and community in which persons are formed and nurtured" as pointing toward "a form of political life that is communal without being statist."[52] Taking a related but more critical tack, others posit that religious arguments pose no threat to our liberal democracy because religion in the present-day United States has been, in Michael Perry's term, "domesticated."[53] An alternative strand of permissive argument acknowledges the divisive character of some religious advocacy but emphasizes that secular modes of political argument can be equally or more divisive.[54] Permissive theorists in this vein often claim that secularism poses a

equal respect to some citizens but denying "that *every* style of religious politics necessarily does so"); *see also* McConnell, *supra* note 49, at 648–49 (assailing over- and under-inclusiveness of distinctions between supposed characteristics of religious and secular political arguments). R

51 *See* Frederick Mark Gedicks & Roger Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1600 (1987) (extolling communitarian aspects of organized religion, which "help the emergence and retention of personality and individuality"); Hollenbach, *supra* note 10, at 891–96 (describing an "intellectual solidarity" approach to political engagement by religious believers); McConnell, *supra* note 49, at 649 (noting that "much religiously motivated political action is loving, gracious, and humble"); Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Is Not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. 217, 233–34 (2001) (summarizing instances of religion's constructive ethical contributions throughout U.S. history). R R

52 Hollenbach, *supra* note 10, at 883. R

53 Perry, *supra* note 15, at 715. Maimon Schwarzschild admits the possibility that "religion may be uniquely inimical to liberalism at some times and in some places." Maimon Schwarzschild, *Religion and Public Debate in a Liberal Society: Always Oil and Water or Sometimes More Like Rum and Coca-Cola?*, 30 SAN DIEGO L. REV. 903, 904 (1993). He maintains, however, that religion poses no threat to modern, developed liberal societies. *See id.* at 913–14; *see also* Nicholas Wolterstorff, *The Role of Religion in Decision and Discussion of Political Issues*, *in* AUDI & WOLTERSTORFF, *supra* note 36, 79–80 (arguing that religious arguments pose no threat to social peace in the contemporary United States). Stephen Carter puts some descriptive stock in this account of religion's place in contemporary U.S. politics while lamenting it normatively. *See* CARTER, *supra* note 49, at 52–58 (arguing that the Christian Coalition has diminished its force as a challenger to liberalism by compromising its religious principles). R R R

54 *See* CARTER, *supra* note 49, at 21–22 (denying that religious faith is either more destructive or more dogmatic than secular ideas); Perry, *supra* note 15, at 721–22 (arguing that religious and secular discourses in public culture are monologic, divisive, and sectarian in comparable measures); Schwarzschild, *supra* note 53, at 914 (suggesting that "many secular movements and ideas" rely on convictions "rooted in empirically or logically unprovable premises" to a similar or greater extent than religion). R R R

greater threat to liberal democracy than religion.[55] Some compare what they portray as overblown claims of religion's divisiveness to the genuine divisiveness of political advocacy by or for historically disadvantaged racial and ethnic groups.[56] Richard Neuhaus takes the permissive attack on secular politics to its logical limit, insisting that religion's absence from public life could prefigure a totalitarian state.[57]

Permissive theorists take particular exception to two elements of the restrictive case that religious argument threatens liberal democracy. First, they reject the restrictive concern that resort to religious argument in public political debate denies nonbelievers equal respect and regard by underwriting religious justifications for coercive government action.[58] Permissive theorists assail the restrictive account of what constitutes a proper justification for government action as a subjective construct that privileges both secular values and, to some extent, the rhetorical approaches of those religions that choose to engage in dialogue with nonbelievers.[59] Permissive theorists suggest that whatever features of insularity or exceptionalism might cause certain religious arguments to alienate nonbelievers are equally likely to

55 *See* NEUHAUS, *supra* note 49, at 8 (positing "militant secularism" of totalitarian regimes in order to characterize the secularized public square as "a dangerous place"); Schwarzschild, *supra* note 53, at 911 (asserting that "[f]or most of the twentieth century, at least outside the Islamic world, illiberal politics have overwhelmingly been Communist politics, or the politics of essentially secular forms of fascism, nationalism, or Third World socialism"); Wolterstorff, *supra* note 53, at 79–80 (contrasting religion's role in the development of liberal democracy with the violent consequences of secular ideologies in the twentieth century). R R R

56 *See* McConnell, *supra* note 49, at 649 ("[N]ot a little secular political activism—especially in this day of identity politics—is as divisive, intolerant, and uncompromising as anything seen on the religious side of the line."). R

57 *See* NEUHAUS, *supra* note 49, at 82 ("[T]he notion of the secular state can become the prelude to totalitarianism."); *see also id.* at 164 ("The triumph of the secularist option would . . . do grave, perhaps fatal, damage to the American experiment in democratic governance."). R

58 *See supra* notes 33–40 and accompanying text. R

59 *See* Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 775–76 (1993) (explaining and rejecting "unfairness" as a basis for excluding religious arguments from public political debate); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747, 786–87 (1993) (criticizing a conception of political dialogue that requires participants to "be willing to change even their most fundamental religious commitments" and specifically to acknowledge the fallibility of their beliefs); Wolterstorff, *supra* note 53, at 76–78 (arguing that liberal democracy should not limit the grounds of justification that citizens may offer); *see also* Steven Shiffrin, *Religion and Democracy*, 74 NOTRE DAME L. REV. 1631, 1634–35 (1999) (criticizing the positions that religious arguments are unfair in public discourse and that tolerance requires openness to compromise). R R

cause certain secular arguments to alienate believers or others.[60] In any event, they contend, religious argument in public political debate does not dictate policy outcomes but simply makes "one contribution among others in a debate on how political power is to be used."[61] Second, permissive theorists deny that religious arguments are less accessible than secular arguments to the political community generally.[62] They maintain that nonbelievers can access the distinctive sources of religious knowledge in the same way anyone accesses any source of knowledge—by reading or listening.[63] In contrast, secular as well as religious arguments may rest on knowledge that is inaccessible to outsiders, such as personal experience or subjective valuation.[64]

Proceeding from their denial that religious argument threatens liberal democracy, most permissive theorists focus their affirmative case for admitting religious argument into public political debate on believers' political autonomy. Permissive theorists lament the unfairness of requiring believers to deny or disguise their deeply held convictions as the price of entry into public political debate.[65] In their view, the restrictive position forces believers to accept that their relig-

60 *See* Jason Carter, *Toward a Genuine Debate About Morals, Religion, Politics, and Law: Why America Needs a Christian Response to the "Christian" Right*, 41 GA. L. REV. 69, 82 (2006) (rejecting as unfair to religious believers the idea of excluding religious arguments because they might alienate nonbelievers); Perry, *supra* note 15, at 714 (denying that any special characteristic of religious arguments makes them more likely than secular arguments to deny citizens equal respect and regard); Perry, *supra* note 51, at 245 (rejecting the idea that offering religious reasons for state coercion denies nonbelievers equal respect and regard); Wolterstorff, *supra* note 53, at 109–11 (arguing that Rawlsian insistence on generality as a precondition of equal respect and regard improperly ignores the importance of respect and regard for religious particularity). R R R

61 Waldron, *supra* note 15, at 841. R

62 *See supra* notes 26–32 and accompanying text. R

63 *See* NEUHAUS, *supra* note 49, at 19 ("Christian truth, if it is true, is public truth. It is accessible to public reason."); McConnell, *supra* note 49, at 653 (characterizing most religious traditions as based on exegesis of sources that nonbelievers can study, such as natural law for Catholics and the Bible for fundamentalist Protestants); Shiffrin, *supra* note 59, at 1639–40 (arguing that nonbelievers can access any source of religious knowledge, including claims of divine inspiration); Waldron, *supra* note 15, at 835–37 (discussing the comprehensibility of unfamiliar grounds for argument under an Aristotelian conception of public discourse). R R R R

64 *See* McConnell, *supra* note 49, at 652. R

65 *See* Hollenbach, *supra* note 10, at 897 ("Persons or groups should not face political disability or disenfranchisement simply because their political views are rooted in religious traditions and beliefs."); McConnell, *supra* note 49, at 655–56 (arguing that the restrictive position denies religious believers equal citizenship); Perry, *supra* note 13, at 18 (arguing that the morality and ethics of liberal democracy do not require religious believers to forego reliance on religious arguments in making political decisions); Wolterstorff, *supra* note 53, at 77 (arguing that liberal calls to R R R

ious convictions are true or valid only within a "private" sphere that excludes policy battles in which believers may have strong interests.[66] They warn that excluding religious argument from public political debate will cause believers to reject secular authority as illegitimate.[67] Permissive theorists' focus on individual autonomy is somewhat surprising, because it runs counter to the communitarian character of much religious belief, practice, and rhetoric. When permissive theorists do make nominally communal arguments, the relevant communities usually are churches, and the claims tend to boil down to autonomy arguments on behalf of churches—and ultimately their congregants—vis-à-vis the state.[68]

Permissive theorists place limited emphasis on the value of religious argument for society's general interest in public political debate. Some suggest a broad connection between institutional religious autonomy and public discourse, holding out churches as important

exclude religious argument from public political debate violate the fundamental liberal commitment to equal freedom).

66 *See* CARTER, *supra* note 49, at 25–26 (emphasizing, in a permissive argument, the unbounded salience of religious doctrine to believers); Gedicks & Hendrix, *supra* note 51, at 1599 ("When religious morality is excluded from politics, the religious individual is alienated from public life."); Hollenbach, *supra* note 10, at 882–85 (discussing inconsistency between the Catholic tradition and the goal of relegating religious belief to the private sphere); McConnell, *supra* note 49, at 654–55 (decrying the premise that religious truth only applies within a separable private sphere); Wolterstorff, *supra* note 53, at 105 (positing that religious belief, for many believers, "is not, for them, about *something other* than their social and political existence; it is *also* about their social and political existence"). R R R R

67 *See* CARTER, *supra* note 49, at 3 ("[I]f we build too high the walls that are intended to keep religion out of politics, we will face religious people who will storm the barricades and declare the government no longer legitimate . . . ."); NEUHAUS, *supra* note 49, at 180 (defining "morally legitimate" government "by reference to the religiously based values of the people"); Gedicks & Hendrix, *supra* note 51, at 1600 ("If the religious people who constitute the majority of Americans come to believe, as many already do, that the law making process does not respect their religious beliefs . . . , then they themselves will respect neither the process nor the laws that it generates."); McConnell, *supra* note 49, at 650 (positing that restrictions on religious political argument "will deepen the anger and hostility that [religious] citizens feel toward the hegemonic and exclusionary practices of the secular power structure"); Shiffrin, *supra* note 59, at 1638 ("[F]or many, a society that is not responsive to their comprehensive views is illegitimate."). R R R R R R

68 *See, e.g.*, Gedicks & Hendrix, *supra* note 51, at 1602 ("[H]ostility toward or ignorance of religious communities risks diminishing or altogether eliminating a critical context by which individuals choose their values and define the meaning of their existence."). R

crucibles for encouraging participation in political and civic life.[69] Permissive theorists often note, in a cursory manner, that religious arguments may contain insights that advance nonbelievers' understanding of political issues.[70] Some also suggest that public political debate may benefit from the consideration and rejection of religious arguments.[71] These points, however, tend to play only a secondary

69 *See* Carter, *supra* note 60, at 83–84 (positing religious communities' value for civil society); Gedicks & Hendrix, *supra* note 51, at 1602 (emphasizing religion's important contribution to self-definition for many members of the political community); Hollenbach, *supra* note 10, at 887–88 (discussing a survey showing "that people's spiritual concerns translate into active efforts to respond to the needs of their neighbors only when these concerns are lived out in the context of a publicly visible and active religious community"). R R R

70 *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 232 (1993) (positing "th[e] ability of the religions to fire the human imagination, and often the conscience, even of nonbelievers"); Gedicks & Hendrix, *supra* note 51, at 1611 (noting approvingly "the first amendment intuition . . . that society is better served by more exposure to diverse information, ideas, and expression than by less"); Hollenbach, *supra* note 10, at 891–92 (discussing the potential value of religiously grounded arguments in broadly framed public debate); Michael W. McConnell, *Secular Reason and the Misguided Attempt to Exclude Religious Argument from Democratic Deliberation*, 1 J.L. PHIL. & CULTURE 159, 168 (2007) (arguing that excluding religious argument from political debate would "prevent secular Americans from learning about the beliefs, ideas, and motivations of large numbers of their fellow citizens"); Perry, *supra* note 13, at 11–12 (advocating admission of religious arguments into public political debate so that participants can be tested by religious arguments); Shiffrin, *supra* note 59, at 1640 (stating that persuasion by religious arguments "is always a possibility"); Waldron, *supra* note 15, at 841–42 (arguing that admission of religious ideas can broaden both public debate and nonbelievers' worldviews); Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2077 (1992) (book review) (calling the restrictive position "gratuitously censorial"); *see also* Mark W. Cordes, *Politics, Religion, and the First Amendment*, 50 DEPAUL L. REV. 111, 159–67 (2000) (arguing, as a matter of First Amendment doctrine, that excluding religious arguments from public debate would amount to a viewpoint-based restriction that would undermine various free speech interests, including democratic interests); Franklin I. Gamwell, *Religion and Reason in American Politics*, 2 J.L. & RELIGION 325, 338–39 (1984) (arguing that religious believers may and should attempt to advance their religious commitments in public political debate). R R R R R R

71 *See* Gamwell, *supra* note 70, at 339–41 (suggesting that reasonable participation in public debate entails religious believers' openness to being proved wrong); Hollenbach, *supra* note 10, at 895 (urging religious believers to risk changes to their beliefs in political debate); Perry, *supra* note 13, at 5 (advocating admission of religious arguments into public political debate so that debate can test religious arguments); Waldron, *supra* note 15, at 839 (suggesting that consideration of "even . . . clearly *wrong*" religious arguments may benefit public debate); Michael Walzer, *Drawing the Line: Religion and Politics*, 1999 UTAH L. REV. 619, 637 (advocating admission of absolutist religious views into public political debate out of "hope that the pressure of democratic argument will ensure that absolutism is not the last word"). R R R R

role in permissive arguments, and they suffer from two intrinsic deficiencies. First, they do not offer substantial normative theories of public political debate in a liberal democracy, providing only the most general account of how religious arguments might advance democratic political debate or benefit the political community as a whole. Second, they follow permissive form in ignoring the possibility that religious arguments in public political debate might pose a meaningful threat to liberal democracy. Accordingly, they do not weigh the value of religious arguments for the political community against the problems such arguments might cause.

