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COMMENT ON ROBERT AUDI'S
*DEMOCRATIC AUTHORITY AND THE
SEPARATION OF CHURCH AND STATE*

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Among the tasks of liberal democratic theory are the identification and defense of political principles that express the demands of citizens' liberty and equality.¹ Since the demands of these two fundamental values sometimes conflict or seem to conflict, liberal democratic theory has the task of reconciling or balancing them. The most prominent attempt to execute this task in recent decades has, of course, been that of John Rawls. Rawls famously denied that the balance between liberty and equality should be struck intuitionistically—that is, by seeing what balance strikes us as the most intuitively plausible.² Instead his approach is constructivist. Citizens are represented as free and equal parties to a procedure of construction, and political principles are identified and defended by showing that they would be the outcome of that procedure. The principles are said to reconcile citizens'

¹ I am grateful to Andrew Koppelman for helpful comments on an earlier draft.

² John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999), section 7.

liberty and equality because they are the principles that citizens represented as free and equal would agree to live under.

Among the ways in which citizens are equal is that they are equal co-holders of society's coercive political power. And so the task of reconciling citizens' liberty and equality is, in part, that of showing how their liberty can be reconciled with legitimate legislation and enforcement. In *Democratic Authority and the Separation of Church and State*,³ Robert Audi shoulders the task of identifying principles of individual and institutional conduct appropriate for a religiously diverse liberal democracy, principles that reconcile individual and institutional religious liberty with the rightful exercise of democratic authority. As we would expect from his pioneering contributions to moral philosophy,⁴ Audi's approach is intuitionist. By that I mean that he identifies a range of considerations that bear on the desired principle, proposes a principle which is initially plausible in part because it seems to respond to those considerations, and defends it by clarifying it, pointing out difficulties with alternatives and fending off a range of objections. This is, for example, the method he follows in the identification and defense of his *Principle of Secular Rationale* (see pp. 65f.).

Audi quite rightly recognizes liberty and equality as considerations that bear on his principles. I shall argue, however, that the balance Audi strikes between them is

³ Robert Audi, *Democratic Authority and the Separation of Church and State* (New York: Oxford University Press, 2011). Unless otherwise specified, parenthetical references refer to this text.

⁴ Robert Audi, *The Good in the Right: A Theory of Intuition and Intrinsic Value* (Princeton: Princeton University Press, 2005).

mistaken. The mistake can be seen by reflecting on how he thinks disagreements about the exercise of authority should be settled, and it raises questions about the *Principle of Secular Rationale* and its grounds. Crudely put, I believe the mistake is due to the fact that Audi's intuitions about liberty are too strong and that his intuitions about equality are too weak. I begin with the former.

On p. 41, Audi says “The scope of governmental power over the governed is plausibly thought to be limited by the ‘harm principle’” of John Stuart Mill, which he then goes to quote. Audi thinks that Mill's principle, though plausible, needs some qualification. His own view is that:

justification of restrictions of liberty must come from adequate evidence that non-restriction will be significantly harmful to persons—though I would add that harm to animals, the environment or even property should also be taken to be a potentially adequate ground for restricting liberty. (pp. 41-42)

This view can be expressed as what we might be called *Audi's Harm Principle*:

(1) Restrictions of liberty are justified only if there is “adequate evidence that non-restriction will be significantly harmful to persons, animals, the environment or property.” (pp. 41-42)

To coerce someone restricts her liberty, so *Audi's Harm Principle* implies:

(2) Coercion is justified only if there is “adequate evidence that non-coercion will be significantly harmful to persons, animals, the environment or property”.

What counts as harm, what harms are significant, whether there is evidence that non-coercion will result in harm and whether the available evidence is adequate are all subject to dispute and will actually be disputed in many cases. Sometimes these disputes are among the informed and the ill-informed. But sometimes not. Sometimes each acknowledges that those with whom she disagrees—or some of those with whom she disagrees—are her equal or, as Audi says, her “epistemic peer” with respect to the matter at hand.

