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The Liberal Tightrope: Brettschneider on Free Speech

Sarah Song[†]

INTRODUCTION

Corey Brettschneider’s book takes up one of the most important questions in moral, political, and legal philosophy—what are the grounds and limits of toleration—by focusing on the problem of hate speech. I admire his aspiration of crafting a middle position that defends robust free speech protections while also subjecting those espousing hateful viewpoints to “democratic persuasion.”

Brettschneider begins with a critique of two dominant responses offered by political and legal theorists to the problem of hate speech. On the one hand, you have the “neutralists” who defend strong rights of free speech, including protections for “hateful viewpoints,” which he defines as “hostile to the core ideals of liberal democracy.”¹ On the other, you have the “prohibitionists” who endorse coercive bans on hate speech.² The first approach is reflected in the “United States Supreme Court’s current free speech jurisprudence,” whereas the second is “found in most liberal democracies outside the United States.”³ Brettschneider argues that both approaches are problematic. Neutralists fail to take seriously the ways in which hateful viewpoints undermine the ideal of free and equal citizenship. Prohibitionists disregard the autonomy of citizens, their capacity to choose, revise, and pursue their own conceptions of the good.

Brettschneider proposes a middle path between these two positions, based on a distinction “between a state’s coercive power, or its ability to place legal limits on hate speech, and its expressive

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¹ COREY BRETTSCHEIDER, *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY* 1 (2012) (internal quotation marks omitted).

² *Id.*

³ *Id.*

power, or its ability to influence beliefs and behavior by ‘speaking’ to hate groups and the larger society.”⁴ The state should refrain from using its coercive capacity against groups espousing hateful viewpoints in the name of respecting freedom of expression while simultaneously criticizing such groups in its expressive capacity in the name of respecting equal citizenship. Such a middle path provides a more nuanced approach but it is also like walking a tightrope. Teeter too far in one direction and you endanger liberty; lean too far the other way and you sacrifice equality.

Another way of characterizing the aim of Brettschneider’s book is in terms of two liberal dystopias to be avoided. For neutralists, the *summum malum* is the Invasive State where government officials constantly monitor and punish citizens for speaking or acting on beliefs contrary to the ideal of free and equal citizenship. By contrast, prohibitionists fear something different: the Hateful Society in which robust liberal rights protections permit a thousand hateful viewpoints to bloom. Brettschneider argues we should guard against both dystopias. He agrees with the neutralists that the state should not coercively infringe upon free speech and privacy rights, but he also sides with the prohibitionists in recommending that the state actively engage in “democratic persuasion,” which involves criticizing and even condemning hateful viewpoints. When the state “speaks,” it should not only remind citizens of the *content* of rights; it should also present the *reasons for rights*. The reasons for the liberal rights of freedom of speech, association, and religion are none other than the values of freedom and equality at the core of liberal democracy. Any moral or religious viewpoints incompatible with these core values are properly subject to “democratic persuasion” even while being shielded from coercion.

My focus in this essay is to develop and amplify concerns that prohibitionists, on one side, and neutralists, on the other, will continue to have about Brettschneider’s “third alternative.” To build a middle position aimed at addressing the concerns of two opposing sides inevitably means building a framework around a tension. Each side has reason to think Brettschneider’s position betrays its core concerns to appease the other side. Are they right?

⁴ *Id.* at 3.

I. THE PROHIBITIONIST OBJECTION: DEMOCRATIC PERSUASION DOESN'T GO FAR ENOUGH

The traditional liberal approach to drawing the limits of state regulation has been based on a spatial metaphor between “the public” and “the private.” On this view, certain “spaces” of life—the family, the market, churches, and voluntary associations—are deemed to be private spaces and thereby free of state regulation. Building on the work of feminist theorists, Brettschneider argues that no space is immune from state regulation. The state can override privacy rights wherever those rights are exercised in ways that violate the rights of others. This point is pithily captured by the feminist slogan, “the personal is political.”