The next subpart contests the permissive premise that religious argument in public political debate poses no danger to liberal democracy, and it explains the extent to which we should take such a threat seriously.

B. Religious Argument's Potential Danger for Liberal Democracy

Religious argument, like secular argument, encompasses a great diversity of opinions and rhetorical approaches, most of which fit comfortably within the political conventions of liberal democracy. Moreover, to the extent any sort of secular argument poses the same sort of threat to liberal democracy as certain forms of religious argument, such secular argument requires the same degree of scrutiny to which the restrictive theorists subject religious argument. The potential danger of religious argument for liberal democracy, however, remains a distinctive phenomenon that warrants focused examination. One substantial claim about the danger of religious argument rests on the restrictive premise that religious beliefs cannot legitimately underwrite coercive government action in a liberal democracy.[72] Certainly arguments tend to cause the results they urge; thus, if the restrictive premise about legitimacy is correct, religious argument undermines liberal democracy by promoting justifications for government action that an analytically prior normative consensus has ruled out of bounds. Beyond this sort of danger, two particular categories of religious argument seem especially likely to foster the sort of political instability against which restrictive theorists commonly warn.[73]

72 *See supra* notes 33–40 and accompanying text (discussing restrictive theorists' concern that religious argument leads to democratically illegitimate justifications for coercive laws). R

73 *See supra* notes 41–48 and accompanying text (discussing restrictive theorists' concern that religious argument can destabilize liberal democratic politics). R

One sort of religious argument that may destabilize liberal democratic politics asserts that God has directly revealed to the advocate special wisdom that bears on political debate. Such arguments from revealed truth raise a concern about what I will call the *subjective epistemology* of their proponents. The concern about subjective epistemology transcends the error of positing an objective epistemological distinction between "faith" and "reason."[74] The primary problem with political arguments based on claims of revealed truth is not that their epistemic sources render them "inaccessible" to nonbelievers. Rather, the potential threat to liberal democracy arises from the distinctive ways in which the view that a political position rests on divine revelation may lead its proponent to behave in public political debate. Liberal democracy requires open-ended political give-and-take that encourages all members of the political community to participate in the project of self-government.[75] When a member of the political community believes, based on her deepest moral commitments, that her political position transcends discussion, then she necessarily rejects the terms of liberal public debate. As Stanley Fish contends, such a believer "should not seek an accommodation with liberalism; he should seek to rout it from the field, to extirpate it, root and branch."[76]

Political arguments grounded solely in what the believer views as divinely imparted insight can destabilize public political debate in several ways that give rise to serious concerns for liberal democracy. First, such arguments foreclose dialogue with nonbelievers.[77] Indeed, the belief that God has directed one's insight compels resistance to open discussion.[78] Many Enlightenment rationalists, postmodernists,

74 *See* Alexander, *supra* note 59, at 774–75 (arguing that political liberalism's normative character forecloses any liberal ground for excluding religious arguments from public political debate based on religion's supposed nonempirical character or resistance to critical assessment). R

75 *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948), *reprinted in*, MEIKLEJOHN *supra* note 14, at 1, 27 (describing expressive freedom as "a deduction from the basic American agreement that public issues shall be decided by universal suffrage"). R

76 Stanley Fish, *Why We Can't All Just Can't Get Along*, FIRST THINGS, Feb. 1996, at 18, 21.

77 *See* Audi, *supra* note 36, at 31 (contending that religious arguments that rest on claims of divine authority foreclose any actual debate); Fish, *supra* note 76, at 21 ("The trouble with Christianity, and with any religion grounded in unshakable convictions, is that it lacks the generosity necessary to the marketplace's full functioning."). R R

78 *See* Fish, *supra* note 76, at 20 ("[T]he belief whose prior assumption determines what will be heard as reasonable is not itself subject to the test of reasonableness."). R

and religious believers alike value self-questioning and openness to persuasion.[79] Believers in revealed truth reject that consensus in favor of what Michael Walzer calls "a kind of political escapism, where what is being escaped is the day-in, day-out negotiation of difference."[80] Second, the idiosyncratic basis for any argument from revealed truth necessarily prevents anyone who does not embrace the proponent's metaphysical premises from taking the argument seriously.[81] Rhetoric based on claims of revealed truth, whether or not nonbelievers find those claims cognitively "accessible," cannot perform the informative function that arguably provides the principal value of any statement in public political debate.[82] Many other sorts of arguments may fail to illuminate the complexities of political controversies, but arguments from revealed truth inherently, categorically lack the capacity to do so. Finally, at the unusual but dangerous extreme, a religious argument that the advocate advances as divinely inspired may embolden violent or discriminatory action that shatters the boundaries of liberal public debate.[83]

The subjective epistemology of arguments from revealed truth presents a distinctive source of concern for liberal democracy. Nothing comparable to the belief in the divine provenance of one's political arguments characterizes any secular belief system with currency in

79 *See* Perry, *supra* note 13, at 25–35 (praising self-critical rationality as an element of religious belief and public argument); Rorty, *supra* note 29, at 1, 6 (characterizing Enlightenment rationality as encouraging open public debate); Fish, *supra* note 76, at 20 ("[A]n open mind, a mind ready at any moment to jettison even its most cherished convictions, is the very definition of 'reasonable' in a post-Enlightenment liberal culture . . . ."). R R R

80 Walzer, *supra* note 71, at 637. R

81 *See, e.g.*, Gedicks & Hendrix, *supra* note 51, at 1603 ("The bias of modern liberalism . . . is that God, if he exists at all, does not talk to us and never did."). My claim differs from Abner Greene's warning that arguments based on "an extrahuman source of value" improperly foreclose political participation by nonbelievers. *See* Greene, *supra* note 15, at 1619. I fear not that arguments based on claims of divine revelation will disempower nonbelievers but that such arguments will fail utterly to engage them. R R

82 *See* Meiklejohn, *supra* note 14, at 115–18 (describing the necessity of free public discourse for effective self-government). Diminution of an argument's informative function in public debate does not undermine other interests the argument might serve, such as self-expression or religious witness. *See* Shiffrin, *supra* note 59, at 1640 (criticizing the view that speech in a democracy primarily serves interests related to persuasive interpersonal engagement). R R

83 *See* Audi, *supra* note 9, at 691 (suggesting that "when people believe that extreme measures, such as bravely fighting a holy war, carry an eternal reward . . . they may find it much easier to kill"); Marshall, *supra* note 41, at 859 ("Fervent beliefs fueled by suppressed fear are easily transformed into movements of intolerance, repression, hate, and persecution."). R R

the contemporary United States. Anyone, of course, can have the courage of her convictions, and anyone can follow that courage to a hidebound or even destructive extreme. But most modes of argument based on secular reasoning, like many modes of argument based on religious reasoning, internalize a mechanism of self-criticism and skepticism. The transcendent character of religious belief entails stronger claims on believers than those advanced by competing secular belief systems.[84] Walzer explains:

> Political ties are not the same as religious ties. They don't bind men and women into a mystical body or a holy congregation. Politics makes for a cooler fellowship, whose character, organization, and purposes are not conceived to be divinely ordained or eternal; they are constructed by human beings in human time and are always subject to reconstruction.[85]

Permissive theorists' efforts to compare the potential destabilizing effects of religious argument with those of so-called identity politics[86] strike an especially hollow note. A fervent sense of ethnic or racial pride or grievance may inspire views that, in some instances, cross the line from conviction to obstinacy. No such sensibility of which I am aware, however, purports to rely on revelation that transcends any ground for questioning.

A second type of religious argument that may destabilize liberal democratic politics replicates the position of an authoritative religious leader, based on the believer's submission to the leader's authority. Political fealty to religious authority amounts to a derivative belief in the divine provenance of one's argument: God may not speak directly to me, but I believe He speaks to or through my religious leader. As Walzer suggests, "[T]he authority structures of most of the world's religions are antithetical to those of liberal democracy . . . ."[87] Mar-

84 *See* Gedicks & Hendrix, *supra* note 51, at 1592 (explaining the distinctive capacity of religion to influence behavior). R

85 Walzer, *supra* note 71, at 621; *see also* Gedicks & Hendrix, *supra* note 51, at 1592 (positing that disapproval of a secularist's peers carries a weaker sanction than disapproval of a believer's God). Walzer's quoted statement appears in a section of his article that aims to articulate elements of the restrictive position, with which he later expresses significant disagreement. Nothing in the position he ultimately advocates, however, undermines or amends his distinction between political and religious allegiances. *See* Walzer, *supra* note 71, at 631–38 (setting forth Walzer's own views on religion and politics). Citations to Walzer reflect my understanding that the cited statements express his own views. R

86 *See supra* note 56 and accompanying text. R

87 Walzer, *supra* note 71, at 624; *see also* Audi, *supra* note 36, at 32 (condemning arguments based on the dictates of religious leaders as contradicting "the minimal autonomy that citizens in a liberal democracy may hope for in one another"). Audi R

shall portrays religion as providing a comforting response to "existential anxiety,"[88] and he argues that religious authority figures often have opportunities to leverage that comfort into hostility toward contrary beliefs.[89] Political arguments based solely on fealty to religious authority substitute the religious leader's judgment for that of the advocate. Thus, like arguments based on a subjective epistemology of revealed truth, authority-bound arguments undermine public political debate by limiting the opportunity for meaningful dialogue, severely constraining the informational function that even distasteful political arguments generally perform, and fostering the unlikely but worrisome possibility of violent excess.[90]

Frederick Gedicks, a prominent Mormon legal scholar, describes how religious authority animated Mormons' decisive support for California's Proposition 8, a 2008 ballot measure that banned same-sex marriage. Gedicks explains that LDS Church members, due to their theology and history of persecution, "display an extraordinary degree of obedience and deference to the wishes and preferences of the leaders of the church's governing priesthood hierarchy."[91] Early in the referendum campaign, the LDS leadership in Salt Lake City issued a decree, read to all California LDS congregations, that urged believers to campaign actively for the initiative on the ground that "[m]arriage between a man and a woman is ordained of God, and the formation of families is central to the Creator's plan for His children."[92] Church members responded with a fundraising and volunteer effort that appears to have played a crucial role in lifting the measure to passage, although we cannot measure the precise impact of their involve-

focuses his concern on authoritarian as distinct from "moderate" or "fallibilist" modes of religious argument, whatever the source of religious inspiration behind the argument. *See* Audi, *supra* note 19, at 288–91. R

88 Marshall, *supra* note 41, at 855. R

89 *See id.* at 857–59 (contending that religious doctrine and ritual, particularly in the context of organized religious structures, can cause believers to resist or attack competing belief systems).

90 *Cf. supra* notes 77–83 and accompanying text (discussing these same harms in the context of arguments based on a subjective epistemology of revealed truth). R

91 Frederick Mark Gedicks, *Truth and Consequences: Mitt Romney, Proposition 8, and Public Reason*, 61 ALA. L. REV. 337, 366 (2010).

92 Letter from the First Presidency of The Church of Jesus Christ of Latter-day Saints to Church Leaders in California (June 29, 2008), *reproduced at California and Same-Sex Marriage*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS NEWSROOM (June 30, 2008), http://newsroom.lds.org/ldsnewsroom/eng/commentary/california-and-same-sex-marriage.

ment.[93] When LDS canvassers encountered nonreligious voters, they employed secular arguments against gay marriage, but with religious voters they directly pressed the LDS leaders' theological argument.[94] Gedicks avers that "[t]he questionable and controversial nature of some of the public reasons advanced by Latter-day Saints against Proposition 8 only served to highlight the apparent priority of their theological reasons."[95]

Religious leaders' claims of authority over believers' approaches to political issues vary widely in their force. The Roman Catholic Church provides an illustration. Catholics in the United States and elsewhere have historically suffered disdain and even persecution because of the false perception that their faith binds them to the Pope's every command, regardless of both reason and citizenship.[96] In fact, while Catholic religious authorities frequently make pronouncements that stake out bold and emphatic positions on public policy matters, most of those pronouncements do not obligate Catholic citizens to agree or obey. In some circumstances, however, Catholic leaders do issue compulsory edicts on public matters. The Pope and Catholic bishops have the power to make certain infallible pronouncements that compel acquiescence by the force of authority,[97] and even some of their fallible pronouncements can effectively obligate believers to obey.[98] In the most important present instance, the Church has long made clear that Catholic belief mandates opposing

93 *See* Gedicks, *supra* note 91, at 364–68 (discussing LDS members' role in the campaign for Proposition 8); Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES, Nov. 15, 2008, at A1 (portraying LDS efforts to pass Proposition 8 as decisive). R

94 *See* McKinley & Johnson, *supra* note 93; *see also* Gedicks, *supra* note 91, at 367 (describing heavy LDS reliance in Proposition 8 campaign on "sectarian arguments drawn from LDS theology"). R

95 Gedicks, *supra* note 91, at 368. R

96 *See, e.g.*, TIMOTHY A. BYRNES, CATHOLIC BISHOPS IN AMERICAN POLITICS 13–16 (1991) (discussing anti-Catholic sentiments and actions in the nineteenth century United States based on doubts about Catholic citizens' loyalty and patriotism).