It is sometimes thought that my awareness of disagreement with an epistemic peer about some matter should undermine my confidence in the adequacy of the evidence I have about it. And so it may be thought that if I advocate a coercive measure believing that the measure is warranted but then learn that an epistemic peer disagrees, I should attach less credibility to the belief. Audi agrees, intimating that my knowledge of such disagreement should engender epistemic humility. (p. 119) But he goes further, implying that disagreement bears not, or not only, on when citizens can *know* or can *justifiably believe* that the condition expressed in (1) and (2) is satisfied, but on whether it *actually is* satisfied. He writes:

(3) “The justification of coercion in a given instance is (other things equal) inversely proportional to the strength of the evidence for epistemic parity among disputants who disagree on whether coercion in that instance is warranted.” (p. 118)

This is Audi’s *Principle of Rational Disagreement*. Since the question of whether coercion is warranted just is the question of whether it is justified, we can reword (3) as:

(3') The justification of coercion in a given instance is (other things equal) inversely proportional to the strength of the evidence for epistemic parity among disputants who disagree on whether the conditions of justified coercion are met in that instance.

Now let us suppose for the sake of argument that citizens in pluralistic democracies—and, in particular, the disputants referred to in the *Principle of Rational Disagreement* and in (3')—accept *Audi's Harm Principle* and its corollary (2). Then we can suppose that at least part of what they may disagree about when they disagree about public policy is whether the condition expressed in (2) is satisfied. That latter supposition, together with (3'), implies:

(4) The justification of coercion in a given instance is (other things equal) inversely proportional to the strength of the evidence for epistemic parity among disputants who disagree on whether there is adequate evidence that non-coercion will be significantly harmful to persons, animals, the environment or property.

One of the crucial notions in the *Principle of Rational Disagreement*, (3') and (4) is that of epistemic parity. Audi explains:

Roughly, epistemic peers are (rational) persons who are, in the matter in question, equally rational, possessed of the same relevant evidence and equally conscientious in assessing the evidence. (p. 117)

He does not say that epistemic peers must be equally good at assessing the evidence or equally conscientious in their attempts to amass it, but leave those omissions aside.

In mass democracies, large numbers of citizens are often mobilized on every side of a policy debate. The citizens on each side may differ along the three epistemic dimensions that Audi says make for parity. The likelihood that they will raises questions about how (4) is to be interpreted. Is the justification of coercion proportional to the evidence for parity among the best advocates for each position? The average advocates for each? The median advocate for each? And how are the relevant advocates to be identified? Is there an index for measuring each person's epistemic competence that combines her scores along the three dimensions? If so, how are the dimensions weighted and how is the index determined?

To make these questions more specific, suppose evidence indicates that the best-informed advocates of restrictions on carbon emissions are twice as likely as their best-informed opponents to be right about the consequences of non-restriction for the global climate. We might suppose that advocates of the restrictions are no more rational or conscientious than those with whom they disagree but are possessed of evidence of future harm to persons, animals, the environment and property that is twice as good as their opponents' evidence because their climate models take account of twice as many variables or deliver predictions that are twice as accurate or deliver twice as many correct predictions. Then it seems to follow from (4) that the justification for imposing restrictions on carbon emissions is twice as strong as the justification for not imposing them.

It is difficult to see what practical import there is to this conclusion which would not also attach to the conclusion that the justification for imposing restrictions is “much

stronger” than that for not imposing them. This difficulty, and the fact that the precision that I have taken (4) to imply seems to contradict what Audi says elsewhere about the adequacy of reasons being “non-quantitative” (p. 68), raises the question of why Audi builds inverse proportionality into the *Principle of Rational Disagreement*. As if to parry this question, Audi says:

[t]he principle of rational disagreement does not specify how weak the justification for coercion becomes as the case for parity becomes stronger. If the case is conclusive—though that would be at best rare—I suggest that the obligation to tolerance becomes overriding. This is in good part because the justification for coercion in a given instance approaches zero as the strength of the case for epistemic parity among disputants who disagree on whether the relevant coercion in that instance is warranted approaches conclusiveness. [...] The principle thus clarifies the sense in which liberty is the default position in a democracy. (p. 119)

The first sentence of this passage does not seem to be right since the principle seems, at least in cases such as the one I imagined, straightforwardly to tell us the relative strengths of the justifications for coercion and liberty. Of course, the principle would not yield precise relative strengths if it were re-worded by replacing “is [...] inversely proportional to” with the weaker “varies inversely with”, and perhaps that is what Audi has in mind.