In lieu of the spatial metaphor, Brettschneider offers what he calls the “principle of public relevance” to determine the limits of the state regulation.⁵ “What makes certain beliefs and practices publicly relevant is that they conflict with our public status as free and equal citizens.”⁶ In cases of conflict, personal beliefs and actions “ideally should be changed to make them consistent with the ideal of free and equal citizenship.”⁷ To implement the principle of public relevance, we need to answer a prior question: what is required to treat others as free and equal citizens?

In fleshing out the ideal of free and equal citizenship, Brettschneider seems most concerned to show how minimalist that ideal is. Following John Rawls, the leading liberal philosopher of the twentieth century, he characterizes his principle of public relevance as “political, not metaphysical.” It “is not ‘deep’ in terms of either its justification or the types of beliefs to which it applies.”⁸ To demonstrate why the ideal is not deep, Brettschneider elaborates the kind of freedom and equality that is required:

According to value democracy, citizens must be treated as having equal status in that the rights of all citizens must be equally respected. These rights include freedom of expression, association, and religion, as well as rights of political participation and the rule of law. Citizens are to be regarded as “free” in the sense of being able to possess and exercise the rights of citizenship.⁹

The “political, not metaphysical” move appeals to many contemporary liberals for the familiar reasons Rawls gave.

⁵ *Id.* at 26.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 30.

⁹ *Id.* at 31.

Political liberals aim to develop political principles that could be acceptable to citizens who hold a wide variety of comprehensive moral and religious doctrines. Democratic societies are characterized by the fact of reasonable pluralism—the plurality of comprehensive doctrines that people hold is reasonable because when people are left to judge for themselves on fundamental moral and religious questions, they inevitably come to different conclusions due to what Rawls calls the “burdens of judgment.”¹⁰ Rawls’s *Political Liberalism* offers a political conception of justice that may command widespread agreement in the form of an overlapping consensus in spite of the fact of reasonable pluralism. A political conception of justice is “political” in virtue of being presented independently of any comprehensive moral doctrines and because it is worked out from fundamental ideas seen as implicit in the public political culture of a democratic society.¹¹ Brettschneider’s value democracy, like Rawls’s political liberalism, requires all citizens to accept the core values of free and equal citizenship but not any comprehensive moral or religious doctrines. Rawls himself maintained that among the core values of liberal democracy “are the freedom and equality of women, the equality of children as future citizens, [and] the freedom of religion.”¹²

Here is the objection I want to raise with “political, not metaphysical” approaches on behalf of “prohibitionists.” I draw here on the feminist political theorist Susan Okin’s critique of Rawls. Okin emphasized that political liberals’ “toleration of a wide range” of personal beliefs and practices tends to come at the expense of the equality of women.¹³

Many political liberals, including Brettschneider, respond that public toleration of a plurality of moral and religious doctrines is conditional on those doctrines being compatible with the ideal of free and equal citizenship. That is a crucial limit of liberal toleration. In fleshing out the ideal of free and equal citizenship, Brettschneider says it requires recognizing citizens as “politically autonomous and equal.” He sums it up this way:

In short, the “freedom” in free and equal citizenship requires respect for both the political and personal autonomy that citizens need to

¹⁰ JOHN RAWLS, *POLITICAL LIBERALISM* 54-58 (2005).

¹¹ *Id.* at 12-13.

¹² John Rawls, *The Idea of Public Reason Revisited*, in *COLLECTED PAPERS* 573, 601 (Samuel Freeman ed., 1999).

¹³ For extended analysis of Okin’s critique of Rawls with a focus on religious associations, see Sarah Song, *Religious Freedom vs. Sex Equality*, 4 *THEORY & RES. IN EDUC.* 23, 24 (2006).

develop opinions about politics and the good life. The “equal” in free and equal citizenship reflects a concern to ensure that these capacities are respected equally regardless of one’s race, ethnicity, or gender.¹⁴

Brettschneider points to slavery, segregation, and race- and sex-based exclusion from the vote as clear violations of the ideal of free and equal citizenship. But what about less clear-cut cases that involve doctrines supporting inequalities based on race, sex, and sexual orientation that are perpetuated within families and houses of worship?

