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Appeals to Reason: Negotiating Rhetorical Responsibility and Dialectical Constraints in Church-State Separation Discourse

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Appeals to Reason: Negotiating Rhetorical Responsibility and Dialectical Constraints in Church-State Separation Discourse

by

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Dissertation

Presented to the Faculty of the Graduate School of

The University of Texas at Austin

in Partial Fulfillment

of the Requirements

for the Degree of

Doctor of Philosophy

The University of Texas at Austin

May 2014

Appeals to Reason: Negotiating Rhetorical Responsibility and Dialectical Constraints in Church-State Separation Discourse

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The University of Texas at Austin, 2014

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This dissertation explores how argumentation theory can supplement models of responsible persuasion in rhetoric and writing studies. In particular, it demonstrates how reasoning as envisioned in the pragma-dialectical approach of argumentation can provide an alternative to exclusionary, unethical operations of reason. Despite longstanding work with models of argument from Aristotle to Stephen Toulmin, rhetoric and writing has paid little attention to the potential uses of dialectical argumentation theory. Such theory deserves greater consideration given its ability to meet the ethical demands voiced by rhetorical critiques of traditional ways of arguing. Critiques of reason demonstrate how the abstractions necessary for logical certainty exist in tension with the inherent ambiguity of human arguments. In attempting to strip away that ambiguity, some discussants unfairly exclude relevant details from others and may exclude entire populations who should be included in a fair deliberation. Goals of understanding and inclusion unite the variety of calls for new ways of arguing made in rhetoric and writing under titles of Rogerian, non-agonistic, listening, and invitational rhetorics. Nevertheless, as Chaïm Perelman and Lucie Olbrechts-Tyteca describe, even as our arguments involve irresolvable ambiguities, they must also function as stable and coherent viewpoints such that our interlocutors can hold us accountable to agreement or disagreement. In this way,

we responsibly argue questions of ethics, politics and law. Though no final resolution of ambiguity is possible in such questions, we can reason together for a better understanding of each other's positions and craft pragmatic policies to deal with our disagreements. In order to explore the disciplinary questions about the relationship between rhetoric and argumentation, the dissertation examines a series of case studies drawn from judicial disputes over church-state separation in the United States. In examining problematic rhetoric of these disputes, the dissertation builds an understanding of responsible reason informed by dialectical argumentation and demonstrates its utility for both critical and pedagogical applications.

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Introduction: The Responsible Ends of Reasonable Persuasion

This dissertation examines the ways in which we understand troubled acts of persuasion, and it considers the ways in which our understandings are themselves troubled. To help keep matters clear given these two levels of analysis, I will start with an illustrative narrative. The controversy recounted here represents common features of church-state separation discourse. It involves people engaged in actions that can be seen to push the boundaries of legal, ethical, and rhetorical propriety in the various ways those boundaries are drawn. Analysis of controversial arguments is difficult because the boundaries between these three standards are not always clear. What is ethical may not be legal. What is persuasive may not be ethical. Rhetoric has long struggled with criticism about irresponsible uses of persuasion. I do not intend to offer any simple defense of rhetoric, because no such defense is possible. The abuses of rhetoric are many and serious, and they are not remedied by simply invoking an aspiration of good people speaking well. Nevertheless, the damage done by rhetoric wrongly used demands our attention, as the case at hand makes clear.

Samantha Dobrich attended her high school graduation in the spring of 2004 in Georgetown, Delaware. She was the only Jewish student in her class, and she planned to attend the Jewish Theological Seminary and Columbia University. Pastor Jerry Fike of Mt. Olivet Church of the Brethren gave a prayer before the graduation ceremony. As Samantha, her parents, and younger brother watched from the audience, Fike said:

> Let us bow for the invocation. Our heavenly Father we thank You for a bright and beautiful day tonight, in which we can celebrate the accomplishments of these students and those who have assisted them over the years.... We pray that You guide them as they use their gifts and abilities and discover them during the coming days.... I also pray for one specific student, that You be with her and

> guide her in the path that You have for her. And we ask all these things in Jesus' name, and for His sake. Amen. ("Plaintiff's First" 7-8)

It is not difficult to see how Fike's prayer was less than persuasive, even offensive, for Samantha and her family, thus the prayer can be seen as a rhetorical failure (at least from the Dobrichs' perspective). Fike's prayer and the school's role in inviting him also raise questions of legal transgressions, and I will consider the constitutional background of church-state separation in the first chapter. For now I am interested in the rhetorical problems that attend Fike's prayer.

Fike does not address Samantha by name, but her role as the intended audience can be inferred (as the "one specific student" who happens to not be Christian).[1] Whatever the Dobrichs' expectations of ceremonial language as part of a high school graduation, Fike's targeted proselytizing was not among them. At a school board meeting after the graduation, Mona Dobrich told the board, "I looked down to see my daughter searching for my face in the crowd. It was in her eyes and I saw it. The pain that comes from being made to feel like and outsider. Why on this day, on this occasion, with all she had worked for?" ("Plaintiff's" 19). To say that Fike's prayer failed to gain the Dobrichs' adherence understates the negative emotional impact of his speech. The rhetorical failure is clear, yet the argument is not an unequivocal failure for all audiences involved in the event. From Fike's perspective, he used an opportunity to pursue an action to which he and many in the audience were deeply committed and an action that he believed to be of the highest good: spreading the gospel and attempting to convert a non-Christian to Christianity. Fike achieved his purpose of proselytizing, even if he does not convert

[1]In its Answer to the Complaint, the District denies that it formally invited Fike to give a prayer, but it admits that the prayer did occur as described in the Complaint. The Answer does not explain how, if uninvited, Fike found himself addressing the audience. See "Answer to Amended Complaint" *Dobrich vs. Indian River* (3).

Samantha. He also reinforced the deeply held religious commitments of some in the audience.

The ethical questions yield similarly ambiguous interpretations for those involved. From Fike's perspective, he merely took advantage of an opportunity afforded him by the school district to pursue an ethical good. As he later told a reporter, "My loyalty is to Jesus Christ, foremost, even if that takes me to prison or to death" (Parks 61). From the Dobrichs' perspective, however, Fike and the school authorities that allowed his participation at the ceremony were engaged in an abuse of the public trust. Under their ethical domain, the resources of the government school (the building, the dais, the sound system, and the captive audience provided by a school function) ought not to be misused to promote any one religious view let alone bring community pressure to bear on a single student. Distinguishing the ethical arguments from the rhetorical is difficult and not always easy, but, as I hope to show, our ability to define responsible persuasion would benefit from engaging these distinctions.

The graduation prayer was the final straw for the Dobrichs who had long perceived a pattern of religious favoritism in their public schools (other events included preferential treatment for students in a Bible study, distribution of Bibles in the schools, and teacher-led prayer at athletic events). The Dorbichs and another family choosing to remain anonymous filed suit against the district. The suit was eventually settled out of court for an undisclosed sum and a thorough revision of the school's policies on religion.[2] During the dispute, the arguments aired in the community became heated as they often do when touching on emotion-laden issues. The Dobrich and Doe families objected to what

[2]The settlement covered only practices within the schools themselves. The anonymous family continued pursuing a case against sectarian Christian prayers offered at the start of school board meetings. While the District Court ruled against the Doe family, the Third Circuit ruled on appeal in August 2011 that the prayers were unconstitutional. See *Doe v. Indian River School District* 685 F.Supp.2d 524 (2010).

they saw as unconstitutional uses of religious language on the part of the government. In so doing, they were subjected to uncivil condemnation from their fellow citizens. The debate was not a dispassionate consideration of proposition and counter-proposition. The debate was not even confined to a narrow set of passionately debated questions. Rather, the discussants' viewpoints ranged widely, casting opposing views as threats to community values.

I want to briefly remark here on some features of church-state separation discourse that may give pause to audiences unfamiliar with the issues. The flagrance with which Fike abuses the public trust and the enmity with which people argue church-state matters may seem unusual, but both are common in church-state cases. Some senses of decorum would not abide using a captive audience at a high school graduation to promote anything other than the commemoration of the graduating students' hard work, but Fike has no such qualms. Those who speak out against unconstitutional actions often find themselves the target of hostility that seems far in excess of what their objections might merit (examples from the Dobrich case will be discussed below). Church-state cases also lend themselves to oversimplification of the issues under debate, reducing the dispute to binary pro/con positions (the good, faithful Christians and the bad, anti-Christian Dobrichs, or, from an opposing view, the good, constitution-supporting Dobrichs, and the bad, anti-liberty school officials). Binary thinking, vituperative language, and indecorous behavior emerge, of course, in other social controversies.

The volatility of these arguments, regardless of topic, poses a challenge not only for analysis but also for writing pedagogies that encourage civic engagement. In the conclusion of this dissertation I will discuss applications for both the classroom and for bridging the classroom with the wider community. The difficulties inherent in controversial discourse underscore Linda Flower's advice that civic engagement should

begin with inquiry and pursue understanding through communication (4). Yet, irresponsible discourse provides a formidable obstacle to cultivating inquiry and understanding. One of my goals is to increase understanding of the problematic rhetorical phenomena that prevent such cultivation, so that discussants might consciously acknowledge irresponsible rhetorical practices without succumbing to those practices themselves.

The antagonistic rhetoric used in social controversies poses a serious concern for those who wish to encourage productive persuasion. Demonization and polarizing language must be addressed in any consideration of rhetorical propriety, and I quote an example below, but they do not exhaust the range of problematic argumentation. [3] Of equal concern, though less widely considered in scholarship, is a fundamental confusion of the questions under debate. The conflicting perspectives in the Dobrich case exemplify confusion in church-state discourse. The different parties feel that deeply held values are under attack, but they do not feel that the same values are under attack. What the Dobrichs see as standing up for their civil liberties against the abuse of government, Reverend Fike and others see as an attack against their religious liberty. Neither considers the other's view. They don't just disagree—they don't acknowledge what the other says or explain why the other is wrong. This breakdown in the process of argumentation between participants, and its common recurrence in social controversies, suggests that rhetoric and writing studies would benefit from greater attention to the interactive dimension in the process of argumentation.

[3]The issue in the Dobrich case is complicated by the presence of anti-Semitism, though a pattern of demonization in church-state cases is common, as objectors are cast as anti-Christian. It just so happens in this case the supposedly anti-Christian Dobrichs can be described with prejudiced anti-Semitic tropes. The Doe family's religion is not disclosed in the suit, but they also speak of facing backlash from the community as well.

It may seem contradictory to talk about interaction in argumentation as under-discussed in a field that has long incorporated process models of composition and where textbooks foregrounding argument rhetoric abound. Richard Fulkerson, however, notes that while argument often occupies a central focus of many writing textbooks, far fewer works exist exploring argumentation theory aimed at an audience of instructor-scholars. In his assessment of argument-focused composition theories, Fulkerson cites two scholarly collections: Barbara Emmel, Paula Resch and Deborah Tenney's 1996 *Argument Revisited; Argument Redefined* and Timothy Barnett's 2002 *Teaching Argument in the Composition Course*. Both of these textbooks discuss classical rhetorical argument, Perelman, Toulmin, Rogers and critiques thereof but neither book includes chapters on dialectical argumentation theory. Emmel, Resch and Tenney do cite prominent argumentation theorist Frans H. van Eemeren to explain that "what counts as rational assessment" is an important question (xii) and Barnett includes citations to dialectical theorists in a bibliography of general argumentation theory, but neither book offers a detailed explanation of dialectical approaches. This absence bears repeating. Despite critiques of liberal reason's potential for exclusion and repeated efforts to locate ways of arguing that redress reason's limits be it in listening, invitational or other non-agonistic models, rhetoric and writing scholars have not paid much attention to the inclusive potential of dialectical argumentation theory.

As Brian Jackson and Jon Wallin note, rhetoric and writing avoids pedagogies that attend to the interactive, dialectical dimensions of argumentation—what they call the "'back-and-forthness' of rhetoric" wherein interlocutors build off of each other's arguments (W374). They explain that students may craft their arguments to appeal to a particular audience, but this adaptation to audience is usually a one step process. Even though drafts may undergo multiple revisions, with students responding to feedback from

peers and instructors, interaction between the student's argument and counter positions does not attain the depth of interaction available in other contexts, such as in the online discussion thread Jackson and Wallin investigate. Jackson and Wallin comment on the dearth of interest in dialectical argumentation among rhetoric and writing scholars, noting that argumentation theory has found greater interest among rhetoricians working in the communication studies tradition. Within rhetoric and writing Jackson and Wallin note Richard Fulkerson and Patricia Roberts-Miller for their concern that the field has under-considered argumentation. I will say more about Fulkerson's position on argumentation below and in Chapter Three's discussion of argument pedagogy. Roberts-Miller observes that dialectical argumentation in particular, what she describes as "reciprocally critical argumentation," might augment more common approaches to teaching argument in rhetoric and writing (227). The minimal attention paid to dialectical, interactive models of argumentation is puzzling given longstanding calls for developing models of argument in rhetoric and writing that contrast exclusionary agonism. These calls include Krista Ratcliffe's listening rhetoric, Barry Kroll's exploration of non-adversarial argumentation, Sonja Foss and Cindy Griffin's invitational rhetoric, and Deborah Tannen's call for non-agonistic argument. As Dennis Lynch, Diana George, and Marilyn Cooper explain, emphasizing the dialogic dimension of argumentation does not necessarily mean ignoring disagreement. They suggest that no matter what efforts an instructor undertakes to encourage perception of differences, students will inevitably resort to some amount of oversimplification and binary thinking. However, Lynch, George, and Cooper also argue that students can work through initial attitudes of conflict and hostility, using conflict as motivation to pursue more detailed understanding.

Various methods exist for encouraging a responsible persuasion that acknowledges nuance. In addition to the approaches advocated by the authors above,

writing textbooks turn to Rogerian argument or Peter Elbow's believing game to help students think about other perspectives. All of these methods aim to develop a receptivity to other positions, operating from the principle shared by Flower that before making arguments we should accurately perceive other positions. Too often attempts to engage other positions fail as discussants pursue caricatures of each other. Argumentation theory provides an analytical framework for mapping the interactive influences of different positions as they come together in the process of argumentation, providing a potentially useful heuristic for diagnosing failures of argumentation and generating productive argumentation in the writing classroom. Procedural models of argumentation identify breakdowns in interaction as they happen, in contrast to the structural models that focus on form and that often appear in rhetoric and writing, such as the syllogism or Stephen Toulmin's model as I detail in Chapter Three.

The Toulmin model, first described in *The Uses of Argument*, has found wide application in writing textbooks and classrooms. While it remains popular, it has also been criticized though perhaps undeservedly. As Joseph Bizup explains, writing studies has worried that Toulmin's abstract categories of claim, data, warrant, qualifiers, and conditions of rebuttal do not capture the details of practical, everyday argumentation. However, Bizup argues, research has shown that students and teachers adapt the model to their own purposes, and Toulmin himself advocates for a more nuanced, pragmatic understanding of argumentation in his later work. Toulmin's model does provide a more lifelike and adaptable description of argumentative structure than the formal syllogism, but it does not capture the interactive dimension of argumentation. An interaction perspective explains how discussants perpetuate misunderstanding. One discussant mischaracterizes the position of another, and instead of taking time to correct the mischaracterization, other discussants respond in kind, derailing the argument away from

its original question. I claim that dialectical argumentation models can help us intervene in these problematic feedback loops, because they define normative standards in terms of interactive behavior and not in terms of defective structures. The need for such intervention is evident when examining the extent to which communication breaks down between participants in heated debates, such as in the Dobrich case, to which I will return presently and I will discuss pedagogical implications of argumentation theory in more detail in Chapter Three and the Conclusion.

Reporter Lynn Parks describes local reactions to the Dobrich lawsuit and her report includes a range of argumentative dysfunction. There are obviously problematic arguments that I could highlight, such as Church of Christ Reverend David Bennett's claim that "there are a number of organizations out there, especially the [American Civil Liberties Union], that are trying to change the American Christian view to an atheistic, godless world view. They don't like Christians and they want to destroy Christianity" (Parks 54). The sense of persecution and the portrayal of opponents as pursuing the elimination of a way of life recur often in church-state rhetoric. I will mention persecution arguments at times, but such acrimonious if heartfelt complaints do not pose the most difficult problem in church-state argument. From some perspectives, Fike's prayer is not problematic, and, at any event, questions about the exercise of power through discourse are complementary to yet distinct from questions about the operation of discourse itself. This is a difficult but vital distinction to make. A more subtle problem, I suggest, arises when participants in the debate experience a breakdown in communication. This breakdown does not occur because one party withdraws in the face of heated language. In this breakdown, all discussants continue to vigorously pursue their viewpoints, but the viewpoints as articulated by one discussant do not respond directly to views expressed by another.

In her report on the Dobrich case, Parks records evidence of (but does not comment on) such a breakdown. Lack of awareness of the breakdown pervades church-state debate, afflicting the discourse of everyone from legislators, judges and attorneys to legal scholars, political writers and citizens. The example that follows will briefly model the approach I take in the chapters of this dissertation. Two sources, ostensibly discussing the same issue, will be read against each other in order to explore the extent to which the viewpoints actually engage the same subject. In this case, the arguments of a member of the Indian River School District board of education will be read alongside those of an advocate for separation of church and state. Board member Dr. Donald Hattier says, "If I want to pray, why should I have to give in to you if you believe something different? I am sorry if you are offended, but you can walk away while I do something that benefits everybody else. If [someone else] wants to pray in front of me, if she wants to take the Hebrew path, then I say, 'Go for it'" (Parks 60). Jeremy Leaming, a spokesman for church-state separation advocacy group Americans United argues, "You can be high and mighty as all get-out. But you don't have the right to use the government as a tool to force what you think on other people" (Parks 61).

There are some interesting claims here that I will not pursue too closely, such as whether Hattier's prayer benefits "everybody" or what it means to use government to "force" beliefs on people as Leaming suggests. I do want to highlight here the disconnect in how each man describes the action under debate. Hattier sees the debate as concerning people speaking and practicing their religion. Leaming sees the debate as concerning the use (or misuse) of government. This is not simply a failure of persuasion. It is a fundamental failure of engagement. The discussants are speaking at cross-purposes, because they are asking questions about different phenomena. Hattier is making an argument about his right to express his religious views *as a citizen*. Leaming is making an

argument about the extent to which certain *government activities* are constitutional. Persuasion cannot occur when one discussant's argument fails to address the questions as defined by the others.

Throughout the dissertation I will rely on this kind of dialectical reading of two or more discussants ostensibly engaged in debating a single question (i.e. one viewpoint directly addresses another in the same venue, such as in a scholarly publication or judicial ruling). I use the term dialectical purposefully, because the theoretical methods I bring to bear on church-state discourse include but are not limited to rhetorical theory as it has been developed in rhetoric and writing studies in the twentieth and twenty-first centuries. In addition to modern rhetorical theory read primarily through the frame of Perelman and Olbrechts-Tyteca's *New Rhetoric*, I turn to dialectical argumentation theory for its insights on defining reasonableness. Before getting into the details of theoretical approaches, however, I wish to raise a more general question of exigency.

WHY STUDY CHURCH-STATE SEPARATION DISCOURSE?

The disconnect over the basic question under debate as seen in the Hattier-Leaming example illustrates troubles facing not only church-state arguments but also civic discourse in general. We are aware of differences of opinion, but we aren't always aware of how deeply those differences run or how they negatively affect our ability to argue about our differences. Church-state separation is not unique in this sense. Any issue of moment in civic debate yields contradictory views wherein what is valued by one side is anathema to another. For example, during the Civil Rights Movement one group's desire to racially segregate public accommodations, while considered despicable by the norms of today, was a treasured value of that group, much in conflict with the value of racial equality pursued by their opponents.

What makes church-state separation useful is that, unlike past judicial conflicts which have reached some point of consensus, the dividing line between what is right and wrong remains muddled for church-state cases. Though some today would re-institute segregation if they had their druthers, their desires would find no legal sanction and would face widespread condemnation. However, racism itself remains problematic, even as its language has largely shifted from the explicit racism of the mid-twentieth century to the implicit, color-blind racism of the twenty-first.[4] In the courts at least, questions of public accommodations segregation and employment discrimination are largely settled (with continuing unresolved disputes raised in affirmative action and similar policies). There is no such consensus within the courts as regards church-state separation disputes. The ongoing debate and the difficulty discussants have engaging each other's positions at length offer resources of discourse suited to investigating how argumentation theory might inform an understanding of responsible rhetoric.

The rhetoric of the debate over the relationship between religious and government institutions is also an interesting area for study insofar as it is an under-discussed subject within rhetorical studies. There are some considerations of the First Amendment's religion clauses in the literature.[5] More common, however, are scholarly discussions of religious political rhetoric. For reasons that I will make clear in the first chapter, there is an important difference between political arguments that invoke religion and arguments about the relationship between religious institutions and government. It is the latter type

[4]See Bonilla-Silva, Eduardo. *Racism Without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America*. 3rd Edition. Lanham, MD: Rowam & Littlefield, 2010.

[5]Aune, James. "Tales of the Text: Originalism, Theism, and the History of the US Constitution.*" Rhetoric & Public Affairs* 1.2 (2010): 257–279; Aune, James "Three Justices in Search of Historical Truth: Romance and Tragedy in the Rhetoric of Establishment Clause Jurisprudence." *Rhetoric & Public Affairs* 2.4 (2010) : 573–597; Davies, Ann. "In Law More Than in Life? Liberalism, Reason, and Religion in Public Schools." *Rhetoric & Public Affairs* 9.3 (2006) : 436–458; Stahl, Roger. "Carving Up Free Exercise: Dissociation and' Religion' in Supreme Court Jurisprudence." *Rhetoric & Public Affairs* 5.3 (2002) : 439–458.

of argument, I suggest, that has been under-discussed in rhetorical studies. I will also discuss the difference between the Constitution's free exercise and establishment clauses and explain in more detail my reasons for focusing on establishment clause conflicts. I also want to differentiate a study of the rhetoric of religion from a study of the rhetoric of church-state separation.[6] The content of particular religious viewpoints is relevant insofar as it informs attitudes toward the relationship between religion and government, but the setting for church-state disputes includes the full range of religious identifications, including those who identify as non-religious and non-theists, and the arguments dispute the intersection of religion and government, not the nature or content of religious beliefs.

In a larger sense, the rhetoric of church-state separation in particular and the question of defining responsible rhetoric in general are worth study because the costs of unproductive rhetoric can be high, even when they are not obvious, and they are never unambiguous or uncontested. When considering what is at risk in church-state separation debates, it is tempting to think of the cranky neighborhood atheist who objects to a nativity scene in the town square: his objection seems to rest on arbitrary preference, and the potential for injury seems nil. However, the reasons for objecting to the co-mingling of religion and government go deeper than a sense of personal indignation and can exact high costs for both the individuals and governments. Of course, neither the reasons nor the costs are universally acceded to by all parties in a dispute. What the Dobrichs experienced as inequitable treatment at the hands of government, others in their community saw as government action well within the bounds of ethical behavior, yet the risks remain.

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[6]For an overview see Zulick, Margaret D. "Rhetoric of Religion: A Map of the Territory." *The SAGE Handbook of Rhetorical Studies*. Eds. Andrea A. Lunsford, Kirt Wilson, and Rosa A. Eberly. Thousand Oaks, CA: SAGE Publications, Inc., 2009. 125-138.

The give and take of civic debate gives and takes more than ideas. People can lose standing in their community, their jobs, sleep. The Dobrichs eventually moved out of the school district to give their son Alex a chance at a learning environment free from harassment, and the on-going family stress led to Samantha dropping out of college. When they still lived in the community and advocated for their civil liberties, Alex attempted to speak at a school board meeting only to have another audience member shout, "Take your yarmulke off!" Flustered by the heckler and unable to read his statement, his sister read it for him, which began, "My name is Alex Dobrich. I am in the sixth grade. I have gone to Indian River School District all of my life. I feel bad when kids in my class call me Jew boy" ("Plaintiff's" 23). When attending a school board meeting, Mrs. Doe asked for a police escort past an angry crowd protesting against the Dobrichs outside. The costs were not borne by the Dobrich and Doe families alone. All community members paid a price for the dispute, whether they were sympathetic to the Dorbichs' side or not, as the school board (i.e. the district tax payers) paid an undisclosed sum to the Dobrich and Doe families in settling the lawsuit.

I see such costs as reasons to cultivate better argumentative practice. We should be able to conduct disagreements without recourse to intimidation and without distorting the views of our fellow discussants. These are doubtless obvious and uncontroversial claims for a rhetoric and writing audience, but they bear repeating. Of course the presence of intimidation raises questions about responsible rhetorical practice. While I advocate a practice free from intimidation, my purpose here is to investigate theoretical frameworks of discourse describing the complexities of rhetorical practice, as opposed to simply stating my allegiance to certain ethical and political norms. I do sympathize with particular ethical-political norms, including the avoidance of intimidation. I do favor on the whole a critical use of liberal public reason so long as that public reason recognizes

its limitations and potential misapplications as will be discussed later. However, I do not think responsible rhetorical practice can be defined only in terms of ethical and political norms for reasons that I will explain below. Further complicating our understanding of responsible rhetoric is that the distortion of viewpoints need not arise out of malicious intent. In the news article quoted above, board member Hattier is not intentionally misrepresenting the Dobrichs' position when he says they oppose the free exercise of religion. There are propagandists aplenty on all sides of church-state debates. There are also community members who engage in irresponsible persuasion because they are confused by propagandists or because they are caught up in the passion of the crowd and not because they operate from intentional bad faith.

The following then are the dual levels of troubled rhetoric this project considers. In the first level, citizens, such as the Dobrichs, protest unconstitutional actions. Others in the community respond to their protest, leading to irresponsible rhetoric that fails to help the discussants negotiate their disagreement and find resolution. Some problematic responses express bigotry and seek to intimidate, and others fail to accurately describe the viewpoints under discussion (which may or may not result from any conscious, strategic manipulation). In the second level, our models for understanding these troubled instances of persuasion are themselves troubled by longstanding disagreements over how persuasion ought to be understood.

THEORIZING MODELS OF REASON

Rhetoric and writing treats models of reason cautiously because of their potential for abuse. The repeated calls for dialogic, invitational, and non-agonistic rhetorics respond to exclusionary models of reasoning that quickly descend into an application of overly formalistic rules. Writing scholars have found fault with positivist, normative

models of rationality that strip away context in favor of abstraction. Janet Emig demonstrates the deficiencies of a rationality that gives "no consideration or acknowledgement of the setting" (66). Reducing context can enable clearer understanding of logical form, as in the syllogism, but such forms poorly represent argumentation as people conduct it. In the social realm of rhetoric, discussants cannot control for variables as researchers do in laboratory experiments. The premises of civic debate exist as tentative claims, not as the universal truths needed for logically valid deduction. Rhetoric deals with questions for which the methods of science yield no certain answers.[7] Abstract models of rationality, however, provide only one way to define reason. James Crosswhite defends a different conceptualization of reason that operates not in the abstract structures of logical form but "at least partly in the deep competences people have to be members of social groups that disclose the world and interpret things in a shared way" (*Rhetoric* 43). Reason for Crosswhite functions as a process in which people interact through argumentation in order to resolve disagreements. Rhetorical reason serves a pragmatic role, embracing the contingent and nuanced world of human discourse instead of trying to rise above it through the construction of abstract models and formal procedures.

The tension between abstraction and practicality plays a longstanding role in the question of how to define responsible persuasion. In invoking the term dialectical in the above reading of the Dobrich case, I am intentionally raising questions of disciplinarity that have attended rhetorical studies since their formalization into methods of teaching and practice in antiquity. Rhetoric has long faced criticism for its potential to be abused.

[7]As Aristotle says, "[Rhetoric's] function is concerned with the sort of things we debate and for which we do not have [other] arts.... And we debate about things that seem to be capable of admitting two possibilities; for no one debates things incapable of being different either in past or future or present." Trans. George A. Kennedy. *On Rhetoric: A Theory of Civic Discourse*. New York: Oxford UP, 1991. 41.

Critics offered the exacting procedures of dialectical testing as counterbalance to the excesses of persuasion run wild. The tension between early practitioners of rhetoric and their critics hold prominent places in standard histories of rhetoric. For example, both Thomas Conley and George Kennedy begin their histories with the emergence of sophistic performance and the critical response that followed. Conley notes the concern that "Protagorean debate...could easily degenerate to a dialogue between two equally ignorant and misguided parties, and Gorgianic persuasion could easily become a cynical exercise in manipulation by one who had mastered the techniques of charming one's listeners" (7). The ability to convince someone of a proposition does not entail that that proposition is right or good, creating the potential for irresponsible uses of persuasion. Plato's dialogues capture the anxiety over rhetoric's ability to change people's minds without first investigating the truth or goodness of a question, and they advocate the testing method of interrogating propositions through a process of dialectical question-and-answer.

I will not spend time here reiterating historical narratives that have already been well described elsewhere. I mention this history to note the longstanding concerns about responsible persuasion that have circulated within and around rhetoric. Rhetoricians have produced a range answers to the question of how to make persuasion responsible. These answers have benefits and drawbacks that I will discuss in a moment. The continued interest, both in asking and answering how or whether rhetorical practice can be conducted responsibly, suggests that additional perspectives, such as those found in argumentation theory, might find application in rhetoric and writing studies. While I do intend this dissertation to touch upon broad questions of disciplinary definition, I focus on a more limited question. Rhetorical inquiry, as conducted in the rhetoric and writing tradition, has relied on various ways to understand argumentative failure in addition to

the metric of failing to persuade an audience. Troubled arguments are often subsumed under broad labels such as illogical, unethical, unreasonable, unproductive, bad-faith, or simply bad arguments. Turning to such labels provides the appearance of understanding problems of argument while at times perpetuating confusion. The question I address is how rhetoric and writing might expand on the methods it uses to understand and teach responsible persuasion using insights from argumentation theory.

Argumentation theory should appeal to a rhetorical perspective because of the way it models the operation of persuasion. This model attempts to negotiate between normative and descriptive approaches, and in so doing provides a means of defining responsible argumentative practice that avoids the false hopes of positivist and foundationalist thinking. Locating a middle ground between impractical formalism and unrestrained persuasion poses considerable challenge. Rhetoricians have met this challenge with at least three answers: grounding rhetoric in a commitment to an ethical-political framework, subjecting rhetoric to various tests of rightness, and using rhetoric's persuasive potential to undermine irresponsible uses of rhetoric.

The first answer relies on a commitment to an ethical-political worldview for defining responsible persuasion, such as a liberal model of public reason. Sharon Crowley demonstrates such a commitment in distinguishing "spin" from "rhetoric" in *Toward a Civil Discourse*. Spin, for Crowley, is bad because it exacerbates confusion and lessens the chances for community members to hear all arguments and make decisions based on a fair hearing (25-26). The second answer relies on a method for testing arguments for their quality. This approach is in line with classical dialectic in the Platonic tradition, Richard Weaver's modern reconfiguration of the Platonic approach as seen in *Ideas Have Consequences*, and other methods that admit a more limited, contingent method of truth testing, such as in the approach of Karl Popper. These methods need not

rely on apprehensions of transcendent truth. They can instead rely on tentative hypotheses supported by evidence and subject to community consensus. The third answer relies on the (nearly) infinite mutability of language and meaning—on the sophistic ability to argue persuasively in any situation on any topic. This answer is seen in advocates of neosophistic rhetorics such as Victor Vitanza and Michael Mendelson. A Protagorean approach to argument may be used irresponsibly, making a weaker argument appear to be stronger, but it can also be used to undo such manipulations, revealing underlying strengths behind arguments others intend to portray as weak. Each of these three answers, however, has serious shortcomings, as exemplified in the problematic church-state arguments discussed in this dissertation.

The use of an ethical-political worldview, such as liberal democracy, as a means to recognize and respond to bad arguments faces both inherent limitations and problems for practical application. Critical appraisals of liberal democracy have consistently demonstrated how such political programs fail to attain the values of equality and inclusive deliberation to which they aspire. For instance, Bryan Garsten argues in *Saving Persuasion* that the rational-critical public sphere promises equal access, but it inevitably ends up excluding certain voices. Reason, in this critique, serves not as a neutral method accessible to anyone but as a code word to demarcate acceptable from unacceptable arguments along lines drawn not on the strength of arguments themselves but on the social status and power of those who voice them. Assuming that such inherent difficulties can be mitigated to salvage some coherent theory of public reason in the liberal model, there remains a considerable gap between the invocation of liberal principles and their application. I do agree that these difficulties can be addressed, whether through the procedural approach Garsten favors or the viewpoint-expanding work of counter-publics as discussed by Nancy Fraser or Iris Marion Young's methods for ensuring greater

inclusion. I will discuss these attempts to revise liberal public reason in the first and second chapters, and I see them as valuable components of a responsible rhetoric, but when comparing these ethical ideals to rhetorical practice the reality of irresponsible rhetoric is clear. Problematic arguments have infiltrated legislative and judicial discussions of church-state separation to a considerable extent, even as those arguments are voiced by discussants ostensibly committed to operating within the liberal democratic framework of the US Constitution. Commitment to such a framework, while necessary for a fair exchange of views, does not guarantee by itself deliberation that includes all voices.