97 *See* John H. Garvey, *The Pope's Submarine*, 30 SAN DIEGO L. REV. 849, 858 (1993). Garvey explains that the Church asserts its strongest authority only in the domain of "faith and morals," which excludes many important political questions. *See id.* at 861. Although Catholic bishops may take independently infallible or authoritative actions, their authority always remains subordinate to that of the Pope. *See* BYRNES, *supra* note 96, at 54. R

98 *See* Garvey, *supra* note 97, at 862 (describing Catholic doctrine's requirement that believers submit their wills and minds to authoritative moral teachings of the Pope and bishops). R

legal rights to abortion.[99] Although the Church's position on abortion draws primarily on moral reasoning, it also advances claims of religious authority. Increasing numbers of U.S. bishops in recent years have imposed religious consequences—including denials of the sacrament of Holy Communion, threats of excommunication, and authoritative predictions of eternal damnation—on political candidates who publicly support abortion rights and even on voters who support such candidates.[100] These actions have not prevented U.S. Catholics from maintaining diverse viewpoints on the abortion issue.[101] Nonetheless, the bishops have encouraged public arguments based on religious authority while discouraging Catholics from evaluating the abortion issue with the same breadth of critical judgment they apply to other policy questions.

As with arguments based on revealed truth, arguments grounded in religious authority present liberal democracy with a distinctive cause for concern.[102] No analog appears in contemporary U.S. society or politics to the claims of authority that some religious leaders make and some believers embrace. Any person may indulge any level of fealty to any authority. Religious authorities' claims to fealty, however, can transcend individual psychology by systematically urging obedience on many people in an organized community. Of course, history is littered with examples of secular leaders' claims to absolute or tran-

99 *See* Conference of Catholic Bishops, Resolution on Abortion, (Nov. 7, 1989), *reprinted in* 19 ORIGINS 395 (1989), *available at* http://www.usccb.org/prolife/tdocs/resabort89.shtml; Sacred Congregation for the Doctrine of the Faith, *Declaration on Procured Abortion*, U.S. CONF. CATH. BISHOPS (Nov. 18, 1974), http://www.usccb.org/prolife/issues/abortion/DeclarationonProcuredAbortion.pdf; Nat'l; *see also* BYRNES, *supra* note 96, at 55 ("[B]y 1967 the popes and the church had unequivocally condemned *all* direct abortions for over a century."); Garvey, *supra* note 97, at 867–68 (summarizing authoritative Catholic teachings on abortion since the 1960s). R R

100 *See* BYRNES, *supra* note 96, at 139–40 (describing individual bishops' denials of communion and warnings about damnation to pro-choice politicians); Garvey, *supra* note 97, at 851 (noting a 1990 statement of New York's Cardinal John O'Connor that Catholic politicians who make public funds available for abortions risk excommunication); Peter Steinfels, *Catholics and Choice (in the Voting Booth)*, N.Y. TIMES, Nov. 8, 2008, at A21 (reporting some bishops' threats to deny communion to pro-choice candidates and voters during the 2004 and 2008 presidential elections). R R

101 U.S. Catholic voters favored pro-choice candidate Barack Obama over pro-life candidate John McCain in the 2008 presidential election by a margin of fifty-two to forty-five percent, despite the Catholic bishops' vigorous admonitions to pro-life voting. *See* Steinfels, *supra* note 100 (numbering the U.S. bishops among the 2008 election's "big losers"). R

102 *See supra* notes 84–86 and accompanying text (discussing the distinctive character of threats to liberal democracy from arguments grounded in a subjective epistemology of divine inspiration). R

scendent authority, but liberal democracy generally forecloses such claims by political leaders. Not even at the height of the 2008 Democratic primary battle between Barack Obama and Hillary Clinton, or the climax of the general election contest between Obama and John McCain, did many people advocate any position based merely on their preferred candidate's asserted authority. Apart from electoral politics, some leaders of social movements might arguably inspire devotion to authority comparable to what some religious leaders can command; but many movement leaders historically have themselves been clergy, and in any event the United States in 2011 is not a font of great social movements.

C. Permissive Theorists' Inadequate Response to the Potential Danger of Religious Argument

Permissive theorists, with only limited exceptions,[103] predicate their case for full admission of religious argument into public political debate on the premise that religious argument poses no meaningful threat to public political debate or to liberal democracy generally.[104] Depending on one's substantive normative views, the permissive theorists may or may not be right to reject the restrictive theorists' position that religious justifications cannot form a legitimate basis for coercive government action and the claim of harm that follows from that position.[105] Beyond that disagreement, however, the dangers discussed in the last subpart of two particular varieties of religious argument—arguments that rest on claims of divine revelation, and arguments based on fealty to religious authorities—cast serious doubt on permissive theorists' assertions of religious argument's categorical harmlessness. Accordingly, vindicating the normative propriety of religious argument in public political debate requires an analysis that departs from the permissive theorists' familiar precincts.

Michael Perry exemplifies permissive theorists' difficulty in coming to terms with the danger for public political debate of arguments based on revealed truth. Perry has claimed that restrictive theorists "cannot acquiesce in the claim that religious beliefs have a privileged epistemological status" and therefore "cannot join the argument that, because of their privileged epistemological status, such beliefs are unsuited as a basis for political choice."[106] This complaint misses the critical distinction between the claim that religious beliefs enjoy a priv-

103 *See infra* notes 118–26 and accompanying text. R
104 *See supra* notes 49–64 and accompanying text. R
105 *See supra* notes 33–40 and accompanying text. R
106 Perry, *supra* note 15, at 716. R

ileged epistemological status, which of course restrictive theorists do not embrace, and the restrictive theorists' actual concern: that some religious believers subjectively view their beliefs as enjoying a privileged epistemological status. Perry in later writing seems to acknowledge that concern when he declares that "no religious community that fails to honor the ideal of self-critical rationality can play a meaningful role in the politics of a religiously pluralistic democracy like the United States."[107] He predicts, however, that the strategic unwisdom and normative unattractiveness of uncritical reliance on religious premises will dissuade religious believers or communities from indulging such reliance in significant numbers.[108] He nonetheless sees a need to urge that "[i]nsisting on a persuasive secular argument in support of a claim about human well-being is obviously one important way for the members of a religious community to honor the ideal of self-critical rationality,"[109] an admonition that concedes substantial ground to the restrictive theorists.[110]

John Garvey similarly illustrates permissive theorists' difficulty in grappling with the danger for public political debate of arguments grounded in religious authority claims. In the final page of a nuanced and thoughtful piece about the nature and force of authority claims in the Catholic Church, Garvey abruptly dismisses concerns about whether liberal principles should foreclose political reliance on noth-

107 Perry, *supra* note 13, at 30. R

108 *See id.* at 29 (arguing that nonbelievers, and even some coreligionists, will reject a claim of divine revelation behind a political argument as "little more than a prideful and self-serving stratagem"); *see also* Gamwell, *supra* note 70, at 339–40 (broadly dismissing the possibility that religious believers will reject fallibilism); Walzer, *supra* note 71, at 622 (suggesting the argument that religious believers should "politicize" their views by "surrender[ing] their absolutism" and should be open to political compromise). R R

109 Perry, *supra* note 13, at 31; *see also* Gedicks & Hendrix, *supra* note 51, at 1616 ("Religious as much as secular individuals must translate their personal beliefs into a language that is accessible to all."); Perry, *supra* note 13, at 34 (urging at least partial reliance on secular arguments in public political debate in order to "help[ ] American politics to maintain a relatively ecumenical character rather than a sectarian one"). Perry exempts religious arguments about human worth, as distinct from human well-being, from his call for partial reliance on secular arguments. *See id.* at 20–24, 37. R R

110 Perry disavows arguing "that a commitment to liberal democracy somehow entails or otherwise supports the principle of self-restraint that I have recommended here." Perry, *supra* note 13, at 46. That disavowal, however, seems at odds with his recognition that meaningful participation in democracy requires self-critical rationality. R

ing more or less than religious leaders' directions.[111] While Garvey's discussion focuses on public officials' actions, his analytic framework applies to ordinary citizens' public political arguments as well.[112] Garvey claims that acting solely in reliance on religious leaders' views of right and wrong presents no problem for liberal democracy, given that "[i]t is permissible . . . to hold an activity immoral simply because our tradition teaches that it is."[113] This argument suffers from two defects. First, its descriptive premise about tradition is dubious. Although Garvey provides no specifics, he must be thinking about moral principles such as the belief that murder is wrong. Certainly the force of tradition buttresses that sort of belief, but most people can articulate substantive reasons for deploring murder. Second, Garvey's comparison of tradition to religious authority is inapt for a pluralist society. Traditions usually reflect shared aspects of a societal experience. Virtually everyone in the United States shares a tradition that decries murder as immoral. To the extent large segments of a society do not share a given tradition, the tradition becomes more difficult to hold out as a noncontroversial ground for government action. Maimon Schwarzschild shrugs these problems off with a predictive judgment similar to Perry's assertion about arguments based on revealed truth: arguments based on religious authority claims have so little persuasive force that religious communities will voluntarily foreswear them.[114] Like Perry, however, Schwarzschild offers no support for his conjecture.

One impediment to permissive theorists' dealing effectively with the potential dangers of religious argument stems from their strained insistence that any conceivable threat from religious argument could arise just as easily from any number of secular directions.[115] Advo-

111 *See* Garvey, *supra* note 97, at 876. In particular, Garvey refers to decisions based on what he calls "the service conception of authority." For a discussion of this conception, see *id.* at 854–55. R

112 Garvey first discusses the obligations that Catholic leaders' policy pronouncements impose on ordinary Catholic citizens. *See id.* at 859–65. In turning to public officials' obligations, he notes several constraints on fealty to religious authority claims that do not apply to ordinary citizens. *See id.* at 865–67. His overall analysis deals with justification rather than public argument, but the logic he employs in defending justifications based on religious authority claims applies, on its own terms, to public political arguments based on religious authority claims.

113 *Id.* at 876.

114 *See* Schwarzschild, *supra* note 53, at 914 ("[T]here is scarcely much practical mileage to be had for such religious groups to argue from authority on public questions. . . . [I]f anything, that sort of argument is likely to sow doubts among the faithful."). R

115 *See supra* notes 49–57 and accompanying text. R

cates for the value of religion in public life routinely argue that religious faith, by transcending secular authorities and concerns, provides an especially valuable or even exclusive source of morality.[116] How can accounts of religion's distinctive power fail to contemplate distinctive threats from extremes of religious argument—particularly threats to the temporal authorities and values they extol religion for opposing and/or transcending? Another, rather surprising element of permissive theorists' inadequate response to the dangers of religious argument stems from their predominantly autonomy-based rhetoric.[117] Permissive theorists understandably view the restrictive position as an attack on believers' participation in politics that requires a direct response, and autonomy values have undeniable salience for any discussion of normative (let alone legal) constraints on individuals' behavior. Nonetheless, the autonomy defense provides no answer to the restrictive concern that religious arguments based on revealed truth or fealty to authority may threaten liberal democracy. As I contend below, an effective defense of religious argument's place in public political debate must thoroughly engage restrictive theorists on the matter of religiously grounded arguments' democratic consequences.

Stephen Carter and Steven Shiffrin depart from other permissive theorists in recognizing at least the possibility that religious arguments might destabilize liberal democracy. Even as Carter rejects any suggestion that religious believers are especially dogmatic[118] or undemocratic,[119] he advocates a vision of political engagement by churches that clashes with ordinary premises of liberal democracy. Carter extols the subjective epistemology of divine inspiration in a spiritually debased public culture, calling upon believers to enter public debate

116 *See* CARTER, *supra* note 49, at 5 (equating religion with morality); NEUHAUS, *supra* note 49, at 8–9 (arguing that the exclusion of religion from public life leaves a "naked public square" defenseless against "seven demons aspiring to transcendent authority"); Perry, *supra* note 13, at 22 (raising "the possibility that there is no plausible or even intelligible secular argument that every human being is sacred"); *see also* Waldron, *supra* note 15, at 846–47 (arguing that secular thinkers are in the process of constructing distinctively secular conceptions of religiously grounded moral ideas central to liberalism). R R R R

117 *See supra* notes 65–68 and accompanying text. R

118 *See* CARTER, *supra* note 49, at 21 (asserting that only "bias" can explain any argument "that religionists are, by the nature of their beliefs, significantly more dogmatic than anybody else"). R

119 *See id.* at 20 (dismissing as "clunkers" any suggestions that entry of religious voices into politics are undemocratic, based on religion's historical role in U.S. politics).

with an unwavering prophetic voice.[120] He identifies creationists, for example, as a "cognitive minority" who do themselves a disservice when they undermine "the epistemology of the Word" by attempting to cast their arguments in terms that might make epistemic sense to nonbelievers.[121] Carter notably demands legal protections for churches—as distinct from individual religious believers—because he views churches' capacities to inculcate not only dissident ideas but dissident epistemology as essential to their religious mission.[122] Shiffrin portrays our public culture as debased on political rather than spiritual grounds, decrying what he sees as widespread economic injustice and a corrupt, unrepresentative political process.[123] He therefore welcomes the possibility that religion might serve as a force for the dramatic social change that he believes necessary.[124] Where Carter and Shiffrin rejoin the mainstream of permissive theorists is in doubting that religion truly threatens liberal democracy as a descriptive matter. Carter portrays religious engagement in democratic politics as necessarily distorting the purity of religious belief.[125] Shiffrin downplays his hope for religion-driven social change as "more of the something-is-better-than-nothing variety."[126]

120 *See id.* at 171–75 (asserting the subversive value of public religious resistance to secular norms); *see also* NEUHAUS, *supra* note 49, at 18 (attributing to fundamentalist religion "a welcome claim to authoritative truth" and urging nonfundamentalist religions to adopt "dogma that can provide authoritative communal referents"); David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067, 1094 (1991) (reviewing MICHAEL J. PERRY, LOVE AND POWER (1991)) ("The natural tendency of [traditionalist theism and modernist liberalism] is to destroy the other."). R

121 *See* CARTER, *supra* note 49, at 152–53. David Hollenbach offers a milder variation on the same point, expressing doubt whether deep moral and theological questions "are best dealt with in arguments about quite precise issues that are up for decision in the spheres of law and public policy." Hollenbach, *supra* note 10, at 899. R

122 *See* CARTER, *supra* note 49, at 71–79 (criticizing separationist constitutional doctrine for stifling religious institutions' ability to resist secular political norms). R

123 *See* Shiffrin, *supra* note 59, at 1642. R

124 *See id.*; *see also* Walzer, *supra* note 71, at 627 (suggesting, in a critique of separationist doctrine, that religion brings to politics "a sense of radical hope, the belief that large-scale transformations and reversals are possible"). Shiffrin's hope for progressive outcomes from religious arguments depends on his view that "religious perspectives frequently buck the egoistic tide . . . [and] are a necessary counterpoint to the corporate state." *See* Shiffrin, *supra* note 59, at 1651. R

125 *See* CARTER, *supra* note 49, at 185–86 (questioning the efficacy of religion as a distinctive voice in efforts to influence public policy); *see also* McConnell, *supra* note 49, at 650 ("When groups identifying themselves with the gospel of Christ enter the political arena, and come to make political alliances and compromises, it is inevitable that they will blunt their religious witness."). R

126 Shiffrin, *supra* note 59, at 1651. R

Unlike the permissive theorists, the restrictive theorists place little weight on individual autonomy, and they purport to defend public political debate against threats from religious argument. Preserving the perceived liberal status quo, however, does not equate to advancing the best interests of liberal democracy. Restrictive theorists move from positing religious argument's danger to advocating its normative suppression without adequately assessing the functions of public political debate. An accurate accounting of the religious argument question's stakes for liberal democracy requires a nuanced analysis of how religious argument serves or disserves those functions. The next Part examines two salient normative debates in First Amendment free speech theory that can animate such an analysis.