Take, for example, the case of the Catholic Church’s prohibition of female priests. Insofar as the Church does not directly oppose the equal status of women in society at large, Brettschneider says it should not be subject to democratic persuasion. If it were to advocate policies that dissuade women from serving in public life, however, the case for cutting off state-funded tax privileges becomes stronger. In Brettschneider’s view, the state’s subsidy power is a tool of persuasion, not coercion, and the state should withhold subsidies from groups that violate the ideal of free and equal citizenship. In the case of the Catholic Church, Brettschneider argues that the Church should be immune from democratic persuasion because whether the Church’s policies are actively opposed to the ideal of free and equal citizenship is “ambiguous” at best. Democratic persuasion should be restricted “to clear instances in which the ideal of free and equal citizenship is opposed.”¹⁵ He imposes this “substance-based limit” on democratic persuasion to appease the worries of neutralist liberals, but in doing so, does he betray his other commitment to combating the spread of inequality-breeding doctrines?

I think Brettschneider is too quick in dismissing the state’s use of democratic persuasion in this case. Why should the ambiguity of a case not trigger democratic persuasion instead of ruling it out? A fuller appreciation of the feminist slogan “the personal is political” requires recognizing that the influence runs in both directions. The slogan stands not only for the proposition that public regulation of private beliefs and practices is sometimes justified, but also that private beliefs and practices strongly shape political life. Okin emphasizes the latter when she says, “it is exceedingly difficult to see how one could both hold and practice (in one’s personal, familial, and associational life) the belief that women or blacks, say, are naturally inferior, without its seriously affecting one’s capacity to relate

¹⁴ BRETTSCHEIDER, *supra* note 1, at 35.

¹⁵ *Id.* at 135.

(politically) to such people as citizens ‘free and equal’ with oneself.”¹⁶ We need not agree with Okin’s characterization of the world’s major religions as “rife with sexism” in order to share her view that privately held beliefs strongly shape women’s access to citizenship rights.¹⁷ Ensuring the worth of the equal rights of citizenship for women requires supportive social mores. This private–public dependence led Okin to a conclusion contrary to Brettschneider’s: that the state should withdraw tax-exempt status from the Catholic Church or any religious association “as long as they discriminate against women” in all its most important hiring decisions and in the distribution of institutional power.¹⁸ The question, then, for Brettschneider’s value democracy is why the Church should be immune from democratic persuasion when its position on gender-based leadership roles is “ambiguous” at best.

We can amplify this feminist objection by considering the curious asymmetry among many political liberals in their treatment of race, as opposed to sex, discrimination in familial and associational life. In addition to discussing the Catholic Church’s ban on women from the priesthood, Brettschneider discusses Bob Jones University’s ban on interracial dating.¹⁹ He says “Bob Jones University is a prime illustration of when a religious organization should not be given the tax privileges of non-profit status, because of its opposition to the ideal of free and equal citizenship.”²⁰ Why does Bob Jones University’s policy trigger democratic persuasion while the Catholic Church’s policy does not?

In spelling out further inquiry that might be pursued in these cases, Brettschneider says we should examine the Catholic Church’s current attitudes toward public officeholders who are women. Yet, he suggests a rosier picture than seems warranted when he says the Church “often celebrates Catholic women who attain high political office,” without providing any evidence.²¹ By contrast, in the case of Bob Jones University, Brettschneider says “[a] more conclusive inquiry should ask whether [the university] could have some principled reason for

¹⁶ Susan Moller Okin, *Political Liberalism, Justice, and Gender*, 105 *ETHICS* 23, 29 n.16 (1994).

¹⁷ Susan Moller Okin, *Justice and Gender: An Unfinished Debate*, 72 *FORDHAM L. REV.* 1537, 1556 (2004); see also SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* 12-17 (Joshua Cohen et al. eds., 1999).