The extent of problematic arguments also undermines trust in the second answer for defining responsible rhetoric—methods of testing arguments for truth or goodness. Those tasked with the duty of resolving conflicts and supposedly equipped with the methods to do so equitably (in this case officers of the court) are unable to render consistent decisions over disputes deeply connected to emotion and ideology. Whether we locate the problem within the argumentative procedures of the courts or their imperfect application, we are left with an impaired ability to test arguments. The third answer, linguistic play in line with (neo)sophistic rhetoric, may be able to generate new persuasive responses to troubling arguments, but it is just as capable of generating new and persuasive means of manipulating, distorting, and dissembling.

In addition to the limitations unique to each of these three approaches, they all share another limitation. The three means of defining responsible rhetoric—reliance on ethical-political frameworks, testing methods, or sophistic agility—only work when all discussants concerned find the means valid. Often this is not the case. Sharon Crowley addresses such a disjunction in the friction between secular liberal and fundamentalist Christian ideologies in *Toward A Civil Discourse*. Crowley seeks to understand how

persuasion may eventually work in such cases, bridging the gulf between two seemingly incommensurable positions. Ultimately Crowley places hope in the transformative effect interaction of viewpoints can have on ostensibly rigid viewpoints. I share this hope, but I am more interested in better understanding how persuasion goes wrong. In the case of the Dobrich family, community members may have agreed that irresponsible speech took place, but they disagree as to what counted as irresponsible. The Dobrichs experienced what they perceived as unjust treatment, yet for positions sympathetic to Fike the Dobrichs' discomfort and the financial costs of the lawsuit were necessary and acceptable consequences of religious obligations. As contradictory as the different positions are in church-state separation discourse, they still engage each other in a prolonged series of mutual misunderstandings. If Crowley is right to hope that continued engagement may on occasion yield progress toward understanding, then it behooves us to understand not only how that understanding might occur, but also the processes that impede understanding.

Engagement is key to my understanding of responsible rhetoric in this dissertation. Discussants reasoning in an engaged, accurate manner with each other's positions enact a responsible persuasion. I think the most salient point of contact between rhetoric and writing and argumentation theory is Perelman and Olbrechts-Tyteca's discussion of argument in *The New Rhetoric: A Treatise on Argumentation*—and in particular their treatment of the idea of responsibility. I will return to *The New Rhetoric* throughout this dissertation not only for its discussion of responsibility but also for its role as a bridge between rhetoric and argumentation theory. With regard to responsibility, Perelman and Olbrechts-Tyteca say that giving adherence to conclusions of argument for which there is "never a completely necessary proof...does so by an act that commits [us] and for which [we] are *responsible*" and that "argumentation aims at a choice among possible theses; by proposing and justifying the hierarchy of these theses, argumentation

seeks to make the decision a rational one" (62; emphasis added). The responsibility in *The New Rhetoric* is responsibility to the asking and answering of questions, the defending of choices to others so that their doubts and questions may either be satisfied or that they may raise doubts and questions in your own mind as to your position that necessitate changing your position. *The New Rhetoric* offers argumentation as an alternative to the false certainty of the ideologue who believes despite contrary evidence and the total skeptic who will not believe even with evidence (62). This responsibility does not mean that facts and evidence have no role to play. On the contrary, discussants engaged in responsible argumentation will forward evidence and, more importantly, respond to evidence forwarded by others. However, the responsibility in *The New Rhetoric* contrasts with responsibility defined as accurate apprehension of reality such as Richard Weaver's idea of "responsible rhetoric" which is "a rhetoric responsible primarily to the truth" ("A Responsible" 82). Persuasion for Weaver depends on speakers having "some understanding of the probative value" of their arguments (82). Truth, however valuable or useful, cannot by itself produce adherence in rhetorical argumentation as Perelman and Olbrechts-Tyteca explain.

When we engage in persuasion, we take on responsibility for putting forth and responding to arguments knowing that certitude cannot be found. We try to convince others when we believe we are right, but our position is not right in a way that is obvious and incontrovertible to others (or else we would not need to turn to argumentation), as "only the existence of an argumentation that is neither compelling nor arbitrary can give meaning to human freedom, a state in which a reasonable choice can be exercised" (Perelman and Olbrechts-Tyteca 514). There are of course different standards against which we can judge arguments to be responsible—standards of consistency, evidence, politics, and ethics. However, Perelman and Olbrechts-Tyteca identify a more basic sense

of responsibility that can be lost amidst these standards. Arguments are responsible to accurately hearing and responding to other arguments as made by interlocutors. Irresponsible arguments distort the position of others. No matter how good our reasons are, they are never "compelling reasons" in the sense that others will be unable to object (514). All too often, however, in trying to put forward an irrefutable case, people produce arguments that deny the existence of alternatives or describe them inaccurately. In avoiding accurate engagement, they eschew responsibility.

The pragma-dialectical approach to argumentation provides a way to articulate what happens at the point of rupture between discussants at a finer level than the broad terms incommensurate or incompatible, helping create a framework to analyze irresponsible persuasion and produce more responsible persuasion. Argumentation theory also provides a normative theory for evaluating the quality of arguments, and this normative function can usefully join other methods for testing argumentative quality already at work in rhetoric and writing. However, I do not want to overstate the value of the normative aspect or understate the value of the descriptive aspect. In terms of description, argumentation looks at the symbolic interchange between discussants, offering objects for analysis that can be analyzed more discretely than ethical-political frameworks. With this descriptive focus I do not intend to evade the difficult questions raised by relying on ethical-political frameworks for defining responsible argumentation. Instead, I suggest that using an argumentation framework to describe the activity of persuasion with a focus on symbolic activity (thus stepping back from but not abandoning ethical-political frameworks), will allow us to more clearly perceive conflicting ethical-political frameworks and more readily create means for counteracting problematic rhetorical behaviors. Before explaining the value of the argumentation model in more detail, however, I will first describe the model itself.

THE PRAGMA-DIALECTICAL APPROACH TO ARGUMENTATION

From among the variety of approaches found within the discipline of argumentation theory, I rely on the pragma-dialectical approach to argumentation developed by Frans H. van Eemeren and Rob Grootendorst. This approach offers both a well-defined concept of reasonableness that complements responsible rhetoric and an analytical approach useful for illustrating reasonableness. I wish to make clear at the outset that I will take elements from the approach and integrate them into rhetorical analysis. I explain and use argumentation theory only insofar as it helps define responsible rhetoric as I conceive it here. This dissertation does not perform formal dialectical analyses nor does it reprise the more complete background treatments of argumentation theory such as found in Douglas Walton's *Informal Logic: A Handbook for Critical Argumentation* and Frans van Eemeren's *Fundamentals of Argumentation Theory*. What this dissertation does offer are argumentation-theory-informed rhetorical analyses that explore how a dialectical theory of reasonableness might supplement approaches for responsible argument more familiar in the rhetoric and writing field.

The elements from pragma-dialectics that I use in particular are its conceptualization of reasonableness and the idea of argumentation as a critical dialogue through which reasonableness is defined. The pragma-dialectical approach proceeds from the definition that "argumentation is a verbal, social, and rational activity aimed at convincing a reasonable critic of the acceptability of a standpoint by putting forward a constellation of propositions justifying or refuting the proposition expressed in the standpoint" (van Eemeren and Grootendorst 1). The term argument, as used by argumentation researchers, has a much narrower definition than the everyday sense of disagreement. The particular approach proposed by van Eemeren and Grootendorst is pragmatic in that it identifies and analyses discrete speech acts or moves made by

discussants in a critical discussion (most importantly viewpoint expression, challenge and defense). It is also pragmatic in the sense that arguments arise due to a disagreement and allow discussants to resolve their disagreement through the exchange of viewpoints. The approach is dialectical in that it examines how each discussant's moves affect the others and the larger shape of the argument, positing an ideal critical discussion underlying argumentation. This ideal discussion can be thought of as a kind of generative grammar of disagreement. If our disputes over disagreements are to be resolved through language, those disputes will follow particular patterns, just as words follow particular patterns in order to form sentences that are mutually intelligible to those who speak the same language.

The pragma-dialectical approach sits within the larger discipline of argumentation theory. In order to properly situate the details of the approach I will briefly note its broad inter-disciplinary background. Describing argumentation as a "hybrid discipline," van Eemeren attributes the "rebirth of argumentation theory in the twentieth century" to Toulmin and Pereleman and Olbrechts-Tyteca who "emphasized that argumentation is an effort to make a standpoint in a reasonable way acceptable to addresses who are in doubt rather than a logical proof of its truth" ("In What Sense" 50). He continues to explain that "argumentation theorists pay systematic attention to all factors pertinent to the production, analysis and evaluation of argumentative moves," drawing theoretical insights and methodological approaches from logic, linguistics and other disciplines (50-51). Approaches differ in how to define "a reasonable way." I choose to work with the pragma-dialectical approach because I believe it can help supplement rhetorical understandings of responsible persuasion, but I do not want leave the impression that it is the only framework under which argumentation researchers operate. Logic, informal logic, pragmatics, rhetoric, communications and other disciplines and sub-disciplines

contribute to the work of argumentation studies. I cannot and do not provide a comprehensive overview of argumentation's hybrid variety here. Even considering different approaches to right reason as seen from multiple disciplines within argumentation theory would take me too far afield from the questions at hand. Douglas Walton demonstrates the considerable scope of these different ways of understanding reason, noting that reason can be understood as operating in internal thought processes or in external speech acts and that reason ranges in confidence from the certainties of deductive logic to the probabilities of practical reasoning in the face of incomplete knowledge ("What Is Reasoning" 405). The details of these varied conceptualizations of reason go beyond the scope of my argument here. I will, however, describe the model of reasonableness that pragma-dialectical argumentation theory sees operating in critical discussions. What follows is a discussion of the dimensions of pragma-dialectics that I believe to be most relevant for enriching our understanding of responsible rhetoric.

Argumentation theory focuses on narrower purposes for discourse than the broad persuasion goals in rhetorical studies, and it is in this narrower purpose that it defines reason. Argumentation theory examines dialogues which Walton defines as "exchange[s] of speech acts between two speech partners in turn-taking sequence aimed at a collective goal. The dialogue is coherent to the extent that the individual speech acts fit together to contribute to this goal" (*The Place* 19). Persuasion may presuppose an audience but it does not presume a back-and-forth conversational context whereas dialogues do. Walton describes different dialogue types with different goals: advice-solicitation, negotiation, inquiry, and quarrel among others. Key to Walton's treatment of fallacies, which I will discuss more in Chapter Three, is his proposal that fallacies are arguments that shift dialogue from one type to another, violating one or more participants' expectations about what the dialogue should accomplish. Walton explains how the pragma-dialectical

approach uses a version of persuasion dialogue known as the critical discussion that provides a definition for reasonable discourse:

> ...the goal of each party is to persuade the other party to accept some designated proposition, using as premises only propositions that the other party has accepted as commitments. The goal of the critical discussion is to resolve a conflict of opinions by means of rational argumentation. The concept of commitment is the basic idea behind all dialogue as a form of reasoned argument. (*The Place* 21)

Walton's use of the term "commitment" brings to mind *The New Rhetoric*'s statement about our granting adherence committing us, even if commitment here has a more limited definition (commonly accepted premises) than *The New Rhetoric*'s more general ethical use of the term. Reason in the pragma-dialectical critical discussion is an activity akin to Crosswhite's sociality function of reason—the "deep competencies" that allow us to understand what others say (*Rhetoric* 43).

The joining of a standard for judging through reason with the study of the exchange of viewpoints yields what van Eemeren calls a normative pragmatic approach. The pragmatic analysis of the pragma-dialectical approach draws on speech-act theory. The critical discussion is constituted in particular moves or speech acts performed by discussants. What J. L. Austin calls illocutionary and perlocutionary acts, van Eemeren terms communicative and interactional acts (*Strategic Manuevering* 37). Standpoints put forward in a critical discussion do not only communicate meaning. They perform argumentation functions such as defending, explaining or challenging. Van Eemeren and Grootendorst cite the influence of John Searle for his insights on how meaning depends on the combined intent of the speaker and the conventions of language and Paul Grice for his concept of the obligations that inhere in the interaction of speech acts between speakers. I describe in more detail how speech acts interact in the pragma-dialectical framework for critical discussion below, but I want to emphasize the value of the basic

approach of normative pragmatics. The reasonable interaction of a critical discussion is an analytically useful frame through which to examine troubled acts of persuasion because it helps explain why they are troubled in terms of discrete units of interactive discourse. Such analysis does not preclude current ethical-political approaches for treating (ir)responsible persuasion and, indeed, I believe such analysis can supplement those approaches as the case studies in this dissertation demonstrate.

For a critical discussion to reach its goal of mutually agreed resolution of disagreement within the pragma-dialectical framework, the viewpoints and challenges forwarded by the discussants must abide by certain rules. Based on analysis of a variety of arguments, van Eemeren and Grootendorst have proposed a set of fifteen rules that govern successful reasonable discussions (190). Broadly stated, these rules allow any viewpoint to be forwarded in a discussion. They require that once a viewpoint has been forwarded it may be challenged, and when challenged it must be defended through arguments that the other discussants find acceptable. If viewpoints are successfully defended, the other discussants must accept them. If viewpoints are not successfully defended, they must be abandoned as the argument moves on toward resolution of the disagreement.[8] The concept of rules governing human communicative interaction can at first glance seem so abstract as to be either hopelessly idealistic or positivist. However, the development of the approach through descriptive analysis and its commitment to a narrowly defined set of communicative behaviors can alleviate these concerns.

I agree to an extent with the developers of pragma-dialectics that it offers something of a middle ground between abstract norm and concrete description. Pragma-

[8] In using the phrase "moves on toward resolution" I do not want to give the impression that the approach prescribes a unidirectional from-disagreement-to-resolution movement in arguments. The approach describes different stages of critical discussion, but these stages can and do occur in various orders or fail to occur altogether.

dialectics situates its understanding of reasonableness within the boundaries of argument as a means of resolving disagreement and in a way that all interlocutors involved will find agreeable. The narrow scope helps defend pragma-dialectics against charges of idealism and positivism. It claims not to explain all communicative acts but only those that have a goal of resolving disagreements between interlocutors in a manner that is valid to the issue at hand and for the people involved. There is no guarantee that resolution will occur, but the approach demonstrates why resolution does not. Argumentation theory does not reduce all discourse to critical discussions. It examines discourse used for a particular end through the lens of the critical discussion. Nor does argumentation theory attend to other aspects of persuasion. Responding to rhetoricians' concerns that dialectical theory might supersede rhetoric, van Eemeren explains that "the scope of rhetoric is, of course, much broader [than pragma-dialectics]," and though pragma-dialectics has borrowed insights from rhetorical analysis in order to refine the descriptive accuracy of its analyses, it "leaves rhetoric as such untouched" ("The Pragma-Dialectical Theory Under" 446). According to its advocates, pragma-dialectics offers an explanation not of how persuasion operates but how reasoned disagreement operates, which is where I argue its usefulness lies for rhetorical studies.

Following Stephen Toulmin, van Eemeren and Grootendorst describe the traditional problem with frameworks for reasoning. The frameworks rely on either formal logic (or "geometrical") or situated (or "anthropological") approaches to defining reasonableness (*Systematic* 128). Formal logic associates reason with an argument's validity, which constrains the definition of reasonableness within a closed set of relationships between premises and conclusions. Whether anyone would accept as true the premise "all voorwerps are green" does not affect the validity of the syllogism: "All voorwerps are green. Simon is a voorwerp. Therefore, Simon is green." Logic by itself

yields no explanation of how challenges to the truth of premises or conflicts between contradictory premises are carried out. Van Eemeren and Grootendorst argue that situated approaches to reason can quickly devolve into relativist and fragmented understandings of reason. If reasonableness is defined according to what a given group thinks is reasonable, then again there is no framework describing processes by which contradictions are dealt with—a proposition is either reasonable or not to a given group, and the group's sense of reasonableness will change over time.

In either case, logical or situated, reasonableness derives from justifications either to the internal relationship of propositions or to an audience's standards. These justifications are problematic because they are either circular or lead to an infinite regress of justifications, and in either case are arbitrarily cut off at a particular justification (van Eemeren and Grootendorst 131). Van Eemeren and Grootendorst propose that their approach resolves the dilemmas of both logical and situated approaches by connecting reasonableness not to premise/conclusion validity or audience acceptability, but to the process inherent in dialectical argument:

> The reasonableness of the procedure is derived from the possibility it creates to resolve differences of opinion (its problem validity) in combination with its acceptability to the discussants (its conventional validity). In this connection, the rules of discussion and argumentation developed in a dialectical theory of argumentation must be scrutinized in terms of both their problem-solving effectiveness and their intersubjective acceptability. (132)

Whether this approach does indeed relieve us of the problems of justificationism is an open question, and one I will consider more in the Conclusion. However, I find that the carefully structured framework wherein argumentation has a single goal allows for integration with other frameworks where discourse has multiple goals, such as rhetoric, that overlap with the goal of resolving disagreement. Not all persuasion will be or should

be reasonable, but responsible persuasion may be defined through an understanding of reasonableness.

Rhetoric faces a difficult situation when it comes to the question of responsible persuasion. It justifiably resists putatively objective models of rationality, because those models fail to describe argumentative reality. The inhabitation of other positions does not always occur, horizons do not always converge, and veils of ignorance cannot always occlude social contexts and privileges. Historically, arguments have been praised for their reasonableness and propriety while blatantly disregarding concerns for equity. Claims of unreasonableness have dismissed views that are impolitic, counter-hegemonic, anti-majoritarian—arguments that are, in short, against the established order. Reason, however, is not coextensive with the privileged and empowered ideological frameworks within any given rhetorical context, even though the name of reason has been used to maintain the established order. As rhetoric moves away from normative evaluations of persuasion, it opens space for irresponsible persuasive practice where arguments that seem persuasive win the day regardless of their merit. In order to discourage such abuses rhetoric must rely on one or more ways to judge responsible rhetorical practice. The model of reasonable persuasion offered by argumentation theory, as I will demonstrate in the following chapters, can help balance the ethical imperative of inclusion with the need for means of evaluating arguments that may exclude.

Before describing the chapters in detail, I wish to offer a final thought in these introductory comments on my rationale for using judicial rhetoric to explore the thematic issues of reasoning and responsible argumentation that this project examines. This dissertation's central question is how rhetoric and writing's approaches to reasonable persuasion might expand through application of argumentation theory. I use judicial rhetoric for examples to explore theoretical questions. This rhetoric is useful, as I explain

above, because it provides examples of troubled persuasion with which these theoretical models are concerned. However, I do not just find the *content* of judicial rhetoric useful for this project but also its *procedures*. I see in the work of the judiciary a parallel to the work of the writing classroom. In both, readers and writers argue over texts with contested meanings. In both, there exists a kernel of the critical discussion wherein discussants interpret arguments made in writing and respond with their own arguments.

I do not want to overplay the analogy. First-year or even advanced writing differs greatly from the writing of professionals with decades of experience, and yet within that diversity of writing can be found some commonalities in terms of purpose as defined in the critical discussion with which pragma-dialectics concerns itself, and similar kinds of troubles undermine achieving those purposes. I think it useful to compare the work of judges reading prior decisions, attorney arguments and their fellow judges' judicial opinions to the work of students working with sources, synthesizing different views and making their own arguments insofar as both groups of rhetors encounter difficulties of fairly summarizing other views and converging on the same questions. While I would like nothing better than to have both students and judges argue better, that is not the purpose of my project here. Rather, I am raising the question of how we might define responsible rhetoric through application of dialectical argumentation, and I explore that question using examples from judicial rhetoric.

ORGANIZING PRINCIPLES

Each of the following three chapters centers on a key term drawn from church-state separation debates: the public square, neutrality and the reasonable observer. Each key term inspires the selection of a case study drawn from judicial scholarship (as in Chapter One) or court cases (as in Chapters Two and Three). The key terms also intersect

with questions in rhetoric and writing regarding how to define rhetorical responsibility. Each case study performs a dialectical reading of two or more discussants engaged in arguing ostensibly the same question. These readings exemplify how a dialectical model of responsible persuasion can highlight problematic argumentative moves. These readings do not replicate dialectical analysis as performed in argumentation theory. I am not transplanting the methods of argumentation theory into rhetoric. Rather I am using the philosophical and theoretical insights of pragma-dialectics regarding the definition of reasonableness to inform a rhetorical analysis seeking to understand what role reasoning plays in a responsible rhetoric.

While the case studies form the explanatory core of my argument that dialectical argumentation can supplement rhetorical understandings of responsible persuasion, I do not want to lose sight of the questions within rhetoric and writing that inspired my search for supplemental approaches nor neglect to explain how rhetoric and writing might apply insights from dialectical argumentation. Rhetoric and writing scholars have consistently sought to describe alternate ways of arguing that redress potentially exclusionary uses of reason. I will argue that the pragma-dialectical model can fruitfully join these alternatives. The scholarly discussion of argumentation that does exist consistently connects theory to pedagogical application. As such, the theoretical discussions in this dissertation preface the case studies considered in each chapter, beginning with the potential benefits and risks of defining responsible rhetoric through a liberal model in Chapters One and Two and culminating in pedagogical implications in Chapter Three and the Conclusion. The following descriptions introduce the case studies and theoretical considerations considered in each chapter.

The first chapter, "Arguing In And On The Public Square," provides background on the history of the First Amendment's religion clauses and the predominant lines of

argument in church-state separation controversies. It describes the idea of separation of church and state as seen through conflicting interpretations of the First Amendment's establishment and free exercise clauses. Those arguing over such interpretations often invoke the phrase "religion in the public square," which, for reasons explained in the chapter, encourages people to talk past each other instead of engage on a common question. The "public square" language exemplifies the kind of irresponsible rhetoric that, I argue, can be more fully addressed through a combination of both rhetorical and argumentation theory resources. The chapter's case study examines a response to the "Williamsburg Charter," a document discussing the concept of religious liberty on the bicenntenial of the Constitution signed by a variety of legal, political and academic figures. The Charter uses the term public in ambiguous ways as does its interlocutor. The "public square" language also coincides with principles in liberal political theory about the role religious views can play in civic discourse and democratic society. I lay the groundwork for discussion of liberal reason by investigating the various ways the ambiguous term public is defined. This discussion continues in the second chapter with a consideration of the similarly ambiguous term neutrality.

The concept of neutrality plays a key role in discussions of both reason and the separation of church and state, and it serves as the focusing concept in the second chapter "Putting It In Neutral." I unpack the concept of neutrality using Perelman and Olbrechts-Tyteca's discussion of impartiality which they contrast with the objectivity of logic. The dangers of an objective perspective loom large in the critiques of liberal democracy wherein appeals to rational judgments exclude the perspectives of those who do not occupy positions of privilege, thus neutrality as objectivity poses problems for defining responsible rhetorical practice. However, *The New Rhetoric*'s discussion of impartiality, or fairness, acknowledges the situated position of all perspectives while aspiring to an

even-handed consideration of all viewpoints. In addition to objectivity and impartiality, neutrality can also be used in a presentational manner that claims the title of neutral while actually endorsing an imbalanced, partisan approach. In state-church matters, presentational neutrality often takes the form of arguments that attempt to portray a context where government supports a religious practice as a neutral norm and describes any efforts to end that support (thus restoring impartiality) as a biased act against the favored religion. Just as with the concept of public as discussed in the first chapter, the second chapter looks at the ambiguous ways in which discussants invoke neutrality to defend contradictory positions in church-state debate. The case study draws from a judicial majority opinion and minority dissent from the Ninth Circuit Court of Appeals about a challenge to the constitutionality of the phrase "under God" as used in public-school-led recitations of the Pledge of Allegiance. In this case, two judges pursue contradictory understandings of neutrality without engaging in a sustained argument about the reasoning behind their preferred understandings.

The third chapter, "Seeing Reason," considers the idea of the reasonable observer as developed in Supreme Court jurisprudence. When evaluating whether government actions endorse religious messages, the Court needs to define the perspective from which to read such actions. Similar to the challenges facing the idea of neutrality, the reasonable observer cannot overcome differences in fundamental assumptions to reach any sort of object view, and the Justices' arguments over the reasonable observer itself run into the same dangers to which their arguments over the initial government action succumb. Contested and ambiguous understandings of the reasonable perspective also trouble rhetoric and writing approaches to evaluating the quality of arguments. Having considered theoretical challenges posed to evaluating the quality of reason in the first two chapters, the third chapter considers pedagogical methods for evaluating the quality of

reason as pursued in rhetoric and writing textbooks. Similar to procedural and structural approaches to reasoning discussed above, approaches to reasoning in textbooks tend to break down into two varieties: structural, describing some variety of logical or informal logical form, and dispositional, describing cognitive behaviors necessary for good thinking. The ontological question of what is reason, like the questions of what is neutrality or the public, exists in tension with procedural questions of how we go about enacting reason, neutrality, the public or other abstract values in the absence of unanimous agreement on the meaning of such ideas.

The Conclusion, "Negotiating the Dangerous Appeals of Reason," revisits the question of justification in the face of this tension. If we cannot or at the very least at the moment do not have access to a universally-agreed upon apprehension of reason, to what extent can we converge upon ways of thinking that will seem potentially reasonable to different parties even as they contest the meaning of reasonable? The Conclusion outlines principles for a pedagogy informed by dialectical argumentation as one way to explore a procedural reasoning. Such a pedagogy draws on two principles. The first is the normative model of the critical discussion that informs a standard of reasonableness. The second is the methodological model of interactive, dialectical analysis. Even in the absence of certain justifications for the evaluation of claims, these two principles provide a tentative platform for analysis. The reasonableness of the critical discussion dovetails with the ethical value of fairness promoted in approaches more familiar to rhetoric and writing. The reasonable dialectical exchange obligates interlocutors to accurately represent each other's views and build the agreement (or disagreement) from that accurate representation. The Conclusion closes with a consideration of the implications for civic discourse in the absence of reasonableness. Dialectical argumentation usefully reminds critics that, while exclusion poses one problem for responsible rhetoric,

discussants talking past one another poses another problem and one that can affect any side in a discussion regardless of power differential. Continued divergence between discussants can also lead to a withdrawal from difficult discussions where experience shows conversations often lack engagement between opposing views.

Chapter One: Arguing In And On The Public Square

According to many scholarly and popular treatments of church-state separation, court rulings on the religion clauses of the First Amendment are contradictory, capricious, and entirely lacking in any legal reasoning that would yield consistent rulings. Despite the concision of the phrasing of the Constitution's religion clauses,[9] that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," the interpretation of these clauses, according to many scholars, has yielded a byzantine array of judicial rulings, as described somewhat irreverently by Jeffrey M. Shaman, DePaul University Professor of Law:

> The Supreme Court has held that the government can finance bus transportation for parochial school students to and from school but not on field trips. The Supreme Court has held that the government may loan nonreligious textbooks to parochial school students, but it may not lend other religious instructional materials such as maps, magazine, and tape recorders. It is permissible to loan a book, but impermissible to loan a map. What about an atlas...a book of maps? The Court has prohibited state-sponsored prayer in school but has given its approval to state-sponsored prayer in state legislatures, even when the prayer is recited for sixteen years running by the same Presbyterian chaplain. In so holding the Court is clearly favoring a particular faith, which supposedly is especially contrary to the Establishment Clause. I would like to know why prayer in school is not permissible but prayer in the legislature is perfectly all right; it seems ludicrously inconsistent to me. The Supreme Court has said that the Ten Commandments are "plainly religious" but that the nativity scene is secular so long as it is surrounded by a few reindeer or candy canes. How the Ten Commandments are religious but the nativity scene is secular is simply not clear to me. Of course, if they take away the candy canes and reindeer, then the nativity scene is religious and impermissible, although a Chanukah menorah accompanied by a Christmas tree and a sign saluting liberty is nonreligious and permissible. (321)

[9]The First Amendment "free exercise" and "establishment" clauses are two of three clauses in the Constitution that mention religion. The third clause is found in Article VI, and it mandates that "no religious test shall ever be required as a qualification to any office or public trust under the United States." Relatively few legal challenges are filed on the basis of the religious test clause as compared to the Free Exercise and Establishment Clauses, so my references to the "religion clauses" are meant to focus on free exercise and establishment issues.

Legal scholars debate whether the decisions are as inconsistent as Shaman's thumbnail sketch suggests, but as I will show below it is evident that there is considerable disagreement over the interpretation and application of the Constitution's religion clauses.

What I find notable about church-state debate from a rhetorical perspective is not that disagreement exists. That judges, attorneys, activists, and scholars produce seemingly contradictory answers to the question of how to interpret the Constitution is not surprising from a rhetorical perspective well accustomed to conflicting arguments on public policy issues. However, a focus merely on the presence of contradiction with almost no critical awareness of breakdowns in communication between discussants makes church-state debate a prime site for rhetorical study. Church-state discourse abounds with calls for consistent principles and proposals for the one true doctrine that will yield just and consistent decisions on religion clause disputes, and discussants favoring one approach will chastise the approaches of others; yet, there is little consideration that the ways in which these proposals are discussed may be as much to blame for confusion as is the wrong positions of any particular viewpoint.

In this chapter, I will provide an overview of church-state separation as related to the issues considered in this dissertation, and I will analyze the operation of one common problematic argument that afflicts church-state discourse. As discussed in the Introduction, church-state discourse is not unique in terms of yielding problematic arguments (similar rhetorical misbehavior can be easily found in debate on other hot-button issues such as abortion, same-sex marriage, or gun rights). The church-state arguments discussed in this dissertation are intended as case studies through which to study problematic argumentation as it occurs under one theme—separation of church and state.

A comprehensive review of the historical, philosophical and legal development of the Constitution's religion clauses and the popular and legal debate of those clauses once enacted is not possible in this project. As I will focus on a subset of religion clause debates as they have occurred in the twentieth and twenty-first century, I will restrict much of the overview of church-state separation that follows to matters most relevant to the area discussed in the dissertation, but a general overview is needed at the outset to situate readers among the common themes in church-state separation histories. This brief historical overview will include references to scholarship that covers religious liberty history in more depth than I do here.

Accounts of the precolonial history relevant to the Constitution's religion clauses include discussions of religious liberty in the American colonies and developments of political philosophy in the eighteenth century. As my focus is on the rhetoric of US church-state debate, I will not pause here to recount the history of political philosophy in the Enlightenment and earlier periods as they bear on religious liberty, toleration and the changing relationship between religious and governmental institutions in Europe and America. John Witte Jr.'s *Religion and the American Constitutional Experiment* provides an accessible account of this history (in addition to a history of the religion clauses' drafting and of court challenges involving the clauses). I will provide some of the historical background to contextualize the church-state arguments as needed in this and later chapters. For now, I intend only to offer a brief sketch of the American historical context surrounding the framing of the First Amendment and a summary of the major controversies related to interpreting the religion clauses of that amendment.

The historical context of the religion clauses includes popular and official religious discrimination in the colonies. Histories often nod to the almost cliché pattern of immigrants fleeing religious persecution in Europe only to become the persecutors of

other religions in the colonies. For example, Peter Irons, a professor of law specializing in religious liberty, opens his treatment of recent church-state separation cases with the history of religious oppression in *God on Trial*. The religiously motivated banishment of Roger Williams and Anne Hutchinson, among other religious conflicts prominent in colonial US history, provide both an explanation of the motives for the original drafting of the First Amendment's religion clauses and a reminder for participants in modern church-state debate of the stakes at risk. Of course, popular religious prejudice and government-sponsored religious discrimination did not end with the ratification of the Bill of Rights. Anti-Catholic prejudice played a large role in nineteenth century church-state disputes. Arguments that appeared on the surface to deal with the question of whether Bibles should be read in public schools often masked nativist anti-Catholic sentiments, such as in the so-called 1844 Philadelphia Bible riots (Feldberg). The dangers of mixing the power of government with the mandates of religious institutions has long been recognized in American history, but the ways in which these dangers have been perceived, the weight given to different dangers, and the proposed legislative solutions to these dangers differed widely in the past and continue to differ widely today.