II. Normative Insights from Free Speech Theory

First Amendment legal rules that bar the government from suppressing speech depend on underlying normative theoretical assumptions about the value of speech for public debate.[127] This Part discusses two distinct but related issues in free speech theory that can inform the normative debate over religiously grounded political argument. First, the controversy over First Amendment protection for Communist advocacy, which preoccupied courts and commentators for much of the last century, implicates the restrictive theorists' ultimate concern that religious argument poses an existential threat to liberal democracy. Second, the debate over how the First Amendment should affect the balance in public discourse between values of political stability and political dynamism implicates the incremental choice at issue in the normative debate over religious argument. Both of these debates reflect deeply rooted normative concerns about the optimal contours of liberal public discourse. This Part demonstrates how these two free speech controversies resonate with the normative question of religious argument. Part III will derive lessons from these free speech controversies in order to defend religious argument, and substantive criticism of religion, as normatively proper—indeed, valuable—components of public political debate.

127 *See, e.g.*, Meiklejohn, *supra* note 75, at 42 (contending that the First Amendment "was written to clear the way for thinking which serves the general welfare"). *But cf.* Frederick Schauer, Free Speech 86 (1982) (arguing that constitutional protection for expressive freedom finds its soundest justification not in any affirmative principle but rather in concerns about the government's incompetence as a regulator of speech). R

A. Communist Advocacy and the Existential Dilemma of Expressive Freedom

This Article's discussion of religious argument's potential threat to liberal democracy has emphasized that no secular force in our political culture matches the capacity of religion to inspire a belief in the infallible inspiration of one's position or fealty to the views of an authoritative leader.[128] That arguably was not true for much of the last century. Courts between about 1920 and 1960 took very seriously the idea that international Communism overbore the will and rational faculties of its partisans, enlisting them in a formidable campaign to overthrow liberal democracy and enslave the world. The Supreme Court's first steps in developing modern First Amendment doctrine dealt with expressions of Communist views, and the Court followed a path that eventually led to a robust doctrine of constitutional protection for subversive political advocacy. That protection, however, stands on a foundation of dissenting and concurring opinions; it came to fruition only when the Court eased its concerns about the danger of Communist revolution; and it did not settle the academic debate about the proper degree of protection for speech, like Communist advocacy, that may threaten the very existence of our speech-protective constitutional system. Many scholars have noted similarities between religious and Communist political arguments,[129] but none has explored the resonance of the Cold War legal battle over Communist advocacy with the contemporary normative dispute over the proper role of religious argument in public political debate.

The U.S. Supreme Court began to construct First Amendment free speech doctrine in a series of cases that challenged federal convictions of Communists and other leftists who opposed U.S. entry into World War I. All of the Court's decisions rejected First Amendment challenges, but separate opinions by Justices Holmes and Brandeis urged strong First Amendment limits on punishment of subversive

128 *See supra* notes 84–86, 102 and accompanying text. R

129 *See* Lipkin, *supra* note 29, at 2069 & n.165 (comparing the futility of arguing with religious believers and Marxists); Marshall, *supra* note 41, at 859 n.80 (noting similarly "non-dialogic" characteristics of religion and Communism but distinguishing religion's special volatility); McConnell, *supra* note 49, at 642 (analogizing present suspicion that defenders of religious political argument sympathize with the "religious right" to past suspicion that defenders of Communist advocacy were "fellow travelers"); Schwarzschild, *supra* note 53, at 911–12 (comparing Communism and religion as objects of censorship in liberal democracies); Walzer, *supra* note 71, at 626 (suggesting a comparison of religious community with "the political messianism of the Marxists"); Fish, *supra* note 76, at 25 (suggesting that neither religion nor Communism "will . . . pledge allegiance to the mimicry of tolerance"). R R R R R

advocacy. In *Schenck v. United States*,[130] which affirmed convictions of a pair of Socialists for opposing the draft, Justice Holmes's majority opinion declared that First Amendment protection ended only where advocacy posed a "clear and present danger" of some unlawful conduct.[131] Holmes, however, soon recognized the weakness of a First Amendment standard that protected only innocuous speech. In *Abrams v. United States*,[132] the Court affirmed convictions of a group of anarchist supporters of the Russian Revolution for seeking to discourage domestic munitions production. Holmes's dissent, joined by Brandeis, advanced a normative case for expressive freedom as "the best test of truth"[133] while focusing the First Amendment analysis on "the present danger of immediate evil or an intent to bring it about."[134] Even here, however, Holmes sweetened the speech-protective pill by likening the defendants' speech to "the surreptitious publishing of a silly leaflet by an unknown man."[135]

A few years later, in cases that affirmed convictions of Communists under state criminal syndicalism statutes, Brandeis and Holmes established a First Amendment ideal that even the most politically dangerous speech deserves unblinking constitutional protection. Brandeis's concurring opinion in *Whitney v. California*[136] grounded a normative defense of open democratic debate in his conception of the Framers' attitude toward existential danger:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.[137]

130 249 U.S. 47 (1919).

131 *Id.* at 52.

132 250 U.S. 616 (1919).

133 *Id.* at 630 (Holmes, J., dissenting).

134 *Id.* at 628.

135 *Id.*

136 274 U.S. 357 (1927).

137 *Id.* at 377 (Brandeis, J., concurring).

Holmes's dissent in *Gitlow v. New York*[138] left no doubt as to the significance of this protection in the face of a true threat to liberal democracy's continued existence. "If in the long run," he declared, "the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[139] The circumstances of *Whitney* and *Gitlow* differed markedly from those of *Schenck* and *Abrams*: the later cases involved peacetime, rather than wartime, prosecutions under state, rather than federal, statutes. The arguably diminished stakes, while not moving the Court's majority, may have emboldened Holmes and Brandeis to advocate heightened First Amendment protection for subversive advocacy.

In the Court's next major confrontation with Communist speech, the Justices' perception of heightened stakes proved decisive. After World War II, intensified fears of global Communism led to federal analogs to the *Gitlow* and *Whitney* prosecutions. In 1951, the Supreme Court in *Dennis v. United States*[140] affirmed convictions under the Smith Act[141] of the leaders of the U.S. Communist Party for advocating Communist revolution. The *Dennis* defendants, as Justice Black noted in dissent, "were not even charged with saying or writing anything designed to overthrow the Government." Instead, they merely "agreed to assemble and to talk and publish certain ideas at a later date."[142] Even so, the majority Justices portrayed the defendants' speech as a grave threat to liberal democracy in the United States. Chief Justice Vinson's plurality opinion described the Communist Party as "a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language" and intoned that "the general goal of the Party was . . . to achieve a successful overthrow of the existing order by force and violence."[143] The concurring opinions echo the plurality's warnings. For Communists, Justice Jackson explained, "[f]orce or violence . . . may never be necessary, because infiltration and deception may be enough."[144] Justice Frankfurter added that "the Communist doctrines which these defendants have conspired to advocate are in the ascendency in pow-

138 268 U.S. 652 (1925).

139 *Id.* at 673 (Holmes, J., dissenting).

140 341 U.S. 494 (1951).

141 Smith Act of 1940, 54 Stat. 670 (codified as amended at 18 U.S.C. §§ 2385, 2387 (2006)).

142 *Dennis*, 341 U.S. at 579 (Black, J., dissenting).

143 *Id.* at 498 (plurality opinion).

144 *Id.* at 565 (Jackson, J., concurring).

erful nations who cannot be acquitted of unfriendliness to the institutions of this country."[145]

The *Dennis* Court concluded that the severity of the Communist threat required a distinctive First Amendment analysis. Holmes and Brandeis, explained Chief Justice Vinson, "were not confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis."[146] Thus, the *Dennis* plurality applied a test articulated by Chief Judge Learned Hand in his opinion below for the Second Circuit: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[147] This test allowed the plurality to anchor the defendants' convictions in its warnings about the Communist threat:

> The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score.[148]

Chief Justice Vinson notably refused to consider the unlikelihood or imminence of a Communist revolution.[149] The concurring Justices again tracked the plurality's analysis. Justice Jackson emphasized that "[u]nless we are to hold our Government captive in a judge-made verbal trap, we must approach the problem of a well-organized, nationwide conspiracy . . . as realistically as our predecessors faced the trivialities"[150] that fostered the "clear and present danger" test. Justice Frankfurter likewise distinguished mere "hostile or unorthodox views" from "the power of the centrally controlled international Communist movement."[151] He would have resolved the case by even less speech-

145 *Id.* at 547 (Frankfurter, J., concurring in the judgment).

146 *Id.* at 510 (plurality opinion).

147 *Id.* (alteration in original) (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)) (internal quotation marks omitted).

148 *Id.* at 510–11.

149 "Obviously, the words [of the test] cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. . . . We must therefore reject the contention that success or probability of success is the criterion." *Id.* at 509–10.

150 *Id.* at 568–69 (Jackson, J., concurring).

151 *Id.* at 546 (Frankfurter, J., concurring in the judgment).

protective reasoning than that of the plurality, affirming Congress's authority to strike the balance between such weighty competing values as free speech and the Communist threat.[152] Dissenting Justices Black and Douglas, in contrast, mocked their colleagues' move from fearing Communism to weakening the First Amendment. "We might as well say," complained Douglas, "that the speech of petitioners is outlawed because Soviet Russia and her Red Army are a threat to world peace."[153]

Within a few years the Supreme Court backed away from both the rhetoric and the holding of *Dennis*. In *Yates v. United States*,[154] decided in 1957, the Court reversed convictions of the leaders of the Communist Party in California. Dissenting Justice Clark emphasized that these defendants "served in the same army and were engaged in the same mission [as the *Dennis* defendants]. The convictions here were based upon evidence closely paralleling that adduced in *Dennis* . . . ."[155] The *Yates* Court, however, not only reversed the convictions but took the rare step of judging the evidence insufficient to retry some of the defendants.[156] The Court claimed to be following *Dennis*, distinguishing the two cases on the ground that the *Yates* plaintiffs engaged in "mere doctrinal justification of forcible overthrow" of the government.[157] The real difference between the two decisions, however, lies in their assessments of the Communist threat. The *Yates* Court, unlike the majority opinions in *Dennis*, spent no time warning of the Communist Party's size, cohesiveness, or orientation toward action, or reciting the contextual hazards of the Cold War world. Without the *Dennis* Court's emphasis on the existential threat of Communism, the *Yates* convictions lacked any defensible basis. Four years later, in *Noto v. United States*,[158] the Court followed *Yates* and reversed the conviction, under the membership provision of the Smith Act, of a

152 *See id.* at 525.

153 *Id.* at 587–88 (Douglas, J., dissenting). Justice Douglas, however, also emphasized the U.S. Communist Party's weakness in arguing that the First Amendment should protect it. *See id.* at 589 ("[I]n America [Communists] are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful.").

154 354 U.S. 298 (1957).

155 *Id.* at 345 (Clark, J., dissenting).

156 *See id.* at 327–34 (majority opinion) (reviewing the evidence). "In its long history," objected dissenting Justice Clark, "I find no case in which an acquittal has been ordered by this Court solely on the *facts*. It is somewhat late to start in now usurping the function of the jury, especially where new trials are to be held covering the same charges." *Id.* at 346 (Clark, J., dissenting).

157 *Id.* at 321 (majority opinion).

158 367 U.S. 290 (1961).

defendant who had not merely advocated Communism but had actually schemed to infiltrate labor unions.[159] Despite that seemingly important aggravating factor, the *Noto* Court once again betrayed little concern about the existential danger of Communism. The majority not only reversed the conviction but narrowed *Dennis* by requiring "some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive" to overcome First Amendment objections in subversive advocacy prosecutions.[160]

The Court seemingly sealed the coffin of *Dennis* with its 1969 decision in *Brandenburg v. Ohio*,[161] which struck down Ohio's criminal syndicalism statute. That decision, following Holmes and Brandeis, extended First Amendment protection to everything short of "advocacy of the use of force or of law violation . . . directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action."[162] The *Brandenburg* Court charitably and implausibly characterized *Dennis* as reflecting this same standard.[163] The facts of *Brandenburg*, however, completely obviated the existential threat concern that had animated *Dennis*. The defendant, convicted under a state rather than federal statute, was not a Communist but rather a member of an isolated Ku Klux Klan cell that—notwithstanding its odious statements and activities—posed no conceivable threat to the survival of the Republic.[164] While *Brandenburg* represented a doctrinal victory for the Holmes-Brandeis approach to subversive advocacy, the Court's decision had the benefit of lowered stakes. In *Dennis*, the Justices had feared that Communism could destroy liberal democracy in the United States. What overcame *Dennis* was not the Court's repudiation of the link between threat and suppression but rather its eventual disregard for the threat.