¹⁸ Susan Moller Okin, “*Mistresses of Their Own Destiny*”: *Group Rights, Gender, and Realistic Rights of Exit*, 112 *ETHICS* 205, 230 n.68 (2002).

¹⁹ See *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983).

²⁰ BRETTSCHEIDER, *supra* note 1, at 137.

²¹ *Id.* at 135.

believing its prohibition on interracial dating was compatible with an endorsement of the legality of interracial marriage,” and he registers his doubt that any such justification is available.²² Why not apply a similar inquiry to the Catholic Church? Such an inquiry would involve addressing questions such as: What are the principled reasons for banning women from the priesthood, and what do they imply for Catholic women’s attainment of leadership positions both inside and outside the Church? Are those reasons really compatible with respecting women as free and equal citizens? Without hearing more, we are left to ponder why Brettschneider’s theory, like that of many political liberals, appears tougher on race-based, as opposed to sex-based, discrimination.

II. THE NEUTRALIST OBJECTION: DEMOCRATIC “PERSUASION” IS COERCION

Perhaps the most innovative aspect of Brettschneider’s theory of value democracy is the use of the state’s taxing and spending power as a key tool for responding to hateful viewpoints. The innovative claim is not so much that the state should use its subsidy power to respond to the problem of hate speech, but rather that we ought to view the state’s use of subsidies as an instance of democratic persuasion, not coercion. This claim depends, of course, on your conception of coercion and persuasion.

Brettschneider adopts the philosopher Robert Nozick’s influential account of coercion, which he interprets “as the state threatening to impose a sanction or punishment on an individual or group of individuals with the aim of prohibiting a particular action, expression, or holding of a belief.”²³ I wish he had dug a bit deeper into Nozick’s account because there are some problems that it raises for his argument. On Nozick’s account,

P coerces *Q* if and only if:

1. *P* aims to keep *Q* from choosing to perform action *A*;
2. *P* communicates a claim to *Q*;
3. *P*’s claim indicates that if *Q* performs *A*, then *P* will bring about some consequence that would make *Q*’s *A*-ing less desirable to *Q* than *Q*’s not *A*-ing;

²² *Id.* at 162.

²³ *Id.* at 88.

4. *P*'s claim is credible to *Q*;
5. *Q* does not do *A*;
6. Part of *Q*'s reason for not doing *A* is to lessen the likelihood that *P* will bring about the consequence announced in (3).²⁴

On Nozick's definition, the law criminalizing murder is a clear instance of coercion. An individual may choose not to commit murder because the state has made clear that it will impose harsh criminal penalties against him if he does so. The state also engages in coercion if it aims to prevent a group from associating and speaking out by threatening imprisonment or a fine as a consequence. As Brettschneider explains, "State coercion is employed in an attempt to deny the ability to make a choice. By contrast, financial inducements like pure persuasion, clearly attempt to convince citizens to make a particular choice, but they do not deny the citizen the right to reject it."²⁵ So when the state decides to withdraw state funding from a group espousing hateful viewpoints, the state is engaging in persuasion, not coercion.

Upon closer examination, however, democratic "persuasion" by threat of withholding state funding does appear to be an instance of coercion on Nozick's definition. The state aims to keep hateful groups from choosing to perform a particular action (holding and espousing the hateful viewpoint). The state communicates this claim to the group, indicating that if the group continues to hold and espouse the hateful viewpoint, the state will bring about the consequence of withdrawing state funding from the group. To resist this conclusion, Brettschneider needs to stipulate a narrower category of "consequences" that the state can bring about in order to make it less desirable for hateful groups to hold hateful viewpoints. He attempts something like this when he interprets Nozick's view in terms of imposing "a sanction or punishment." Similarly, when he says there are "means-based" limits on democratic persuasion, he suggests the state cannot use coercion to prohibit expression, by which he seems to mean direct infringement on the basic rights of free speech, association, and conscience.²⁶ But Brettschneider's argument is at odds with Nozick's view of

²⁴ Scott Anderson, *Coercion*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 2.1 (Edward N. Zalta ed., Winter ed. 2011) (citing Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440, 441-45 (Sidney Morgenbess et al. eds., 1969), available at <http://plato.stanford.edu/entries/coercion/#NozNewAppCoe>).