Early post-Revolutionary War attempts to forge government mechanisms for protecting religious liberty are often exemplified by James Madison's 1785 "Memorial and Remonstrance Against Religious Assessments" and Thomas Jefferson's 1786 "The Virginia Act for Establishing Religious Freedom," which influenced the later drafting of the First Amendment. Madison's "Remonstrance" opposed a proposed bill that would tax Virginia citizens for the purposes of paying religious educators. Professor of government Isaac Kramnick and professor of history R. Laurence Moore describe in their book *The Godless Constitution* Madison's commitment to a government that cannot interfere with the religious beliefs of citizens (103). Madison argues that government cannot support

religion if it wishes to protect both the rights of individual conscience and the vitality of religion itself, noting that "during almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution." The bill levying taxes to pay for religious education against which the "Remonstrance" argued ultimately failed to pass into law, and Jefferson's "Act" was signed into law, holding:

> No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in nowise diminish, enlarge, or affect their civil capacities.

Madison and Jefferson advocate for a neutral government that should not and cannot alter its policies toward citizens based on their religious beliefs, but as Witte explains debate over the wording of the First Amendment brought a plethora of potential drafts. The debate over those drafts and the differing attitudes they reflected toward the relationship between religion and government fail to provide us with any clear way to measure the original purpose of the First Amendment as conceived by its drafters. Witte argues, "The congressional record [on debate of the First Amendment] holds no dispositive argument against any one of the nineteen interim drafts [of the religion clauses] and few clear clues on why the sixteen words that comprise the final text were chosen" (72). The lack of clear historical context and the ambiguity inherent in the application of any abstract principle to concrete particulars has led to numerous court challenges over the precise meaning of the religion clauses as applied in various contexts.

Broadly speaking, the viewpoints on church-state issues can be grouped into two camps: separationist and accomodationist. Admittedly this bifurcation obscures the

complexity of the individual arguments made in church-state debate, but the separationist/accomodationist schema is common in legal scholarship, and it serves to capture two prominent strains of thought. Separationist interpretations of the religion clauses conform to the Madisonian and Jeffersonian principle that government must remain neutral and that it cannot favor or disfavor through policies any religious or nonreligious viewpoint. Accomodationist views allow for some intermingling of government and religion, such as in the government funding of religious institutions that provide social services, a position endorsed by public policy professor Joseph P. Viteritti in *The Last Freedom* and by legal scholar Frederick Mark Gedicks in his book *The Rhetoric of Church and State*.[10] Separationists might object to government funding of religious charities on the grounds that such funding conveys endorsement of the charities religion or functionally helps the charity proselytize, but accommodations would argue that the establishment clause was never intended to prevent government from supporting charities even if religious or that the good done by government support of charities outweighs minor establishment clause concerns. In either case, church-state questions revolve around the intersection of government and religion.

Perhaps the language most commonly associated with the religion clauses is the phrase "separation of church and state." The phrase was popularized by Thomas Jefferson's 1802 letter to the Danbury Baptist Association, and it serves as the focus of Philip Hambuger's *Separation of Church and State*. Hamburger, a professor of law specializing in the history of law and religious liberty, suggests that the phrase's prominence in church-state discourse and its tendency to be understood as an absolutist prohibition on any church-state interaction frustrate a nuanced understanding of the

[10]Despite its title, *The Rhetoric of Church and State* deals not with the range of arguments brought to bear on church-state matters but one particular argument that Gedicks believes has poisoned church-state debate.

proper relationship between church and state. The "separation" phrase, Hamburger notes, is perhaps better known among the general public than the actual phrasing of the First Amendment, exacerbating misunderstandings. An early but comprehensive twentieth century treatment of church-state separation also picks up on the key issue of language. Anson Phelps Stokes, Episcopal priest and one-time secretary of Yale University, published *Church and State in the United States* in 1950. Stokes' work discusses cultural and legal history contributing to the framing of the Constitution's religion clauses and church-state law disputes in the early twentieth century. Stokes' text is notable not only for its depth but also for the detailed care Stokes takes at the start of the text to define the key terms of the debate, notably "church" and "state." Such detail may at first glance seem to border on the pedantic or the useless. After all, everyone seems to know what is meant by state and church. But the condition of church-state discourse during the sixty years since Stokes published his work bears out the wisdom of defining key terms, as I will show.

To understand the arguments in Establishment Clause disputes, it helps to start with the first case Shaman mentions in his list, the 1947 *Everson v. Board of Education of the Township of Ewing*. *Everson* is a landmark Supreme Court case because it was the first time the Court held that the First Amendment's religion clauses were binding on state laws and because the case exemplifies the difficult questions raised by the establishment clause. Prior to *Everson* the Constitution's admonition that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" did not apply to disputes arising from state laws.[11] The majority opinion in *Everson*, authored by Justice Hugo Black, applied the First Amendment to state laws

[11]There were some cases before 1947 where federal jurisdiction did cover First Amendment disputes, such as the 1878 *Reynolds v. United States*, which held that free exercise rights did not protect from prosecution the act of polygamy as practiced for religious purposes.

through the equal protection clause of the Fourteenth Amendment. In this case, a tax payer in the Ewing, New Jersey school district objected to tax money being spent on bus transportation for students attending Catholic schools in the district. The question as concerned the establishment clause is whether the state's allocating tax money for transportation of students to parochial schools demonstrates government support for a religious institution in a way that "respects an establishment of religion" thus violating the First Amendment.

The Court reached a five-to-four decision, with Justice Robert Jackons's minority opinion accusing the majority of "utterly discordant" reasoning. In the majority opinion, Black reviews the history of discriminatory relations in colonial American, and he offers a strongly worded interpretation of the Establishment Clause that has since been widely quoted in church-state discourse:

> The "establishment of religion" clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." (15-16)

Having said that "no tax in any amount, large or small, can be levied to support any religious activities or institutions," Black and his fellow justices decide that the funding of transportation is not equivalent to a tax supporting religious institutions, because the funding itself is not an act of government preferential support for a religious institution. The tax, according to this argument, supports education; it does not support religion.

According to the majority's opinion, to withdraw the funding would betray government preference, as the court "cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools." Furthermore:

> Cutting off church schools from these services so separate and so indisputably marked off from the religious function would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them. (17-18)

Thus the question for the majority is not whether the taxes support a religious institution, but whether cutting off funding *only* for Catholic schools would demonstrate (negative) preferential treatment on the part of the government toward religion. It is on the definition of neutrality and equal treatment that this case, and many other establishment clause case, is decided.

At its most basic, the debate over the establishment clause is a debate over where to draw the line between government law and action that favors or disfavors one or more religions, but the definition of neutrality that is used to define favor or disfavor changes constantly as I explore in the next chapter. The minority opinion authored by Jackson and joined by Justice Felix Frankfurter argues that the social welfare policy of funding transportation is not equally open to all, but offered to public schools and Catholic schools and not nonreligious private schools or private schools of other religions. Jackson argues that the majority "ignor[es] the essentially religious test by which beneficiaries of this expenditure are selected," thus if they were to apply their neutrality standard to the

facts of the case, they would strike down the transportation policy as favoring a particular religion.

Jackson may believe that the majority's decision to permit publicly funded transportation to religious schools is "utterly discordant" with their argument for a clear demarcation between the activities of church and state, but there is nothing inherently contradictory in Black's argument that defunding the transportation program would violate the Constitution because it would require the government to leave neutrality aside on the basis that government provides funding to religious and non-religious schools alike. Potential contradictions arise, as Jackson notes, when we consider the fact of whether the transportation policy was truly open to all schools, and not just Catholic. If the government is only funding Catholic schools, and not other religious schools or secular private schools, then the case can be made that such funding is already preferential to one religious institution and ending it would restore neutrality. The equal treatment/neutrality issue becomes difficult when in a given jurisdiction there are limited options (e.g. either private Catholic or secular public schools are the only choices), but we might hope that disagreements over whether government policies are truly neutral, whether they truly treat religion and non-religion equally, could be resolved by careful and unbiased attention to the facts of a given case; however, if there is one lesson rhetoric has taught us continually it is that argument over facts is no easy matter.

The difficulty that arose in the *Everson* decision of applying abstract principle to concrete facts is not troubling in any sense that calls into doubt our abilities to reason and persuade. This difficulty of applying principle to a particular exigency is common enough in public argumentation. Indeed, rhetoric, according to one Aristotelian definition, deals with matters that have no clear resolution—of "things capable of admitting two possibilities" (*Rhetoric* 41). The decision in *Everson* may seem at odds with the decisions

in other establishment clause cases as Shaman suggests, but I suggest that the contradictory rulings that so concern legal scholars are only an effect of a larger underlying rhetorical problem. That rhetorical problem arises, both in *Everson* and in other church-state disputes, when discussants not only fail to converge on common understandings of basic, abstract concepts crucial to understanding the questions under debate, but also fail to recognize that they are using differing and contrary understandings and when they fail to realize that there is anything amiss with the debate as it is held. Participants in the debate appear to be talking to and with one another, but often they make divergent arguments that offer the semblance of dialogue because they use similar terms (i.e. religion, politics, or neutrality) but attach contradictory meanings to those terms.

I must note that this dissertation is not intended to offer any pat resolution to the juridical or civic confusion surrounding religious liberty cases. Rather, I am interested in what the confused arguments that so often accompany church-state cases can reveal about the operation (and failed operations) of argumentation and answer the question of how to define responsible persuasion. In this chapter, I will investigate a problematic argument that, I suggest, adds considerable confusion to debate over religious liberty. This argument is explained in more detail in the section "Rise of the Public Square" below. The argument's basic form is the accusation that certain government policies (including court decisions) minimize, discriminate against or are otherwise hostile to religion "in the public square." This argument is problematic in that the term "public square" (and its cognates) are ambiguous enough to cause confusion to basic key terms in church-state debate. Though I of course hope the analysis offered in this and later chapters can contribute to clearer thinking on the constitutional issues at hand, my goal for this chapter

and the chapters that follow is to describe and refine theoretical approaches to defining problematic arguments.

Before moving into the details of the arguments for analysis in this chapter, I need to offer a rationale for the arguments I select for analysis. As will become apparent in later chapters, the problematic arguments discussed in this dissertation are drawn predominately from the discussants working toward more interaction between religious and governmental institutions (i.e. accomodationists). In the interests of transparency, I acknowledge that my personal position on church-state questions tends to align with the strong separationists, emphasizing government neutrality on religious questions and equal treatment of all religious and non-religious organizations and individual beliefs. That said, I do not find problematic accomodationist arguments problematic because I disagree with them. Through the analyses that follow I will note examples of non-problematic accomodationist arguments. Nor is it the case that proponents of separation never make problematic arguments. They do, but problematic arguments made by separationists more often involve a lack of rhetorical effectiveness for their intended audiences rather than the problematic arguments among accomodationists that effectively motivate audiences while also confusing the debate. I will note some problematic separationist arguments;[12] however, I will not strain for some semblance of balance where none is supported by evidence. The balance of problematic arguments will fall among the accomodationist camp (though non-problematic accomodationist arguments will also be discussed). Regardless of particular positions, my overarching purpose throughout is to use examples of church-state arguments to explores models of persuasion and reason, not chastise particular bad actors.

[12]See my extended discussion of Justice Harry Blackmun's argument in Chapter Three.

THE RISE OF THE PUBLIC SQUARE

The phrase "religion in the public square," as used in scholarship discussing religion and government, originates with discussions of Lutheran pastor turned Catholic priest Richard John Neuhaus' 1984 book *The Naked Public Square*. Before the publication of Neuhaus' text, the phrase "religion in the public square" does not occur in law review literature and other scholarly articles.[13] The core of Neuhaus' argument is that social elites (composed predominately of academics and lawyers) have cultivated an anti-religious culture that minimizes and demeans religious viewpoints in civic discourse, and that legislation and jurisprudence has codified this hostility toward religion. This minimization is dangerous, Neuhaus argues, because it denies the essential, religious foundation from which law draws its authority, and because it silences the voices of those citizens who draw on religion for their political views. The problem of ambiguity in Neuhaus' argument is spotted by the first scholarly reviewer of the text. Reviewing *The Naked Public Square* for *The Review of Politics*, John A. Coleman agrees that religious views should not be dismissed or prevented from entering public, political debate, but he also explains:

> Neuhaus exhibits too much slippage from the notion of the 'naked public square' when it refers to politics and society (where, of course, religious arguments have as much right as any others to try to persuade) to a notion of a 'naked public square' when it refers to the state (which on all religious questions must be, in my view, secular, i.e., totally self-limiting and self-negating in making any religious judgments). (132)

Coleman's concern over "slippage" in terminology between "public" as social and "public" as government fails to catch on with the scholarly discussions that emulate Neuhaus' phrasing.

[13]Per searches of both Hein Online Law Journal Library and Google Scholar databases.

In the decades since the publication of *The Naked Public Square* scholarship discussing "religion in the public square" proliferated. Numerous scholarly articles consider the question of whether various agents (courts, legislators, commentators, academics, US culture at large, etc.) are hostile toward religion in the "public square," and many of these arguments fail to disambiguate between public-as-government and public-as-social.[14] In addition to "public square," other terms such as "public," "political" and "civic" are also used as substitutes for "government." One detailed consideration of the public square question is discussed in a DePaul Law Review symposium titled "Is the First Amendment Hostile to Religion?" Popular press books also pick up this phrasing, most notably Stephen Carter's *Culture of Disbelief*, which provides a more nuanced though no less rhetorically problematic implementation of the public square argument as Neuhaus' treatment. In some discussions of the religion clauses, questions of whether there are laws "respecting an establishment of religion" battle for space with (and are at times even eclipsed by) questions of whether there is "hostility" toward religion in various public settings enacted not by government agencies but by ill-defined social/cultural agencies.

The key difference that the phrase "public square" obscures is that between the activities of government officials and laws and the activities of non-governmental individuals, groups, and organizations. Despite this ambiguity, the public square phrasing is widely used in church-state separation debate. Sometimes the phrase has a eulogistic function, often when used by accomodationists (e.g. "public square" can refer to a sense

[14]See Frederick Mark Gedicks "Public Life and Hostility to Religion," *Virginia Law Review* 78 (1992): 671-696; Michael Walzer "Drawing the Line: Religion and Politics," *Utah Law Review* (1999): 217-638; Michael W. McConnell "Religious Participation in Public Programs: Religious Freedom at a Crossroads" *University of Chicago Law Review* 59 (1992): 115-194; Suzanna Sherry "Religion and the Public Square: Making Democracy Safe for Religious Minorities," *DePaul Law Review* 47 (1997-1998): 499-517. Note that Sherry's position is separationist, demonstrating that discussants who embrace the ambiguously defined "public square" are not restricted to one side of this debate.

that a valued expression of religion in government is at risk), and sometimes it has as a dyslogistic phrase, as when used by separationists (e.g. "public square" can refer to our government favoring one particular religion, thus putting at risk the religious liberties of others). Of course, not all books and articles using the phrase "religion in the public square" are discussing constitutional religion clause questions, but those that do use "public square" or similar terms for discussing constitutional questions face serious problems.

The most serious problem with the public square phrase is that it permits (and encourages) the conflation of arguments that would more productively be discussed separately. These arguments discuss different agencies (government laws vs. public speech) as undertaken by different agents (government officials vs. private citizens) in different settings (government institutions vs. the literal public square, non-governmental publications, etc.). There is a useful comparison to make between the ambiguities resulting from "the public square" to the ambiguities Nancy Fraser warns about in "Rethinking the Public Sphere" where she notes that "the public sphere" can "conflate at least three analytically distinct things: the state, the official economy of paid employment, and arenas of public discourse," and she explains how that conflation has "practical political consequences, for example, when agitational campaigns against misogynist cultural representations are confounded with programmes for state censorship" (57). Similar conflation occurs in church-state separation debate where arguments against the government promoting a religious view are confounded with arguments in favor of government censoring that religious view.

Church-state questions can only be debated sensibly when discussants acknowledge the differences in agency, actor, and setting. To use "public" in a related example, one cannot use the same argument to say that citizens should have unrestricted

access to "public" buildings including a grocery store, city hall, and the Pentagon. These are all "public" buildings in one sense or another, but they are not public in the same ways (the grocery store is open to the public but privately owned, city hall is open to the public and owned by the people, and the Pentagon is owned by the people but not open to the public in the same ways a grocery store or city hall are). As concerns church-state separation discourse, there are at least three arguments involving distinct questions that get muddled through the use of the ambiguous "public square" phrasing. The three questions are these:

1. How should religious arguments be weighed in democratic deliberation among a population that includes diverse religious and nonreligious populations? More specifically, do those who argue that religious arguments cannot provide adequate reasons for all people in such a population demonstrate hostility toward religion in the public square? (This is a question about deliberative theory not the law that results from deliberation.)
2. Is the refusal by government to accommodate religious practices of individuals or groups without a compelling state interest a demonstration of hostility toward religion in the public square? (This is a question about law.)
3. Are judicial decisions that invoke the establishment clause to end or remove practices that favor religious viewpoints that are funded and/or carried out by government institutions a demonstration of hostility toward religion in the public square? (This too is a question about law.)

For church-state discourse, the third question poses the greatest challenge to defining and enacting responsible argumentation. This question is also the least remarked on in legal and popular church-state literature (indeed lack of awareness of the problems encountered in asking this question is one defining aspect of its problematic nature). The

balance of the remainder of this chapter will be devoted to analyzing arguments responding to the third question, but first the other two questions will be briefly considered, and in describing the more productive nature of these questions my argument will be able to better explain what is unproductive about the third question.

Liberal political theory has long debated the first question. The claim that religious viewpoints cannot provide convincing or credible reasons for governmental policies among religiously diverse populations is prominently defended by John Rawls and Robert Audi among others. The concern expressed by the Rawlsian position is that public reason needs to operate through arguments that are justifiable to all involved in public debate (politicians, legislators, citizens, etc.). Rawls explains this principle of reciprocity in the "The Idea of Public Reason Revisited." Rawls describes some ideologies as "irreconcilable comprehensive doctrines," which include religion and other frameworks that exist beyond the reach of debate, because people of differing doctrines cannot effectively discuss their content. Reasonable discussion of these doctrines is impossible because they are considered unalterable or because the content of one doctrine cannot be translated or otherwise communicated in a sensible way to another doctrine. Rawls does not suggest that such doctrines cannot be discussed publicly; he only argues that such doctrines cannot provide the basis for ethical debate in which all citizens can participate and set policies binding on everyone.[15]

[15]While the place of religious ideas in liberal democracy raises a number of questions concerning epistemology, ethics, and rhetoric, the topic is not germane to the argument of this dissertation. Lest readers guess at my position based on lack of discussion, I will say that I'm skeptical of the Rawlsian position insofar as I'm skeptical that people can get beyond their "irreconcilable comprehensive doctrines" to participate in any sort of coherent public reason that leaves these doctrines behind. Any model for productive public deliberation must provide for a response to views put forward from irreconcilable positions that is more rhetorically effective than the response, "That isn't reasonable." Further, religion is also just one of a range of potential ideological frameworks that can prove irreconcilable. That Catholics or Protestants might bend the state to disadvantage the other is not qualitatively different than the risk that devotees of jazz or classical music might do the same (except for the quantitative historical track record of the former actually occurring and the latter not). This example isn't intended to demean or minimize

In prescriptive theories of liberal democracy such as that offered by Rawls the term "public" is not equivalent to government. The "public reason" conceived of by Rawls is one in which government officials participate, but it is not only practiced by agents of government. When Rawls says that religion (or any other "irreconcilable comprehensive doctrine") cannot operate within public reason, he is making a definitional claim for a normative system of political theory (i.e. how people should discuss and craft policies for governance). He is not suggesting that religious viewpoints should not be expressed, only that religious or otherwise "comprehensive" views cannot serve as reasonable views in his definition of public reason. Rawls makes no claim that government should in any way restrict liberties of speech, conscience or action.

The second question is one where concern over explicitly governmental hostility toward the religious liberties of citizens seems most valid, as the free exercise clause does involve government restraint on religious belief and practice (though I would still note that "public" is far from the most accurate term to describe the agency of government). In the much-reviled 1990 decision *Employment Division v. Smith*, the Supreme Court held that states were not obligated to provide accommodations for the religious use of drugs, thus two men who used peyote as part of a religious ritual were constitutionally denied unemployment benefits for failing a drug test. Stephen Carter holds up the case as the prime example of how "citizens who adopt religious practices at variance with official state policy are properly made subject to the coercive authority of the state" (127). Because these free exercise concerns do deal with governmental actions toward religious practices, they would be best discussed using the terms "government," and not "public

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people's dedication to their religion (or art); rather, it serves as a reminder that if we voluntarily place into public discussion what we hold most high, then we must be willing to expose those values to criticism or dismissal by our fellow citizens. Such criticism or dismissal is not necessarily hostility, although it may be perceived as hostility.

square," but the overall question of whether hostility is exhibited by government practices is one that can be fairly discussed. The less problematic question of hostility in free exercise cases is the reason why I focus on the more problematic use of the public square phrasing as it is used in establishment clause cases. As for the third question, the problem with asking whether there exists hostile attitudes toward religion in public when dealing with questions of the establishment clause is that the clause restricts the actions of the *government*, not of the public broadly defined. All of the issues Shaman describes in his litany of judicial church-state contradiction at the start of this chapter are issues where government policies (as enacted by government schools, city halls, and legislatures) are the subject challenged on the basis that those policies violate the establishment clause.

I wish to stress here that there are a wide range of establishment clause arguments that do not run into the problem of the public square phrasing (arguments made on both accomodationist and separationist ends of the spectrum). For instance, it isn't irresponsible to raise the question of whether in striving for neutrality government institutions put in place policies that endorse the lack of religion over religion (such as school curricula where the historical role of religion is occluded due to concern over accidentally endorsing a religious viewpoint).[16] It is even possible to consider productively the question of whether neutrality is possible in either theory or practice and how that neutrality is measured. Thus, the *Everson* arguments are not problematic in the way that the public square phrasing is problematic, but the public square phrasing seems

[16]It should be noted that the separationists who endorse neutrality almost always agree that schools can teach about religion without endorsing or proselytizing that religion. Again, there is a question to fairly debate over whether schools can teach about religion in a way that is truly neutral, but to ask whether those who challenge what they see as biased endorsements of religion in public (i.e. government) schools are hostile to religion in public (i.e. society) runs into the problems described in this chapter. For examples of the separationist position see Americans United's *Religion in the Public Schools* website (http://religioninthepublicschools.com/) and ACLU's "Joint Statement of Current Law on Religion in the Public Schools" (http://www.aclu.oarg/religion-belief/joint-statement-current-law-religion-public-schools).

to cultivate a rhetorical situation where defining neutrality becomes difficult. Where questions over responsibility of debate arise, however, is when discussants argue viewpoints in such a way that deny others the opportunity to raise opposing views (often through the use of ambiguous terminology that at once brings their viewpoint to dominance in debate while minimizing the space for other views). When one discussant insists on the term "public" while responding to another's arguments that are about the policies of "government," the central question remains inchoate.

To set the immediate effects of the phrasing aside for a moment, the language is also notable because it is hardly ever the focus of study in church-state separation arguments though the phrasing shapes the debate and controls much of the content of those debates. In other words, there is little awareness that the public square phrasing undermines the quality of debate, even as it is sometimes criticized as a poor position to hold in the debate. Separationists may criticize accomodationists for conflating "public" with "government" but they offer no larger awareness of the negative effects the phrasing has on the debate. Instead, they will merely chide their opponents for slippery use of language, and move onto defending their own preferred interpretation of church-state separation.[17] There is almost no consideration that the use of slippery or ambiguous language has any effect beyond indicating that any interlocutor who uses such language employs faulty thinking.

I have located one exception to the lack of attention paid to the phrasing's effect on the wider debate. That exception is church-state attorney T. Jeremy Gunn's short essay "Clothes Encounters in the Naked Public Square." Gunn does not focus as much as he could on the effect that the public square argument has on church-state discourse, but

[17]Such as Theodore Y. Blumoff "The New Religionsists' Newest Social Gospel*," University of Miamai Law Review* 51 (1996): 1-56 and William W. Van Alstyne, "What is 'An Establishment of Religion'?" *North Carolina Law Review* 909 (1986-7): 909-916.

he does at least hit upon the crucial concept that the public square argument hinders discussion, explaining that "in the interest of having an honest and illuminating civil discourse, it would be helpful if everyone participating in the debate on the role of religion in public life would use the word 'government' (or something like that) when the role of government is the issue, and not use the term 'public' as a misleading euphemism" (51). It is Gunn's attention to an "illuminating civil discourse" that makes his argument notable above and beyond arguments that merely criticize another's argument for using vague language. Gunn's essay appears in a collection published by the liberal Center for American Progress titled *Debating the Divine: Religion in 21st Century Democracy*. The collection is the product of the Faith and Progressive Policy Initiative at the Center. The Initiative describes itself as concerned with describing and supporting progressive "moral, ethical, and spiritual values underpinning policy issues" and with "safeguard[ing] the healthy separation of church and state that has allowed religion in our country to flourish" (Steenland 2). Sally Steenland, editor of the collection, introduces it as an attempt to survey progressive responses on the question of the proper role for religion in public life. Steenland's introduction itself employs confused "public square" imagery, using the phrase in such a way that equates the religious viewpoints expressed by citizens in liberal democratic deliberation with the policies of government. She asks "whether religion should be a force shaping our public policies and our common civic life," which defines public in terms of deliberation that leads to government policies, but then she also notes that "contrasting views about the role of religion in public life predate our nation's birth—[such as] the Massachusetts Bay Colony, where officials collected taxes to support the Puritan church and compelled attendance at its services," which defines public in terms of government policies (4).

Here we see the common conflation of two distinct agents under the "public" term, which is what Gunn criticizes later in the collection.

Gunn's title directly responds to Neuhaus' "naked public square" phrasing, and the essay notes the proliferation of the phrasing, questioning why it is so often used in church-state debate. Gunn's question "Why do so many people raise the alarming specter of a religion-free 'naked public square'?" is interesting to consider, but its answer is not necessarily relevant to my interest in what effect raising that specter has on the shape of church-state debate. Gunn notes, "While I completely agree that religious voices should not be excluded from the public square, the risk of this actually happening in the United States is so close to zero that *the real question is*: Why do [Eboo] Patel and so many others talk about the possibility of religion being excluded—as if it were a lurking risk?" (49). Patel is another author in the collection, and his argument is that religious pluralism in civic conversation is the best response to any divisive religious voices. In his words, "it is fundamentally illiberal to exclude religious voices from the public square" (Patel 18). Gunn offers a list of examples to bolster his claim that public religion is at no risk of exclusion: religion on radio and TV, concert hall revivals, religious materials distributed without restraint through the mail, proselytizers working door-to-door, religious buildings and symbols on public display, and political candidates discussing religious motivations among other examples (49). Gunn proposes that the answer to the question of why there are so many claims that public religion is treated with hostility "lies is some mischief-making that exploits the ambiguity of the word 'public.' Although I do not think that Patel is trying to confuse the issue, he first adopts and then deploys the language that comes straight from mischief-makers" (50). The question of where the language comes from is somewhat beside the point of my argument.

Gunn, perhaps due to his work with the ACLU and his experience battling political opponents, attributes the operation of the public square phrasing to bad-faith arguments made by discussants with whom he is ideologically opposed. While these discussants may be guilty of intentionally propagandistic arguments, I think that the operation of the public square phrasing cannot be easily laid at the feet of certain bad actors. As noted above and as will be discussed below, discussants on multiples sides of the issue adopt the "public square" language, and while some may consciously use it to confuse the issue, I suspect most who do use the phrase do so without making a conscious, strategic decision. Regardless of the origin of the threat to religion trope in public argument, its effect on debate remains, and that effect is to confuse "the real controversy," which Gunn accurately describes as "not whether individuals, families, and religious communities may express their religion in the public square; rather, it is [the] extent to which the government should be involved in promoting religious activities" (51). Before considering how we can have that honest and illuminating civil discourse to which Gunn aspires we need to see how the problematic argument operates.

A Dialectical Take on the Rhetoric of Church-State Separation

As discussed in the Introduction, dialectical and rhetorical models differ widely in terms of how they explain the function of persuasive discourse, but there is an important similarity in the way each framework models the operation of viewpoint interchange. Approaches within all frameworks can envision persuasive discourse as moving toward some kind of convergence among discussants involved. This convergence is not necessarily agreement, though it can be. The pragma-dialectical approach postulates a goal of mutually agreed resolution of disagreement, whereas rhetorical models (such as stasis theory) might postulate a minimal goal of agreement over the question that

discussants are debating or seek a moment of conjunction between speaker and audience as in Burkean identification or Perelman's adherence. In offering this idea of convergence, I am not trying to subsume the considerable diversity (and at times incommensurability) of the models at work in these frameworks; I am only trying to suggest an area of contact between them. In applying these models of convergence to texts arguing multiple instances of the public square phrasing, I hope to highlight both the limitations of the models, and the places where they intersect to suggest models of responsible argumentative behavior in civic discourse. Throughout this project the question of responsible argumentation attempts to take into account three measures of discursive propriety—dialectical soundness, rhetorical effectiveness, and ethical rectitude—in order to investigate the extent to which we can synthesize all three views in a standard of reasonable argument.

The rest of this chapter will look at texts that exemplify the problem with the public square phrasing. The analysis in this chapter will be relatively brief given the space already devoted to explicating establishment clause disputes, but it will begin an examination of key terms and how those terms are seen to operate within the differing frameworks. This pattern of analysis will be followed with more elaborate analyses in later chapters. In this chapter, I will look at a text written by a committee to celebrate the bicentennial of the Constitution and published in 1988. The Williamsburg Charter was the product of a wide array of religious leaders, academics, political activities, elected officials, and interest groups. Signed by Presidents Carter and Ford, Supreme Court Justices Rehnquist and Burger, and many other governmental and political figures, the Charter promises to clarify the meaning of religious liberty as determined by the First Amendment. I will also read the Charter against an essay critical of the Charter's arguments. The Charter provides a good source for analysis because it provides a rare

moment of (limited) consensus in church-state discourse. People representing a diverse range of views signed onto the Charter's views. As I will show in the analysis below, however, this surface appearance of consensus belies deeper confusion about fundamental concepts including that of the public.

I will not examine Neuhaus' *The Naked Public Square*, even though it is responsible for planting the wording of the public square argument in church-state debate, because it does not make a good source to analyze for the purposes of this project. In analyzing church-state debate, I am assuming that participants in the debate are invested in resolving disputes over interpretation of the First Amendment religion clauses and not dispensing with those clauses altogether.[18] The hardline separationist & neutrality interpretations of the Establishment Clause, such as espoused by the "godless constitution" of Kramick and More, differs from and is incompatible with Hamburger's accomodationist interpretation that sees a space for religiously significant activities in government, but both intend to demarcate boundaries between government and religious institutions. Neuhaus, especially in his work building on *The Naked Public Square*, moved out of this church-state mainstream and aligned himself with those in the Christian Reconstructionist movement who seek to replace the Constitution with biblical law (see Sherry 516-7). The rhetoric of extremism, as practiced by radicals, revolutionaries or reactionaries, is a fruitful area for rhetorical study (and the operation of extreme rhetoric no doubt effects less extreme discussants); however, I suspect there is just as much to learn about the operation of persuasion in rhetorical situations where discussants appear to be engaged in reasonable debate but are actually engaged in deeply troubled rhetorical practice as there is to learn about the operation of rhetoric that is

[18]My analysis acknowledges the existence of more obviously propagandistic arguments circulating in church-state discourse, but my analysis is not focused on such arguments.

classified as extreme or propagandistic. For a more mainstream but also popular text that engages in the public square argument, I direct readers to attorney Stephen Carter's 1994 *The Culture of Disbelief*. Carter's text also contributed to the spread of the public square phrasing (the book was well advertised by politicians, including then-incumbent President Clinton).

The rhetoric of church-state debate is useful for investigating questions of productive persuasion, because it involves many discussants who appear to be close to each other's positions yet the substance of their arguments rarely intersects. The Williamsburg Charter demonstrates the breadth of confusion circulating around the public square phrasing, and the political range of its signatories suggests that its rhetorical infelicities are less likely to be the product of intentional rhetorical bad behavior, such as Gunn criticizes various Religious Right groups for making. I start with texts written for popular and semi-professional (a mix of scholarly, political, government audiences and more general public audiences), because the circulation of these arguments outside of legal scholarship and courtroom application have some bearing on the more professional arguments given the influence of popular press books like Neuhaus' and Carter's. Certainly the phrasing of "the public square" originated in a popular press publication. Even if the relationship is not directly causal, focusing on non-professional writing first allows me to build up toward the specialized legal arguments that will be discussed in the later chapters.