159 *See id.* at 294–95 (describing plans for infiltration of unions). The Court found the evidence of these plans insufficient to establish that the defendants had actually advocated violent overthrow of the government within the meaning of the Smith Act. *See id.* at 298–99.

160 *Id.* at 297–98. The Court, on the same day it decided *Noto*, upheld another conviction under the membership provision of the Smith Act where substantial record evidence indicated that the defendant had worked actively toward overthrowing the government. *See* Scales v. United States, 367 U.S. 203, 206 (1961).

161 395 U.S. 444 (1969) (per curiam).

162 *Id.* at 447.

163 *See id.* at 447 n.2.

164 The defendant participated in a cross burning on a farm and made a speech in which he railed against African Americans and Jews, discussed the Klan's organizing efforts in vague terms, and suggested that the white race might at some future time take "revengeance" on the government. *See id.* at 445–47.

Constitutional scholars have vigorously debated the proper First Amendment status of speech that threatens the existence of liberal democracy. A few years before the Court decided *Dennis*, Alexander Meiklejohn advanced the seminal account of First Amendment protection for democratic political debate.[165] In condemning viewpoint-based constraints on political speech, Meiklejohn echoed Holmes' mandate from *Gitlow*[166] that public debate must admit even the speech of liberal democracy's enemies:

> It makes no difference whether a man is . . . defending democracy or attacking it, planning a communist reconstruction of our economy or criticising it. So long as his active words are those of participation in public discussion and public decision of matters of public policy, the freedom of those words may not be abridged.[167]

Two decades later, shortly after the Supreme Court decided *Brandenburg*, Robert Bork challenged Meiklejohn's formulation. Bork advocated limiting the First Amendment to protecting "the discovery and spread of political truth,"[168] and he defined "political truth" as "what the majority thinks it is at any given moment . . . because the majority is permitted to govern and to redefine its values constantly."[169] On this view, advocacy of the violent overthrow of the government does not warrant First Amendment protection "because it violates constitutional truths about processes and because it is not aimed at a new definition of political truth by a legislative majority."[170] Disdain for *Dennis* remains the majority view among scholars,[171] but a vocal minority of commentators from the *Dennis* era[172] through the pre-

165 *See* MEIKLEJOHN, *supra* note 75, at 4–8. R

166 *See supra* notes 138–139 and accompanying text. Meiklejohn quoted Holmes' words twice in two pages, lionizing them as "magnificent" and "Americanism." *See* MEIKLEJOHN, *supra* note 75, at 41–43. R R

167 MEIKLEJOHN, *supra* note 75, at 42. R

168 Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 30 (1971) (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)) (internal quotation marks omitted).

169 *Id.*

170 *Id.* at 31. Unlike even the *Dennis* Court, Bork insisted that Holmes and Brandeis had been wrong to claim First Amendment protection for any sort of subversive advocacy. *See id.* at 31–35 (defending the results in *Gitlow* and *Whitney*).

171 *See, e.g.*, Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 194–201 (tying the Supreme Court's *Dennis* analysis to cognitive biases related to risk assessment and prejudice against undesirable groups).

172 *See, e.g.*, Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 195 (1956) ("No democratic or constitutional principle is violated . . . when a democracy acts to exclude those groups from entering the struggle for political power which, if victorious, will not permit that struggle to continue in accordance with the democratic way.").

sent[173] has joined Bork in defending limits on public political debate imposed to protect the Constitution against real or perceived existential threats.

Although the restrictive theorists on the question of religious argument in public political debate advance a comparatively modest and nuanced agenda, their fears about the dangers of religious argument resemble the *Dennis* Court's fears about Communist advocacy. The Justices who made up the *Dennis* majority portrayed Communism as an overpowering belief system that disdained liberal democracy's procedures in order to destroy its substance, fortified by fanatical conviction and rigorous discipline. Likewise, religious argument, which derives from powerful institutions outside the boundaries of liberal democracy, most plausibly threatens liberal democracy when it advocates arguably illegitimate grounds for government action or manifests a subjective epistemology of divine revelation or fealty to religious authority.[174] These forms of religious argument, like Communist advocacy of violent revolution, advance ideas of the good intended not merely to enter public political debate but to deny entry to any contrary idea.[175] Indeed, Judge Hand's opinion for the Second Circuit in *Dennis* invoked religious imagery to dramatize the gravity of the Communist threat. Hand called the *Dennis* defendants the "controlling spirits" of the U.S. Communist Party, whose members he described as "infused with a passionate Utopian faith that is to redeem mankind."[176] He continued:

> [The Communist Party] has its Founder, its apostles, its sacred texts—perhaps even its martyrs. It seeks converts far and wide by an extensive system of schooling, demanding of all an inflexible doctrinal orthodoxy. The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of

173 *See, e.g.*, David E. Bernstein, *The Red Menace, Revisited*, 100 NW. U. L. REV. 1295, 1305–09 (2006) (reviewing MARTIN H. REDISH, THE LOGIC OF PERSECUTION (2005)) (arguing that the Smith Act convictions upheld in *Dennis* had strong justifications and that *Dennis* did negligible harm to First Amendment interests).

174 *See supra* notes 72–102 and accompanying text. R

175 *See* GREENAWALT, *supra* note 10, at 56 (conceptualizing, in a discussion of religious argument in public political debate, a duty of citizens in a "relatively stable" liberal democracy "not to undermine the basic requisites of that system"); Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2285–86 (1997) (characterizing intolerant religious beliefs as "inimical to [the liberal state] and threatening to its survival"); Schwarzschild, *supra* note 53, at 912–13 (discussing tension between a liberal norm of tolerance and substantive value systems such as religion). R R

176 Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

> success by lawful means. That article, which is a common-place among initiates, is a part of the homiletics for novitiates . . . .[177]

Hand's rhetoric vividly connects the underlying justification for the *Dennis* holding to the features of religious argument that concern the restrictive theorists.

The linkage between subversive political advocacy and religious argument draws further support from First Amendment cases about religious expression that mirror important elements of the Communist speech decisions. Two cases involving street orations by Jehovah's Witnesses prompted the Court in the early 1940s to hold that the First Amendment does not protect "fighting words"—speech likely to provoke a violent response.[178] That limit on free speech protection closely parallels Holmes's original "clear and present danger" principle. The Court subsequently refined the religious fighting words decisions in two important ways. First, *West Virginia State Board of Education v. Barnette*,[179] a case involving the refusal of Jehovah's Witness children to salute the flag and recite the Pledge of Allegiance, declared that the First Amendment would not countenance government hostility toward the socially aberrant expression (or nonexpression) of minority believers.[180] Second, *Cohen v. California*[181] made clear that the fighting words exception encompassed only "direct personal insult[s]" and did not deny First Amendment protection to any sort of advocacy.[182] Even so, First Amendment doctrine on provocative religious expression reflects the same sort of subtle ambivalence that characterizes the doctrine on subversive advocacy. The Court has never explicitly repudiated the idea that religious speech may lose First Amendment protection when it manifestly threatens the social order. *Cohen*, a contemporary of *Brandenburg*, has no more to do with religion than *Brandenburg* has to do with Communism. The Justices have

177 *Id.*; *see also* GERALD GUNTHER, LEARNED HAND 603 (1994) (quoting Hand as criticizing the *Dennis* prosecutions on the ground that "[t]he blood of the martyrs is the seed of the church").

178 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–74 (1942) (affirming, based on the "fighting words" principle, the conviction of a Jehovah's Witness under a statute that prohibited offensive insults in public places); Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940) (emphasizing the nonthreatening character of the speech at issue in reversing the conviction of a Jehovah's Witness for disturbing the peace).

179 319 U.S. 624 (1943).

180 *See id.* at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

181 403 U.S. 15 (1971).

182 *Id.* at 20.

broadened free speech protection for religious expression in a line of decisions that mandate equal access for religious speakers to public resources.[183] All of those decisions, however, vindicate the rights of mainstream Christians. In the related context of Free Exercise Clause jurisprudence, the Court has forcefully secured the government's authority to prevent minority believers' aberrant practices from creating "a system in which each conscience is a law unto itself."[184]

B. The Incremental Tension Between Political Stability and Political Dynamism

Free speech theorists who view constitutional speech protection as instrumentally necessary for a healthy liberal democracy have devoted substantial attention to the role of public discourse in maintaining a balance between political stability and the dynamic capacity for political change. Where the Communist speech debate focuses on a point of existential danger to liberal democracy, the debate about the balance between stability and dynamism implicates a marginal choice between two important political values. First Amendment theory initially treated expressive freedom as protecting stability by providing a "safety valve" for radical impulses toward change. Thus, Justice Brandeis in *Whitney* justified constitutional speech protection, in part, on the ground that "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."[185] Thomas Emerson later characterized this sort of justification as "a theory of social control" under which expressive freedom "maintain[s] the precarious balance between healthy cleavage and necessary con-

183 *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001) (striking down a school district's denial of access to school property after hours for meetings of a religious children's group); Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 845–46 (1995) (striking down a university's withholding of student activity funds from a religious publication); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 387, 396–97 (1993) (striking down a school district's refusal to let a church group use school property after hours to show a film); Widmar v. Vincent, 454 U.S. 263, 276–77 (1981) (striking down a university's denial of meeting space to a religious student group).

184 Emp't Div. v. Smith, 494 U.S. 872, 890 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997). The *Smith* Court endorsed a Free Exercise Clause regime that "will place at a relative disadvantage those religious practices that are not widely engaged in." *Id.*

185 Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

sensus."[186] On Emerson's account, "allowing dissidents to expound their views enables them 'to let off steam'" and facilitates "a channeling of resistance into courses consistent with law and order."[187] The idea that expressive freedom safeguards democracy by encouraging political stability has two serious failings. First, it treats political dynamism as a potentially dangerous force that requires a harmless outlet. Second, by presuming stability's normative primacy, it provides an incomplete account of the ways in which public discourse can advance both stability and dynamism. Subsequent free speech theorists have attempted to transcend these failings by considering how our norms of public discourse should assess the relative tradeoffs between political stability and political dynamism.

One view of the stability-dynamism tension focuses on the elements necessary for engaged public discourse. Robert Post posits that "the ultimate purpose of [public] discourse is to enable the formation of a genuine and uncoerced public opinion in a culturally heterogeneous society."[188] To achieve this purpose, he argues, norms of public discourse must satisfy two conditions. First, public discourse entails "critical interaction," which "depends upon the continuous possibility of transcending what is taken for granted."[189] Post sees First Amendment doctrine as preventing the political majority from interfering with this possibility.[190] At the same time, public discourse requires the capacity for "rational deliberation," which "entails consideration and evaluation of the various positions made possible by the space of critical interaction."[191] Rational deliberation depends on the maintenance of communal norms of civility, an imperative that helps to explain judicial reluctance to extend First Amendment protection in certain areas of cultural sensitivity.[192] This tension manifests itself in, for example, the tension between constitutional speech protection and legal liability for defamation.[193] The simultaneous need for norms of openness and civility generates what Post calls "the paradox of public discourse": "To the extent that a constitutional commitment to critical interaction prevents the law from articulating and sus-

186 Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 884 (1963).

187 *Id.* at 885.

188 ROBERT C. POST, CONSTITUTIONAL DOMAINS 145 (1995).

189 *Id.* at 144.

190 *See id.*

191 *Id.* at 146.

192 *See id.* at 176.

193 *See id.* at 150–63 (discussing Post's public discourse analysis in light of Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988)).

taining a common respect for the civility rules that make possible the ideals of rational deliberation, public discourse corrodes the basis of its own existence."[194] This paradox does not allow for any final resolution. "[T]he boundaries of the domain of public discourse," Post maintains, "will remain both ideological and vague, subject to an endless negotiation between democracy and community life."[195]

Another perspective on the stability-dynamism tension emphasizes the different models of participatory democracy that might underwrite norms for the conduct of public political debate. Ed Baker examines this question in considering the normatively desirable scope of constitutionally permissible media regulation under the First Amendment's Press Clause.[196] Baker, tracking the analytic structure of Jürgen Habermas,[197] contrasts a republican model of democracy with a pluralist model and then charts a third course. In Baker's conception, the modes of public political debate impelled by the two opposing visions of democracy embody the conflict between stability and dynamism. Republican democrats, focused on pursuit of the common good in a political system that helps to constitute individual preferences, emphasize discursive structures that encourage mutual understanding and, ultimately, consensus.[198] Pluralist democrats, focused on distribution of benefits and burdens in a political system that sorts out preexisting private preferences, emphasize discursive structures that facilitate competition among those preferences.[199] Baker advocates a third model, which he calls complex democracy, that "assumes the reality and legitimacy of bargaining among groups over irreconcilable conceptions of the good, but also hopes for discursive development of common conceptions of aspects of the good."[200] Complex democracy requires a relatively weak First Amendment constraint on press regulation, in order to maximize flexibility for balancing these contrasting aims.[201] A central virtue of complex democracy, in Baker's view, is that it allows a liberal democratic political community to negotiate continuously the competing principles and demands of the republican and pluralist models.

194 *Id.* at 147.

195 *Id.* at 177.

196 *See* C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 125–213 (2002).