What the *Principle of Rational Disagreement* does not specify is a *threshold* that the evidence for epistemic parity must surpass for coercion to be licitly be imposed. The last sentence says that the principle clarifies the presumption of liberty and the ‘thus’ in that sentence suggests that the clarification is provided by the sentences that precede it. Those sentences tell us that liberty wins and coercion is

unjustified when there is conclusive evidence for parity. But if the clarification provided by the *Principle of Rational Disagreement* is that liberty wins and coercion is unjustified *only* when there is conclusive evidence for parity among the disputants, then Audi's presumption of liberty is quite weak. We might think that if the presumption is to have real teeth, the evidence of epistemic disparity favoring those who advocate coercion would have to be very strongly in their favor for coercion to be justified, at least in cases where basic liberties such as religious freedom are at stake.

To see that this might be a reasonable way to strengthen the presumption of liberty, recall that the epistemic dimensions along which Audi says parity and disparity are to be assessed also include some measure of evidence possessed. Suppose, therefore, that Audi conjoined the *Principle of Rational Disagreement* with the claim that coercion is legitimate only if its advocates possess and can produce evidence that liberty will prove harmful which is much stronger than the evidence advocates of liberty possess and can produce about the harms of coercion. Then, once he said in what ways the evidence must be stronger—perhaps by reference to a standard such as strict scrutiny—he would have clarified the presumption of liberty while making it more robust and would have done so in a way that is not unreasonable.

But let's put aside the clarification that I suggested Audi provide and turn to the one he in fact provides. For having suggested that, where basic liberties are at stake, the *Principle of Rational Disagreement* makes presumption of liberty too weak, I now want to argue that where the liberties at stake are not basic, the principle should be rejected because it

makes the presumption of liberty too strong. It makes the presumption too strong because it, together with the assumption that disputants accept *Audi's Harm Principle*, implies (4). And according to (4), disagreement among epistemic peers about whether there is “adequate evidence that non-coercion will be significantly harmful to persons, animals, the environment or property” itself implies that whatever “evidence [there is] that non-coercion will be significantly harmful to persons, animals, the environment or property” is inadequate. In that case, coercion fails to satisfy the condition expressed by (2) and is therefore unjustified. In sum, disagreement among epistemic peers about the adequacy of evidence for coercion in any instance *ipso facto* makes that coercion unjustified. That conclusion, I submit, is far too strong.

To see that Audi is committed to this line of thought and to see the problems with it, let us return to the quoted passage. As I read it, Audi would agree that (4) implies:

(5) The justification of coercion in a given instance is zero if there is conclusive evidence for epistemic parity among disputants who disagree on whether there is adequate evidence that non-coercion will be significantly harmful to persons, animals, the environment or property.

I assume that statutory restrictions on carbon emissions are coercive. Let's therefore consider an instance of (5), with the disputants in question being those who favor combatting global warming with statutory restrictions on carbon emissions and those who favor market-based approaches such as cap-and-trade:

(6) The justification of statutory restrictions on carbon emissions is zero if there is conclusive evidence for epistemic parity among disputants in the US who disagree on whether there is adequate evidence that non-restriction of carbon emissions will be significantly harmful to persons, animals, the environment or property

To test the plausibility of (6), suppose:

(7) There is conclusive evidence for epistemic parity among disputants in the US who disagree on whether there is adequate evidence that non-restriction of carbon emissions will be significantly harmful to persons, animals, the environment or property.