CASE STUDY: THE WILLIAMSBURG CHARTER

I will take some time to summarize in detail the Williamsburg Charter's arguments before performing a dialectically-informed analysis of the public square phrasing as revealed in the Charter. The Charter demonstrates well just how imbricated

the various meanings of "public" become in church-state arguments. Though billed as "A Reaffirmation of the First Amendment" in its subtitle, the arguments in the Charter careen between public-as-government and public-as-social. Ostensibly, the Charter discusses religious liberty as the concept emerges from interpretation of the religion clauses of the First Amendment, but often the Charter's argument meanders into discussions of popular attitudes toward religion which are only tenuously, if at all, connected to matters of First Amendment interpretation and application. At other times, the Charter makes clear distinctions between public attitudes toward religion and governmental activities concerning religion.

The cause for concern with the Charter's arguments is not so much the contradictory arguments themselves as that those arguments foster a relationship between the arguments about public-as-government and public-as-social that is ambiguous, thus making contradictions difficult to acknowledge and discuss. For instance, the Charter is of two minds when it comes to the question: Is it the case that government striving for neutrality has encouraged hostility toward religion in US culture? At times the Charter suggests the answer to that question is yes, and at other times the Charter suggests that government neutrality is an unambiguous good to be sought in church-state relations.

The Charter's introduction situates its authors' concern for "a fresh consideration of religious liberty in our time, and of the place of the First Amendment Religious Liberty clauses in our national life." Thus the Charter promises a consideration more in line with the public-as-social than public-as-governmental (in the use of "national life"), yet it conflates social questions regarding religion with governmental questions:

> The First Amendment's meaning is too often debated in ways that ignore the genuine grievances or justifiable fears of opposing points of view. This happens when the logic of opposing arguments favors either an unwarranted intrusion of religion into *public life* or an unwarranted exclusion of religion from it. History

> plainly shows that with religious control over *government*, political freedom dies; with *political* control over religion, religious freedom dies. (emphasis added)

The problem created by framing debate over the First Amendment as one of "unwarranted intrusion of religion into public life or an unwarranted exclusion of religion from it" is that courts consider questions of the First Amendment as it applies to government actions, not "public life" writ large (not to mention the hazards of reducing complex debates to binary positions as the Charter does with its either/or reasoning here). Courts do not control popular attitudes toward religion.

The Charter tries to connect the state of religion in public life to the Constitution, but it continually uses language in the way that Gunn is critical of—conflating ideas of public and government. There is nothing problematic in suggesting that government plays a role in fostering social attitudes, but at times the Charter suggests an oversimplified, one-to-one (and one-way) relationship between law and culture. The Charter states, "The First Amendment Religious Liberty provisions provide the United States' *most distinctive answer* to one of the world's most pressing questions in the late-twentieth century. They address the problem: How do we live with each other's deepest differences?" (emphasis mine). The legal provisions of the First Amendment, restricting government from impeding on citizens' rights of speech, publication, religion and assembly certainly provide a legal framework (i.e. scene) from within which "we" make our public arguments. But "we" (i.e. agents) are not coterminous with government or law. It is not the provisions of legislation that alone are responsible for how people interact and how they treat each other's views (or bodies). There are a range of arguments, from socially acceptable to unacceptable, over which the government has no control. Even if there were

resistance or hostility to religious viewpoints in public debate,[19] that hostility can come from public speakers who in no way speak for or are supported by the government.

These arguments linking the Constitution and public attitudes toward religion (and toward debating religion) exist in an uneasy tension with other arguments in the Charter where the Charter argues that "it is false to equate 'public' and 'governmental.'" Equating public with governmental is exactly what other arguments in the Charter imply, such as "Much of the current controversy about religion and politics neither reflects the *highest wisdom of the First Amendment* nor serves the best interests of the disputants or the nation" (emphasis added). The Charter could more consistently argue that disputes over interpretation of the "First Amendment Religious Liberty provisions" provides an exigency for *asking* the question of how we ought to live with each other, but to suggest that constitutional law "answer[s]" that question immediately runs into the public framing problems Gunn describes.

In order to understand the full ramifications on church-state discourse of the public square phrasing, it is helpful to read the Charter alongside another discussant responding to the Charter's ambiguous arguments. A special issue of the Journal of Law and Religion published two years after the Charter's publication was dedicated to discussing the arguments put forward in the Charter. Edited by Edward Gaffney, Jr., with a preface written by Justice Sandra Day O'Connor, the special issue includes an article titled "What's Wrong With the Williamsburg Charter" by John M. Swomley, professor of Christian Ethics and then-chair of the ACLU Church-State Committee.

[19]Whether there is hostility to religion in US culture is a question that does not need to be answered when considering the effect the public square phrasing has on church-state debate, as the problem with public square arguments is their confusion of public with government, not with the falsity or truth of their claims about hostility.

Swomley's criticisms of the Charter focus in part on the ambiguity of the language employed in the Charter's argument. A close reading of Swomley's criticisms demonstrates that the confused nature of basic terms in the Charter's arguments leads to difficulties in maintaining responsible debate on the issues raised in the Charter. I will focus on Swomley's criticism of the ambiguous language used in the Charter. Swomley does criticize the Charter for its inconsistent and ambiguous use of the phrase "public life," but he offers a more elaborate criticism of its use of the term "secular" that demonstrates similar rhetorical difficulties as those encountered among arguments deploying the public square phrasing. Indeed, secular proves to be part of the definition of the public for both Swomely and the Charter though each uses the term in contrasting ways. While Swomley raises several sound criticisms of the Charter's language and arguments, his critique is not without its own faults. Whether those faults result from a sort of sympathetic overreaction to the Charter's own ambiguous language is impossible to say based only on the evidence of the two texts, but it is a possibility that bears consideration when asking the larger question of how to define responsible argumentation and rhetorical practice. The promise of responsible argumentation can be premised on different goals—of resolving conflict, of disagreeing in a way that each discussant understands the other, of persuading. In the case of the argument between Swomley and the Charter, I think it is best to start with the goal of understanding, because their debate demonstrates a considerable failing in that regard, and mutual understanding plays an important role in both rhetorical and dialectical conceptions of responsibility.

Swomley criticizes several problematic terms used by the Charter. Those most relevant to the analysis at hand are "secular," and, in Swomley's terms, "such words and

phrases as 'government,' 'public life,' and 'society'" (166). Addressing the argument over the term secular Swomley says:

> Unfortunately the Williamsburg Charter does not view the Constitution as a secular document, but assumes that there is something wrong with the secular state. For example, in the section cited at the head of this article, it speaks of a move 'in more recent times...toward the de facto semi-establishment of a wholly secular understanding of the origin, nature and destiny...of the American nation,' as if there is something wrong with its secular origin and nature. It rejects the usual dictionary definition of secular as 'temporal, nonreligious worldly,' and says 'Secular purpose...should not mean 'non-religious purpose' but 'general public purpose,' as if there can be a general public purpose that is religious rather than secular. For my part, I rejoice in the very secularity of American society that the Charter finds ironical or seems troubled about...". (163-4)

Obviously what Swomley means by the term secular and what the Charter means are different, and the differing understandings of the term secular are crucial. When the Charter argues that "constitutional jurisprudence has tended...to move toward the de facto semi-establishment of a wholly secular understanding of the origin, nature and destiny of humankind and of the American nation," it intends "secular" to carry a denotation of explicitly not-religious, i.e. religion is actively removed from considerations of law and US culture by government agents (namely the courts). The Charter uses "secular" to refer to cultures that are populated by the non-religious and to refer to an ostensible group of stakeholders in church-state debate: the "secularists" (a term used more often in the Charter than the word "secular" itself is used) who appear to hold some animosity toward religion in public (i.e. those who "favor an unwarranted exclusion of religion from [public life]"). When Swomley uses the word "secular," he means a condition in which both religious and non-religious views and practices can flourish on account of a neutral government that can neither favor nor disfavor the views and practices of citizens on the basis of their religious belief or disbelief.

The significance of this divergence in defining "secular" is that Swomely does not elaborate on it. He offers his definition of secular, dismissing the Charter's definition, and the debate, such as can be had between a committee-written text and a journal article written a year or so later, goes nowhere. The back-and-forth rejection and proposition of favored definitions is common in church-state discourse. The Charter's and Swomley's insistence on their own favored definitions of "secular" with no discussion of why their definitions differ or how those differences might be resolved is representative of wider church-state debate where terms such as secular and public create a kind of rhetorical wall past which the conversation cannot move.

The question of why this divergence occurs matters less for my argument than carefully describing how it occurs. The pragma-dialectical model produces a useful picture of how the Charter/Swomley conversation could have unfolded differently. A rational-critical discussion, as postulated by van Eemeren and Grootendorst's model, requires all viewpoints put forward in a debate to be accepted by all discussants. If one discussant objects to a viewpoint, the discussants who proposed the viewpoint must defend it to the satisfaction of the objector. If the defense doesn't satisfy the objection, then the viewpoint must be dropped. In this way, the viewpoints put forth into debate shape each other. Using this model we could recreate a more dialectically sound version of the Charter/Swomley debate as follows:

1. Charter: Secular equals government hostility toward religion in public.
2. Swomley: No. Secularism equals government neutrality which protects religion in public.
3. Charter: OK. Secularism equals government neutrality. However, attempts to enact that neutrality have actually led to hostility.

This progression moves the debate beyond the empty cipher of "secular" onto which each side can project its own (often implicit and under-discussed) meanings and into a place where they are discussing the particulars of government policies that might potentially violate the establishment clause. Unsurprisingly this critical-rational idea does not reveal itself in the actual debate. Swomley says, "I rejoice in the very secularity of American society that the Charter finds ironical or seems troubled about," but the concept that Swomley rejoices in is not the "very secularity" that the Charter criticizes. The Charter's secularity is a very different concept than the concept that Swomley values. The Charter associates secularity with hostility toward religion, with an unjustifiable diminishing of religion's correct place in US culture perpetrated at the hands of near-villainous "secularists." Swomley criticizes the Charter's definition of "secular" without fully understanding what that definition is. He says that the Charter "rejects the usual dictionary definition...and says 'secular purpose...should not mean 'non-religious' purpose' but 'general public purpose,' as if there can be a general public purpose that is religious rather than secular" (164). The concern of the Charter is whether there can be a secular purpose that is not minimizing to religion, a secular purpose that is truly neutral.

Swomley's insistence on using the term "secular" and attempting to reclaim it from what he considers the Charter's wrong usage raises the question of why. What is so important about using that specific term "secular" that Swomley tosses it back in the face of the Charter by "rejoicing" in it instead of using more detailed language that explores the differences between social attitudes toward religion and government policies toward religion? In asking why, I am not asking for the psychological motivation of particular discussants (as such motivations are largely beyond the reach of textual evidence) as much as I am asking what rhetorical effects could accrue from the use of the ambiguous terms and could motivate their use.

As will be discussed in the following chapters, invoking these ambiguously defined key terms allows rhetors to appeal to powerful persuasive resources without having to engage in a detailed process of formulating arguments with extended lines of reasoning and detailed collections of evidence. Though these powerful resources can help in rousing an audience's fervor, they can also cause problems when it comes to situations where discussants from multiple sides need to engage each other's arguments (such as in a formal hearing). Appeals to ambiguous terms are persuasive because audiences can project their own preferred meanings onto "public square" or "secular," building up an epideictic outrage that occurs whenever a community's values are seen to be under attack. From an accomodationist perspective, the public square phrasing helps foster a unified sense of identity aligned against "secularists" (to use the term from the Williamsburg Charter) who seek to diminish or abolish the cherished place of religious belief and practice as it occurs in various public fora (i.e. public in the sense of being open to the view of all but not sponsored or conducted through government). Ambiguous phrasing may most often originate from the accomodationist camp, but it has potentially disruptive effects on the intersection of any viewpoint in church-state arguments, making it difficult for discussants to hear other views and describe them accurately, just as Swomley and the Charter fail to converge on a common understanding of "secular."

While the ambiguity may be used to persuasive effect for one audience or another, it undermines responsible rhetorical practice. A reasonable discussion, in the pragma-dialectical framework, requires a hashing out of disagreements. The procedures of reasoning, the exchanges of "yes I agree because" or "no I disagree because" cannot function when the basic terms offer chimeric meanings that shift among discussants. I will discuss in more detail the procedural reason of dialectical argumentation in coming chapters. At this point I wish to emphasize with the analysis of the public square the deep

divergences in meaning that can operate beneath a surface appearance of reasonable argument. The next chapter will consider how the concept of neutrality operates in church-state discourse, which, as with "the public square," is a key term that often confuses more than it clarifies due to the contradictory ways in which discussants define it. Under certain accomodationist understandings of neutrality, courts cannot end religious activities in government because to do so would demonstrate hostility on the part of the government toward religion. The separationist response maintains the hostility to religion theme while shifting the agent wielding that hostility from anti-religious secularists to incipient theocrats who would use the power of the state to privilege one religious identity while subjugating others. In other words, separationists claim that government must restrain government-sponsored religious activities not out of hostility toward religion but in the interests of treating all religions equally. In seeking a perspective from which to adjudicate conflicting viewpoints such as these, the courts have tried to define some neutral standpoint to fairly judge them; however, as critiques of rationality's putative objectivity have demonstrated, neutral viewpoints do not exist. Chapter Two explores what role if any neutrality can play in defining critical reason by considering the case study of the neutral observer.

Chapter Two: Putting It In Neutral

The idea of the public square as described in the previous chapter is one of several church-state concepts used in ambiguous or contradictory ways. Neutrality is another key term that discussants use with different understandings. Whereas the phrase public square appears widely in both popular and judicial discourse, neutrality narrows the focus more closely to language used by attorneys and judges, having served as a principle in Supreme Court decisions since the mid-twentieth century. Before examining the operation of neutrality more closely, though, I want to reiterate the significance an examination of these problematic terms has for the study of persuasion. The quality of church-state debate is troubling from the civic perspective, because it continually thwarts efforts to resolve conflicts that have serious consequences. It also troubling from a rhetorical perspective, and not just because discussants engage in ethically questionable discursive behavior. It is lamentable but by no means surprising that people debating heated topics step beyond the bounds of propriety (in the various ways those bounds are defined). What is more disconcerting is that rhetorical analyses of problematic civic discourse can miss divergence of viewpoints as revealed in the evidence of interaction between two or more discussants.

As I will discuss below, the phrases public square and neutrality serve as persuasive distractions, offering up broadly defined eulogistic values that seem to offer wide-spread appeal but actually are used to support only one viewpoint. Problematic uses of neutrality in particular function similarly to problematic uses of equality and agency in discussions of racism, sexism, and classism. I am thinking here of the class-, color- and/or gender-blind Horatio Alger argument that insists individuals can pull themselves up by their own bootstraps, to use a term brought to prominence in rhetoric and writing

by Victor Villanueva. The ideology conceives of society as a level (i.e. neutral) playing field and ignores systemic power differences (i.e. discrimination operating through racism, sexism, market forces, etc.). Thus, an approach to church-state issues that privileges Christian religious norms is portrayed by its supporters as the neutral norm, just as an approach to discrimination laws that privilege white supremacy are defended as a neutral norm. For example, the racist presentation of color-blind equality can claim that it is not racism that causes unequal hiring between races but individual worth. Crucial to this presentation of equality is the effort to portray any argument to correct power imbalance as itself unfair (e.g. affirmative action portrayed as reverse racism).

A common rhetorical critique of such presentational arguments is to appeal to both empirical evidence and an ethical-political framework that valorizes equality only once the operation of inequality is made explicit. A well-known example familiar to rhetoric and writing is Peggy MacIntosh's "invisible knapsack" concept for explaining white privilege. As MacIntosh explains, those benefiting from systemic privilege are often unaware of their privilege and fail to perceive inequalities that exist. MacIntosh's and other critiques of privilege use empirical demonstrations of disparities to demonstrate the actual inequality that exists in place of the perceived equality. This approach is effective for an audience of fellow rhetoric scholars who share assumptions and perceptions of ethos that make them adhere to the ethical-political frameworks and empirical studies proffered by other scholars (and this approach can even work well in a classroom setting when the resources are available cultivate a critical-but-supportive space for discussion).

However, these critiques present two challenges to rhetorical study. First, in turning to the material and lived conditions of the rhetorical context, analysis shifts its focus away from symbolic content. I am emphatically not suggesting here that such an

interdisciplinary and multiframework approach is inappropriate. On the contrary, it is evident that without appeals to evidence and ethical frameworks, rhetoric would be powerless in the face of persuasion used for unethical ends. I am suggesting that balancing the variety of perspectives rhetoric borrows is a difficult task, and that when the discipline focuses on one area others may not get the attention they deserve. The second challenge is that while the critiques may be persuasive for some, they are of limited persuasive potential back in the civic realm where the problematic arguments hold sway. A dialectical argumentation theory perspective (which is notably one discipline rhetoric has *not* borrowed much from) may help meet both of these challenges. In this chapter, I will read one judicial argument that depends heavily on the concept of neutrality, and I will suggest areas of intersection between rhetorical and dialectical approaches. Before the argument itself is examined, however, I will provide a brief background on the history of neutrality as it has developed in Supreme Court establishment clause cases and in considerations of rhetorical and political theory. This chapter focuses the analysis of judicial texts through argumentation theory. In the third chapter, I will pursue the intersection of analyzing judicial texts with classroom practices of teaching the reading and writing of contested texts. After briefly describing the ways in which neutrality has been constructed in a few exemplar cases, I will discuss concepts of neutrality as they operate in political and rhetorical theories to highlight an analogy between the difficulty of defining neutrality in legal cases and the difficulty the discipline faces in defining reason. I conclude with an examination of the problematic uses of the term neutrality in a particular case.

NEUTRALITY IN ESTABLISH CLAUSE JURISPRUDENCE

John Witte, Jr. offers an overview of the important role the concept of neutrality has played in Supreme Court decisions. He locates the origin of this approach in the 1963 *Abington School District v. Schempp* decision (ending public-school-led Bible readings), which argues that any law violates the First Amendment if it causes "either the advancement or the inhibition of religion" (Witte 157). This neutrality ideal was later formulated into three similar-yet-distinct tests: the Lemon test from 1971's *Lemon v. Kurtzman*, the Endorsement Test developed in the opinions of Justice O'Connor since 1984, and the Coercion Test used by Justice Kennedy in the majority opinion for *Lee v. Weisman* in 1992. Kennedy's coercion test, according to Witte, allows for culturally approved government acknowledgment and support of religion unless those "accommodations of religion effectively coerce public participation in religious exercises" (160). O'Connor's Endorsement Test "forbids governmental endorsement or disapproval of religion" (Witte 159). The Lemon Test has three prongs, stating that laws "(1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must foster no excessive entanglement between church and state" (Witte 157).

Despite the extended arguments on the subject developed by justices over the years, neutrality has yet to yield an unambiguous standard by which to test establishment clause cases. Potential contradictions emerge in arguments over the line Kennedy tries to draw between acceptable (and ostensibly neutral) instantiations of religion in government and unconstitutional instantiations that coerce people's beliefs or, as suggested by O'Connor, send a message that certain groups are favored or disfavored by the government. As seen in Chapter One, Supreme Court decisions are far from coherent in their constructions of the line between religion and government, and while a theme of

neutrality can be found in the decisions Witte discusses, the justices define neutrality in different ways.

Within church-state litigation, the concept of neutrality finds its most detailed articulation in the three-pronged test developed by the majority in 1971's *Lemon v. Kurtzman*. It is helpful here to briefly describe the particular government policies under dispute when discussants argue over neutrality in establishment clause cases. The Lemon case, consolidated along with two other similar cases, considered whether state governments violated the establishment clause when they appropriate money for educational materials or teacher salaries at private, religious schools. In each case, the funds were ostensibly to be used only for work done in secular subjects. Unlike the *Everson* case described in the previous chapter that upheld tax monies for student transportation to religious schools, the Lemon seven-judge majority ruled that the state appropriations did not pass constitutional muster. As described by Peter Irons, Chief Justice Burger's opinion reasoned that "deciding how much—if any—religious content parochial-school teachers inserted into their courses … would entangle state officials in theological briars they should better avoid" (34).

Burger constructs a tripartite framework that defines and constrains the various ways in which governmental action could potentially achieve the neutrality envisioned in *Abington* to neither advance nor inhibit religion. It does so by requiring that laws have a secular purpose, a secular effect and by avoiding entanglement between state and religious institutions. Despite appearing to provide a useful heuristic for judging Establishment Clause disputes, the Lemon test did not yield consistent results in future cases. Irons notes that Burger moved away from his own test in *Lynch v. Donnelly*, which was also the first case in which Justice O'Connor proffered her Endorsement Test. In 1984, the Court heard an objection to a Christmas display maintained by the Pawtucket,

Connecticut city hall and displayed in the shopping district as will be discussed in more detail in the next chapter. The display contained:

> ...many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here. (*Lynch* 671)

The display also contained a traditional creche visualizing the birth of Jesus. The plaintiff argued that the display violated the establishment clause by demonstrating a government endorsement of Christianity. O'Connor notes the stakes at risk in establishment clause disputes, warning, "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message" (*Lynch* 688). If the holiday display were to convey unambiguous endorsement of a particular religious view, it would be unconstitutional; however, O'Connor joined four other justices in deciding that the largely secular content of the display (Santa, reindeer, candy striped polls, etc.) undermined or overrode any religious meaning conveyed by the crèche. I will return to questions of content and context as they relate to government-sponsored religious displays in the third chapter. For now, the relevant issue to note is that perceptions of meaning differ. What appears to one debate participant as a neutral display welcoming a variety of religious views (or at the very least not conveying a positive message of endorsement on one view) appears to others as an unwelcoming endorsement of one view at the expense of others. It is important to note O'Connor's focus on the term "government." Her concern here is not with any space that is publicly accessible (such the front lawn of a church), but with spaces controlled by government agencies. Discussants can disagree over the meaning of the content of the

government-owned display (the four dissenting justices argued that the winter holiday elements did not nullify the religious meaning of the crèche), but in this case they at least agree that the dispute involves a question of government action, not an ambiguous public actor that bedeviled arguments discussed in the previous chapter.

The Court took note of differing perceptions in *Lee v. Weisman* where the father of a public middle school student objected to the school's inviting religious leaders to give prayers at graduations. Between 1986 and 1988 the district invited Christian clergy, including a Baptist minister who had prayed "'in the name of our Lord and Savior, Jesus Christ'" and in 1989 invited a rabbi (Irons 40). David Weisman objected to any religious leader offering prayer at graduation ceremonies. Justice Anthony Kennedy wrote the opinion for the 5-4 majority arguing that school students were susceptible to coercion through peer pressure and the actions of the state when sectarian prayers were officially sanctioned at graduation ceremonies (*Lee* 598-9). Particularly notable in Kennedy's opinion is the awareness of differing perceptions: "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy" (*Lee* 592). Different discussants in the debate attach different meanings to the same government action. As Kennedy says, those witnessing a state-enacted prayer that conforms to their beliefs may not as readily recognize the constitutional problems as those witnessing the same prayer from an out-group perspective. Unfortunately the awareness of subjectivity demonstrated in Kennedy's opinion is all too rare in church-state litigation (including some of Kennedy's own later opinions as discussed in the next chapter).

The potentially ambiguous interpretations of neutrality in church-state questions emerge from the pursuit of two questions seen from subjective positions. First, does the

mere presence of religious content in government activities betray a non-neutral position on the part of the government? Second, does that religious content have to have an effect on citizens in order to count as non-neutral? That nearly five decades of Supreme Court decisions have failed to resolve this ambiguity may relate to the absence of sustained consideration of yet a third question: To what extent does the mere presence of religious content in government have an effect on citizens and what is that effect? This question is handled particularly poorly in church-state discourse, and understanding how the argument malfunctions (let alone suggesting changes to make it more productive) benefits from combined rhetorical and dialectical perspectives.

CONCEPTS OF NEUTRALITY IN POLITICS AND PERSUASION

In order to contextualize the establishment clause disputes over neutrality, I will discuss three varieties of neutrality that operate within judicial rhetoric: neutrality as objectivity, neutrality as impartiality or fairness, and presentational neutrality. Perelman and Olbrechts-Tyteca discuss the first two varieties of neutrality in contrasting rhetoric with formal logic and philosophy. Formal logic promises a systematic method that can be applied by anyone to answer questions or resolve disputes. In a narrow range of disciplines, such as mathematics, such rule systems do provide objective means for evaluation that do not depend on the subjective perceptions and attitudes of those who make use of the rules. Perelman and Olbrechts-Tyteca explain, however, that in matters of disagreement over policies and ethics, systems of "law and morality" never "enjoy universal validity, nor are they perfectly univocal" (59). The hope is that once the rules for evaluation are discovered, they can then be applied by anyone without bias, but this is not the case. Instead of objectivity, Perelman and Olbrechts-Tyteca offer the alternative of impartiality. The use of the term "impartiality" is potentially problematic, because

Perelman and Olbrechts-Tyteca explicitly do not mean a person who has no interests. They mean instead a person who has interests, who belongs to a larger group of interested persons but one who maintains awareness of her or his interests while trying to also give fair hearing to the others involved in a disagreement. They claim that "being *impartial* is not being *objective*, it consists of belonging to the same group as those one is judging, without having previously decided in favor of any one of them" (60; emphasis theirs). The extent to which one can set aside preferences and loyalties is a good question to consider, but it isn't necessary to answer that question to appreciate the distinction Perelman and Olbrechts-Tyteca make between objective neutrality and impartial neutrality.

The concept of neutrality as a consciously cultivated sense of fairness or impartiality is complementary to the Rawlsian model of public reason discussed in the previous chapter and a key component of other models of democratic deliberation. Rawls' conception of public reason permits the operation of a wide range of ideologies, but in coming together to deliberate on public policy, it asks that stakeholders within that range converge on a vocabulary that is common to all parties. Those who hold views incompatible with others are not required to abandon their commitments, but they are asked to translate their views into language that others in their polity can debate. In other words, they are asked to assume the impartial mindset described in *The New Rhetoric*. Critics such as Nancy Fraser and Iris Marion Young have described the limitations of this traditional liberal emphasis on public political argument that requires a translating or setting aside of personal commitments and exemplifies the difficulty of defining neutrality.

Rawls' principle of reciprocity has the benefit of requiring arguments that all parties can speak to, but this same principle has the drawback of excluding relevant views

that the political forum refuses to include, arbitrarily declaring them non-reciprocal and irrelevant because they are indecorous, radical or elsewise incompatible with reasoned deliberation (two prominent historical examples would be the US women's suffrage and civil rights movements). Fraser describes counterpublics whose "alternative styles of political behavior and alternative norms of speech" would not necessarily find reciprocity in the dominant political discourse (116). Fraser suggests that the various publics are not necessarily locked into immovable factions but that communication can take place between them through "multicultural literacy" (127). Fraser's hope for productive evolution, for counterpublic narratives to enter and become part of the dominant narrative, depends on the continual interaction of viewpoints. Acknowledging the role of counterpublics and supporting the idea of expanding avenues of communication, Iris Marion Young advocates expanding communicative practices beyond the dominant political discourse to actively invite the views of those previously left out and to encourage the perception and recognition of their lived experiences using techniques neglected in mainstream rhetoric (56). In either the traditional liberal framework or the post-liberal critiques, the need for a neutrality that allows different viewpoints to engage each other is present, whether through the top-down imposition of an impartial mindset, as seen in Rawls, or the emergent, ever-expanding sense of inclusion (or at the very least interaction), as seen in Young and Fraser. Another skeptical criticism of the traditional liberal public reason is offered by Bryan Garsten who advocates abandoning public reason instead of attempting to reform it, offering a custom of persuasion as an alternative.

Whereas advocates of public reason such as Rawls offer rationality as a better alternative than the dictates of an arbitrary Hobbesian sovereign that constrains difference, Garsten suggests that public reason is no less problematic, because it too can

arbitrarily demarcate bounds of acceptable civic discourse that preclude stakeholders from fully participating in public reason. Just as Young worries about the exclusion of non-mainstream voices, so too does Garsten worry about the demands of public reason alienating people by asking them to leave behind their commitments. Where Rawls says that translation of deep commitments into mutually reasonable propositions is possible, Garsten argues that reason and emotion are inseparable and that "[w]e judge best when we are situated within these structures of value, able to draw on their complexity and able to feel, emotionally, the moral and practical relevance of different consideration in as subtle a way as experience has equipped us to do" (192). Our reason, then, is impaired if we have to shed deep commitments to reason together. Neutrality, for Garsten, exists only insofar as we are open to persuasion—the kind of impartiality envisioned in *The New Rhetoric*. Garsten succeeds no better than Young, Fraser, or Rawls in answering the question of how to ensure that all stakeholders are not only free to speak but that their voices are heard and engaged by those who disagree, and especially those discussants whose positions of power in a polity mean they never have to engage with those who hold less or no power, or in contexts where the range of socially acceptable arguments precludes the voicing of relevant critiques, such as in early reactions to the suffrage movement that deemed protestors indecorous.

My project does not answer this question, but I do think it is an important question to continually raise. Garsten's insistence on the need for different groups to communicate with each other *persuasively* as opposed to justifying positions through abstruse logic, traditions proffered as reason, or an appeal to force brings this question to the fore, and it raises a related question that is central to this dissertation. In those instances, however fleeting, that the relevant stakeholders do find themselves engaged

with each other in argumentation (such as in the courtroom[20]), and where the procedural guidelines aspire to some standard of sustained engagement that fairly addresses the views of others (again such as in the courtroom but also too in the classroom), what actually occurs in the symbolic interchange, especially in those instances that we would characterize as unreasonable? I will return to this question shortly.

Impartiality is just as necessary a condition for responsible discursive practice as seen from dialectical argumentation frameworks as it is in rhetorical frameworks. Dialectical models of argumentation require interlocutors to approach viewpoints with a mindset of impartiality insofar as each viewpoint forwarded in a discussion is given the kind of fair hearing described by Perelman and Olbrechts-Tyteca. In van Eemeren and Grootendorst's pragma-dialectical approach, interlocutors are expected to hear challenges to their own position, and either answer those challenges or abandon the position challenged if no defense is possible—a process consonant with *The New Rhetoric* criteria for the impartial person to not have "previously decided in favor" of a position.

Unlike rhetorical frameworks, however, argumentation theory does not make as clean a break with the objectivity of formal logic. As argumentation theory has developed in close relation with informal logic, I will here discuss the concept of neutrality as related to both fields. Though informal logic and argumentation do not aspire to apprehension of a universal, transcendent truth, as in Plato's dialectic, they do pursue patterns of reasoning that are universally applicable within particular contexts. In these frameworks, a neutral perspective is one that perceives these patterns and can determine

[20]I think Garsten is right to invest hope in governmental institutions, though of course no form of government can guarantee equal freedom and justice for all of its constituents all of the time. I think it is also the case that in certain rhetorical contexts rhetors in subject positions may need to engage in strategic action, to use Habermas' terms, before the context will sustain communication action (one clarion example being non-violent resistance in the Civil Rights Movement). In other words, neither persuasion nor politics will suffice by themselves.

to what extent discussants' dialogue conforms to them. Ralph H. Johnson and J. Anthony Blair define informal logic as concerned with "the study of norms of arguments (as contrasted with those of inference or implication)" ("Informal" 94). Informal logic, they argue, does not determine norms according to the logical validity of syllogistic forms, but rather through the observation of the "standards, criteria or procedures" used by people when arguing (94). Scholars of argumentation and informal logic acknowledge that arguments as they occur in everyday settings can never attain the certainty of formal logic because the premises involved in human argumentation are only likelihoods not certainties and because argumentation is only one part of human discursive behavior. However, they proceed with the theoretical assumption that there are norms or patterns in human argumentation that can be understood, recalling my analogy of a generative grammar of disagreement from the Introduction. We can use these patterns to critically and impartially but not objectively evaluate how well arguments yield a reasonable discussion.

These norms incorporate the perceptions and reactions of discussants, noting how behaviors in communication move a discussion closer to or further away from a resolution of disagreement. As discussed in the Introduction, logical validity depends on the arrangement of the structure of propositions, resulting in arguments that can be formally logical yet devoid of ideas that discussants would agree to be true (all voorwerps are green, Tim is a voorwerp; therefore, Tim is green). Pragmatic argumentation searches for discourse patterns that discussants enact when responding to propositions. When taken together these patterns describe procedures of interaction through which discussants evaluate and criticize each other's views in ways that work toward their mutual dialogue goal. These rules are not inherent to the structure of any one argument, as they would be in formal logic. Rather the rules are inherent in the process of the

exchange of views toward a goal, such as resolving disagreement in the case of pragma-dialectics. Van Eemeren and Grootendorst describe the "critical discussion…as an exchange of views in which the parties involved in a difference of opinion systematically try to determine whether the standpoint or standpoints at issue are defensible in the light of critical doubt or objections" (52). The systematic testing and dialectical generation of new viewpoints that emerges from that testing distinguishes argumentation impartiality from rhetorical impartiality. Rhetorical impartiality asks only for an open mind; it does not lay down rules by which the open-minded person should or will evaluate the claims she or he hears. Argumentation norms will be discussed in more detail in the analysis section below. For the time being, I wish only to note the similar-yet-distinct understanding of impartiality operating within argumentation theory and contrast it with rhetorical theory. Just as in *The New Rhetoric*, argumentation does not envision discussants who are emotionless and devoid of partisan associations, but it does expect discussants to conform to the procedures of discussion if their arguments are to be considered reasonable, which activity differs from rhetorical invention. A rhetor is constrained by audience and context. While various inventive strategies are available (topics, appeals to emotion, character, and reason, etc.) these are not systematic rules that are to be applied the same way in each rhetorical situation. The procedures of rhetoric are contingent on context; the procedures of a rational-critical discussion apply to any argument that seeks resolution of disagreement. Even with these differences, both frameworks promote an understanding of impartiality wherein participants in a debate are open to other points of view.