197 *See, e.g.*, Jürgen Habermas, *Three Normative Models of Democracy*, *in* DEMOCRACY AND DIFFERENCE, *supra* note 33, at 21. R

198 *See* BAKER, *supra* note 196, at 138–43 (conceptualizing republican democracy). R

199 *See id.* at 135–38 (conceptualizing liberal pluralist democracy).

200 *Id.* at 143–47 (conceptualizing complex democracy).

201 *See id.* at 212–13 (discussing complex democracy's implications for First Amendment law).

Although Post and Baker assess the stability-dynamism tension in different contexts, their accounts substantially converge. Post sees civility norms, often insulated by legal restrictions on speech, as conflicting with norms of open debate, often protected against legal restriction by the First Amendment, and he portrays this conflict as giving rise to an irresolvable tension that our free speech norms and law must constantly mediate.[202] Baker sees a republican model of democracy, which entails structures that incline toward political consensus, as conflicting with a pluralist model of democracy, which entails structures that incline toward political dissensus, and he finds the best resolution of their conflict in a complex model of democracy, which requires constant legal and normative mediation between the conflicting models.[203]

The normative tension between political stability and dynamism sometimes animates doctrinal First Amendment disputes. Two cases with particular relevance for the present analysis involve disputes over state regulations of political parties, in which the U.S. Supreme Court elevated the interest in stability over the interest in dynamism.[204] In *Timmons v. Twin Cities Area New Party*,[205] Minnesota banned fusion candidacies, a device by which minor political parties conominate a major party candidate, who then appears on both parties' ballot lines.[206] Minor parties challenged the ban as a violation of their First Amendment right of political association; the Supreme Court upheld the ban.[207] In a remarkably candid embrace of a substantive political theory, Chief Justice Rehnquist wrote that states' "strong interest in the stability of their political systems" allows them to enact restrictions "that may, in practice, favor the traditional two-party system . . . and that temper the destabilizing effects of party splintering and excessive factionalism."[208] In *California Democratic Party v. Jones*,[209] California had established a "blanket primary" system, under which any voter could step into the voting booth on primary election day and vote for a candidate of any party for any office.[210] In this case the two major

202 *See* POST, *supra* note 186, at 147–77.

203 *See* BAKER, *supra* note 194, at 135–47.

204 I discuss these cases in greater detail in Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 2011–24, 2031–37 (2003).

205 520 U.S. 351 (1997).

206 *See id.* at 353–54.

207 *See id.*

208 *Id.* at 366–67.

209 530 U.S. 567 (2000).

210 *See id.* at 569–70.

parties led the First Amendment challenge against the state's action. The Court struck down the blanket primary.[211] Justice Scalia's majority opinion nods in the direction of political dynamism, decrying the aim of creating a system that would produce more "moderate" general election candidates.[212] On a more fundamental level, however, the Court's decision echoes the *Timmons* Court's preference for political stability over dynamism. Advocates of the blanket primary had contended that the system would broaden and diversify political participation by drawing in independent and disaffected voters, and minority party voters in "safe" electoral districts.[213] Belittling this concern, Justice Scalia declared that "[t]he voter who feels himself disenfranchised should simply join the party."[214]

The tension between political stability and political dynamism permeates the normative dispute over religious argument in public political debate. Liberal democracy tends to fear the corrosive effects of religious discord.[215] Restrictive theorists on the question of religious argument fit this tendency, emphasizing the importance of political stability as a central reason to impose normative constraints on arguments grounded in comprehensive moral beliefs.[216] Rawls's emphasis on civility in advocating the public reason principle links his ideal of public reason to Post's conception of the political interest in stability.[217] Indeed, Joseph Raz has pointed out how the emphasis of liberals like Rawls on stability as a defining goal of liberalism complicates their strenuous efforts to maintain a posture of neutrality as to the ultimate truth of any particular substantive value.[218] Permissive theorists, by contrast, tend to prefer political dynamism. Often, echoing Baker's analytic structure, they ground their arguments in a preference for a pluralist, as opposed to republican, vision of democratic

211 *See id.* at 586.

212 *See id.* at 579–80.

213 *See id.* at 583.

214 *Id.* at 584.

215 *See* Sullivan, *supra* note 45, at 197–98 (maintaining that "[r]eligious grounds for resolving public moral disputes would rekindle inter-denominational strife"); Walzer, *supra* note 71, at 632 ("In the United States, we have so far avoided [highly destructive politics], and the separation of religion from politics has been a critically important means of avoidance."). R R

216 *See supra* notes 41–48 and accompanying text. R

217 *See* Rawls, *supra* note 11, at 769 (reaffirming the centrality of a moral duty of civility to the ideal of public reason while acknowledging that a legal duty of civility would undermine the freedom of speech). R

218 *See* Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 PHIL. & PUB. AFF. 3, 14–15 (1990) (arguing that Rawls's emphasis on the value of political stability properly commits him to a substantive ideal of justice).

politics. Shiffrin rejects the "civility" ground for excluding religious argument based on his pluralist conception of public discourse, dismissing the idea of democracy "as a national debating society" and asserting that, in our actual political culture, "[m]uch public debate is appropriately targeted for an audience smaller than the whole."[219] Positing that "our society is permeated with injustice,"[220] he extols religious argument in public political debate as contributing to a desirable climate of "more stirring of the waters, less quiescence, and, if necessary, more instability."[221] Likewise, McConnell derides as "hopelessly utopian" the idea "that laws in a pluralistic republic can be based on shared premises."[222] Jeremy Waldron expresses a similar hope that religious argument will complicate political consensus.[223] He laments a scenario in which excluding religious and other destabilizing arguments from public debate will leave only "bland appeals to harmless nostrums that are accepted without question on all sides."[224]

The final Part of this Article derives from these two free speech controversies normative lessons that lead me to advocate full admission for religious argument—and also for substantive criticism of religion—into public political debate.

III. RECASTING THE NORMATIVE CASE FOR ADMITTING RELIGIOUS ARGUMENT INTO PUBLIC POLITICAL DEBATE

The normative debates in free speech theory over Communist advocacy and the proper balance between political stability and political dynamism share many common elements with the normative question of religious argument. The Communist speech prosecutions grew out of the same existential anxiety that animates the restrictive position on religious argument: certain kinds of political advocacy clash so fundamentally with the foundations of liberal democracy that they pose an unacceptable threat to liberal democracy's survival. The stability-dynamism controversy reflects an incremental variation on the same concern: certain modes of political argument, while contributing to political dynamism, do so only by exacting an unacceptable

219 Shiffrin, *supra* note 59, at 1641. R

220 *Id.* at 1645.

221 *Id.* at 1646.

222 McConnell, *supra* note 49, at 653; *see also* Teitel, *supra* note 59, at 780–87 R (arguing that conceiving of politics as a discursive process, including civility norms, masks a covert goal of forcing religious and moral consensus).

223 *See* Waldron, *supra* note 15, at 838–40 (arguing that the destabilizing effects of R religious argument may provide a desirable check on Rawls's preference for political consensus).

224 *Id.* at 842.

cost in political stability. These parallels suggest that the norms underlying our commitment to expressive freedom can help to resolve the question of religious argument. This Part contends that the best insights we can draw from free speech theory should lead us to reject normative constraints on religious argument. Religious argument, even in the extreme forms that I have suggested may validate restrictive theorists' fears about dangers to liberal democracy, can greatly enrich the informative and participatory value of public political debate. At the same time, and for substantially the same reasons, our norms of public political debate should fully accommodate substantive criticism of religious arguments and underlying religious beliefs.

A. Welcoming Religious Argument into Public Political Debate

The restrictive theorists posit that certain forms of religiously grounded argument may existentially threaten or at least incrementally complicate liberal democracy. The lessons of the Communist advocacy and stability-dynamism debates, however, should lead us to embrace norms of public political debate that value even the most threatening forms of religious argument and thus abjure any constraints on religious argument.

1. Lessons from the Communist Speech Controversy

Restrictive theorists on the normative question of religious argument fail to explain, let alone validate, their move from the premise that religious beliefs cannot properly justify coercive government action in a liberal democracy[225] to the conclusion that liberal democratic norms of public debate should restrict religious argument. The most straightforward explanation for that move is that our norms should restrict arguments for justifications unacceptable on liberal democratic terms because such arguments can only increase the likelihood that the political community will embrace the unacceptable justifications. Rawls suggests this sort of causal connection when he likens the limitations of public reason to rules that bar hearsay and unlawfully acquired evidence to ensure proper grounds for decision in criminal trials.[226] The Supreme Court in *Dennis v. United States*[227]

225 *See supra* notes 33–40 and accompanying text. R

226 *See* RAWLS, *supra* note 9, at 218. For a summary of Rawls's theory of public reason, see *supra* notes 16–20 and accompanying text. Larry Solum similarly limits the value of arguments in public debate to their capacity to resolve political questions. *See* Solum, *supra* note 19, at 742 (discussing limits on public debate under actual conditions of finite time and imperfect reason). In particular, Solum posits that pub- R R R

likewise made a fair assumption that advocating violent overthrow of the government makes violent overthrow of the government at least marginally more likely.[228] The *Dennis* decision, however, required two additional assumptions. The first was idealistic: that a liberal democracy can sustain its highest principles while also suppressing whatever speech may increase the likelihood of violent overthrow of the government.[229] The second was practical: that Communist advocacy had no effect on public discourse other than increasing the likelihood of violent overthrow of the government.[230] The restrictive theorists on the normative question of religious argument indulge parallels of these same two assumptions.[231] In both contexts, the first assumption is normatively unattractive, and the second assumption cannot withstand analysis. Our commitment to open public debate should foreclose suppressing ideas whose consequences we fear. In any event, illiberal arguments offered in public political debate bring substantial benefits to our liberal democracy.

First, even if certain religiously grounded arguments existentially threaten liberal democracy, our laws and norms of public debate should welcome such arguments into public political debate. Neither the supporters of legal constraints on Communist advocacy nor the restrictive theorists on the normative question of religious argument have taken sufficient account of the normative problems that any sort of viewpoint-based constraint on public political debate create for democracy.[232] Free speech theory, and First Amendment doctrine, place great emphasis on those problems. With the exception of legal obscenity, long a doctrinal outlier in First Amendment law,[233] the

lic political debate loses nothing by adopting norms that restrict the range of rhetoric permissible in public political arguments, so long as public political arguments may permissibly state novel conclusions. *See* Lawrence B. Solum, *Novel Public Reasons*, 29 LOY. L.A. L. REV. 1459, 1478–81 (1996) (contesting Waldron's argument that Rawls's idea of public reason forecloses development of novel public reasons).

227 341 U.S. 494 (1951).

228 *See id.* at 550–51 (Frankfurter, J., concurring).

229 *See id.*

230 *See id.* at 514–15 (plurality opinion).

231 *See supra* note 218 and accompanying text.

232 I do not mean here to endorse, and in fact I reject, the Supreme Court's present view that legal restraints on religious expression necessarily constitute viewpoint-based discrimination under the Free Speech Clause. *See* Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 831–32 (1995). The restrictive position on the normative question of religious argument, however, manifestly addresses religious viewpoints, as distinct from mere religious content.

233 *See* Miller v. California, 413 U.S. 15, 24 (1973) (permitting states to punish "patently offensive" speech that violates "contemporary community standards").

Supreme Court has never excluded any category of adult speech from First Amendment protection because the ideas the speech expresses might succeed in influencing the audience's behavior.[234] Such limitation would—and in the case of obscenity does—contradict the idea that members of the political community should be free to evaluate the worthiness of ideas without regard to the political majority's disapproval. Our core commitment to freedom in public discourse should tighten, not slacken, when the speech in question poses a putative existential threat to liberal democracy itself. If we take that commitment seriously, then the strength of our resolve should grow with the vulnerability of the speech to popular disapproval, which grows with the presumed threat the speech presents. Moreover, a liberal democracy can make no more persuasive display of its commitment to freedom than to extend freedom even to that speech that threatens liberal democracy's existence. We honor our highest principles by embracing existential danger—by taking special care to ensure that First Amendment doctrine and the norms of public political debate, in their respective spheres, fully protect the speech that most strongly threatens our entrenched commitments, no matter how dearly held.[235]

Second, religiously grounded arguments—even those that urge justifications for coercive government action that violate our ideals of democratic pluralism—make positive contributions to the informative and participatory functions of public political debate.[236] Restrictive theorists on the normative question of religious argument, like advocates of suppressing Communist advocacy, take insufficient account of these contributions. Most obviously, permitting arguments for normatively unappealing positions facilitates ongoing critical evaluation of underlying justificatory norms and conventional policy preferences. Liberal democracy derives distinctive benefits from the political community's opportunity to consider the broadest possible range of political positions, including criticisms of liberal democracy itself. Public political debate can—and should—test our substantive commitments by entertaining even harsh and destructive criticisms of those commit-

234 The Court has treated certain expression by minors differently. *See* Morse v. Frederick, 551 U.S. 393, 410 (2007) (holding that "[t]he First Amendment does not require the school to tolerate . . . student expression that contributes to [the] dangers" of illegal drug use by promoting such activity).

235 *Cf.* Texas v. Johnson, 491 U.S. 397, 419–20 (1989) (describing normative benefits of extending First Amendment protection to flag burning).