Steps (6) and (7) imply:

(8) The justification of statutory restrictions on carbon emissions in the US is zero.

I take it that whatever threshold of evidence the adequacy condition in (2) requires, a coercive policy with zero justification falls short of it. So I take it that (2) and (8) imply:

(9) Statutory restrictions on carbon emissions are unjustified in the US.

If Audi also thinks, as I assume he does, that government should not impose restrictions which are unjustified, then he must think that:

(10) The US government should not enact statutory restrictions on carbon emissions.

I have two worries about the argument for (10). One is that the argument might be self-undermining when one of its premises is conjoined with another claim that I believe Audi endorses. For suppose, as I believe Audi thinks and as seems eminently reasonable, that:

(11) Citizens of a democracy have a *prima facie* obligation not to advocate or support unjustified restrictions on one another's liberty.

Steps (9) and (11) imply:

(12) Citizens of the US have a *prima facie* obligation not to advocate or support statutory restrictions on carbon emissions.

The problem is that whether citizens are epistemic peers—whether they “are (rational) persons who in the matter in question, equally rational, possessed of the same relevant evidence and equally conscientious in assessing the evidence”—is typically revealed by how they argue for their positions. So if citizens who favor statutory restrictions on carbon emissions refrain from advocating them, as (12) requires, there will not be evidence—or at least not conclusive evidence—that they are the epistemic peers of those who oppose such restrictions. There will not, that is be evidence of the sort to which (7) refers and which must be available if it is to be justifiably asserted. But without (7), we cannot reach (12). So (12) can be supported only if citizens violate the obligation it purports to express.

I believe the problem with the argument lies with the *Principle of Rational Disagreement*. But perhaps it will be said instead that the problem lies in (11), which I imputed to Audi but which might be thought too crude. Perhaps instead of (11), what Audi thinks is:

(11') Citizens of a democracy have a prima facie obligation not to advocate or support restrictions on one another's liberty once it is true that (7).

Then instead of (12), the argument would lead to:

(12') Citizens of the US have a prima facie obligation not to advocate or support statutory restrictions on carbon-emissions once it is true that (7).

But (12') strikes me as no less problematic than (12), since I find it implausible that the mere fact of disagreement among epistemic peers obliges American citizens who favor statutory limits on carbon emissions to break off their political debate and advocacy. The implausibility of (12') is traceable to the implausibility of (11'). That step, like the *Principle of Rational Disagreement* that it was introduced to salvage, attaches too much importance to disagreement.

The fact that one of Audi's central commitments in this book leads to a self-undermining argument is itself very worrisome. But an even more worrisome feature of the argument for (10) is that even if (10) is true, it is reached in the wrong way. Two crucial features of the case I introduced at (6) are that basic liberties are not at stake and that evidence bearing on the consequences of non-coercion and coercion is fraught with uncertainty. Epistemic parity is

compatible with both sides to the dispute being able to offer only highly conjectural forecasts since climatic and economic models are extremely complex. Moreover epistemic parity as Audi describes it seems to be compatible with very different attitudes toward risk. Peers who disagree about the adequacy of evidence favoring some particular form of restriction on carbon-emissions might disagree because they have different but defensible attitudes toward what long-term risks it is sensible to run. Different people who are equally conscientious in their assessment of the evidence and of the rationality of risk can quite reasonably reach different conclusions. Disagreement about what policy the evidence supports does not seem to me to imply that the evidence favoring statutory restrictions on emissions is inadequate. Hence it does not seem to me to support (8), (9) or (10).

Other cases share some of the features of the carbon-emissions case: disputes about whether to impose a financial transaction tax, for example, and about whether to require employers to pay a (higher) minimum wage. As with the carbon-emissions case so with these, basic liberties are not at stake, models are complex, forecasts are uncertain and reasonable epistemic peers can disagree about what policies the available evidence supports. In such cases it is surely better to identify the justified policy *politically* than to accept the *Principle of Rational Disagreement*, (3), (3'), (4) and (5) and the analogues of (10). To maintain instead that disagreement among epistemic peers suffices to pick out the non-coercive policy as the one that is justified is to make the presumption of liberty too strong.