Perhaps the most obvious problem with neutrality as impartiality is its too minimal presence in public conversations. The cultivation of fairness that is central to healthy rhetorical, dialectical, and democratic discourse is easily ignored, especially by

perspectives operating from positions of privilege, which brings me to the third variety of neutrality. Presentational neutrality offers an argument that the playing field is level when it is actually tipped in favor of certain groups.[21] Cass Sunstein provides a useful illustration of how legal arguments use presentational neutrality to project an appearance of neutrality that belies an imbalanced reality. Sunstein notes the two different standards by which neutrality or partisanship on the part of government can be measured: either "general" neutrality by which "government may not play favorites; it must by impartial" (1), or neutrality for which "existing distributions serve as the baseline against which to measure..." (2). As an example, Sunstein describes a criticism of *Brown v. Board of Education* written by Herbert Wechsler. Sunstein describes Wechsler's argument:

> [T]he problem of segregation involved a conflict between two sorts of associational preferences: the desire of blacks to attend school with whites and the desire of whites to attend school without blacks. As far as Wechsler was concerned, the Court had established no neutral principle to permit a choice between these two sets of desires.... For current observers, Wechsler's demand for neutrality...seems to have an otherwordly quality. The notion that the associational desire of whites and blacks should be put on the same plane, and given the same status, appears exceedingly peculiar. (5)

It is peculiar, Sunstein argues, because the government had set up the legal apparatus of segregation to begin with. The "beginning distributions" of racial disparities at the time of *Brown* was not the natural way population patterns in the US occurred but patterns cultivated through racially discriminatory government policies. To ask the court not to change government policies to correct inequities caused by other government policies is the opposite of neutrality. The example of neutrality as it relates to segregation may seem extreme when compared to church-state matters, but Sunstein's point about "existing

[21]Readers familiar with the history of writing studies may see a parallel here with the debates on politicization in the classroom during the 1980s and 1990s. See Hairston "Diversity," Trimbur et al. "Responses," Lazere "Teaching."

distributions" of power and preference being "a product of law, hardly neutral" applies just the same (8). Traditional government practices that favor predominant Christian religious traditions serve as the beginning distributions that are later taken as the neutral baseline, even though those distributions favor one set of religious identities at the expense of others. This presentational neutrality approach conflicts with the impartial neutrality approach.

Arguments operating from both impartial neutrality and presentational neutrality come into conflict in establishment clause disputes, and were it simply the case that these two different understandings were in conflict, the arguments would not hold interest apart from serving as yet another example of contentious argumentation. But these arguments speak to a deeper problem with the operation of reason in public discourse. Differing understandings are deployed by discussants engaged in the same conversation without their recognizing that they use terms differently, much as discussants use "public square" to mean different concepts without recognizing those differences as described in the previous chapter.

Presentational neutrality in particular and the more general disconnect between different understandings of key terms challenge both rhetorical and dialectical conceptualizations of good argument. The arguments do not engage the same question and do not move toward mutually agreeable resolution of disagreement, but they are persuasive for particular audiences (so much so that they are difficult for opponents to persuasively rebut). Moreover, they seek to win an argument by defining opposing views out of the conversation. These are troubling behaviors to be sure, but from a perspective of studying persuasion there are additional interesting questions to consider: why do the discussants not recognize that their interchange is problematic, and what effect does their lack of awareness have on the larger debate? To call back to the public square argument

in the previous chapter, an accomodationist can rail against dark secular forces trying to erase religion from the public square, for example, in response to a separationist argument to remove a 10 Commandments monument from the lobby of a courthouse. This argument may rally supporters (and infuriate separationists), but it does not provide a question that the differing parties can agree to debate (the separationist sees her action not as attempting to erase religion from public but as trying to end an unconstitutional establishment of religion on the part of the government, even as the accomodationist sees the separationist as attacking religious freedom, not upholding it). The discussants may converge on a question of policy (yes, keep the 10 Commandments monument at the courthouse, or no, remove it), but this convergence is coincidental to the substance of their arguments which in no other way connect with each other. They speak past each other, but do not realize that they speak past each other. They realize they disagree, and each viewpoint states that the other is wrong, but the support brought to bear on these antithetical policy claims engages separate conversations. Parties in conflict cannot hope to persuade each other, as we might to hope to see in Garsten's model, if they do not converge on the same question.

In some contexts, such as bull sessions in a bar or group brainstorming sessions in a writing classroom, talking past one another isn't necessarily a problem (it can even be functional, prolonging discussions, encouraging expression and perception of differing values and definitions), but within more narrowly delineated deliberative and forensic institutional contexts, talking past one another has more dire implications. Garsten counterbalances rhetoric's potential for bad behavior with the mechanisms of Madisonian representative democracy whereby factions are kept in a state of contention. The checks and balances of the three branches of the US government, Garsten argues, function to prevent a demagogue from running roughshod over the opposition by seizing control of

government. However, if disputes resolved in the courts exclude the perspectives of one or more stakeholders, then the effort to persuade can be just as alienating (and just as unjust) as the worst appeals to public reason or sovereign rule. As I said above, even calls for vigorous persuasion as in Garsten or in expanding the range of voices heard as in Young face the problem of instantiating the kind of inclusion to which they aspire, but this problem is beyond the scope of my project. Assuming for the sake of argument that inclusion can be achieved, we are still left with the question of how to judge the quality of arguments that are made—a question that rhetoric and writing studies continue to struggle with as discussed in the Introduction and as will be discussed in Chapter Three.

Dialectical argumentation offers new ways to frame questions about the quality of arguments that relate to both methods of analysis and theory. Argumentation focuses our attention on how viewpoints as expressed by one discussant provide the discursive materials other discussants use to express their viewpoints and a means by which the quality of discussion can be judged. In terms of analytical method, rhetoric often uses abstract and generalized conceptualizations of audience to describe the influences on a particular argument. Arguments themselves are closely analyzed by examining diction and devices—such methods are influenced by the close reading practices of our literary forbears in English studies—and specific evidence is described to demonstrate the influence of audience, kairos, and other elements of context, but not enough attention has been paid to the *interaction* of viewpoints engaged together in debating a specific question as revealed in textual evidence. This minimal attention to interaction holds true in both rhetorical scholarship and in writing pedagogy. I will consider at length rhetoric and writing pedagogy in Chapter Three and in the Conclusion, examining the ways in which textbooks suggest writers should evaluate the quality of arguments. Here I wish to focus on a specific method already in use in rhetoric and writing that that is capable of

analyzing interaction between viewpoints but the potential of which is drastically underutilized.

Despite theoretical frameworks that can accommodate a focus on interaction, rhetoric often isolates the symbolic content of one discussant for close analysis. For example, some textbooks use stasis theory to help students critically analyze texts and invent arguments. As I will discuss in more detail in the next chapter, many textbooks use stasis theory as an invention tool and/or a way to categorize types of arguments. While I agree that the invention application of stasis can help students, I find the critical use of stasis theory more compelling in that textbooks describe how stasis reveals breakdowns in communication—breakdowns similar to those this dissertation examines. Yet, textbooks do not pursue this analysis of interaction between discussants. Instead, the texts mention how stasis can highlight a breakdown but then move onto application of stasis as an invention tool. For example, Sharon Crowley and Debra Hawhee's *Ancient Rhetorics for Contemporary Students* offers students an account of how a failure of stasis can disrupt civic discourse. They use the example of abortion, noting how different sides pursue questions in different categories of stasis. A pro-life position will argue within the category of definition that abortion should be considered murder, therefore abortion should be illegal. A pro-choice position will argue within the quality and policy categories that making abortion illegal would infringe on women's rights, therefore abortion should remain legal. Crowley and Hawhee explain that the discussants fail to converge on the same question and "are arguing right past each other" (82). Having noted that failure of stasis can result in unproductive arguments, Crowley and Hawhee encourage students to use the categories of stasis to survey different views on an issue and come up with a question to pursue in their own project, but they do not suggest

reading two or more sources that engage each other in conversation.[22] In this way, stasis is used to analyze one text or as a method of invention, not to examine at length the language used by two or more sources to evaluate their interaction.

In addition to the revival of stasis, rhetoric and writing has periodically produced calls for perspectives that emphasize conversation and the accurate perception of other views and the inclusion of a wide range of views. I mentioned these dialogic models in the Introduction, linking them to Barry Kroll's idea of "arguing differently" that encourages engagement with other views in the hope of finding compromise or at least understanding instead of seeing arguments as contests to be won. Despite the various dialogic models, textbooks and scholars say little to nothing about analyzing interaction to assess the extent to which arguments do engage in a responsible conversation that accurately perceives other views. Instead, they focus their attention on describing and criticizing theoretical models. One popular and longstanding approach with a more dialogic goal is Rogerian argument first popularized in the field by Maxine Hairston who drew on the work of Richard Young, Alton Becker and Kenneth Pike. According to Hairston, a Rogerian argument asks us to "avoid using evaluative language" and "listen to each other with understanding and acceptance" ("Carl" 373). To draw an example from a contemporary textbook, Donald Lazere's *Reading and Writing for Civic Literacy* describes Carl Rogers' idea that "conflict is frequently based on semantic or psychological misunderstandings and inability to empathize with someone else's viewpoint when it clashes with your own" (130).[23] Though the Rogerian approach tries to

[22]Uses of stasis as an invention tool in writing textbooks can be found in Charney et el. *Having Your Say*; Corbett & Eberly *Elements of Reasoning*; Corbett & Conors *Classical Rhetoric for the Modern Student*; Mauk & Metz *Inventing Arguments*; Stolarek & Juchartz *Classical Techniques and Contemporary Arguments.*

[23]Other textbooks that cover Rogerian arguments are Lunsford & Ruskiewicz's *Everything's an Argument* and Ramage, Bean & Johnson's *Writing Arguments*.

foster the expression of a wide variety of views, some feminist perspectives critique it because it artificially levels different views, much like presentational neutrality, forestalling evaluative responses in favor of an open floor where all views can be equally expressed. Phyllis Lassner demonstrates how from one perspective the Rogerian approach opens up discussion, from another it can shut discussion down in that "[speakers] [need] to figure out how to be comfortable in the role of 'an equal' in relation to those on the other side of the issues who had failed to regard them as such" ("Feminist Responses" 225). Similar to how presentational neutrality ignores differences in the starting distributions of power in favor of a fallacious level playing field, Rogerian argument can demand equal treatment of views that may not deserve equal treatment. My point here is not to resolve these conflicts and advocate for or against any one model. Different models suit different contexts. I do want to emphasize how rhetoric and writing has consistently sought out approaches to persuasion that move beyond an agonistic pro/con debate, because my argument throughout this dissertation is that argumentation theory addresses some of the same goals sought in pursuit of dialogic rhetoric.

Invitational rhetoric joins Rogerian argument among the dialogic approaches, and it may even remediate some of its limitations, though it too has met with criticism. Sonja Foss and Cindy Griffin describe an "invitational rhetoric ... built on the principles of equality, immanent value, and self-determination rather than on the attempt to control others through persuasive strategies designed to effect change" (4-5). While I doubt the extent to which persuasion can ever exist without intention of bringing about change, I do appreciate Foss and Griffin's emphasis on communication between equal agents. Such an approach can potentially circumvent the false leveling of Rogerian argument. Invitational rhetoric invites the sharing of all views, but in emphasizing immanent value and self-determination it allows for a more nuanced critical interaction between views than the

non-evaluative stance sought in Rogerian argument. As we can see in the differing responses to Rogerian argument and invitational rhetoric, even among models that promise greater inclusion of views there remain serious questions about their ability to fulfill that promise. The theoretical questions that remain would benefit from interaction analysis to produce evidence to help refine our models.

Despite these theoretical frameworks that emphasize the accurate perception and summary of others viewpoints, there has been relatively little rhetorical work done studying the discourse of two or more sources as they interact as a way to define good persuasive habits. Frameworks propose various ethical standards (i.e. they encourage fair summary, autonomy, collaboration). The frameworks explain how discussants should argue (and note examples where discussants violate those standards), but the analytical methods used in conjunction with these frameworks rarely pursue multiple interlocutors engaged in the same instance of argument. The rhetorical analytical focus here contrasts with argumentation, which focuses on interactive models (and appropriates some methods of discourse analysis), where the analyses performed more often focus on examples of interlocutors engaged in conversation or other instances of interaction. For example, van Eemeren and his co-authors' analysis of a conversation between Mormon missionaries and a non-Mormon household in *Reconstructing Argumentative Discourse* (41) and Edward Schiappa's analysis of oral arguments and written opinions in *Roe v. Wade*.

One example of an interaction-focused analysis in rhetoric that deserves wider attention and replication is Krista Ratcliffe's examination of written correspondence in *Rhetorical Listening*. Ratcliffe's sense of rhetorical listening invokes an orientation toward openness similar to the orientations invoked in invitational rhetoric or Rogerian argument, though the theoretical details of her approach are not important for my point

here. Instead I want to highlight Ratcliffe's method that provides an extended analysis of textual evidence from two interlocutors engaged in conversation—in this case Mary Daly and Audre Lorde attempting to negotiate conflicting understandings of feminism and racism. Ratcliffe rightly situates difficult dialogues within historical and ideological contexts (of white privilege and systemic racism), but she also connects these contexts to key terms used in Daly and Lorde's language. Articulations of rhetorical ethical norms are necessary, but those norms should be informed by close analysis of how discussants do go awry in their interactions. Proposed norms of openness and understanding invites analysis that examines the extent to which those norms are met.

In addition to method, a dialectical argumentation framework also offers new theoretical avenues to pursue. Argumentation offers a theory of reason different from the Rawlsian model of public reason while also providing criteria for judgment that supplement without replacing or displacing the standard of persuasion that is critical to Garsten's model. The rules for critical discussion in the pragma-dialectical approach do not ask people to set aside their deep commitments. Any subject and any perspective is welcome in the critical discussion, so long as the interlocutors can abide by the procedural rules. Obviously, in saying that any subject can be discussed in theory I also acknowledge that not every subject can be discussed in practice, but my point here is to establish criteria, not promise their guaranteed implementation. In an argument, discussants may find each other's positions to be troubling (or even repugnant), but disputes over ideology can be differentiated from contested models for analyzing troubled discursive behavior. This distinction is especially important to keep in mind from an analytical perspective. Discussants operating from ethically dubious worldviews may practice troubling discursive behavior (and may do so because they operate from an ethically compromised position), but addressing bad discursive behavior from the

perspective of an ethical-political framework as rhetoric often does obscures the distinction between ideological disputes and discourse phenomena.

CASE STUDY: NEUTRALITY IN THE "UNDER GOD" PLEDGE OF ALLEGIANCE CASE

In order to demonstrate the useful intersections between rhetorical and argumentation approaches to persuasion, I will conduct an extended analysis of a Circuit Court opinion and dissent that fail to converge on a productive discussion of neutrality. *Elk Grove Unified School District v. Newdow*, initially filed by Michael Newdow, objected to the phrase "under God" in public school-led recitations of the Pledge of Allegiance. For my purposes of examining problematic arguments, the "under God" issue is an especially compelling example for a few reasons. First, the issue has provoked discussion from a wide range of backgrounds—attorneys, legal scholars, judges, politicians, church-state advocates, media commentators, and citizens. The analysis in this chapter will focus on arguments produced by two judges, but the context of widespread interest and investment in the values at stake in the case is important for understanding how the judicial arguments function. The judicial authorship is a second reason for examining the *Newdow* case. Unlike disputes taking place across a variety of publication venues, such as we saw with the discussion of the public square terminology in the first chapter, the opinions and dissents in a single court case should ideally converge on debating the same questions. As will be demonstrated below, however, the same kinds of failed argumentation occur. The emotional investment attached to keeping or removing the phrase "under God" is a third reason for considering this case. Most church-state separation cases provoke emotional responses on all sides, but in the case of the Pledge we can easily see the disconnect between the different parties' claims of injury as they contend over a practice that appears on the surface to be specific and easily

defined (the recitation of two words) yet on closer consideration yields a myriad of contending interpretations, including the question of whether the phrase has religious meaning. The phrase "under God" is in this sense different than other establishment clause disputes involving religious practices that are more easily identified with one concrete religious tradition such as the school-led readings from a Protestant Bible in *Abington School District v. Schempp*.

In June 2002, a three judge panel of the Ninth Circuit Court of Appeals issued a ruling that met with widespread condemnation. The court ruled in *Newdow v. U.S. Congress et al.* that school officials violated the establishment clause when they led elementary school students in the Pledge of Allegiance with the phrase "under God." The President, members of Congress of both parties, commentators, and citizens reacted with shock and outrage that the Ninth Circuit, ostensibly the most liberal of the Courts of Appeals, would attack so beloved a national institution as the Pledge. The defendants sought an en banc hearing by the full Ninth Circuit. Their request was denied by a majority of the judges, and a final revised opinion was issued 28 February 2003. This opinion includes the original opinion written for the two-to-one majority by Judge Alfred T. Goodwin (and joined by Judge Stephen Reinhardt), the original dissent to that opinion written by Judge Ferdinand D. Fernandez, and a new dissent written by Judge Diarmuid F. O'Scannlain, arguing against the refusal to hear the case en banc.

Goodwin's opinion and O'Scannlain's dissent demonstrate the problems that arise in church-state discourse where discussants seldom engage other views and demonstrate no awareness of their failure to connect. O'Scannlain's dissent is troubling for a number of reasons, not least of which is that it uses the problematic "public square" language discussed in the previous chapter. However, the exchange between Goodwin and O'Scannlain is perhaps most useful in its confused argument over the concept of

neutrality as it applies to government actions that could potentially violate the Establishment Clause due to their religious content.

My analysis will discuss O'Scannlain's inability to accurately summarize and engage the majority's arguments about the definition of neutrality (including arguments over whether "under God" in the Pledge is religious for establishment clause purposes). Where the majority develops its argument about the religious nature of the Pledge, O'Scannlain sidesteps, developing an argument similar to the issues raised by the opinion but not directly rebutting them. The differences between the positions orbit around two questions. (1) Is the act of *reciting* the Pledge similar to the act of *reading* other historical documents that merely "acknowledge" or reflect the religious beliefs of their historical context and particular author(s), such as the Gettysburg Address or the Declaration of Independence? (2) Does the phrase "under God" have religious meaning or is it historical and/or ceremonial and/or patriotic? The judges do not converge on the same questions, leading to divergent arguments as to what effect removing "under God" from school-led recitations of the Pledge would have: restoring government neutrality or betraying government hostility toward religion.

There is a less-problematic understanding of neutrality used by accomodationists such as O'Scannlain, but his opinion does not rely on this understanding. Witte describes the differences between separationist and accomodationist understandings of neutrality thus: "Separationists tended to formulate this as government neutrality between religion and nonreligion, accomodationists as governmental neutrality among religions" (156). As will be shown, it is not neutrality among "religions" in general that O'Scannlain's position seeks, rather a context in which certain types of religion (and religion-in-government) are seen as the "neutral" standard by which other hypothetical contexts would be judged. O'Scannlain objects to treating nonreligious viewpoints as equal to

religious viewpoints under the establishment clause, and his objection hinges on not just his definition of religion but his definition of neutrality.

The presentational neutrality used by O'Scannlain obscures the already inequitable nature of government-religious interaction in the US. The separationist objection to "under God" in school-led recitations of the Pledge uses the same reasoning as objections to the school-led Protestant prayers in *Abington v. Schempp*, and that is that the government-sponsored activity privileges one religious viewpoint at the expense of others (in the case of *Abington* those viewpoints included Catholic and Jewish families and Protestant Christians who objected to public and government-sponsored religious practice directed at school children[24]). This historical context, in which certain varieties of Christian views are privileged by the government, is what O'Scannlain addresses as a neutral position using the presentational variety of neutrality.

For O'Scannlain, neutrality is consonant with (perhaps even equal to) whatever the majority believes, even if that belief has been supported by previous law that plays favorites among the religious identifications of US citizens. If the vast majority of Americans find no problem with "under God" (or if they value "under God," and O'Scannlain isn't clear as to which), then the phrase is neutral regarding religious content that could potentially violate the establishment clause. O'Scannlain's preferred definition of neutrality, though, puts his argument in a difficult position because he has to argue at the same time that "under God" in the Pledge has no (or minimal) religious content in order for it to pass constitutional muster—though it does have historical & patriotic content according to O'Scannlain—and yet he appeals to the public reaction to the

[24]The diversity of Christian attitudes toward religion and government cannot be stressed enough when discussing establishment clause concerns. Just as there are Christians who call for government-sponsored religious activity, there are those who defer to Matthew 6:5-6.

original decision as evidence for the Pledge's historical/patriotic value, even though this outrage was largely articulated in terms of offended religious values.

Goodwin prefers impartial neutrality over O'Scannlain's presentational neutrality, attempting to create a space where all religious viewpoints are equal (insofar as the state voices no opinions that either privilege or disadvantage those viewpoints). Goodwin says:

> A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," *or a nation "under no god,"* because none of these professions can be neutral with respect to religion. (*Newdow* 2808; emphasis added)

O'Scannlain says:

> [The majority] … confers a favored status on atheism in our public life. In a society with a pervasive public sector, our public schools are a most important means for transmitting ideas and values to future generations. The silence the majority commands is *not* neutral—it itself conveys a powerful message, and creates a distorted impression about the place of religion in our national life. The absolute prohibition on any mention of God in our schools creates a bias against religion. The panel majority cannot credibly advance the notion that [its opinion] is neutral with respect to belief versus non-belief; it affirmatively favors the latter to the former. One wonders, then, does atheism become the default religion protected by the Establishment Clause? (*Newdow* 2798; emphasis in original)

Goodwin's argument claims that removing "under God" leads to neutrality because it removes language that endorses one religious viewpoint (without exchanging it for another, such as "under no God"). O'Scannlain's argument suggests that removing "under God" is the equivalent of inserting the phrase "under no god" because he defines the neutral position as the status quo. Moreover, the majority nowhere advocates an "absolute prohibition on any mention of God in our schools...." (*Newdow* 2798).

The problems in the discussion between minority dissent and majority opinion are many. In order to clarify how the argument is operating, and in what sense it is going wrong (or right), I will examine three elements of the argument from a dialectically-

informed perspective. Both Goodwin and O'Scannlain discuss three questions in their contesting versions of neutrality: (1) who is the actor with which the court should be concerned regarding recitations of the Pledge with "under God," (2) what is the definition of recitations of the Pledge (including the value assigned to the activity), and (3) what would be the effect of removing "under God" from the Pledge? Goodwin's argument on the third question is brief (the effect would be to end an unconstitutional practice), so I will discuss the first two questions where there is more elaboration of arguments on the part of both Goodwin and O'Scannlain. A rhetorical model of adherence on the part of an audience brought about by a speaker predicts that Goodwin's argument will marshal evidence and values ostensibly persuasive for his audience of fellow appellate judges (and a future audience of Supreme Court justices), and that in the case of disagreement a dissenting judge will offer a rebuttal using reasons that Goodwin will find persuasive. A pragma-dialectical argumentation model predicts that in the event of disagreement, a dissenting judge will raise questions related specifically to the viewpoints put forward in Goodwin's opinion. While both of these general predictions are at times confirmed in the Goodwin/O'Scannlain exchange, the extent to which the argument diverges from rhetorical and dialectical expectations raises questions as to how well our models account for troubling argumentative behaviors.

The first question debated between the opinions is the definition of the action of the elementary students when they say the Pledge of Allegiance. Goodwin's argument emphasizes the role played by the government (in the form of the school and its employees) whereas O'Scannlain emphasizes the role played by the students themselves. In the first section of his opinion, "Factual and Procedural Background," Goodwin writes:

> In accordance with state law and a school district rule, [Elk Grove Unified School District] teachers begin each school day by *leading* their students in a recitation of

> the Pledge of Allegiance ("the Pledge"). The California Education Code *requires* that public schools begin each school day with "appropriate patriotic exercises" and that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of American shall satisfy" this requirement. (*Newdow* 2799-2800; emphasis added).

When considering the effects of the Pledge, the students are central, but for Goodwin the activity of the Pledge itself is not produced by the students but by the state (and more specifically the state's agents in the persons of teaching and administrative staff following state law and school district policy that seeks to fulfill the requirements of state law). Goodwin writes not of "children reciting the Pledge" but of the state law requiring teachers to "lead their students in a recitation of the Pledge." Goodwin defines the activity of the Pledge as the result of state actions. This definition is potentially persuasive as it draws on a legal framework and vocabulary with which the judges are familiar, but it is by no means an incontestable statement of fact, and it isn't surprising that some judges do disagree. O'Scannlain does disagree, and begins the first section of his dissent:

> We should have reheard *Newdow I* en banc, not because it was controversial, but because it was wrong, very wrong—wrong because reciting the Pledge of Allegiance is simply not a 'religious act' as the two-judge majority asserts, wrong as a matter of Supreme Court precedent properly understood, wrong because it set up a direct conflict with the law of another circuit court, and wrong as a matter of common sense. We should have given 11 judges a chance to determine whether the two-judge majority opinion truly reflects the law of the Ninth Circuit. Reciting the Pledge of Allegiance cannot possibly be an "establishment of religion" under *any* reasonable interpretation of the Constitution. (*Newdow* 2781-2782)

O'Scannlain's initial focus on addressing the mistake, in his opinion, of the majority is appropriate. It is both potentially persuasive, assuming he provides sufficient reasoning to demonstrate to Goodwin where he is mistaken, and the argument is dialectically sound, because it raises an objection, though again, its continued soundness depends on the nature of the support O'Scannlain brings to explain his objection. Also potentially

persuasive is his citation of precedent (though there is likely to be a disconnect between his "proper understanding" of that precedent and Goodwin's own understanding). Problems for both adherence and dialectical soundness emerge in the choice of the words "reciting the Pledge."

Unlike Goodwin's causal definition of the Pledge recitations being directed by the state, O'Scannlain focuses solely on the activity of the students speaking the pledge. In the paragraph after the one above, criticizing the majority opinion for being "bold," he describes the majority decision as "ban[ning] the voluntary recitation of the Pledge" (*Newdow* 2782), and the phrase "voluntary recitation" appears twice more in the opinion. O'Scannlain's aside about boldness isn't as troubling as it might seem. If he is correct that Goodwin's opinion departs radically from Supreme Court precedent and the judicial mainstream as defined in other circuit court opinions, then the majority's position would be open to criticism, and the argument that the majority is wrong in part because it does not sufficiently connect its reasoning to precedent could be persuasive. What is troubling is O'Scannlain's declaration of the Pledge as a "voluntary recitation" for which he provides no reasoning, unlike Goodwin's definition. Whereas Goodwin provides a definition composed of distinct criteria (the agents of state law and teachers and the cause-and-effect relationship), O'Scannlain offers the "voluntary recitation" as an apparent fact. This argumentative move produces difficulties in both rhetorical and dialectical models.

Goodwin's definition is potentially persuasive because it offers criteria with which audience members can accept, reject, or challenge. O'Scannlain's response is less persuasive for an audience that shares Goodwin's views. O'Scannlain not only rejects Goodwin's proposition, he also fails to offer reasoning with which Goodwin and those who share his views can engage (let along reasoning that would gain the adherence of

O'Scannlain's opponents). What Goodwin treats as (an admittedly tentative) truth, to use Perelman and Olbrechts-Tyteca's terminology, O'Scannlain dismisses with an appeal to a supposed fact (that the Pledge is a student-centered, voluntary activity). This fact is contestable (for at least the Goodwin majority), but O'Scannlain treats it as self-evident. Furthermore, he reduces a complex collection of facts (the saying of the Pledge, the context of the students, including the school policies and state laws) to one supposed fact (students voluntarily say the Pledge). Rhetorically O'Scannlain risks failing to gain one audience's assent. Dialectically, O'Scannlain derails the argument. O'Scannlain avails himself of the right to challenge, but he is "not prepared to accept any shared premises and discussion rules," which is a basic requirement for dialectical soundness under the pragma-dialectical approach (van Eemeren and Grootendorst 139).

Rhetorical analysis here benefits from consideration of an argumentation perspective insofar as argumentation theory presents a framework for measuring the failures of argumentation against the concept of critical reasonableness (i.e. how arguments disrupt movement toward resolution of disagreement) as evidenced in the way one discussant summarizes and responds to the viewpoint of another. There is of course a failure of persuasion in this interchange too. O'Scannlain isn't persuasive for Goodwin or vice versa, but persuasion isn't the sole criterion by which we judge responsible rhetoric. For instance, O'Scannlain could be described as violating ethical standards valuable to healthy democratic communication by distorting his opponent's views. Yet turning to ethical frameworks blurs the line between ethical malfeasance and suasive malfeasance. The pragma-dialectical approach directs our attention to the interaction of viewpoints, not on account of ethical concerns (though such concerns do exist) but on account of the way the expression of one viewpoint shapes the way other viewpoints are expressed (and the way they normatively should be expressed).

The judges are not listening to each other, but the interesting element is the particular ways in which their language reveals their failure to listen. In their debate over the Pledge's definition and value, for example, the judges do not see the same thing when they look at the evidence. Goodwin describes recitation of the Pledge with "under God" as "a profession of religious belief, namely, a belief in monotheism" and that it is not:

> …merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase 'one nation under God' in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which is stands [including] monotheism. (*Newdow* 2807-8)

For Goodwin the Pledge is not the same as reading out loud other historical texts that mention God or religion (such as the Declaration of Independence), yet for O'Scannlain that is exactly what the Pledge is. O'Scannlain says that if the Pledge violates the establishment clause, so does recitation of "the Constitution itself, the Declaration of Indepdence, the Gettysburg Address, the National Motto, and the National Anthem" (Newdow 2783). For Goodwin, the Pledge is a "profession," for O'Scannlain a "recitation." For Goodwin, the Pledge with "under God" asks students to make a declaration of "religious belief" (*Newdow* 2807), but for O'Scannlain the Pledge is "unquestionably patriotic in nature" (*Newdow* 2792).

O'Scannlain does not explain why Goodwin is wrong to describe the Pledge as requiring a religious profession of belief, and it is this absence of response to the views forwarded by Goodwin that undermines O'Scannlain in a dialectical framework. O'Scannlain's arguments violate a number of the pragma-dialectical approach's procedural guidelines as described in van Eemeren and Grootendorst's *A Systematic Theory of Argumentation*. His argument prevents Goodwin's arguments from being fowarded by refusing to engage them. O'Scannlain does not explain why Goodwin is

wrong to consider "under God" religious, he simply asserts a contrary position. He attacks views not put forward by Goodwin, such as "the absolute prohibition on any mention of God in our schools" (*Newdow* 2798). The pragma-dialectical approach notes that discussants cannot "misrepresent[ ] an unexpressed premise—for example, by exaggerating its scope," which is what O'Scannlain does when he concludes that eliminating "under God" from the Pledge (which Goodwin distinguishes from other kinds of speech acts) would necessitate the prohibition of any historical documents that mention religion in schools (van Eemeren and Grootendorst 197). This argument also violates the prohibition on misinterpreting another discussant's language. O'Scannlain refuses to accept the starting point offered by Goodwin (that "under God" violates the establishment clause). In short, O'Scannlain's argument disregards the obligations that define reasonableness within argumentation theory.

O'Scannlain's refusal to engage Goodwin's arguments likely makes his dissent unpersuasive in addition to dialectically unsound. If we analyze O'Scannlain's dissent solely in terms of the majority as audience, then he makes a poor rhetor indeed, but the effect of his failings do not end with a failure to persuade a particular audience. It adds fuel to the fire of popular arguments that confuse public understanding of the Constitution, and it poisons the well of arguments from which future judges draw for their opinions. Furthermore, despite the bad behavior particular to O'Scannlain's argument in this case, the causes and effects of bad argumentation are not limited to any one party in the dispute. O'Scannlain, no less than Goodwin or any other participant in establishment clause disputes on any side, speaks from deep ideological commitments that not only contradict other positions but also obscure understanding of why the positions are in contradiction and even awareness of misunderstanding. Moreover, appeals to persecution such as in O'Scannlain's fears of religion being driven out of the

public square can have a polarizing effect making productive argument all the more difficult. The more deeply held the commitments and the more ambiguous the terminology used to argue disputes between commitments, the worse these problems can become.