236 On the importance of considering religious expression's instrumental value for democracy as a factor in analyzing legal constraints on religious speakers, see Magarian, *Colliding Interests*, *supra* note 12, at 262–63. R

ments. Such testing might take place through dispassionate discussion, without resort to arguments that attack liberal democratic norms. But limiting such an important evaluation to such an arid and abstract mode of debate would disserve the democratically crucial process of critically engaging with our political culture's ingrained normative precepts. In addition, public political arguments have substantial informative value beyond their persuasive force. Arguments can repel as surely as they can persuade. They can demonstrate problems with their own premises as grounds for policy outcomes. They can educate other members of the political community about their proponents' motives, mindsets, and values. They can stimulate expansion of the debate to encompass ideas and questions that their proponents may not have intended or even imagined. The opportunity to advance religiously grounded arguments also enhances the participatory value of public political debate by drawing in participants who may proceed to make other sorts of arguments. These many and varied benefits expose the limitations of restrictive theorists' narrow focus on the dangers of religious argument.[237]

Imposing a normative constraint on religious argument in public political debate would also replicate two important practical problems with *Dennis*. First, identifying categories of argument that warrant normative constraint presents difficulties of line-drawing and conceptual slippage. What is Communism or a totalitarian ideology? What is religion? How do we distinguish religious arguments that actually threaten liberal democracy from those that do not? Second, restricting passionately held ideas incentivizes insincerity. One of the great preoccupations of those who sought to restrict Communist advocacy was the well-founded fear that many Communists were hiding their true arguments behind liberal democratic rhetoric.[238] Suppressing overt Communist advocacy, however, simply encouraged Communists to masquerade as democrats. In the context of religious argument,

237 Rawls acknowledges in passing that the value of arguments offered in public political debate may transcend their ultimate persuasive force: "Citizens learn and profit from conflict and argument, and when their arguments follow public reason, they instruct and deepen society's public culture." RAWLS, *supra* note 9, at lvii. He does not explain, however, how or why only arguments framed in terms of public reason can bring the posited benefits. Elsewhere he suggests that participants in public debate may benefit from knowing about their political opponents' comprehensive commitments. *See* Rawls, *supra* note 11, at 784–86. Again, however, he accounts for this benefit only within the confines of public reason. R R

238 *See* Auerbach, *supra* note 172, at 183–84 (describing Congressional findings that warned against the U.S. Communist Party's propaganda techniques of feigning loyalty to the U.S. Constitution and behaving like an ordinary political party). R

the restrictive theorists' translation imperative[239] encourages the same sort of performance. Considerations of expressive autonomy require that religious believers have the choice whether to translate their religious arguments into secular terms; believers often choose to do so.[240] Norms of public political debate, however, should not encourage believers to disguise their true motives or their preferred grounds for argument. Both of these problems carry more dire consequences when they play out in law rather than norms; the restrictive theorists in no sense advocate McCarthyism.[241] If, however, we care about the informative and participatory benefits of public political debate, then legal censorship differs from normative constraint only by degrees. To whatever extent our political culture embraces normative limits on religious argument in public political debate, the quality of debate suffers.

Restrictive theorists might try to distinguish their position from the normative underpinnings of *Dennis* on two grounds. First, they might maintain that their allowances for religious arguments to supplement nonreligious arguments in public political debate would soften the impact of any normative constraint on religious argument.[242] At some point, however, restrictive theorists must choose between injury and irrelevance. If the restrictive position entails any meaningful normative constraint on religious and similarly comprehensive arguments, then it diminishes the content of public political debate. Relegating religion to a secondary justification for political positions would inevitably decrease the incidence of religious argument. Secondary usage would blunt religious argument's impact by making religious arguments less important as justifications for policy positions and by obscuring religious commitments in a broader rhetorical context. In order to avoid these effects, restrictive theorists would have to accommodate religious argument to an extent that negated the essence of their position. Second, restrictive theorists might insist that liberal democracy cannot help suppressing religiously grounded arguments, because situating religious argument

239 *See supra* notes 26–32 and accompanying text (discussing the translation imperative). R

240 *See, e.g.*, Jeffrey Stout, *Religious Reasons in Political Argument*, *in* RELIGION IN THE LIBERAL POLITY 157, 159 (Terence Cuneo ed., 2005) ("In a religiously plural society, it will often be rhetorically ineffective to argue from religious premises to political conclusions.").

241 *See supra* note 9 and accompanying text (discussing the restrictive position's limitation to normative rather than legal constraint). R

242 *See supra* note 19 and accompanying text (discussing restrictive theorists' allowances for supplementary religious arguments). R

within a framework of liberal testing and criticism necessarily undermines the transcendent claims of some religious beliefs.[243] This objection proceeds from a sound premise: liberal democracy cannot simply accede in religious (or Communist) truth claims and remain liberal democracy. But liberal democracy can give religious truth claims, operating on the inevitably inhospitable terrain of pluralistic public debate, the chance to transform liberal democracy into something else, or at least to alter the terms of the debate—if liberal democracy values its commitment to open debate at least as much as its commitment to self-preservation.

2. Lessons from the Stability-Dynamism Controversy

Even if we conclude that legitimate concerns about religious argument's existential threat to liberal democracy do not justify a normative constraint on religious argument, such a constraint might still prove desirable at the margin. The tension between political stability and dynamism requires an incremental choice. Liberal democracy certainly places a high value on political stability, because liberal democracy strives to facilitate political coexistence by people with dramatically different worldviews.[244] At the same time, liberal democracy maintains central commitments to political competition and the possibility of dynamic change, in sharp contrast to the calcified stability of totalitarian and authoritarian political cultures. The free speech theorists who have considered the tension between stability and dynamism recognize that both values matter for an effective system of public political debate and that choosing between them requires constant mediation and adjustment. Walzer summarizes this insight: "Both the conflict and the coexistence are permanent conditions, which need to be protected from the temptations of eternity."[245] Thus, the stability-dynamism controversy can yield no easy or obvious basis for resolving the normative question of religious argument. Considering how religious argument affects the balance between political stability and politi-

243 *See* Walzer, *supra* note 71, at 624 ("[W]hen we require [religious] believers to adhere to the rules of the political arena, we are requiring them to speak and act in unfamiliar ways."); Fish, *supra* note 76, at 21 ("If you persuade liberalism that its dismissive marginalizing of religious discourse is a violation of its own chief principle, . . . it will still be *liberalism's* table that you are sitting at . . . ."). R R

244 "In reaction to the apparent failure of mankind to identify the one truly meaningful thing around which life might be organized, liberalism sets out to identify the set of truly *non*meaningful things—things that no one will want to die or kill for—around which life might be organized." Stanley Fish, *Stanley Fish Replies to Richard John Neuhaus*, FIRST THINGS, Feb. 1996, at 35–38.

245 Walzer, *supra* note 71, at 638. R

cal dynamism can, however, bring into focus the most important considerations for determining whether or not norms of public political debate should welcome religious argument.

The restrictive theorists on the question of religious argument generally ignore the political interest in dynamism because they insist upon common grounds for public political debate. The dangers that restrictive theorists identify with religious argument reflect concerns about stability. Religious arguments that advance illegitimate justifications for the government's use of coercive power not only offend substantive conceptions of justice, they also destabilize liberal democracy by causing resentment among nonbelievers, and they foster intolerance, acrimony, and polarization.[246] Removing these divisive religious arguments from public political debate would have the desirable effect of encouraging consensus. The restrictive theorists pay little attention to the cost that normative constraints on religious argument would exact in diminished political dynamism. They may assume that the sorts of religious argument to which they object add so little to the substance of public political debate that constraining those arguments would not really undermine dynamism. In addition, or in the alternative, restrictive theorists may conceive of political dynamism as a dominant, sometimes unpleasant fact of life in a liberal democracy, and therefore they may see little need to worry about robbing dynamism to pay stability. In any event, while the restrictive theorists make valid points about the value and vulnerability of political stability, they make no case for preferring stability over dynamism in the normative conflict over religious argument. Given the strong reasons that free speech theorists and others have offered for viewing dynamism as an important political value, coequal with stability, the restrictive theory's one-sided exhortation to maximize stability rings hollow.

The permissive theory, in contrast, inclines toward a preference for political dynamism, because religious arguments enhance political diversity. Associating religious argument with political dynamism, however, carries some irony, given that religious faith—whatever its metaphysical validity—appears psychologically grounded in a desire for stability.[247] This irony, combined with the permissive theorists' primary emphasis on religious believers' political autonomy,[248] prevents the permissive theory from generating a consistent or coherent case for preferring dynamism to stability. Many permissive theorists submerge the stability risks of their position by unconvincingly deny-

246 *See supra* notes 41–48 and accompanying text. R

247 *See supra* notes 88–89 and accompanying text. R

248 *See supra* notes 65–68 and accompanying text. R

ing that religious argument poses any threat to liberal democracy.[249] Those permissive theorists who argue openly for dynamism make a muddled and ultimately defective case. On one hand, they express hope that religious truth claims will destabilize a debased secular political order.[250] On the other hand, their argument that public political debate must admit religious argument or else risk a rebellion of believers[251] buys into the stability bias of "social safety valve" arguments.[252] Both of these inconsistent tendencies risk trivializing the value of religious argument for public political debate. Thus, to the extent permissive theorists manifest a preference for dynamism over stability, they fare no better than the restrictive theorists in justifying their preference.

In my view, several practical considerations support a marginal preference for dynamism over stability in resolving the normative question of religious argument. First, notwithstanding the restrictive theory's translation imperative, choosing stability in this setting entails not merely muting the volume or adjusting the form of a set of substantive arguments but imposing categorical constraints on a set of arguments. Even in considering normative rather than legal restrictions, our best insights about the affirmative value of expressive freedom should encourage us to favor inclusion of ideas over exclusion. Second, any marginal decision between two important democratic values should, other things being equal, push back against whichever value has greater momentum. As I have argued above, our system's election laws tend to prize political stability at the expense of political dynamism.[253] Public officials have strong incentives to use their power to entrench the political structures that brought them to power. A normative preference for dynamism in the religious argument context helps to counter the legal prevalence of stability values. Third, and similarly, the particular challenges that liberal democracy poses for religiously grounded political arguments warrant a marginal counterweight. As discussed above, essential attributes of any liberal democracy—open debate, majority rule, some conception of a public-private distinction—contradict or at least marginalize religious arguments.[254] At the same time, the communitarian tendencies and/or desire to avoid political entanglements that characterize many relig-

249 *See supra* notes 49–64 and accompanying text. R

250 *See supra* notes 118–26 and accompanying text. R

251 *See supra* note 67 and accompanying text. R

252 *See supra* notes 185–87 and accompanying text (discussing social safety valve arguments). R

253 *See supra* notes 204–14 and accompanying text. R

254 *See supra* note 243 and accompanying text. R

ious communities undercut the destabilizing force of religious argument in the aggregate.[255]

Beyond such practical considerations, the broad normative case for choosing an added increment of dynamism strikes me as more compelling, in the circumstances of the United States in 2011, than the case for choosing an added increment of stability. A healthy republican democracy depends on the depth of imagination that enriches the substance of public political debate, the breadth of participation that animates and energizes that debate, and the strength of critical engagement that ultimately makes the debate robust and productive. Political dynamism encourages each of these three qualities, and in my view our present political culture suffers from deficits in all of them. We have achieved a remarkable degree of social and political cohesion. Our political divisions pose no evident threat to our safety or even our prosperity, and for all our blue-red posturing, a relatively narrow brand of pragmatic centrism dominates our political debate. At the same time, what few novel approaches we develop for persistent policy conundrums rarely gain political currency; voter apathy and cynicism undermine the legitimacy of our political institutions; and we show a remarkable incapacity to speak and listen across ideological, demographic, and geographic divides. These failings suggest that one need not share some permissive theorists' pluralist sympathies, and their attendant disdain for republican politics,[256] in order to reject the restrictive theorists' preference for stability over dynamism. Of course, these broad, subjective views require a more thorough defense than this Article can offer. But resolving a normative dispute as deeply rooted as the question of religious argument requires some measure of normative analysis, and whether or not my normative analysis is right, it attends to considerations that should inform a sound resolution.

B. Welcoming Criticism of Religion into Public Political Debate

The normative lessons from the Communist speech and stability-dynamism controversies, which counsel openness to religious argument in public political debate, have a second, parallel consequence: Our liberal democratic norms should admit freely into public political debate substantive criticisms of religious arguments and underlying religious beliefs. Unlike religious argument, criticism of religious doctrine generally does face substantial disapproval under prevailing norms, not only from religious believers offended by attacks on their

255 *See supra* note 237 and accompanying text.

256 *See supra* notes 219–24 and accompanying text. R

convictions but from liberals committed to religious tolerance. Most of us do not object as a procedural matter when, for example, religiously motivated opponents of legalized abortion condemn the vices of secularism to support their position, but we wince if supporters of abortion rights take the battle to religious opponents' theological precepts. This discontinuity reflects not any special solicitude for religion, but rather a different aspect of the restrictive theorists' disdain for religious argument: a desire to avoid the destabilizing effects of religious conflict.[257] Just as the case for protecting Communist advocacy points the way past our fears of religious argument's putative existential threat to liberal democracy,[258] and just as the incremental value of political dynamism over political stability validates a role for religious argument's potentially destabilizing effects on liberal democracy,[259] those considerations warrant the same sort of normative allowance in public political debate for substantive criticism of religion. From the standpoint of liberal public discourse, religious grounds for political argument do not differ qualitatively from any other contested grounds, and all such grounds should be open to civil but vigorous criticism.

Our political culture's discomfort with criticism of religion grows out of the same liberal democratic verities on which the restrictive theorists place so much weight.[260] Liberal notions of religious toleration sometimes entail a bar on substantive criticism of religion as a corollary or even a quid pro quo for a normative constraint on religious argument in political debate.[261] At the same time, permissive theorists frequently deride criticisms of religion as reflecting malignant societal hostility toward religion.[262] For example, Frederick Gedicks and Roger Hendrix assert that "[c]ontemporary religious television characters are usually either comedic caricatures or corrupted

257 See *supra* notes 41–48 and accompanying text. R

258 *See supra* notes 172–82 and accompanying text.

259 *See supra* notes 234–40 and accompanying text.