I said at the outset that one of the tasks of liberal democratic theory is that of identifying principles which

balance liberty and equality. Cases of the sort I have just considered suggest that the *Principle of Rational Disagreement* tips the balance too pronouncedly in favor of liberty and against equality. For to say that citizens are political equals is to say, among other things, that they are equal co-holders of its coercive power. And as Audi recognizes (p. 2), one of the ways societies recognize citizens' equality is by counting all equally in the procedures for deciding how that power should be used. But in the cases I have looked at, an unspecified and perhaps small number of citizens can make it the case that coercion is unjustified by virtue of their opposition, even if coercion does not bear on their basic liberties and would be endorsed by a vast majority were it put to a vote.

Now let's consider what I believe to be a different kind of political dispute, the dispute about restrictions on corporate contributions to political campaigns. From (5) by instantiation we get not (6) but:

(6') The justification of restrictions on the corporate financing of political campaigns in the US is zero if there is conclusive evidence for epistemic parity among disputants in the US who disagree on whether there is adequate evidence that non-restriction will be significantly harmful to persons, animals, the environment or property.

In this case, I believe that the deepest grounds of the dispute are philosophical. Disputants disagree about whether corporations should be considered persons entitled to First Amendment protection, about what harms or corrupts democracy or makes it more robust, and about how the functioning of democracy impinges on the well-

being of those who live under it. I confess to having little sympathy for those who say that corporate contributions should not be restricted. But I assume that some of the advocates of non-restriction are rational and well-informed citizens who have arrived at their position conscientiously. And so I assume that:

(7^o) Disputants who disagree on whether there is adequate evidence that non-restriction of corporate funding of political campaigns will be significantly harmful to persons, animals, the environment or property are epistemic peers.

(6^o) and (7^o) imply:

(8^o) The justification for restrictions on corporate funding of political campaigns is zero.

From which it seems to follow that:

(9^o) Restrictions on corporate funding of political campaigns are unjustifiable.

And (9^o) in turn seems to lead to:

(10^o) The US government should not enact restrictions on corporate contributions to political campaigns.

I expressed the worry that the argument for (10) was self-undermining because (10) was based on (7) and because the warrant for (7) depended upon citizens' violating an obligation that (10) supports when conjoined with (11). The argument for (10^o) is not self-undermining because (7^o) differs crucially from (7). Where the grounds

for (7) are largely empirical, citizens of liberal democracies have non-empirical grounds for (7') and for propositions that result from it by replacing its reference to corporate funding with reference to other political-theoretic disagreements. What are those grounds?

Recall that Rawls introduces the notion of a range property to rebut what might seem like a telling objection to political equality.⁵ An important element of Rawlsian political equality is this: all members of a well-ordered society, or almost all members, are equal in virtue of having a capacity for a sense of justice. Some, because of education and native endowment, may possess a more refined capacity than others and, though Rawls does not say so, this might lead them to somewhat different conclusions about what justice demands. These differences, in turn, may seem to tell against citizens' equality. But, Rawls argues, possession of a sense of justice is a range property, like the property of being interior to a unit circle. As all the points within a unit circle equally have the property of interiority regardless of their proximity to the center, so all members of a well-ordered society are equally possessed of the capacity for a sense of justice regardless of its refinement. Once we recognize that the capacity for a sense of justice is a range property, we can assume citizens' equality despite differences in developed capacity and conviction.

In a similar spirit, I suggest that an important element of political equality is equal possession of the ability to have reasonable philosophical views about political questions, and that we treat possession of that ability as a range property. Some people—Nazis, sociopaths, the insane and

⁵ In this paragraph, I draw on Rawls, *Theory of Justice*, section 77.

irrational—obviously fall outside the range. But most citizens, socialized into democratic politics, fall within it. The deep philosophical differences that underlie many political disputes—such as those about campaign finance—should therefore not be taken as evidence that some are more rational or less conscientious than others. Rather, with respect to questions of political philosophy, a commitment to citizens’ political equality requires a rebuttable presumption of their epistemic parity despite marked differences in philosophical sophistication. It is that presumption which grounds (7’).