Given the attention it has paid to defining evaluative criteria like the Lemon Test, the Supreme Court seems aware of the danger posed by ambiguity, and yet such criteria have proven of limited use. Whether in interpreting a phrase like "under God" in official government speech or a religious display on government property, conflicting viewpoints have trouble fairly summarizing the views of others. The challenge of interest here for rhetoric and writing, I argue, is not resolving the conflict. After all, courts and legislatures ultimately resolve such conflicts through majority rule. The interesting challenge is how to conduct disagreement in ways that responsibly address ambiguity instead of allowing it to derail a discussion where discussants talk past one another. The next chapter investigates contested interpretations of religious displays, delving into the Supreme Court's attempt to establish a method of interpretation that would remove or minimize ambiguity by defining the viewpoint from which religious displays should be judged. That viewpoint is one of a "reasonable observer" as first described by Justice Sandra Day O'Connor. As I will discuss, however, appeals to a seemingly objective criterion face challenges similar to the troubled appeals to neutrality discussed in this chapter. The work the justices undertake in fashioning and arguing over a standard like the reasonable observer undermines its intended goal of providing a shared viewpoint. No less than in discussions of the public square and neutrality do discussants contesting how to interpret government religious displays pursue divergent lines of argument and misrepresent other views, calling into question the extent to which we can reason with each other.

Chapter Three: Understanding Reason

In the previous two chapters I have examined how failures to conform to the requirements of a dialectical critical discussion also undermine responsible rhetoric in Perelman and Olbrechts-Tyteca's sense of the term. *The New Rhetoric* offers the hope of argumentation where people converge on a similar understanding of the issues at stake, even if they do not settle their disagreements. The hope is of stability and coherence in our discussions, not certainty or truth. What one person proposes, another can disagree with, and through that process they build common understanding (or at least an understanding of where they disagree). Within the machinations of church-state discourse, however, I have documented arguments that resist being held accountable to disagreement. This resistance results from arguments that attempt to define opposing views out of existence or that exploit ambiguity such that discussants cannot settle on stable definitions of terms. Framing establishment clause disputes as opposition to religion in *public*, for example, occludes the viewpoint that opposes religion in *government*. By pursuing disparate lines of argument and refusing to reach consensus on definitions, the discussants examined in the case studies of the public square and neutrality shirk dialectical obligations and derail arguments such that not only can they not resolve disagreements but also that they do not demonstrate even an accurate understanding of the differences at stake in the disagreement.

These dialectical constraints are compatible not only with the idea of responsible rhetoric discussed in *The New Rhetoric* but they also complement the inclusive, understanding functions of argument emphasized in more recent rhetoric and writing work on argument, even as that work pays little attention to dialectical argumentation.

Emmel, Resch and Tenney situate their collection on argument in the writing classroom by explaining that "understood as inquiry, the argumentative process can move parties from disagreement to negotiation and, if not to accord, then at least toward an understanding of what their differences are and why they exist" (xiv). Perhaps more than any other word understanding unites the rhetoric and writing critiques of exclusionary versions of rational argument, whether those critiques pursue non-agonistic, listening, invitational or other foci. Argumentation theory, I argue, provides a method for the demonstration and assessment of understanding that can work alongside these approaches and supplies a way of testing understanding currently under-used in our field.

This chapter continues with a third case study and, having considered the theoretical underpinnings of a connection between rhetorical and dialectical approaches in the earlier chapters, it also sets up a discussion of applying dialectical argumentation to methods of analysis and teaching that will continue in the Conclusion. The case study will examine the judicial concept of the reasonable observer. Judges hope the concept might define the perspective from which contested interpretations of symbolic activity should be seen, but this hope runs into the same difficulty of unresolved and unremarked on ambiguity that beset the arguments over the public square and neutrality. Unnoticed ambiguities also beset understandings of reason within rhetoric and writing. As with Chapters One and Two, I will take some time before the case study to explore connections to disciplinary concerns. Unlike the discussion of liberal public reason and neutrality in the previous chapters, however, where I focused on broad theoretical concepts that demonstrate the compatibility of a closer link between rhetorical and dialectical approaches, here I focus on particulars of method. I discuss three levels of ambiguity in rhetoric and writing before turning to the case study: ambiguity over the

idea of reason itself, ambiguity of terms describing the processes of reasoning, and finally ambiguity among methods of applied reasoning in writing textbooks.

TEACHING REASON

I approach method from the perspective of teaching argument, and I choose this approach because improving pedagogy is the fundamental motivation cited by the two landmark scholarly overviews of argument within rhetoric and writing I discussed in the Introduction. Emmel, Resch and Tenney explain that their text originated in discussions that began with "little agreement on what the term *argument* actually meant" and discovered "that there was little literature to help instructors compare, contrast, and evaluate various named approaches (the enthymeme the Rogerian approach, Toulmin's model) to argumentative writing" (ix-x). Barnett prefaces his collection noting that the theorists he includes "are the ones most often cited by argument textbooks in general (and, in particular, by the Bedford/St. Martin's argumentation textbook this resource supports...)" (iii). More recent than these two books are articles by Richard Fulkerson and A. Abby Knoblauch that include overviews of argument, though neither scholar offers a comprehensive examination of the teaching of argument. Fulkerson's discussion of argument sits within a much broader overview of writing pedagogy methods. Knoblauch focuses on expanding definitions of argument that she finds troubling. Both do, however, connect their discussion of argument to teaching and to textbooks in particular. Fulkerson notes that the subject of what he calls "composition as argumentation" is "not now discussed much in our leading journals," referring interested parties to argumentation field journals such as *Informal Logic* or *Argumentation and Advocacy* (671), despite the "growth and success of argument-based textbooks" (672). Adding to Fulkerson's concern about the under-discussion of argumentation, Knoblauch suggests that if "textbooks

sometimes serve as students' and teachers' only sustained introduction to theories of argument, we would do well to pay attention to the version of argument that such books perpetuate" (248). Given this interest in seeing argument through the lens of the classroom, theoretical approaches to argument cannot easily be separated from pedagogical application. More importantly for the purposes of this dissertation, I believe that looking at methods of teaching argument can help explain what value dialectical argumentation holds for rhetoric and writing approaches to argument.

As I will discuss below, the methods present in textbooks are diverse and exist in some tension with each other. Before looking at those methods, though, there is an even broader tension between concepts of reasoning that contributes to some of the difficulties I will examine within the textbooks themselves. Much like the public square phrase circulates in church-state discourse meaning different things to different stakeholders, rhetoric and writing scholars define reason in differing and contradictory ways. As with the ambiguities I discuss in church-state rhetoric, I do not think problems arise because disagreement exists but because disagreements are not made explicit and pursued through argumentation, and, as with different positions on the proper relationship between religion and government, I agree with some and disagree with others. For instance, I agree with criticisms of reason that aspires to objectivity, but I also find these criticisms incomplete insofar as they do not engage other approaches to reason.

A clear example of the tension can be seen in Stanley Aronowitz's skeptical treatment of reason. Aronowitz offers a strong defense of the postmodern "rejection of universal reason as a foundation for human affairs," explaining how reason that claims an objective "impartial competence...is constituted as a series of exclusions—of women, of people of color, of nature as a historical agent, of the truth-value of art" ("Postmodernism" 51). The universal in this sense strips away difference (or subordinates

it) in order to achieve a univocal process to judge ideas. Such reason occurs and we must guard against it; however, in criticizing one variety of reason, Aronowitz's argument overlooks other varieties. We do not need to take the term "universal" to mean always the same in all contexts for all individuals as Crosswhite discusses in his reappraisal of Perelman and Olbrecht-Tyteca's universal audience. For Crosswhite, the universal does not transcend human experience but rather emerges from it:

> Every act of speaking must at least implicitly acknowledge this shared reality, must realize this universal audience in some way. This audience varies from situation to situation. There is no self-grounding, autonomous rationality in *The New Rhetoric*, no universality that is not also specific and particular, but there is nonetheless some kind of universality operative in any argument.
> ("Universalities" 438)

Crosswhite's universality does not occlude difference. It emerges from difference. I think it fair to ask whether the term "universal" best suits the phenomenon Crosswhite describes or whether Crosswhite's approach resolves questions about *The New Rhetoric*'s universal audience. Both questions go beyond my purpose here. The very existence of contested definitions of universal reason, though, is important to my argument. Common behaviors or procedures such as those described in pragma-dialectical argumentation theory propose patterns of discourse that attend to communicative interactions in particular contexts (in the case of pragma-dialectics the context of interlocutors attempting to talk through a disagreement to find a resolution), but "common" in this sense is not the same as "universal" as Aronowitz uses the term.

The point here is not to replace Aronowitz's definition of reason with Crosswhite's. I cannot ignore the critique of exclusionary, transcendent reason. Aronowitz criticizes Jurgen Habermas for locating "the barriers to learning...not...in the exigencies of class interest, but in distorted communication" ("Postmodern" 50), yet I would suggest that both of those phenemona (and others) contribute to difficulties in

discourse. Different theoretical frameworks will highlight different elements of discourse, and, to be sure, may obscure others. A pragmatic analysis focusing on how speech acts interact may ignore or downplay class or race interests and vice versa. Only through the synthesis of interdisciplinary dialogue might these blindspots be illuminated. While some rhetoric and writing scholars, such as Elizabeth Ellswoth, share Aronowitz's concerns about the potential abuses of reason, others, exemplified by Patricia Bizzell, pursue such a synthesis in combining the strengths of both traditional reason and insights from postmodern critiques. Bizzell shares a suspicion of claims to "value-neutral, objectiv[ity]," and notes that "we postmodern skeptical academics are habitually fearful that any talk of teaching virtue will tend to introduce exclusions" ("The Politics" 4, 6). Yet, Bizzell commits herself to teaching from an ethical domain while attempting to solve "the problem [of] how to talk about such values without promoting exclusions" (6). Bizzell's invocation of "virtue" places her argument within an ethical-political approach for defining responsible rhetoric, and the activities she describes as virtuous, such as encouraging students to raise questions from an egalitarian perspective, are compatible with the practices of reason found in argumentation theory, and ultimately I believe that both approaches (an ethical framework and a discursive model of reason) are needed.

Even if I do not believe reason inherently problematic, I do acknowledge that its application seems inevitably fraught with the challenge of exclusion. In response to these challenges, scholars have pursued what Barry Kroll calls "arguing differently," yielding the array of collaborative, feminist, non-agonistic approaches and others that I mentioned in previous chapters. Given the suspicions about logical reasoning, and the active pursuit of alternatives, I find it interesting that rhetoric and writing has not worked more closely with dialectical methods from argumentation theory. These methods enact the kind of cooperative interaction between discussants that various rhetoric and writing scholars

have advocated, yet mentions of dialectical argumentation remain few and far between in rhetoric and writing scholarship. The methods and models current scholarship does use to describe reasoning are not in themselves problematic. Various methods for evaluating argumentation are appropriate in different contexts and for different purposes. Given the avoidance of methods considered to be associated with positivism combined with the minimal attention to relevant work in related fields such as argumentation, however, our field faces a situation where scholars and teachers of writing have fewer avenues to pursue than they might have otherwise.

Another source of tension in understandings of reason, in addition to the conceptual fuzziness that attends reason itself, is the array of terms used to describe the production and assessment of reasonable arguments as found in writing textbooks. Terms such as critical thinking, logical fallacies, well-structured arguments and the like are used by different authors without much consistency. Given the diversity of approaches to argument, lack of consistency is not surprising, but it warrants attention insofar as authors may use different terms for similar concepts or similar terms for different concepts, such as the different "universal" reasons of Aronowitz and Crosswhite. The following adjectives describe the quality of reasoning in a selection of writing textbooks that I discuss later in this chapter: reasonable, logical, critical, good, problematic, valid, effective, honest, and positive. Some of these terms correspond to specific models of argumentative quality (e.g. valid corresponds to logic), while others speak to more general assessments of quality (e.g. good). In order to locate some starting point other than arbitrarily picking one of these terms at random, I turn to the language used in the "WPA Outcomes Statement for First-Year Composition." The Statement is, of course, a consensus view offered by the Council of Writing Program Administrators and not a

binding declaration of how college writing is or should be taught, but it still provides a starting point from which to consider the teaching of reasoning in writing.

Taking as read the Statement's caveat that it offers "'outcomes,' or types of results, and not 'standards,' or precise levels of achievement," the language is understandably broad, yet it does offer concrete descriptors for the processes that writing students should enact ("WPA Outcomes"). Most pertinent to my focus here is the second category of outcomes titled "Critical Thinking, Reading, and Writing." The Statement notes that some of its terms "such as 'rhetorical' and 'genre' convey a rich meaning that is not easily simplified," nodding to a professional audience of rhetoric and writing teacher-scholars familiar with these complexities. Thus the Statement does not define in detail what is meant by terms such as "Rhetorical Knowledge." However, something of a procedural understanding of the outcomes reveals itself through the criteria in each outcome category. In other words, students work toward sufficiency in critical thinking by *doing* certain activities: "inquir[ing], learning, thinking, and communicating," "analyzing and synthesizing appropriate ... sources," "integrat[ing] their own ideas with those of others," and "understand[ing] the relationships among language, knowledge and power" ("WPA Outcomes").

While the idea of "critical thinking" finds popularity both inside and outside writing studies, the last activity mentioned in the Outcomes criteria, that which asks students to think about power, also speaks to a prominent tradition more closely associated with writing studies. The critical thinking approach outlined in the WPA Outcomes is consistent with "critical" in the sense of critical pedagogy and the tradition in writing studies of interrogating systems of power and privilege. As described by Russel K. Durst, critical pedagogy "takes as its instructional goal the raising of students' consciousness of their social and political situatedness" and its goal "is to empower

students to take responsibility for their own learning, and while doing so, to teach not only reading, writing, and thinking, but also a more critical, sophisticated political analysis and a higher level of engagement in action for social change" (1670). Historically, traditions and behaviors termed reasonable, rational or logical have obfuscated the contingent nature of power structures and obscured the inequity inherent in those structures. Especially suspect, as Aronowitz notes, are ideas of "universal reason" as "a series of thought that any ideal, rational person might adopt if his/her purpose was to achieve propositions of universal validity" ("Postmodernism" 51). As such, writing studies scholars have at times avoided terminology including reason and rational in favor of a label of critical, but critical thinking is reasoning—just as thinking that has the intent and/or effect of achieving unethical goals is also reasoning.

Whether or not we understand "critical" in the more narrow critical pedagogy tradition or the broader critical thinking tradition, the term as used by the Outcomes Statement, that is "understanding the relationships among language, knowledge and power," invites the challenge of historical power structures, calling attention to their existence as contingent, not natural, phenomena, and as such it demonstrates affinities with classical defenses of rhetoric that argue for persuasion as a way for the weak to argue strongly. Reasoning in these applications, whether we call it critical thinking or not, is not the apprehension of some transcendent truth but the necessary consideration and interaction of multiple viewpoints in order to ensure that all stakeholder viewpoints are taken into account. Despite the prominence of the phrase critical thinking, I prefer to use the term reasoning, because this dissertation has from the start focused on the term reason and because I hope to offer some small measure of rehabilitation for the term.

THE PEDAGOGY OF REASONING AS DISCUSSED IN WRITING TEXTBOOKS

The current overviews on argument for rhetoric and writing run into a couple of limitations: lack of comprehensiveness and a lack of systemization. As I mentioned in the Introduction, neither Emmel, Resch and Tenney nor Barnett include dialectical argumentation among the approaches. Fulkerson and Knoblauch's more recent work looks at argument through the lens of textbooks instead of argument theories. Those textbooks too lack discussion of dialectical argumentation, and the Fulkerson and Knoblauch studies also call attention to the lack of systematic study. As I will discuss below, the set of textbooks examined by Fulkerson and Knoblauch overlaps little. This lack of systematization may relate to the similarly disparate approaches to new rhetorics seeking understanding cited in the last chapter. Each time scholars propose a new model, such as Rogerian or invitational rhetoric, they tend to offer the models with little to no connection to similar work. Little has been done to compare and contrast these models as part of a larger analysis of rhetorics that facilitate understanding. Even when responding directly to earlier work, scholars diverge in details considered. For example, Craig Rood recently discussed approaches to teaching civility, responding directly to Knoblauch's work on argument but he cites completely different textbooks for his analysis than those Knoblauch discusses. I cannot and do not attempt to redress these limitations here, and there remains a need for a new comprehensive review of argument as taught in rhetoric and writing. My purpose here is to highlight the different methods by which argument can be taught and how dialectical approaches could ease certain tensions between those methods. I also limit my focus here even further. I do not look at how textbooks define argument broadly. Instead, I look at a normative question: how is the quality of argumentative reasoning evaluated?

I approach this examination of textbook reasoning with the goal of later demonstrating how a dialectically-informed analysis might complement approaches already in use within rhetoric and writing. The complementary function emerges, I suggest, in light of the tensions that exist between those approaches, most notably the apparent tension between a desire for an argumentation that promotes understanding and a traditional practice of argumentation that apparently promotes exclusion. This tension occupies Knoblauch's focus in her evaluation of argument textbooks. Her critique raises valuable questions about the extent to which alternative argument models, such as Rogerian or listening rhetorics, have found purchase in our instructional texts, but her argument also overlooks some complexities when it comes to describing agonistic argument, particularly the extent to which appreciation and apprehension of other views is necessary to "win" an argument. While "argument as conquest and conversion can serve to reinforce current power structures," I think we must also consider whether the situation may be reversed (Knoblauch 263-4). Might not current inequitable power structures serve to prop up an understanding of persuasion as conquest? The zero-sum approach set up in Knoblauch's description, where winning comes must come at the cost of understanding, meshes well with some just-so narratives popular in rhetoric and writing, but the functions of persuasion and understanding have always closely relied on each other, even if those who use or study rhetoric choose to emphasize one over the other. Indeed, in order for manipulative rhetoric to be effective, a rhetor must observe and understand the audience. These skills of observation can serve ethical or unethical ends. A cutthroat, winner-take-all agonism, I would suggest, is one particular (mis)application of suasive ability, not an inherent tendency in traditional argument. Other potential outcomes inhere in argument. Michael Mendelson highlights the attention to multiple perspectives cultivated in the classical training of controversia declamations. Even

though the goal of controversia was to train rhetors to dominate in a judicial contest, Mendelson explains how asking students to argue multiple sides of hypothetical cases encourages the critical thinking that we wish students to enact in our classrooms ("Quintilian" 279). Thus the relationship between argumentation, understanding, and exclusion are more complex than Knoblauch describes.

Despite the limited description of traditional argument in Knoblacuh's assessment—indeed on account of it—her core questions of how to define argument and how to define good argument through expanding that definition deserve further consideration, especially in light of the minimal conversation between rhetoric and writing discussions of *argument* and the approaches considered in *argumentation* theory studies. Following Knoblauch's rationale for examining a selection of textbooks that emphasize argument, I will briefly examine some of the same texts as well as a few additional titles that emphasize argument in their titles and/or chapter structure, echoing her caveat that, though textbooks do not provide a comprehensive perspective on pedagogy, they influence what occurs in the classroom (248). As noted above, current research on argument in textbooks lacks a systematic approach that I cannot rectify here. Fulkerson mentions eight writing textbooks that emphasize argument. Knoblauch discusses 11 and pays particular attention to the "two bestselling texts in this genre from two of the most popular textbook publishing companies:" *Everything's An Argument* and *Writing Arguments* (248). Between them Knoblauch and Fulkerson only discuss three textbooks in common. Both scholars note the number of argument-focused textbooks, and the expansive selection may contribute to the challenges of a systematic study. Fulkerson describes the "phenomenal" publication success (672) and Knoblauch talks of a "glut" of argument textbooks "mak[ing] it impractical to survey all of them in one article" (248). Similarly it is impractical to survey them all in a systematic fashion here

nor is it necessary for my purposes of noting tensions between some approaches to argument circulating in textbooks. I include some textbooks not mentioned by either Fulkerson or Knoblauch in order to broaden the account of approaches, though there are even more argument-focused textbooks than what I discuss here. At the end of the dissertation I have provided two tables. The first lists the textbooks considered by Fulkerson, Knoblauch and myself and demonstrates the overlap (and lack thereof) between the three and acknowledges the lack of systematization in title selection. The second provides an overview of the categorization of the texts according to how they evaluate the quality of argumentative reasoning as conforming to either disposition or structure.

In offering discussion of what it means to argue well, textbooks provide criteria that break down into two categories. Broadly speaking, these assessments of the quality of reason depend on conforming to the definition of an argument's *structure* or to the procedures of enacting good argumentative behaviors or *dispositions* that arguers should possess. In the following discussion, I wish to draw attention to the emphasis in many textbooks on the structural definition of argument when they discuss the assessment of reasoning. In these cases, the behaviors necessary for good reasoning get brief mention as an introductory reminder of the dispositions students should already be bringing to their studies before moving onto the apparently more difficult work of discerning the proper and improper structures of argumentative reason as seen in logic, the Toulmin model and fallacies. Textbooks with a structural focus conceptualize an audience in need of understanding the structural forms of reason in order to evaluate its quality. The second table below represents the difference in approaches wherein textbooks are described as emphasizing reason as structure or as a combination of structure and disposition.

The relationship between structure and disposition approaches to reason varies across writing textbooks. Authors often include guidelines for creating and assessing argumentation that fall into both of these categories. Sometimes textbooks explicitly differentiate these categories and sometimes they try to blend the two together. Lester Faigley and Jack Selzer's *Good Reasons With Contemporary Arguments* exemplifies a blended approach when it asks, "How can you argue responsibly?" Faigley and Selzer suggest that you argue responsibly when "you set out the reasons for making a claim and offer facts to support those reasons" (6) and when you "cast yourself as a respectful partner rather than as a competitor," "court[] your audience's cooperation," and demonstrate an understanding of the audience's views (7). The first criterion spells out a structural form to which an argument should adhere (i.e. an argument contains a claim supported by reasons and facts). The criteria that follow describe behaviors responsible rhetors should enact. In this way, the structure and disposition approaches complement each other, and in the case of *Good Reasons* they appear to achieve a kind of organic synthesis, though for reasons I discuss below such synthesis is not complete. John Ramage, John Bean and June Johnson's *Writing Arguments* offers another example of a mixed disposition/structure approach notable for its invocation of "dialectical thinking." The mixed approach tells students that good argument requires well-structured arguments but it also explains that such structure requires specific procedures.

The separation between structure and disposition approaches is more evident in textbooks where the chapter organization separates the approaches into different sections of the text or where the author explicitly differentiates between the two. Donald Lazere makes an explicit division between the two approaches, telling students that "some scholars make a distinction between critical thinking *skills*, related formally or informally to traditional logic, and *dispositions* that foster or impede critical thinking within the

broader context of psychological, cultural, social, and political influences" (56; emphasis in original). Here Lazere defines "skills" in terms of logical form, differentiating structural quality from the procedural quality of behaviors. His *Reading and Writing For Civic Literacy* offers detailed discussion of both the structural and disposition aspects of argumentative quality. Whereas Lazere gives considerable attention to both the structure and disposition elements, other texts approach the division differently. Timothy Crusius and Carolyn Channell's *The Aims of Argument* frames a Toulmin structure approach with a brief discussion in the first chapter of the disposition criteria they use for assessing "mature reasoning:" that reasoners should be "well informed," "self-critical and open to constructive criticism from others," that they should "argue with their audiences ... in mind," and that they "know their argument's contexts" (9-10). Cruisius and Channell ask students to evaluate arguments according to how well they conform to the Toulmin structure, but they frame that structural evaluation within the disposition criteria. Other textbooks follow this pattern of devoting more time to discussion of the structural criteria for assessessing argument quality than they spend on discussing the dispositions, including *Discovering Arguments* by William Palmer and Dean Memering, which discusses logic, Aristotelian appeals to logos and the Toulmin model, and Annette Rottenberg and Donna Winchell's *The Structure of Argument*, which couples the Toulmin model and audience analysis with a discussion of informal logic.

Just as texts vary in the ratio of discussion devoted to either the structure or disposition elements of assessing argument quality, they also differ in the types of structures discussed. These structures fall within a small set of models: informal logic (induction and deduction, fallacies, and syllogism), Aristotelian appeals to logos (discussed in the form of the topics), stasis or argument genres influenced by stasis, and variations on the Toulmin model. The quality of arguments in these instances is

determined by how well they follow the structure of a given form. Some textbooks mix structures in a fairly evenhanded manner. Lazere's *Reading and Writing for Civic Literacy* offers an expansive account of informal logic, Toulmin and rhetorical approaches to reasoning. Andrea Lunford and John Ruskiewicz's *Everything's An Argument* also offers a combined approach in joining stasis categories with Aristotelian appeals and Toulmin. Sheila Cooper and Rosemary Patton's *Writing Logically, Thinking Critically* is alone among the texts surveyed in relying on informal logic in describing the structure of reason. Sylvan Barnet and Hugo Bedau also emphasize logical reasoning but not to the exclusion of other structures of argument. Some of the textbooks considered for this chapter draw primarily on two structural models, such as Katherine Mayberry's *Everyday Arguments* which structures arguments using informal logic and the Toulmin model, Annette Rottenberg and Donna Winchell's *The Structure of Argument*, which uses Toulmin and an Aristotelian rhetorical analysis of audience, or Dorothy Seyler's *Read, Reason, Write* and William Palmer and Dean Memering's *Discovering Arguments*, which join Toulmin with Aristotelian discussions of logos taken from the *Rhetoric*. Nancy Wood's *Essentials of Argument* approaches argument primarily from the Toulmin model.

As is evident from these last examples, variations on the Toulmin structure loom large in argumentative writing textbooks. Even so, evaluation of reasoning is often not discussed exclusively in terms of claims, warrants, grounds and backing. Most of these texts offer at least brief forays into syllogistic logic. Many of these discussions of quasi-logical structural models include lists of fallacies. Variously called logical fallacies, rhetorical fallacies, and fallacies of emotion, logic and character, these lists provide names and examples of so-called fallacies, though they offer little-to-no discussion of why fallacies would be considered fallacious beyond brief reference to logical form. Barnet and Bedau describe fallacies as "kinds of invalid reasoning" (87) and divide them

into categories of "ambiguity," "erroneous presumption" or "irrelevance" (369). Cooper and Patton explain that "a fallacious argument [is] an argument that is persuasive but does not logically support its conclusion" (144). Decontextualized lists of fallacies overlook the considerable complexity of informal logic's work on fallacies, the most prominent of which is Douglas Walton's collection of book-length studies of various fallacies. Critical to Walton's work is the understanding that fallacies do not operate within the confines of the syllogism. Rather, fallacies "violate the rules of reasonable dialogue [and] are deceptive tactics used unfairly in arguments to defeat an adversary in dialogue" ("What" 419). Many of the arguments that appear on textbook lists of fallacies, Walton argues, are problematic not because they violate deductive form but because they frustrate a dialectical progression of dialogue wherein interlocutors converge on a common goal. Depending on the context, argumentative forms that seem to be fallacies may not be fallacious at all (Walton *Pragmatic* 15).

I do not want to suggest that the bifurcation between reasoning structure and disposition in textbooks is itself problematic. For the most part these books offer students understandable and applicable discussions of whatever structural model the authors favor. Nor does drawing from both structure and disposition approaches pose a problem, but textbook conversations tend to circulate around the same issues while overlooking new directions. The relationship between structure and disposition is under-theorized in the textbooks. Argumentation theory supplements the structure and disposition models so that instead of rhetoric and writing's approach that good argument must have good form and adhere to rules of good behavior, argumentation posits that good argumentative behavior has its own structures beyond general ethical admonitions to rhetors to be fair and open-minded. Rhetoric and writing overlooks to a great extent the procedural insights of dialectical analysis. The interaction of viewpoints shapes the structure of arguments in

ways that models reliant on logical form or the Toulmin model do not account for. Argumentation theory also points to more productive ways of recognizing and revising problematic argument than the fallacy model. Fallacies are not bad arguments in the abstract but potential pitfalls insofar as they obstruct the goals of a discussion.

Argumentation can direct our attention to ways of analyzing the structure of argument in addition to logical form. The admonition to be fair often appears in discussions of the dispositions of good reasoning, but these mentions are brief. Textbooks devote far more words to describing types of fallacies than to demonstrating how (un)fair summary contributes to the quality of reasoning in argument. Katherine Mayberry explains in *Everyday Arguments* that "effective arguments are ethical as well as reasonable. They make their points openly and honestly...and seek to remove ambiguity rather than exploit it," yet ambiguity often remains unnoticed as I have demonstrated in the examples of judicial rhetoric that I discuss in this dissertation (2). In addition to the traditional fallacy treatment, I can see how writing textbooks might benefit from example dialectical interchanges in which students can observe how the content of arguments changes through multiple turns in a conversation. I do not offer the pragma-dialectical approach as an alternative that we should use instead of the approaches currently favored in rhetoric and writing, but I see potential for it as an additional tool in our pedagogical toolkit, even as it also has drawbacks. The guidelines for a reasonable discussion under the approach include some of the same elements I find limiting in rhetoric and writing's approaches. Those guidelines include the principle that arguments made using formal logic must be valid (van Eemeren and Grootendorst 193), which risks ensnaring analysis in the intricacies of formal logic that dialectics has tried to move beyond. Another problematic guideline is that "discussants may not use formulations that are insufficiently clear or confusingly ambiguous" (195). This guideline is essential for dialectical

progression to occur, but it ignores the inherent ambiguity in language that gives rhetoric its persuasive potential in the first place. After all, in many cases ambiguity cannot be completely removed—at least without more unpacking than can be done in a particular analytical context. Even with these shortcomings I believe the pragma-dialectical approach offers a useful supplement because it encourages readers and writers to slow down in their analysis of a discussion and consider alternate directions in which a conversation may move.

I wish to stress that I do not mean to dismiss valid concerns with the troubling ways rationality can be applied in my attempts to sketch a nuanced treatment of well-reasoned argumentation. Indeed, both our discipline and the courts face a similar problem in the idea of a reasonable viewpoint. In defining reason, neither the courts nor writing instructors can appeal to an objective apprehension of reality. The reasonable observer, then, is also a subjective observer, which raises the question of whether the title reasonable merely serves to cloak partisan interests, such as the question that arises in the case discussed below over religious displays on government property. The potential responses to this dilemma of a lack of universal standard is similar in both the courts and the discipline. The "reasonable observer" like "critical thinking" or "logical argument" offer descriptors that in the abstract promises clear, practical guidelines for the evaluation of argument but in application fail to yield consensus on what arguments are at issue let alone help discussants resolve their disagreements. Part of the confusion results from lack of awareness that confusion is occurring—the difficulty that I have remarked upon throughout the analysis of judicial rhetoric in this dissertation. Another part of the confusion is a lack of consideration of the differences in evaluating reason as structure, as disposition and as process. In other words, what differences emerge when asking the epistemological question of what is reason, the ethical question of how to be reasonable,

and the procedural question of how to do reason? I will discuss these implications of taking these differences into account in more detail in the Conclusion, but first I will describe an example of the confusion as it occurs in judicial discourse.

THE REASONABLE OBSERVER & GOVERNMENT RELIGIOUS DISPLAY CASES

The judicial construct of the reasonable observer, as it relates to church-state cases, was first invoked by the Supreme Court in deciding whether the government could fund a scholarship program used for religion studies. The Court has since turned to the reasonable observer to determine whether religious displays on government property and/or funded by the government violate the establishment clause. As with other church-state questions (such as prayer in school), the Court has turned to different tests to determine constitutionality, including Justice O'Connor's Endorsement Test, which I discussed along with the Lemon Test in Chapter Two. Each of these tests requires judgment about the definition and effects of government actions. In order to determine whether a government act excessively entangles state and religion as the Lemon Test does or whether it sends a message of approval/disapproval about religion as the Endorsement Test does, the Court must first determine from whose point of view such act should be judged. When it comes to judging religious displays on government property, the justices have turned to the construct of the reasonable observer in an attempt to describe the point of view from which such displays should be seen. As described by Benjamin Sachs, the Court first applied the reasonable observer to a religious display case in *County of Allegheny vs. ACLU*. In that case, the Court ruled on the constitutionality of two different displays on government property in Pittsburgh, Pennsylvania. Before discussing the reasonable observer, I need to briefly discuss the

history of religious display cases, which, as with most matters related to establishment clause disputes, contains muddled and contradictory arguments.