260 *See* Schwarzschild, *supra* note 53, at 913 n.18 (suggesting that "'[p]olitical correctness' in American academic circles" derives from the same tendency in liberalism that would exclude religious arguments from public political debate); Walzer, *supra* note 71, at 628–29 (suggesting that the tendency to restrict religious political arguments represents "a kind of antiseptic liberalism" that fears both advocacy and criticism of religious positions). R R

261 *See* Rawls, *supra* note 11, at 782–83 (explaining the essential role of religious toleration in a "reasonable democratic society"); Sullivan, *supra* note 45, at 197 (positing a secular civic order as "the price of ending the war of all sects against all"). R R

262 *But see* Stout, *supra* note 240, at 166 (advocating the normative propriety and practical workability in democratic political debate of "immanent criticism" of religious grounds for political argument). R

hypocrites"[263] and that "television programs regularly portray (and often glorify) . . . vulgar and unflattering references to religion and religious deities . . . ."[264] Similarly, Stephen Carter laments a state of affairs in which "scholars are not expected to cite any authority when, in their academic work, they refer to the religiously devout as narrow-minded, irrational, and poorly educated."[265] None of these accusers, however, presents a single instance or authority to support his sweeping indictments. Such unpersuasive assertions of overt hostility elide a more obvious but amorphous problem for religion in the public life of the United States: withering neglect. Our political culture pays little attention to the substance of religiously grounded arguments.[266] That disregard—including disregard of critical disagreements—seriously diminishes the content of our public political debate.

Gedicks has recently argued with great force against indulging substantive criticism of religious doctrine in public political debate, on the specific ground that such indulgence would harm minority churches and believers. He urges essentially the opposite of the norms that I advocate here: a purging of religiously based advocacy from public political discourse and a concomitant exclusion of substantive religious criticism.[267] Given Gedicks's past advocacy of a larger role for religion in political discourse,[268] his current prescription is both potent and poignant. As a Mormon, he appears shaken by two distinct strains that the 2008 U.S. elections imposed on the LDS Church: conservative attacks on the LDS beliefs of unsuccessful Republican presidential candidate Mitt Romney; and liberal backlash over the LDS Church's pivotal role in passing Proposition 8, Califor-

263 Gedicks & Hendrix, *supra* note 51, at 1581. R

264 *Id.* at 1581 n.13; *see also* Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 695 (1992) (positing a liberal "hostility to religion" that "entails epistemological and political preferences for secularism that have no ideologically neutral justification").

265 CARTER, *supra* note 49, at 187. R

266 This diagnosis tracks Ed Baker's account of "elitist" democracy, which "accepts religious freedom but largely ignores the religious world view." BAKER, *supra* note 196, at 137; *see also* NEUHAUS, *supra* note 49, at 99 (bemoaning "the widespread exclusion of religiously grounded values and beliefs" from the mass media); Fish, *supra* note 175, at 2269 ("There is a very fine line, and sometimes no line at all, between removing religion from the public battlefield and retiring it to the sidelines . . . ."); Gedicks & Hendrix, *supra* note 51, at 1580–81 (complaining that public education and popular culture largely ignore religion). R R R

267 *See* Gedicks, *supra* note 91, at 369–71 (advocating removal from political debate of religious truth claims and criticisms of such claims). R

268 *See, e.g.*, Gedicks, *supra* note 264, at 674, 693–96 (arguing that "American public life is hostile to religion" and that the best defense of this hostility cannot succeed). R

nia's gay marriage ban, a backlash that Gedicks suggests the Church at least partially brought on itself.[269] For Gedicks, both of these conflicts turned on claims about the truth or falsity of LDS theology.[270] He argues that religious truth claims have no useful place in contemporary public political debate, because our postmodern condition—people's increasing resistance to claims that any worldview is provably true or false[271]—renders public arguments about religious truth claims impolitic at best[272] and destructive at worst.[273] Public arguments over religious truth can become destructive by stoking religious acrimony, and Gedicks calls particular attention to the hazard such acrimony poses to minority religions such as the LDS Church.[274] His concerns lead him to an apparently fulsome embrace of Rawls's theory of public reason.[275]

Gedicks, in my view, overstates the ubiquity and understates the complexity of postmodern doubts about truth claims, religious or otherwise. People still make truth claims all the time, even as they more seriously entertain postmodern doubts about the possibility of establishing truth. Accordingly, I find Gedicks's argument about the futility of religious truth arguments unpersuasive. He is surely correct, however, to prioritize minority religions' well-being in our political culture and to warn that the sort of norm this Article proposes for public political debate—a norm that equally welcomes religious advo-

269 *See* Gedicks, *supra* note 91, at 360–70 (discussing the Romney campaign's attempts to allay conservative concerns about his LDS beliefs and the LDS Church's role in the Proposition 8 campaign). *See generally supra* note 3 and accompanying text (noting Governor Romney's religious controversy); *supra* notes 91–95 and accompanying text (discussing the LDS Church and Proposition 8). R R R

270 *See* Gedicks, *supra* note 91, at 360, 369.

271 *See id.* at 346–52 (describing elements of contemporary spirituality that resist religious truth claims).

272 *See id.* at 353 (arguing that reliance on religious truth claims in public political debate implies "discourtesy").

273 *See id.* at 354 ("Strong thought also enables violent action.").

274 *See id.* at 357–58 (contrasting Mormons' and Jews' approaches to the political vulnerability of religious minority status). Gedicks portrays religious truth claims as antithetical to a condition of religious pluralism, which he calls "[f]or religious minorities . . . the guarantee of space for religious liberty." *Id.* at 370. Kenneth Karst has expressed the same sort of concern. *See* Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 504 (1992) (maintaining that "religious minorities" bear disproportionate costs of "the stimulation of a politics focused on religion").

275 *See* Gedicks, *supra* note 91, at 358–60 (favorably assessing public reason limitations on public political debate); *see also id.* at 355 (arguing that democracy requires of religious believers "a certain humility about enacting [religious belief] into law and forcibly imposing it on those who do not share it"). R

cacy and religious criticism—poses a disproportionate threat to minority religions. Too often in our history, religious ignorance and antipathy have metastasized into discrimination or violence against various religious communities and believers, including Jews, Catholics, Mormons, and—most emphatically in recent years—Muslims. We must take this danger especially seriously in an era when the Supreme Court has unapologetically thrown minority religions under the constitutional bus in its lamentable zeal to relegate religious accommodation claims to majoritarian politics.[276] Nonetheless, protecting vulnerable groups by suppressing debate, even at a normative rather than legal level, is not what our society does at its best, certainly not before we exhaust alternatives. The First Amendment axiom that we should address bad speech with better speech reflects a deep normative commitment to critical inquiry and collective intellectual engagement.[277] Do minority believers benefit if public debate ignores the religious commitments, and antipathies, that so strongly influence many political stands? Does a cone of silence combat ignorance and intolerance more effectively than a vigorous discourse that emboldens people of good will to call out their political allies and opponents alike for misinformed or bad faith attacks on people's conscientious beliefs and practices?

To support his warning that arguments grounded in religious truth claims can lead to persecution of minority believers, Gedicks quotes Justice Holmes's statement from *Abrams v. United States,*[278] that "[i]f you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition."[279] William Marshall, who tends to see the world very differently than Gedicks does, employs exactly the same quotation to support his own argument for a normative constraint on religious argument in public political debate.[280] These references betray a remarkable irony. Holmes's statement describes a

276 *See* Emp't Div. v. Smith, 494 U.S. 872, 890 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997); *see also supra* note 184 and accompanying text (noting the *Smith* Court's dismissive attitude toward minority religions). R

277 *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled by* Brandenberg v. Ohio, 395 U.S. 444 (1969).

278 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting); *see supra* notes 132–135 and accompanying text. R

279 *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (quoted in Gedicks, *supra* note 91, at 354 & n.78). R

280 *See* Marshall, *supra* note 41, at 862 n.94. R

justification for excluding speech from public debate. He then proceeds to demolish that justification:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . . . That at any rate is the theory of our Constitution.[281]

Holmes does not argue, as Gedicks and Marshall imply, that the potency of deeply held beliefs should lead us to exclude such beliefs as grounds of public political argument. To the contrary, he explains that the Constitution compels our public discourse to accommodate irresolvable conflicts among truth claims. On Holmes's account, not even our most passionate personal convictions should overcome our societal commitment to air our disagreements openly.

A norm that welcomed substantive religious criticism into public political debate could hedge its bets in either of two ways, both of which would diminish the risk of religious conflict while also diminishing the benefits we derive from open public debate. One approach, which Gedicks suggests, would entail ingraining in the normative framework a triggering mechanism that would foreclose substantive criticism of religion until and unless a religious believer or community first willfully introduced religious convictions into public political debate.[282] Such an understanding would at least allow minority religions to choose between political assertiveness and the hazards of substantive attacks. Ordinary norms of fairness often will encourage this sort of constraint; one who attacks unstated religious beliefs should face a substantial burden of justification. Two important considerations, however, counsel against a triggering mechanism. First, such a mechanism would encourage adherents of minority faiths to protect themselves by foregoing a mode of argument available to others, a normative heckler's veto. As I have argued above, our norms of public political debate must permit such self-restraint, but they should not incentivize it.[283] Second, a religious believer's strategic decision to sublimate her religious beliefs in public political debate should not disempower good-faith opponents from attempting to show that an

281 *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

282 *See* Gedicks, *supra* note 91, at 369 ("[A]n important qualification to the conclusion that attacks on the truth-claims of candidate religions are out of place in contemporary politics . . . must be that such religions must not themselves be intervening in politics on the basis of their truth-claims."). R

283 *See supra* notes 238–40 and accompanying text. R

arguably deficient theology underlies the substance, or fuels the momentum, of her nominally nonreligious argument.

A second normative strategy for protecting minority religions and believers from the worst risks of abuse in public political debate would be to ingrain a principle that, when a particular religious community faced especially harsh societal prejudice, political advocates—who presumably would have little strategic need to criticize that religion in any event—should abstain from doing so as an ethical matter. Depending on our normative preferences, this ethical restraint could apply generally and permanently to all minority religions, or it could apply only when and where a given religious community faced unusual societal hostility—perhaps to Muslims but not Catholics in 2011, or to Muslims in 2011 but not (we can hope) in 2015. This sort of protective norm has a rough legal parallel in the Supreme Court's exemption of especially unpopular political groups from financial disclosure requirements that otherwise do not violate the First Amendment.[284] Immunizing vulnerable groups from public criticism, however, would cut uncomfortably against free speech norms, in the same way that allowing regulation of group libel or misogynist pornography would depart from ordinary free speech law.[285] At the same time, religion's substantive content makes expressions of religious antipathy somewhat more likely than expressions of racial or gender antipathy to carry some political value.

Whatever the merits and costs of these protective strategies, we should far prefer debating them as components of a dynamic, open set of norms for public political debate to pretending that we can productively foreclose advocacy and criticism of religious ideas. We can reasonably hope that our liberal democracy has matured substantially beyond earlier periods of religious discrimination and hostility. When anyone launches a dishonest, needlessly inflammatory, or ad hominem attack on any religious argument or underlying religious doctrine, everyone who cares about the health of our political culture should respond with swift and sharp condemnation. That sort of vocal response, rather than any effort to avoid difficult issues that genuinely divide us, offers the greatest promise for the robust public political debate we need.

284 *See* Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 101–02 (1982).

285 *See* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324–25 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) (striking down an antipornography ordinance that rested on pornography's denigration of women); Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir. 1978) (suggesting the invalidity of the decision upholding a ban on group libel in Beauharnais v. Illinois, 343 U.S. 250 (1952)).

CONCLUSION

Liberal political theorists who advocate normative constraints on religious argument in public political debate get at least two important matters right. First, those restrictive theorists correctly emphasize the critical importance of informative, inclusive political discourse in the functioning of a liberal democracy. Second, they correctly warn that injecting some varieties of religious argument into public political debate threatens the integrity of that debate and the stability of liberal democracy. On these two points, most of the permissive theorists who oppose normative constraints on religious argument seriously err. Their rhetorical emphasis on religious believers' autonomy precludes any fulsome account of religious argument's effects on public discourse, and their insistence that religious argument poses no threat to liberal democracy fails to take account of how at least two forms of religious argument—arguments that the advocate believes to reflect revealed truth and arguments based on fealty to religious authorities—clash with, and threaten to destabilize, the robust exchange of ideas that public political debate in a liberal democracy requires.

The permissive theorists, however, reach the correct bottom line: Norms of public political debate, at least in the contemporary United States, should impose no constraints on religiously grounded arguments. What most theorists on both sides of the argument tend to overlook is the critical importance in public political debate of arguments that challenge, and even threaten, the terms of liberal democracy itself. Examination of how our legal system has dealt with the constitutional status of Communist advocacy demonstrates that constraining even speech that threatens the very existence of our political system diminishes public political debate, while welcoming that speech increases the information available to the political community and increases the challenge to which the debate subjects competing ideas. Consideration of the constant tension that liberal democracies must navigate between the interests of political stability and political dynamism allows a nuanced assessment of religious argument's consequences for public political debate that ultimately, in my view, supports admitting religious argument into public political debate in order to advance dynamism. The same interests in deepening and strengthening public political debate counsel an important, novel corollary: our norms of public political debate should welcome substantive criticism of religion as readily as they welcome religiously grounded argument.

Arguments about religion undoubtedly make public political debate more contentious, fractious, and difficult. But religious argu-

ment threatens to destabilize the debate in ways that should ultimately strengthen our liberal democracy. Liberal political norms should neither resist the contributions of religious argument nor shield substantive religious belief from challenge and criticism. Both sorts of constraint reflect an inappropriate wariness about precisely the sort of open, uninhibited discourse that our highest ideals demand. Many people's political convictions about, for example, the issue of gay marriage draw upon their religious or conscientious commitments, or on their doubts about the religious or conscientious commitments of others. If we consign those influences to the margins of political discourse, our debate will be less engaged, less informative, and ultimately less likely to generate the fresh insights needed to move us toward resolving our differences. Our political norms, no less than our laws, serve us best by embracing existential danger and encouraging greater political dynamism. Whatever material role religion occupies in our public affairs, public political debate should take full advantage of both religiously grounded arguments and substantive criticisms of religion.