As with (10) so with (10’), the conclusion of the argument—even if true—is reached in the wrong way if it not reached politically. And as with (10) so with (10’), the real problem with its supporting argument lies with the *Principle of Rational Disagreement* and with its upshot (5), the principle’s implication for cases of epistemic parity. Why does Audi accept the principle and its upshot?

Recall the presumption of liberty that the *Principle of Rational Disagreement* was supposed to clarify. That presumption is expressed in *Audi’s Harm Principle* and in (2). The latter says:

(2) Coercion is justified only if there is adequate evidence that non-coercion will be significantly harmful to persons, animals, the environment or property.

Perhaps in addition to (2), Audi also thinks:

(2’) Coercion is justified only if *epistemic peers all agree* that there is adequate evidence that non-coercion will be

significantly harmful to persons, animals, the environment or property.

If he does accept (2') then—provided he supposes that unjustified coercion has zero justification—he can infer (5), the case he introduces the *Principle of Rational Disagreement* to cover.

(2') does indeed clarify the presumption of liberty, as Audi said that the principle does. But as I hope my discussion of cases shows, the unanimity condition of (2') makes the presumption far too strong and does so by slighting political equality. So there is very good reason for Audi to reject (2'). And that is precisely what he seems to do, for he says:

I have not implied (and do not believe) that adequate reasons [for coercion] must be shared by everyone, even everyone who seriously considers them. (p. 70)

He then adds:

They need only be in a certain way accessible to all rational adults: roughly, appraisable by them through using natural reason in the light of facts to which they have access on the basis of exercising their natural rational capacities. (p. 70)

This sentence suggests that the condition Audi endorses is not (2') but the weaker:

(2'') Coercion is justified only if the claim that non-coercion will be significantly harmful to persons, animals, the environment or property can be supported by adequate accessible reasons.

The replacement of (2') by (2'') blocks the moves to (3), (4), (5), (6) and (6'). Audi would then not be committed to the problematic conclusions (10) and (10'). Moreover, the weaker condition is all Audi really needs to get conclusions he wants, since on a certain construal of 'accessible', (2'')—when conjoined with (11), which I have assumed Audi endorses and which says that citizens in a liberal democracy have a *prima facie* obligation not to advocate or support coercive laws which are unjustified—straightforwardly implies the *Principle of Secular Rationale*:

[c]itizens in a democracy have a *prima facie* obligation not to advocate or support any law or public policy that restricts human conduct, unless they have adequate secular reason for this advocacy or support (e.g. for a vote). (pp. 65-66)

(2'') therefore enables Audi to derive the principle of individual conduct that he wants without committing him to the overly strong presumption of liberty that he himself sometimes uses to defend it.

Of course if Audi really means to defend the *Principle of Secular Rationale* by appeal to (2'') instead of to (2'), then we need to know why we should accept *it*. Audi denies that he derives his principles from claims about respect for persons (p. 75). I suspect, on the contrary, that (2'') depends upon a commitment to respecting persons as political equals in a much more robust conception of 'political equality' than Audi begins with—a conception of equality which incorporates, among other things, the considerations I said support (7') and tell against (12'). I also suspect that doing justice to the demands of respect for political equality so conceived requires a constructivist rather than an intuitionist framework. Political constructivism is, in part, a theory of political justification: it attempts to identify

reasons which are justificatory in politics and to account for their authority. The second of my two suspicions therefore raises the question of whether a constructivist approach to the reconciliation of freedom and equality would vindicate Audi's claim that secular reasons are, just as such, "accessible" in the sense of (2") and so have justificatory force, or whether it would instead reserve such force for Rawlsian public reasons. Unfortunately the pursuit of this important question must await another occasion.

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