My last chapter considered the context of public schools where young children face pressure to fit in, whereas this chapter looks at religious displays in non-school settings such as courthouses, city halls, and capitol grounds. The Supreme Court has been particularly sensitive to coercion as faced by school children, and it has ruled consistently that sectarian prayers and other endorsements of religion by school officials violate the Constitution (except for the Pledge of Allegiance as discussed in the previous chapter). The question of coercion in non-school contexts remains more open and confused in part because the Court has been better able to describe a coherent audience in terms of impressionable school children than in terms of a more general set of citizens encountering religious displays on public property. The reasonable observer offers a potentially stable definition for this audience, but given the contradictions in the justices' opinions, this stability is likely to remain only potential for the foreseeable future.

The Court has ruled on six establishment clause cases involving government display of religious symbols outside of school settings, and I'll briefly note the disparate rulings in order to reinforce the challenges faces the Court in defining a reasonable observer who might judge such displays. The displays include two crèches, one Christmas tree with menorah, two Latin crosses, and two 10 Commandments displays. The first crèche case from Rhode Island was deemed constitutional (*Lynch v. Donnelly*). A later case ruled on two displays in the city of Pittsburgh (*County of Allegheny v. ACLU*). The first display was a crèche in a court house. The second was a menorah and Christmas tree in front of a government building. The crèche proved too religious to be constitutional, while the Court found that the menorah and tree celebrated the secular aspects of Chanukah and other winter holidays rendering it constitutional. Regarding the

crosses, one was allowed to go up on state property sponsored by the Ku Klux Klan (*Capitol Square Review Board v. Pinette*). The constitutionality of the other, erected on government land by the Veterans of Foreign Wars without the permission of the government, remains in a state of uncertainty as the Court ruling did not touch on its status under the Establishment Clause (*Salazar v. Buono*). Of the two 10 Commandments displays, the Court found one constitutional and the other not (*Van Orden v. Perry* and *McCreary v. ACLU* respectively).

All of these cases (except for the KKK cross) were five-to-four decisions, and most generated multiple concurring and dissenting decisions from both sides. The multiplicity of viewpoints provides a rich resource for studying troubled argumentation of the sort with which this dissertation is concerned. As explained in my Introduction, both responsible rhetoric in the Perelmanian sense and dialectically sound argumentation require discussants to forward stable positions which they defend or concede to criticism. Yet in the religious display cases we see consistent failures by discussants to engage each other in sustained criticism that engages the viewpoints of the other.

The question of whether a display conveys a religious message given its content and context is one of two central questions the Court considers in these cases. The other is that, if the display can be understood as religious, whether it functions as a constitutional acknowledgment or accommodation of religion or as an unconstitutional endorsement of religion. Both questions depend on defining the proper way religious displays should be read. Both questions have met with judicial arguments wherein different parties misread each other's positions, even as they seem to work from a set of common values including neutrality and toward concepts meant to serve as guidelines, including the idea of a reasonable observer from whose perspective religious displays are interpreted.

Justice O'Connor provides the most recent and detailed definition of the reasonable observer. O'Connor's observer is not an actual person but an abstraction of the community who knows the community's historical attitudes and actions toward religious displays in a particular government space, and s/he is less likely to read government endorsement of religious views in displays of historically "ubiquitous" religious practices (Sachs 1524-25). In the abstract, this definition sounds workable, but when it comes to applying such a standard to actual cases the justices run into considerable disagreement. Indeed, the justices who have favored a more expansive role for religion in government have eschewed the reasonable observer and distanced themselves from O'Connor's Endorsement Test, and even among the justices less likely to approve of religious activity in government settings the definition of the reasonable observer has proven difficult to define in a coherent fashion.

The reasonable observer has developed over a series of three cases. The first case dealt not with religious displays on government property but government funding of a student's religious education and yielded a unanimous decision from the Court. In the two subsequent cases dealing with religious displays, the concept, which when first used seemed uncontroversial, encounters ever greater dissension and confusion among the justices. In the first case, *Witters v. Washington Department of Services for the Blind*, Washington State denied a disability scholarship to a student who sought a theology degree on the grounds that the payment would violate the establishment clause. The Supreme Court reversed the state's action, arguing that because students could request funds for any higher education degree, the state did not subsidize religion and did not violate the Constitution. As Justice O'Connor writes in her concurrence, "The aid to religion at issue here is the result of the petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself in

endorsing a religious practice or belief" (*Witters* 493). While the courts may struggle with defining some aspects of neutrality as I discussed in Chapter Two, this application of neutrality—to a government program being open to all comers religious and non-religious alike—has found widespread appeal among the justices. The "reasonable observer" makes an "inference" that conforms to the arguments acceptable to all the justices in this case. However, when it comes to issues where the justices demonstrate greater divergence in interpretation and argument, such as the meaning and effects of religious displays on government property, the definitions of reasonableness likewise becomes more divergent. The two cases that build upon the reasonable observer construct O'Connor offers in *Witters* demonstrate not just a divergence in opinion but an inability to acknowledge the disconnect much as seen in the other case studies I have discussed.

In the following analysis I will highlight both the fundamental conflicting opinions and also the ways in which the justices misrepresent each other's views and/or fail to address the questions raised by their interlocutors. With this case study, I will show that the problem facing the court as it struggles with the reasonable observer is analogous to the problem facing rhetoric and writing when it comes to defining reason: there is no objective observer, so how do we define the reasonable observer in a way where the title "reasonable" doesn't just serve as a mask behind which to disguise partisan interests? On one hand, the Court has not only not answered this question but seems reluctant to consider it. On the other hand, I think that the question as I ask it above may not be answerable, and that more productive lines of argument might serve us better, as I will demonstrate with the investigation of argumentative dysfunction below.

CASE STUDY: OF MENORAHS, CHRISTMAS TREES AND THE KKK

Debate over the reasonable observer begins in earnest in 1989's *County of Allegheny v. ACLU* and reaches an apex (or nadir) in *1995's Capitol Square Review and Advisory Board v. Pinette*. The question in *Allegheny* involved two displays on government property in Pittsburgh, Pennsylvania. *Pinette* dealt with a dispute over the KKK's application to display a cross on a section of property at the Ohio state capitol reserved for displays created by civic organizations. In order to contextualize the particular arguments over the reasonable observer, I will provide a broad summary of the rulings in each case. The two displays in Pittsburgh were a crèche positioned in the central staircase of a court building and a decorated evergreen tree and large menorah standing outside an entrance to another government building. The majority ruled that the crèche display violated the Constitution while the tree and menorah did not. The crèche, because of its explicitly religious content and central location within a government building wherein citizens must do business, had "the impermissible effect of endorsing religion" (*County* 576). The majority determined that the religious content of the tree and menorah display was incidental to its overriding message celebrating diversity and acknowledging various winter holidays, ruling that the display did not violate the First Amendment. In *Pinette*, the Court ruled that the KKK cross, though religious, was given display space in a public forum to which the government provided access on an equal opportunity basis to religious and non-religious groups alike (similar to the reasoning in *Witters*) and as such was a constitutional display.

These brief summaries belie deep-seated divisions not only between majority and minority justices but also between justices who agree on a given decision but disagree as to the reasoning behind that decision. In *Allegheny*, the justices disagree over whether the displays have religious meaning and/or the extent of that meaning. They disagree over the

effect of the government's action in hosting the displays (whether the government sends a message endorsing a religious view or not). In *Pinette*, the justices disagree over the meaning of the "reasonable observer" criterion Justice O'Connor tried to develop in Allegheny in order to provide a coherent framework for assessing religious display cases. The disagreements are notable given the extent to which the arguments fail to converge on the same questions. The following analysis focuses on the questions in *Allegheny* over whether the displays are religious and what effect(s) the government displays have if any, describing the extent to which the arguments between the justices derail.

The *Allegheny* opinions raise a number of difficult questions, any one of which could yield a range of contested viewpoints. I will begin with the questions as defined by the majority opinion, but I also want to note that the dissent rejects those questions outright in preference for framing the issues differently. I do not see this disagreement over how to frame the questions as problematic by itself. Any democratic, procedural system needs mechanisms through which to make decisions in the absence of unanimity, and in the case of the Supreme Court that mechanism is a majority vote. However, the lack of agreement and the effect that lack of agreement has on the quality of the argumentation does raise questions regarding responsible persuasion that I will explore blow. In the majority opinion of *Allegheny*, Justice Blackmun notes that an earlier Supreme Court case also involving Christmas decorations "offers no discernible measure for distinguishing between permissible and impressible [government] endorsements [of religion]" (594), and he praises Justice O'Connor's concurrence in that case that for setting a standards of no constitutional endorsements of religion and for:

> …articulat[ing] a method for determining whether the government's use of an object with religious meaning has the effect of endorsing religion. The effect of the display depends upon the message that the government's practice communicates: the question is "what viewers may fairly understand to be the

> purpose of the display." That inquiry, of necessity, turns upon the context in which the contested object appears. (*Allegheny* 595; internal citations omitted)

That standard pursued by the majority then is one that bars the government from supporting displays that communicate endorsement of religious views and a standard that determines the content of the displays message according to its context. The religious content of the displays, Blackmun argues, "must take into account the perspective of one who is neither Christian nor Jewish, as well as those who adhere to either of these religions...the constitutionality of its effect must also be judged according to the standards of a 'reasonable observer'" (*Allegheny* 620).

Blackmun offers an argument explaining why the crèche set up in the courthouse sends a message of endorsement and why the tree and menorah do not. The details of his definition argument and the arguments of those disagreeing with him are of less interest for my purposes than examining how the justices' interactions demonstrate the fraught nature of the "reasonable observer" construct. I do, however, need to provide a brief description of the justices' positions on this question to contextualize their arguments. The justices split on both the meaning of the symbol and the effect the symbol has. Justices Blackmun and O'Connor both agree that the crèche is religious and has the effect of endorsing religion but the tree and menorah do not have religious content or effect. Justices Brennan, Marshall and Stevens argue that both displays are religious and have the effect of endorsing religion. Justices Kennedy, White, Scalia and Rehnquist argue that all the symbols have religious meaning but do not violate the Constitution (Kennedy raises doubts about the Endorsement Test as a valid judicial tool and describes the effect of the religious displays as different than endorsement even if that test were to be used).

Kennedy's argument points to a gulf between the positions of the justices that none of them seem to acknowledge. Relying on a prior decision that permits non-

sectarian legislative prayers, Kennedy groups the Pittburgh religious displays along with such prayers and other religious features of government such as the Supreme Court sessions starting with "God Save This Honorable Court" and the motto "In God We Trust." Kennedy calls these activities constitutional government "recognition," "acknowledgment, "accommodation" of or "contact" with religion (*County* 661-2). Instead of endorsement, Kennedy draws the line at "coercion" or "proselytization" as the boundary of unconstitutional action on the part of government with regard to religion (661). From one perspective, the disagreement should be relatively straightforward: what do we mean by endorsement or coercion? Is an object religious or not? Under a purely logical or dialectical regime, these definitions could be puzzled out, contradictions in various definitions removed and an objective standard arrived at. Of course, the law does not reside in the realm of logic, as Blackmun himself notes, saying "the word 'endorsement' is not self-defining'" (*County* 593). So, the critical question then becomes how accurately and responsibly do the interlocutors interact? How far are they able to enter into each other's viewpoints to emerge with some shared understanding of the question under debate?

It isn't just that the justices disagree on their reading of the displays, but that they resist engaging in debating the reasoning behind those positions. As with the conversation between John Swomley and the Williamsburg Charter I discussed in Chapter One, the troubling feature of the conversation in *Allegheny* is the extent to which the justices talk past one another. While they also engage in some inaccurate summary of other positions, such behavior is far more limited than in the Ninth Circuit decision discussed in Chapter Two. Here Kennedy sees an equivalence between religious language that the Court has previously accepted, such as prayers at the start of legislative sessions, and the crèche. As the Court has invalided none of these other activities, Kennedy argues,

so too should it sanction the crèche and menorah and tree display, even if the display has religious content. Kennedy explains that in displaying such content, the government "recognize[s] and accomodat[es] the central role religion plays in our society" (*County* 657). Other justices do engage the Kennedy's reasoning on this point, highlighting his own confused standard of acceptable government interaction with religion which Kennedy labels variously as acknowledgment, accommodation, recognition, aid, and contact, but Blackmun's majority opinion resists engaging Kennedy's reasoning on other points that violates the pragma-dialectical expectations for a reasonable discussion.

Many, though not all, of the *Allegheny* opinion and dissent arguments pursue divergent lines of reasoning violating multiple pragma-dialectical guidelines. In particular the opinions resist responding to positions as put forward by interlocutors, refusing to proceed from an agreed upon starting point and using "insufficiently clear" elements (van Eemeren and Grootendorst 195). Each of these guidelines explain how the argument fails to productively resolve the disagreement through argumentation and suggests ways the reasoning in the arguments could improve. Blackmun exemplifies the failure to converge on a common starting point, dismissing Kennedy's claim's outright:

> Although JUSTICE KENNEDY says that he "cannot comprehend" how the crèche display could be invalid after *Marsh*, post, at 665, surely he is able to distinguish between a specifically Christian symbol, like a crèche, and more general religious references, like the legislative prayers in *Marsh* [the case that authorized legislative prayers]. (*County* 603)

Blackmun continues in the same vein:

> Although JUSTICE KENNEDY'S misreading of *Marsh* is predicated on a failure to recognize the bedrock Establishment Clause principle that, regardless of history, government may not demonstrate a preference for a particular faith, even he is forced to acknowledge that some instances of such favoritism are constitutionally intolerable. (*County* 605).

If we take Kennedy at his word, then "surely" he is not able to distinguish between non-denominational prayer, crèche or menorah because Kennedy's own standards do not distinguish between them. Kennedy does recognize that Blackmun (and previous Court decisions) have tried to establish the principle of which Blackmun speaks, but Kennedy disagrees that such a principle exists. Kennedy says that past decisions "must not give the impression of a formalism that does not exist" when it comes to how to interpret the establishment clause, and Kennedy never uses the term "favoritism" because he does not see these government actions with regard to religion as favoritism but rather accommodation or acknowledgment (*County* 657). Blackmun's argument here assumes the very question it tries to defend, which we could characterize as a classical petitio principii along the lines of traditional fallacies. However, in looking at their interaction from a dialectical perspective we can see how Blackmun's refusal to respond affects the directions in which the argument can move and reinforces other problematic features of the argument beyond its apparently faulty logical form.

The traditional view of fallacies, as described by van Eemeren and Grootendorst, "that of 'an argument that seems to be valid but is not valid,'" encounters a number of difficulties including "'validity' [being] incorrectly presented as an an absolute and conclusive criterion" (159). Another challenge is that Aristotle's discussion of fallacies examined a dialogue context, and, when removed from that context, criticism can fail to explain "why a particular fallacy is actually fallacious" (160). Van Eemeren and Grootendorst explain the limitations of a logical perspective when it comes to the petitio principii fallacy in particular. Circular reasoning, they note, is not logically invalid: "'A, therefore A'...(according to the law of identity) [is a] valid argument," but when deployed in a dialogue it has the effect of denying an interlocutor the ability to challenge the argument (176). Despite the limitations of logical perspective, writing textbooks continue

to rely on a flawed logical framework for discussing fallacies. Though this isolated structural model of fallacies has limits, fallacies can be studied from a dialectical perspective that shifts our attention to the goals of argumentation. As van Eemeren explains:

> ...in each particular case the reason to consider an argumentative move as fallacious is its being in some way or other prejudicial or harmful for the realization of the general goal of resolving a difference of opinion on the merits. Viewing fallacies in this way means concentrating on the soundness norms for argumentation rather than on the fallacies as such, taking neither individual cases of fallacies nor the somewhat arbitrary list of fallacies that has come down to us from history as the starting point of theorizing. (*Strategic Maneuvering* 192)

Using a traditional list of fallacies such as found in writing textbooks, students and teachers could label Blackmun's argument (both as generally problematic and with the specific label of petitio principii), but beyond that identification as fallacious the textbooks provide little discussion of why the fallacy is a problem. The textbook approach assumes that once able to identify an ostensible fallacy, a writer's critical dispositions can continue on with the work of critiquing and writing valid arguments. I argue that unless writing instruction takes into account the dialectical perspective of the critical discussion (and the ways in which those discussions become derailed), it will remain more susceptible than it could otherwise be to the irresponsible rhetoric that occurs even in our most supposedly learned discourse communities. Of course, Supreme Court opinions are not ideal critical discussions as envisioned by the pragma-dialectical approach. I do not suggest that the justices should or will enact critical discussions. Rather, a pragma-dialectical perspective provides a rubric for understanding how ideas interact in the opinions and how we might evaluate those interactions. The ideal critical discussion goal of resolving difference can also serve as one goal to consider when evaluating actual discussions.

Blackmun's violations of the discussion norms with regard to Kennedy's argument are only one way in which the *Allegheny* arguments deviate from the goal of mutually agreed resolution of differences. Central to the disagreement is the justices' differing interpretation of the meaning of the tree and menorah display and of the reasonable observer standard by which those displays should be interpreted. Blackmun argues that the secular nature of the tree (it did not include any written religious message like the crèche did or display any explicit Christian iconography) served to secularize the menorah and contribute to an overall message of tolerance and celebration of diversity for the display. This interpretation of the reasonable observer believes that "the city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season" (*County* 620). O'Connor elaborates that "the question under endorsement analysis, in short, is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time" (*County* 631). Blackmun and O'Connor assume an interpretation of the tree and menorah as "secular," but Justice Brennan highlights the subjective nature of this interpretation. Brennan sees the tree as holding religious meaning, but:

> I would not, however, presume to say that my interpretation of the tree's significance is the "correct" one, or the one shared by most visitors to the City County Building. I do not know how we can decide whether it was the tree that stripped the religious connotations from the menorah, or the menorah that laid bare the religious origins of the tree. Both are reasonable interpretations of the scene the city presented, and thus both, I think, should satisfy JUSTICE BLACKMUN'S requirement that the display "be judged according to the standard of a 'reasonable observer.'" (*County* 642-3).

If Brennan is right that both religious and non-religious interpretations can be "reasonable," then the reasonable observer fails to solve the problem for which is was created. As if to support Brennan's point (though disagreeing with him as to the constitutionality of the displays), Kennedy says of the reasonable observer:

> If there be such a person as the "reasonable observer," I am quite certain that he or she will take away a salient message from our holding in these cases: the Supreme Court of the United States has concluded that the First Amendment creates classes of religions based on the relative numbers of their adherents. Those religions enjoying the largest following must be consigned to the status of least favored faiths so as to avoid any possible risk of offending members of minority religions. (*County* 677)

Here Kennedy objects to the majority outlawing the crèche display because he sees their action as one of government disapproval of religion. The argument over the reasonable observer vacillates between the antilogical poles of the neutrality argument discussed in Chapter Two. Blackmun and O'Connor see removing the crèche as restoring government neutrality in removing a display that sends a message that government looks favorably on Christianity. Kennedy sees removing the crèche as betraying government disfavor toward religion. Though I find this question interesting to debate, and my own sympathies lie with Justice Brennan's argument that the tree and menorah's religious meaning cannot be negated, this argument does not play out to a sufficient degree between the justices in the decision. Instead each opinion justifies its own vote on the case, stating that the others are wrong without explaining in much detail why they are wrong (especially in terms of the majority opinion by Blackmun as it responds to Kennedy's dissent). As I noted above, in terms of democratic procedure such justifications serve their purpose well. However, in failing to engage the question of the reasonable observer (or the Endorsement Test) in a manner that respects dialectical obligations, the Court has only postponed addressing

questions that the judiciary and the broader civic conversation will have to address in the future.[25]

For interlocutors engaged in these conversations to respect dialectical obligations, they need to accurately describe the positions expressed by others and they need to converge on the same questions, even if they do not emerge from the discussion coming to an agreement on those questions. Erroneously proffering standards as universally acceded to, such as the reasonable observer, prevents this second goal. My concern with regard to the reasonable observer in religious display cases is analogous to the concern rhetoric and writing has with regard to reason: is the reasonable observer just anthropological reason masquerading as geometrical reason—rationality in a universal, logical sense? Anthropological reason can be dangerous when it disavows its situated nature and instead promotes itself as universal when it is not. Not only can "reasonable" mask partisan interests, it can obscure the differences between levels of power and differences in backgrounds among partisan interests. This is the traditional rhetoric and writing critique of reason where exclusion along lines of power operates under the title of reason. From the perspective of this critique I suppose it is not all that interesting that Justices Brennan and Kennedy insist on such diametrically opposed understandings of which displays should or should not have religious meaning. Each viewpoint pursues its own situated understanding of reality vying with others for dominance. What does interest me is that rhetoric and writing has neglected a different but useful perspective to approach to problematic arguments that shares the traditional critiques' suspicion of reason-as-force and offers instead reason-as-procedure. The reasonable observer in state-church issues may not be an even-handed point of view but may actually be just a name

[25]The Court seems most reluctant to face these questions, avoiding the issue in both the Pledge of Allegiance "under God" decision in *Elk Grove Unified Sch. Dist. v. Newdow* and the cross decision in *Salazar v. Buono.*

that masks a Christian observer whose position allows a certain leverage not available to other discussants. This reasonable observer is used to Christian perspectives and at the same time unaware of or unsympathetic to how other religious positions view and judge government entanglements with religion. Or, as Kennedy suggests, the reasonable observer might just be a name that masks an observer hostile to religion. In either case, the observer does not seem reasonable in the sense that its observations would win wide-ranging assent. It is not an impartial observer, in the sense of *The New Rhetoric*'s use of the term, because its position is already set and not open to change. Rhetoric and writing scholars have asked whether the teaching of reason in writing can avoid a similar risk of disguising certitude as reasonableness and have offered listening, invitational, feminist, Rogerian and other non-agonistic approaches as answers. These approaches seek ethical outcomes. What scholars have not yet embraced are procedural models of reason that can achieve the same outcomes by exploiting the under-developed distinctions between structural, disposition and procedural understandings of reason as I explore in the Conclusion.

Conclusion: Negotiating the Dangerous Appeals of Reason

The examples of church-state arguments discussed in this dissertation demonstrate subtle dangers that accompany appeals to reason. The most obviously bad arguments can easily draw critical attention while other troubled arguments slip by under the guise of reasonable deliberations. Of course, even obviously bad arguments are not obviously bad to all discussants. I began with the story of the Dobrich family's church-state complaint that provoked both subtle and gross bad arguments. Threats, mockery and prejudice announce their incompatibility with deliberative discourse even if the parties that employ such tactics see them as right and proper. Discussants enacting a seemingly more nuanced conversation still run into trouble as they frame the central question in different ways while refusing to acknowledge this difference. What one party sees as a question of religious liberty and the right of citizens to give voice to a religious viewpoint another sees as a question about which religious viewpoints, if any, the government should promote. Almost from the start, not only in the Dobrich case but many other church-state separation cases, discussants diverge from arguing one question to pursuing different questions. Discussants proffer claims and reasons that appear to engage in dialogue but ultimately only sustain conflict. This pernicious danger becomes all the more difficult to see when cloaked in the trappings of liberal democratic reason as enacted by jurists. Divergent arguments within legal rhetoric misrepresent the views of other discussants but they do not necessarily do so with gross caricature strawmen. Instead, these arguments use citation and quotation and rarely use intemperate language. They conform to the expected conventions of professional, learned discourse, but that conformity belies a more troubling breakdown in communication.

This breakdown resonates with concerns about the limits of a liberal public reason. When judges persist in attaching contradictory meanings to the same term, they undermine understanding. That failure of understanding operates in a far less crude manner than yelling "Jew boy" at a classmate, but it produces some similar results in terms of undermining a coherent discussion (obviously anti-Semitic rhetoric has negative effects above and beyond a breakdown in communication). These misunderstandings can either make key stakeholders feel unwelcome or define their positions out of the argument. The exclusion of stakeholders supports the argument that public reason needs constant criticism to reduce the likelihood of abuse, whether that critical approach resides in Madisonian institutional means discussed by Garsten, a counter-public approach as discussed by Fraser, a reliance on less exclusionary ways of framing arguments or a combination of approaches. I offer a dialectically-informed rhetorical analysis as one way this testing or criticism can be accomplished and as a way that deserves further consideration within the field of rhetoric and writing.

Reason can lead to bad outcomes, but, as critical defenses of liberal reason explain, reason also provides a means to remedy its own misapplications. I stand firmly with those critics like Fraser, Garsten and Crowley who see ways to work through the failings of liberal public reason. I also see reason as inextricably linked to a responsible rhetorical practice. Perelman speaks of rhetoric as "practical reasoning," explaining the difference between rhetorical reason and logical rationality:

> There is a difference of paramount importance between an argument and a formal proof. Instead of using a natural language in which the same word can be used with different meanings, a logical calculus employs an artificial language so constructed that one sign can have only one meaning.... To understand an orator, we must make the effort required to render his discourse coherent and meaningful. This effort requires goodwill and respect for the person who speaks and for what he says. ("The New Rhetoric: A Theory" 309)

Perelman describes reasoning in terms of understanding achieved in the face of potential ambiguities. Perelman uses a language of ethics similar to that of listening, inclusive, non-agonistic, and invitational rhetorics, but these abstract ethical values, while praiseworthy, pose risks in terms of analysis. To attribute a misreading to lack of goodwill or disrespect risks shifting an analysis into a debate about personal motivations and away from analysis of discourse. The ambiguity of language of which Perelman speaks means that good faith analyses from different viewpoints can and will arrive at different and contradictory interpretations. Perelman and Olbrechts-Tyteca put the point more plainly in *The New Rhetoric* reminding readers that even the most widely accepted claims "may have their detractors who are not necessarily stupid or dishonest" (62). Ill-will abounds, of course, in political discussions, but I think it important to distinguish between the ethical motivations that define our (mis)uses of reason for particular ends and the functional analysis of reasoning that examines the operation of viewpoints interacting in the process of argumentation. Both perspectives, ethical and procedural, need to be pursued, and I suggest that the heretofore under-considered procedural perspective of dialectical argumentation can work alongside our ethical commitments to create a more robust rhetorical analysis.

I acknowledge that reason is as problematic as some of its critics claim. Some operations of reason do exclude. They take on the cloak of neutrality to disguise the protection of some interests at the expense of others as rational deliberation. In saying that a responsible rhetoric is in part a reasonable rhetoric, I do not evade the sound critiques of exclusionary reason. At the same time I see a blind spot, or, at the very least, an under-development in rhetoric and writing that stems from lack of engagement with non-exclusionary models of reason. In this conclusion I will sum up the pragma-dialectical conception of reasonableness, how it avoids the exclusions of positivist reason

and helps enact and test inclusion. I will discuss how dialectical argument can inform analysis and pedagogy, suggesting directions for the questions raised particularly in the previous chapter. Finally, I will offer a reflection on the implications of the dialectical failures in church-state discourse for civic rhetoric, most notably the courts' increasing interest in avoiding the hard questions of church-state separation.

CONCERNING REASONABLENESS

The last chapter examined the challenges of defining measures of reasonableness within the context of pedagogy, and those challenges follow on from challenges that emerge in theory. An abstract rationality can provide certainty but at the expense of describing the ambiguities and complexities of everyday life and at the risk of excluding relevant viewpoints. The ethics of a liberal public reason demand inclusion, yet they also require a reasonableness that enables some measure of stability wherein discussants can forward viewpoints and defend them from challenge. Responsible argument then must balance stability of viewpoints without removing all ambiguity through complete abstraction. As I described in the Introduction, I see in the pragma-dialectical approach's philosophical definition of reasonableness and its theoretical model of the critical discussion an approach to reason that can strike this balance. Pragma-dialectical reasonableness preserves a measure of consistency, thus opening a space for the responsible rhetoric of *The New Rhetoric* while avoiding the excesses of abstract, logical rationality. However, I think the pragma-dialectical treatment of reasonableness is also useful from a self-reflective perspective for reminding us of a hazard inherent in the pursuit of defining reasonableness. Though the pragma-dialectical approach offers a useable model of reason, in creating that model it tries to resolve some tensions that may

not be resolvable and offers a lesson in the limits to which we can resolve the tension between abstraction and ambiguity.

According to the developers of the pragma-dialectical model, the reasonableness evinced in the critical discussion answers a dilemma first described by Toulmin in *Knowing and Acting*. As I reviewed in the Introduction, van Eemeren and Grootendorst use Toulmin's terminology to describe the tension between geometrical and anthropological models of reasonableness. Geometric reasoning deals with well-defined abstract concepts and classifies sound relationships between propositions. Anthropological reasoning, on the other hand, appeals to a community's values to determine correctness. As van Eemeren and Grootendorst explain, neither abstract logical demonstration nor appeals to prevailing cultural attitudes yield an explanation for justifying change in viewpoints. Geometric reasonableness is a closed system that prescribes correct relationships between premises and conclusions. It does not explain how those premises come into being, how they might change or how we know they are right. Anthropological reasonableness ties the emergence of new viewpoints to beliefs contingent on the vagaries of dominant cultural attitudes. The pragma-dialectic approach argues that the "critical rationalistic" reasonableness of pragma-dialectics offers a better alternative to geometric and anthropological reasonableness because of its systematic testing of viewpoints that justifies new viewpoints through the function of intersubjective validity. Geometric reasonableness does not offer any explanation for the justification of fundamental assumptions and anthropological reasonableness authorizes new viewpoints through whatever views happen to be dominant in a given cultural context (van Eemeren and Grootendorst 17). The pragma-dialectical approach, then, justifies arguments not through appeal to symbolic logic or to prevailing values but through the interactive process between discussants forwarding, challenging and agreeing with viewpoints.

The potential difficulty I see in pursuing this critical reasonableness as a third way between geometric and anthropological reason is that the question of justification can distract our attention from another question of how to approach rhetorical contexts when we have not resolved the question of justification. Instead of a distinction between critical and anthropological reason seen by the developers of pragma-dialectics, I see the critical discussion operating as part of the cultural function of reason described by Crosswhite. To speak of the "deep competencies" that people share in order to understand each other, as Crosswhite does, is to speak of a critical process imbricated in culture (*Rhetoric* 43). People can resolve disagreements reasonably through argumentation when their speech acts conform to the patterns described in the pragma-dialectical guidelines for critical discussion. I do not, however, see this approach to be substantially different from anthropological models. To be sure, argumentation is not simple appeal to custom or authority and it describes patterns of behavior that may play out the same way in different cultures,[26] so what discussants find convincing in a critical discussion does differ from the prevailing norms of a given cultural context. At the same time, the critical interaction still operates through the cultural knowledge of the participating discussants. The questions of whether or not the critical approach does differ from the anthropological, to what extent and in which ways are somewhat tangential to my purposes here, though I do want to disclose my position on the question. More relevant to my argument is the difference between resolving the question of justification and using persuasion when the question of justification is unresolved. I believe there is an important distinction between

[26]Argumentation theorists have recently begun cross-cultural investigations that suggest critical discussions across cultures bear both similarities and differences. See Hornikx, Jos and Judith de Best. "Persuasive Evidence in India: An Investigation of the Impact of Evidence Types and Evidence Quality." *Argumentation and Advocacy* 47 (2011): 246-257; Gillon, Brendan S. "An Early Buddhist Text on Logic: Fang Bian Xin Lun." *Argumentation* 22 (2008): 15-25; Tillemans, Tom. "Introduction: Buddhist Argumentation." *Argumentation* 22 (2008): 1-14.

the work of solving justification, or at least better describing its attendant problems, which is a philosophical question, and the work of defining responsible persuasion that is aware of the problems of justification without necessarily settling on one method of resolving those problems, which is a question for rhetorical practice. Whether classified as anthropological or critical, the reasoning of pragma-dialectics does offer a robust reasoning that provides responsibility in the sense of being answerable to criticism through the discussion of stable viewpoints without sacrificing all ambiguity to the complete abstraction of symbolic logic. Additionally, the pragma-dialectical sense of a critical reasonableness can help bring out in relief subtle differences between measures of good reason that can overlap in some rhetoric and writing treatments of reason.

The positive value that one disciplinary approach assigns to reason can seem negative when seen from the perspective of another. Concern about the dangers of abstract and exclusionary reason leads to avoiding systematic approaches while a concern about defining standards for consistent reason seeks out the systematic for fear of ambiguity paralyzing persuasion. Concern about finding methods that ensure ethical considerations of justice and inclusion blanches at rationality that has used the guise of reason to exclude viewpoints. Despite these differences, sustained interaction of viewpoints seems to be one element shared across frameworks. Rational-critical testing of one viewpoint requires others against which to perform testing. A post-Habermasian, post-Rawlsian liberal reason comes with an ethical imperative to seek out and include viewpoints traditionally excluded. Sophistic persuasion relies on deft manuevering to exploit the ambiguities in different viewpoints. Even pursuit of a Platonic ideal will attempt to cut through the numerous false shadows of the world. In describing how interaction should occur and directing attention to how it does occur, dialectical

argumentation offers a useful compliment to methods used more frequently within rhetoric and writing.

The terms geometrical and anthropological correspond to the structure and disposition categories I applied to textbook approaches to reasoning in the previous chapter. There is an important descriptive function in these terms that explains how dialectical argumentation can supplement rhetoric and writing approaches to argument. As discussed in the previous chapter, pedagogical approaches to evaluating the quality of an argument's reasoning tend to look at the structure of an argument and/or the disposition of the arguer. Despite my misgivings above about clearly separating a rational-critical model of justification from an anthropological model, I do think the distinction provides a useful graduation that illuminates key complexities within non-geometric reasoning. The difference between *anthropological* and *critical* justifications maps onto the difference between an ethical *disposition* approach and a critical *procedural* approach. The idea of the critical discussion helps clarify and concretize functions of argument that in traditional rhetoric and writing approaches are subsumed under the general labels of "critical thinking" or other eulogistic terms mentioned in the previous chapter. When good argument is approached from broad ethical principles, critical questions about how argumentation operates can be left unaddressed. For example, among the disposition guidelines for good argumentation in the textbooks discussed in the previous chapter, Nancy Wood offers these thoughts on "ethical argumentation":

> ...an ethical arguer must have the courage and willingness to argue logically and honestly from a strong sense of personal integrity and values. Also, emotional and motivational appeals should be consistent with positive value systems that will benefit not just one individual but all of society. (155)

People may assent to some sense of the greatest good for the greatest number, but they will disagree on what constitutes the good. "Positive value systems" often conflict, and investigating how viewpoints interact in dialectical argument provides a space to understand how conflicting assumptions function and how we might productively engage in such conflicts.

The conflict of positive value systems troubles all the examples of church-state discourse but is perhaps most salient in the Dobrich case. The Dobrich family valued having a school where their children would not face government-enabled proselytization or government endorsement of any one religious viewpoint. This would seem to many like a non-controversial value—the kind of positive value that Wood describes in her description of ethical argument. Some of the Dobrich's fellow citizens, however, held a competing value in wanting to subject the children to proselytization. They treated the Dobrichs' objections as being hostile to that value. The parties contest what is of "benefit [to] all of society." Wood's textbook does not address the point explicitly and, like some of the other textbooks examined, it turns most of its attention to structural models of argument for evaluating the quality of reason. It says nothing about what to do in the event of conflict between value systems.

Our appeals to a broadly ethical argument run into the same trouble that appeals to ideas like neutrality and the reasonable observer run into. To define responsible argument by criteria of the good or the reasonable or the positive does not move arguments far from Weaver's probative definition of responsible. As argumentation deals with disputed understandings of what is true or what is responsible, truth and responsibility cannot serve as uncontested, universally clear standards by which to judge the quality of argumentation. Appealing to those contested concepts cannot ultimately resolve their inherent ambiguity except through force of power such as a vocal faction of

a town hall meeting shouting down a fellow citizen or a majority of judges out-voting the minority. With no objective way to define these values, the best arguments can aim for is reasoning that is impartial in the sense of *The New Rhetoric*'s use of the term. As I discussed in Chapter Two, Perelman and Olbrechts-Tyteca explain that neutrality in the sense of objectivity cannot apply in argumentation because argumentation occurs in the absence of certainty. They offer instead the idea of impartiality wherein people make the effort to consider a range of options "without having previously decided in favor of any one of them" (60). Of course, human judgment does not refrain from favoring some positions over others, but the responsible persuasion of *The New Rhetoric* and dialectical obligations of argumentation theory do open those favored positions to change through interaction with other positions.

The danger in appealing to neutrality lies not only in the false hope of objectivity but also in the persuasive potential for the title of neutrality to cloak interested bias as non-biased. In both Chapter Two's discussion of neutrality and in Chapter One's consideration of the public square, ideas are offered as neutral starting points wherein all positions are equal but are in fact not equally positioned. The chapters examined accomodationists revising the separationist objection to a government-sponsored religious display as an objection to public religion and a judge defining neutral to be a context that valorizes particular religious perspectives. These arguments want to proffer the meanings of public and neutral as universally shared fundamental assumptions when not everyone shares those meanings. Logic does not help in this case given its inability to justify the meaning of its fundamental assumptions. Public and neutral do not exist in the abstract as mathematical symbols. From an anthropological perspective, multiple understandings of these ideas exist and contest with each other for prominence amidst cultures and subcultures.

If we cannot find a broad-based or universal definition for such terms, we can at least investigate what occurs when their contested definitions interact in argumentation, and the arguments described in this dissertation suggest that those interactions undermine the quality of understanding and inclusion valued in ethically inscribed persuasion and that they do so along particular patterns that can be predicted. However, these analyses also suggest ways of describing problems and revising argumentative practice to draw practice closer to ethical goals. The procedural reasoning of dialectical argumentation does not necessarily function any better in the face of ambiguity used to pursue or protect dominant positions. There are, after all, no dialectical referees judging the judges as they write their opinions. What dialectical argumentation does provide is a perspective from which to interrogate the quality of our reasoning that is not above ideological commitments but is consonant with other methods that can expose conflict between ideological commitments. What dialectical argumentation brings to more familiar methods of ideological critical analysis is its focus on the interactive dimension of persuasion—a dimension rhetoric and writing has touched upon but has not explored in depth.

TOWARD A DIALECTICALLY-INFORMED RHETORICAL ANALYSIS AND PEDAGOGY

The pragma-dialectical critical discussion operates in a context where people use argumentation to work through disagreement. Persuasion broadly understood does not always operate with the same purpose in mind but it can coincide with that purpose, particularly in the rhetorical frameworks that emphasize understanding. A dialectically-informed analysis asks how well differing viewpoints demonstrate an understanding of each other and what happens when one viewpoint disagrees with another: Do discussants acknowledge the differing viewpoints in conflict or do they resist engaging that

difference and instead pursue divergent arguments with little to no evidence of understanding? Do discussants create the ground for responsible rhetoric in the sense used in *The New Rhetoric* by providing tentatively stable positions to form a temporary understanding within which they can defend and challenge each other? Such understanding fulfills a key function in rhetoric and writing responses to exclusionary reason, and yet a dialectical perspective on the interaction between views is largely absent from the analytical methods of rhetoric. I want to distinguish again between insights I call upon from dialectical argumentation and the more general dialogic dimension of rhetoric. Rhetoric, in its classical and modern forms, depends on the interaction of ideas. Invention works not through producing completely original ideas but through engaging and reconfiguring ideas already in circulation. The particular insights from argumentation theory that I want to apply within rhetorical analysis are (1) the concept of a normative reason that evaluates quality in terms of the goals of dialogue and (2) the theoretical model of the critical discussion itself that tests how well discussants meet those goals and especially the back-and-forth interaction between discussants representing each other's viewpoints.

Precedent for a rhetorical analysis infused with a dialectical perspective theory comes from both within rhetoric and writing and from argumentation theorists who highlight the rhetorical aspects of argumentation. Within this dissertation I have cited two examples of rhetorical analysis that could serve as models for exploring the dialectical dimension of arguments in the work of Brian Jackson and Jon Wallin and in Krista Ratcliffe. From within the field of argumentation theory, Christopher Tindale and Michael Mendelson offer a rhetorically focused understanding of argumentation that can also provide starting points for incorporating dialectical analysis into rhetoric and writing, though I think the work of Jackson and Wallin and Ratcliffe can serve as more familiar

points of entry from a rhetoric and writing perspective. As discussed in Chapter Two, Jackson and Wallin operate from an explicitly dialectical perspective and Ratcliffe from an ethical perspective. Both enact a dialectically-informed analysis that can serve as models for analyzing reasoning. Both look at how accurately one source reads others with which it converses, considering the extent to which they converge onto or diverge from the same questions.

Ratcliffe's focus on responsible representation of one's interlocutor demonstrates an interactive reading absent in other rhetoric scholarship that may seem on the surface to attend to questions of interaction but actually produce traditional rhetorical analyses that do not. Though Ratcliffe's framework does not use such terms, her analysis of the exchange between Lorde and Daly highlights a breakdown in dialectical, critical reason. Ratcliffe herself does not use the terminology or methods of dialectical argumentation, but the act of analyzing two sources in direct dialogue with each other provides an example of the kind of analysis I see as being productive for the rhetoric and writing classroom. Other contemporary rhetorical analyses also claim to look into interaction, examining rhetors bound up in the same rhetorical context and drawing on similar language but do not make critical judgments about dialectical progression in discourse (that is whether discussants answer the same questions).

For example, Jenny Rice's study of development rhetoric looks at "exchanges" between stakeholders in development controversies and even describes those exchanges as dialectical, but the dialectic she rightly criticizes is that of an unproductive sophist who avoids questions and causes distractions (19). She looks at the arguments of a developer who deftly shifts the question under debate from what effect development might have on a sensitive watershed to a question of his motivations, saying that his interlocutors falsely accuse him of harboring a malicious desire to destroy the watershed (Rice 73). I have

documented similar kinds of derailment in church-state rhetoric, where a separationist position, such as that of the Dobrich family, objects to the effects of religion in government, and their interlocutors insist on dragging the discussion onto a question of who hates or loves Christianity. Rice does not explain the derailment as an argumentation theorist would in terms of disrupting the mutual goal of discussants engaged in dialogue. Instead she focuses on the persuasive effect of the developer's argument. Where Ratcliffe explicitly points out how Lorde and Daly talk past each other, Rice's analysis does not operate in terms of units of discursive interchange as a dialectical analysis would, revealing the derailed progression of conversation and the fragmentation of the argument into different questions on which interlocutors do not converge. Such is not Rice's purpose, of course, in describing the content of development rhetoric, but I raise her consideration of "exchanges" and "dialectic" to demonstrate the often considerable differences between the way such terms are used in rhetoric and writing and how they are used in argumentation theory.

Providing two (or more) sources engaged in conversation with each other allows for analysis that can take cues from dialectical argumentation particularly with regard to the idea of critical reasonableness as measured in the extent to which discussants accurately represent each other's viewpoints. The key question a dialectically-informed analysis answers is whether discussants converge on the same questions or diverge. The actual texts considered can range widely, from internet comment threads such as Jackson and Wallin consider to scholarly research publications. In seeking out back-and-forth engagement for a dialectically-informed analysis, students also exercise the research skill of understanding the conversation on a topic. Such engagement may be (nearly) synchronous or asychronous, but these dialectically-compatible analyses look at

arguments made by one discussant in direct response to another paying particular attention to how well the source represents the arguments to which it responds.

The minimal requirement for a dialectically-informed rhetorical analysis is a source argument and a second source that summarizes or paraphrases the argument of the first when making its own argument in response. An extended exchange of multiple back-and-forth turns might provide a greater wealth of material for analysis, but it is not necessary in order to make a critical judgment about how well the discussants enact a reasonable discussion. I do not envision the writing classroom engaged in formal pragma-dialectical analyses that reconstruct every turn in a discussion and measure them against the guidelines for critical discussion. Rather, the perspectives noted above of normative reason and discussion as exchange of viewpoints guide critical attention when students consider texts from a dialectical perspective. The critical judgment need not even determine whether discussants are reasonable. Indeed, a dialectical understanding of reasonableness can help move us away from binary good/bad judgments toward a more nuanced understanding of the function of reason as can occur when understanding reason from a logical approach that sees arguments as fallacious or not. As Walton makes clear in his ongoing fallacies project, fallacies pose problems because they disrupt the goals of a dialogue, not because they are inherently faulty arguments.

As students describe the interaction of viewpoints circulating in a discussion, they can and should note arguments that misrepresent other views, but that judgment should serve a more complex understanding of the directions in which arguments can move and the possibilities for understanding and misunderstanding. In order to pursue understanding and consensus as ethical goals, analysis needs to describe how the process of misunderstanding occurs. Dialectical argumentation provides a vocabulary and critical framework for performing that analysis of misunderstanding, and longstanding rhetorical

pedagogy provides a practice in which to apply that analysis in the form of declamation exercises. The classical pedagogical practice of asking students to argue multiple sides of a question has been revised for modern students in textbooks such as in Sharon Crowley and Debra Hawhee's *Ancient Rhetorics for Contemporary Students*, but the role declamation can play in joining dialectical argumentation and rhetoric in order to analyze misunderstanding can be best seen in the work of Christopher Tindale and Michael Mendelson. Mendelson finds in classical declamation exercises a key habit of mind that keeps reasoning productive and non-exclusionary. He advocates a Protagorean antilogy that "entails the emancipation of all parties from dogmatic preconceptions and the subsequent negotiation of mutually acceptable benefits [and that] foster[s] cooperative engagement" (*Many Sides* 60). Such emancipation serves well the cultivation of impartiality in the sense used by *The New Rhetoric*. Mendelson turns to classical controversia and suasoria to engage students in an extended practice of back-and-forth arguing for and against propositions "to extend the range of the rhetor's imagining and open up the possibility of producing something new," with that something new emerging from interaction with other speakers ("Quintilian" 289). Tindale sees a similar function for reasoning instantiated in the interaction between viewpoints. He explains that:

> …all argumentative reasoning is rhetorical. That is, it is a contextual activity, audience-focused and aimed at social ends.... Like so many practices, argumentation requires at least two parties, equal partners in a constructive process that can improve the quality of intellectual communities and the quality of reason itself. (*Reason's* 152)

As I have stipulated repeatedly, partners are rarely equal, but conditions of inequality do not preclude improving the quality of reasoning, and the exercise of arguing in utramque partem provides the pedagogical space for improving both persuasion and reasoning (and perhaps improving persuasion through improved reasoning). The rhetorical pedagogy of

declamation sought to make students nimble in rhetorical practice, enhancing their ability to approach an exigency and deftly invent an argument persuasive to an audience in context. That practice, though, goes hand-in-hand with a mindset that visualizes reasoning as back-and-forth, as discussion, not as structural logical form.

As with church-state arguments, deep disagreements divide discussants on different sides of many civic questions, and students are unlikely to change their minds during the short span of a writing course. They can, however, practice not only inhabiting a variety of different viewpoints to greater depth but also experience interaction of agreement and disagreement between those viewpoints with an eye toward reasonable discussion. Indeed, I have doubts as to what extent students or anyone can inhabit viewpoints not their own, but I am optimistic about our ability to reflect upon and improve our summaries of positions with which we differ. In Chapter Three, I used the key term understanding to describe a goal shared by the variety of post-agonistic, inclusive rhetorics posited by rhetoric and writing scholars, and it is my proposition that the pragma-dialectical model provides a fine-grained, discrete critical apparatus by which to measure understanding that can help move analysis forward in the face of conflict over abstract values even when disagreement itself remains in the arguments analyzed. Declamation exercises prove pedagogically useful as they invite students to make hypothetical arguments without asking the performer to actually commit to an idea. The exercises can serve to practice understanding without agreement. The reasonableness of the pragma-dialectical model depends on understanding. I should emphasize, though, that understanding does not equal agreement. The critical discussion in argumentation is reasonable so long as interlocutors understand each other and where they disagree. Resolution of disagreement is the ideal, but it need not and often does not occur in real world arguments. Declamation style exercises as recommended by Mendelson serve the

purpose of understanding well insofar as they invite students to enact out lines of reasoning in response to opposing lines. One viewpoint represents and responds to another, and its representation should be accurate. Agreement may not be an immediate goal and reasonable discussions may be far and few between. What a dialectically-informed analysis can consider, however, is whether discussants argue in a way conducive to potential understanding and substantive, sustained disagreement, and arguing multiple sides of a question provides a space to practice that analysis.

The critical reasonableness of the pragma-dialectical approach measures the progress of argumentation not in terms of getting closer to truth but in terms of discussants converging on shared understanding. Ideally this progress moves toward resolution of disagreement, but practically we might hope for progress in terms of discussants converging on shared questions while still disputing the proper answers to those questions (instead of diverging along different lines of argument and misrepresenting each other's views). A dialectically-informed rhetorical analysis need not consider whether an argument obeys all the pragma-dialectical guidelines for a critical discussion according to the "Ten Commandments for Reasonable Discussion" in van Eemeren and Grootendorst's *A Systematic View of Argumentation*. Those guidelines can direct out attention to key, potentially problematic moments in argumentative interactions much as I have used them in looking at how discussants treat other views instead of a strict analysis of derailment. The first and third Commandments, for example, state that "discussants must not prevent each other from advancing standpoints" and that "attacks on standpoints may not bear on a standpoint that has not actually been put forward by the other party" (van Eemeren and Grootendorst 190-91). Both Commandments speak to much of the irresponsible discourse I have documented occurring in church-state discussions as discussants try to frame arguments in ways that deny other viewpoints,

such as O'Scannlain's refusal to discuss alternate concepts of neutrality discussed in Chapter Two, or as discussants attack views not forwarded by others, such as Blackmun twisting Kennedy's position on accommodation to mean favoritism as discussed in Chapter Three. The 10 Commandments for Reasonable Discussion could stand in place of pages long lists of fallacies and examples as given in some writing textbooks. I do not necessarily suggest that traditional fallacies need be dispensed with entirely, but instead of only listing them or briefly connecting their function to structural models of propositional logic, fallacies can be explained along the lines of Walton's account in terms of how they disrupt the goals of a dialogue. Discussions of the basic principles of formal logic have their place, but dialectical argumentation offers a more generative framework in asking students to conceive the back-and-forth of an argument than in memorizing the static structural relationships of premises and conclusion. It also alerts to moments in arguments where argumentation tend to go wrong.

I offer a dialetically-informed rhetoric not as a solution to a problem but as a different way of framing questions about problematic rhetorical practice. If understanding is an ethical end that rhetoric should pursue, then the dialectical framework provides students a toolset to measure understanding while at the same time performing practices long familiar to the rhetoric and writing classroom. This framework can also shed light on issues of troubling rhetoric as seen in broader civic discourse as I discuss next. The pedagogical practice I have sketched out here, however, focuses critical attention on the interaction between viewpoints and how discussants represent others. The purpose of such analyses is not to make understanding happen but to make clear the conditions in which understanding can occur and the conditions in which it does not. Persuasion can operate without understanding. Persuasion can achieve ends inimical to ethical standards. Persuasion coupled with reasonableness that depends on understanding, though, provides

an analytical means for discussing unethical persuasion even in contexts where ethical standards are themselves contested. Such contestation is inevitable and can be healthy for civic discourse but only when it occurs responsibly.

CIVIC IMPLICATIONS OF ARGUMENTS WITHOUT REASON

In the Introduction I cited the undetermined state of church-state separation questions as one reason those questions suit a study of troubled rhetorical practice. In these continually contested questions, we find argumentation that breaks down. Eventually the Supreme Court may settle on standards for judging establishment clause questions, and I have no doubt that church-state stakeholders will vigorously debate the justice of those standards. My more immediate concern is what the irresponsible arguments that suffuse church-state legal discourse mean for the quality and content of the broader civic conversation. I see two problematic areas stemming from a lack of reasonable, dialectical engagement. The first is avoidance of difficult discussions. The second is that critical attention focused on identifying and criticizing exclusion may miss the more insidious danger of irresponsible arguments that occur among both excluding and excluded viewpoints. The first problem is exemplified by the courts' increasing reluctance to even hear establishment clause cases and may result in potential compromise positions being overlooked. The second problem raises a challenge in terms of responsible critical rhetorical practice that avoids replicating irresponsible rhetorical patterns in positions it tries to critique. I consider each problem in turn below.

Even as judges do not acknowledge the extent of the disconnect among their differing understandings of basic terms, they do seem to acknowledge the difficulty of church-state questions. Perhaps that difficulty has contributed to the decline in courts accepting church-state cases for hearing. The courts have been less and less willing to

hear establishment clause cases finding that plaintiffs lack standing to sue. The legal concept of standing permits plaintiff's to file suits only if they have an injury that the courts can remedy. Legal scholars William Marshall and Gene Nichol discuss the Supreme Court's recent turn toward a narrow definition of standing that would preclude many establishment clause disputes from a hearing before the courts. Marshall and Nichol suggest that though the current Court seems skeptical of allowing suits for "intangible, 'psychic' harms," these are the kinds of harms the establishment clause was intended to protect against (217). Regardless of the effect restricting standing has on the potential for remedy of establishment clause violation, it does provide the courts with a way around the problem of having troubling discussions, though of course this does not eliminate the questions that spark those discussions in the first place. Responsible reason engages controversy. Avoiding controversy may provide an appearance of tranquility but tensions continue beneath the surface. Such tensions can and have erupted into the kind of hostility seen in the Dobrich case and would be better addressed than deferred, and they would be more productively addressed if viewpoints engage each other instead of pursue strawman characterizations.

The engagement of dialectical argumentation suits well the liberal, deliberative goal of compromise. Consensus may not always be possible, but through the give and take of viewpoints discussants may find a position on which they can agree. If they do not understand the positions of other viewpoints, though, the dialectical process that can yield compromise fails to take place. A compromise position may not seem appealing at first look to stakeholders who come to an issue not having engaged in substantive conversation with other viewpoints. The persusasive work of rhetoric may help in this regard, making what seems at first unappealing appealing. Rhetoric can amplify the slightest possible "I see how that might be the case" into firmer conviction, but this

inventional capacity of rhetoric requires positions to circulate in the first place. It is difficult to amplify positions some insist do not exist.

Talking past each other may not only encourage not talking at all but it also risks by-passing potential compromises. In the case studies I have described, it may seem like there is little room for compromise. Certainly so long as discussants fail to converge on a shared understanding of the questions at issue compromise will remain out of reach. Yet, even lines of argument that could lead to understanding if not compromise seem lost among diverging viewpoints. While I personally disagree with accomodationist arguments that attempt to preserve the presence of government religious symbols by redefining them as non-religious, I have encountered an accomodationist approach that might preserve symbols while acknowledging their religious content in a way that respects the establishment clause. This potential compromise, however, is unlikely to gain hearing let alone traction among stakeholders given the divergent nature of the current rhetorical context.

The establishment clause restricts the government from sending messages of approval or disapproval with regard to religion, and one potential compromise is to use language to counteract any potential message of endorsement that may inhere in religious symbols on government property. Lisa Shaw Roy has proposed the idea of adding to any religious imagery or text a disclaimer disavowing any message of government endorsement. In acknowledging the political difficulties of removing a long-standing monument, avoiding the troubling argument that religious monuments are somehow not religious in meaning and respecting the government's need to remain neutral, Roy argues that religious displays could include a disclaimer in order "to avoid the exclusionary message perceived by some when confronted with religious symbols" (364). Such disclaimers, Roy suggests, would explain the religious monument's historical

significance as the reason for its remaining on government property instead of arguing that its historical significance somehow erases its religious significance. Such an approach meshes with Young's discursive strategies for promoting inclusion. Like many compromises, such a position would not fully satisfy either those in favor of unadulterated religious displays on government property or those wishing no religious displays regardless of disclaimer. However, the proposal has at least the abstract potential of satisfying a separationist position in explicitly disavowing government endorsement. So long as discussants define the questions under debate in contradictory ways, though, such compromise positions are unlikely to gain traction and especially if jurists decide not to hear cases in the first place. Even if heard, such proposals might find themselves subject to the same kind of divergent arguments I have discussed.

While the conflict between separationist and accomodationist positions could be characterized as polarized, I do not think that label best describes the problematic feature of church-state separation discourse which is not the extremes of disagreement but the lack of engagement between positions that can perpetuate misunderstanding on all sides. Breakdowns in communication are bad, but breakdowns not seen as breakdowns, breakdowns that operate under the guise of functioning dialogue pose their own problem. The problem is not one of civility. The judicial rhetoric, as I noted at the start of the Conclusion, is quite civil in tone. Nor is it only a question of argument operating to exclude along lines of power. To be sure, the traditional, predominant Christian views in a community like the Dobrich's in Delaware do function to exclude minority positions, but the dialectically troubled argumentation in this dissertation poses a more complex problem than the traditional rhetoric and writing critique of exclusionary reason. Those opposing dominant views can just as easily fall into the same trap of derailment. When Justice Blackmun makes his separationist argument in Chapter Three he does not

accurately represent Justice Kennedy's accomodationist position, seemingly unable to understand how how Kennedy could even hold the position he does. The problem is not simply one of exclusion but one of dialectically troubled discourse patterns spreading throughout all sides, public and counterpublic alike. A counterpublic achieves a costly and short-lived victory if it introduces new ideas or broadens the public debate as Fraser hopes but also reinforces dialectically unreasonable patterns of argumentations, patterns that perpetuate unfair summary and divergent understandings of the issues at hand.

Douglas Laycock provides a clear example of challenging one problematic feature of church-state arguments favored by the culturally dominant position while doing so in a way that disrupts potential dialectical progress among discussants. He describes what, to him, seem obviously wrong arguments about the meaning of religious displays on government land and in particular the cross in the *Buono* case that accomodationists like Justice Scalia see not as religious but as secular monuments commemorating the sacrifice of service members. Laycock writes that "These comments [by Scalia] can be made only from deep inside a Christian worldview" (1240). Laycock is right. Scalia's redefinition of a religious cross as secular memorial operates within a perspective that, to bend a cliché, cannot see the Christian forest for the trees. But Laycock's argument that such arguments are "transparent rationalizations" moves the conversation nowhere but in circles.

Perspectives "deep inside" different worldviews have to engage in order for argumentation to occur. As I noted in the Introduction, we face a limit in how far we can, as Rawls hopes, set aside our deep commitments, though we can try to translate them into a common language or let them guide us as we deliberate on where our common ground is with others. These goals are best served by a dialogue that understands other positions and portrays them as they are. I agree with Laycock's separationist position and I find Scalia's arguments just as obviously wrong, but those arguments are not wrong to Scalia,

and to simply point at them and call them obviously wrong yeilds no more progress than Scalia's original argument that studiously ignores counter-arguments explaining why the cross holds religious meaning. The rightness of each man's position here is obvious to himself and its wrongness obvious to the other. They disagree but do not do so responsibly in a way that accurately acknowledges and builds upon the others position. When discussants cannot converge on the issues at stake in a discussion, they cannot bridge this gulf even to the extent of understanding the disagreement let along reaching any resolution.

How can we engage what we see as rationalizations or obviously wrong positions in reasonable argumentation? Not all obviously wrong positions deserve engagement in all settings. I'm not suggesting those targeted by bigotry attempt to reason bigots out of their beliefs. But in the setting of the courtroom or the classroom, where a responsible practice depends on understanding, we need ways to work past simple rejection. Reasoning is neither dismissing nor uncritical acceptance. It is not yes or no, but "yes, because" or "no, because." The "because" is an essential element of the pragma-dialectical reasonable discussion. Those putting forward propositions must elaborate in the face of challenge, and challenges must be withdrawn in the face of defense. The pragma-dialectical model describes all sorts of ways these exchanges can go wrong. Any one of the 10 Commandments For Reasonable Discussions can be ignored to the detriment of resolving disagreement, but the basic need for understanding and the extent to which discussants fail to meet that need, as I have documented in the case studies, undermines the ability of discussants to perform all of these requirements.

In cases of deep disagreement, procedural responses such as majority rule will have to carry the day. Democracy needs decisions in order to function. However, if we turn to majority rule without understanding our disagreements we foreclose opportunities

for compromise and lessening tensions. If accomodationists could see separationists as not wanting to remove all public evidence of religion, might there be fewer ugly reactions as we saw in the Dobrich case? I can hope for more responsible argumentation in the public sphere, but in the professional sphere of the courts I expect more responsible argumentation, though even this expectation for refined practice puts the cart before the horse with regard to the value I see in dialectical argumentation rhetoric and writing. Enacting good functioning rhetorical practice requires diagnosing dysfunction, and evaluation of rhetorical responsibility, whether for civic rhetoric or classroom purposes, needs to consider dysfunctions of dialectical progression. The reasoning of dialectical argumentation can illuminate the pitfalls as discussants move toward ethical ends. Appeals to reason risk falling prey to a paradoxical appeal *of* reason: the visceral attraction to a means of thinking that can somehow move us past the biases of our other visceral attractions. No such means exist. What reasoning we do have, nevertheless, can make discourse responsible to an accurate accounting of our interlocutors' positions, and it can show the way to understanding whether or not we ultimately go down that path.

Fulkerson (8 titles)	Knoblauch (11 titles)	Battistelli (12 titles)
	Barnet, Sylvan, and Hugo Bedau. *From Critical Thinking To Argument.*	Barnet, Sylvan and Hugo Bedau. *Current Issues and Enduring Questions*.
	Charney, Davida H, et al. *Having Your Say*.	
Clark, Irene. *The Genre of Argument*.		
		Cooper, Sheila and Rosemary Patton. *Writing Logically, Thinking Critically*.
Crusius, Timothy W., and Carolyn Channell. *The Aims of Argument*. 4th ed.	**Crusius, Timothy W., and Carolyn Channell. *The Aims of Argument: A Brief Guide*. 6th ed.**	**Crusius, Timothy W. and Carolyn E. Channell. *The Aims of Argument: A Brief Guide*. 7th ed.**
Fahnestock, Jeanne and Marie Secor. *A Rhetoric of Argument*.		
Faigley, Lester, and Jack Selzer. *Good Reasons*. 2nd ed.		Faigley, Lester, and Jack Selzer. *Good Reasons With Contemporary Arguments*. 5th ed.
	Goshgarian, Gary, and Kathleen Krueger. *Dialogues: An Argument Rhetoric and Reader*.	
	Kirszner, Laurie G., and Stephen R. Mandell. *Practical Argument*.	
	Lamm, Robert and Justin Everett. *Dynamic Argument*.	
		Lazere, Donald. *Reading and Writing for Civic Literacy*.
Lunsford, Andrea A., and John Ruszkiewicz. *Everything's an Argument*.	**Lunsford, Andrea A., John Ruszkiewicz, and Keith Walters. *Everything's an Argument: With Readings*. 5th ed.**	**Lunsford, Andrea A. and John J. Ruskiewicz. *Everything's An Argument*. 6th ed.**
		Mayberry, Katherine J. *Everyday Arguments*.
	McMeniman, Linda. *From Inquiry to Argument*.	
	Palmer, William. *Discovering Arguments*.	Memering, Dean, and William Palmer. *Discovering Arguments*.
Ramage, John, John Bean, and June Johnson. *Writing Arguments*. 6th ed.	**Ramage, John, John C. Bean, and June Johnson. *Writing Arguments: A Rhetoric with Readings*. 8th ed.**	**Ramage, John, John C. Bean, and June Johnson. *Writing Arguments: A Rhetoric with Readings*. 8th ed.**
		Rottenberg, Annette T. and Donna Haisty Winchell. *The Structure of Argument*.
Rottenberg, Annette T. *Elements of Argument*.		
		Seyler, Dorothy U. *Read, Reason, Write: An Argument Text and Reader.*
Williams, Joseph M., and Gregory G. Colomb. *The Craft of Argument*.		
	Wood, Nancy V. *Essentials of Argument*.	Wood, Nancy V. *Essentials of Argument*.

Table 1: Comparison of Textbook Titles Across Overviews.

Textbook	Structure-focused or Mixed Disposition & Structure	Types of Structure(s)
Barnet, Sylvan and Hugo Bedau. *Current Issues and Enduring Questions*.	Mixed	Informal logic with supplemental reference to Rogerian, Toulmin and civic/ethical debate
Cooper, Sheila and Rosemary Patton. *Writing Logically, Thinking Critically*.	Structure	Syllogistic logic
Crusius, Timothy W. and Carolyn E. Channell. *The Aims of Argument*.	Structure	Toulmin
Faigley, Lester, and Jack Selzer. *Good Reasons*.	Mixed	Genre
Lazere, Donald. *Reading and Writing for Civic Literacy*.	Mixed	Informal logic, Toulmin, Aristotelian rhetoric
Lunsford, Andrea A. and John J. Ruskiewicz. *Everything's An Argument*.	Structure	Genre and Aristotelian rhetoric, Toulmin
Mayberry, Katherine J. *Everyday Arguments*.	Structure	Informal logic, Toulmin
Memering, Dean, and William Palmer. *Discovering Arguments*.	Structure	Toulmin, Aristotelian logos
Ramage, John, John C. Bean, and June Johnson. *Writing Arguments*.	Mixed	Aristotelian rhetoric, informal logic, Toulmin
Rottenberg, Annette T. and Donna Haisty Winchell. *The Structure of Argument*.	Structure	Informal logic, Toulmin
Seyler, Dorothy U. *Read, Reason, Write*.	Structure	Aristotelian rhetoric, Toulmin
Wood, Nancy V. *Essentials of Argument*.	Structure	Toulmin, stasis

Table 2: Textbook Approaches to Reasoning as Structure-focused or Mixed Disposition and Structure with Types of Structures.

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