²⁵ BRETTSCHEIDER, *supra* note 1, at 112.

²⁶ *Id.* at 87.

coercion which notably diverged from prior accounts by excluding direct use of force and associating coercion only with proposals or conditional threats and by requiring that a judgment about coercion refer to facts about the coercee's psychology. If we inquire into the psychology of an association faced with the state's threat of withdrawing state subsidy, it seems reasonable to think it would view the state's threat as an instance of coercion.

Brettschneider might respond to this objection by saying he adopts the spirit, not the letter, of Nozick's account. So let me raise two additional arguments to cast doubt on his claim that the state's use of its spending power is mere persuasion, not coercion.

The first has to do with the distinction between a liberty and the "worth" of that liberty. Rawls makes this distinction in presenting his two principles of justice to show how the first principle, equal basic liberties, must be coupled with principles that ensure some minimum of material resources in order for citizens to exercise their liberties. Brettschneider similarly says that to ensure that the right of free expression has real worth, the state must ensure "the minimum means for citizens to be able to resist democratic persuasion."²⁷ Under certain circumstances, the withdrawal of state funding from groups espousing hateful viewpoints is tantamount to pulling the "minimum means" out from under them. This is ultimately an empirical question, but such cases may be more widespread than Brettschneider seems to assume.

Consider the case of the Christian Legal Society (CLS) at U.C. Hastings College of Law.²⁸ The public university denied funding to the student group on the grounds that CLS held discriminatory beliefs regarding homosexuality, but Hastings continued to permit the group to meet and speak on campus. Brettschneider endorses the U.S. Supreme Court's decision that the university did not violate the right of free speech when it refused to subsidize the group, but he disagrees with the Court's reasoning. The Court focused on which side respected the viewpoint neutrality requirement in funding. Brettschneider argues that the appropriate standard is the idea of free and equal citizenship, which is *not* viewpoint-neutral. As he puts it, there is no "entitlement for a particular viewpoint to be successful" and

²⁷ *Id.* at 113.

²⁸ Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S. Ct. 2971 (2010).

“that hateful or discriminatory organizations have no right to be subsidized by the state.”²⁹

To raise some questions about the “worth” of the rights of free speech and association, let us stylize the example. What if CLS had been the only Christian student organization at the school and it would have ceased to exist as an organization without university support? Under such circumstances, in which state funding is necessary to ensure the minimum worth of basic liberties of Christian students, should CLS receive funding? From the neutralists’ perspective, withholding state subsidies under such circumstances would be objectionably coercive. But if Brettschneider’s approach were to permit state subsidy in such circumstances, would he thereby throw the ideal of free and equal citizenship under the bus, revealing just how extreme his commitment to robust speech protections is? The neutralists would cheer as the prohibitionists would recoil in horror.

My second argument aimed at casting doubt on Brettschneider’s claim that the state’s use of subsidies is mere persuasion is inspired by John Stuart Mill’s account of coercion. Mill’s account is more expansive than most contemporary accounts. He links coercion with the state’s power to punish lawbreakers, but he also suggests a wider range of tools, beyond the use or threat of force, with which agents can exercise constraining power over others. Coercion involves not only the means of “physical force in the form of legal penalties” but also “the moral coercion of public opinion.”³⁰ Mill suggests that the power of social stigma is more potent than the use or threat of physical force:

For a long time past, the chief mischief of the legal penalties is that they strengthen the social stigma. It is that stigma which is really effective In respect to all persons but those whose pecuniary circumstances make them independent of the good will of other people, opinion, on this subject, is as efficacious as law Our merely social intolerance kills no one, roots out no opinions, but induces men to disguise them or to abstain from any active effort for their diffusion.³¹

What Brettschneider calls “persuasion” *is* coercion on Mill’s account. Even if you reject Mill’s more expansive view of coercion, after re-reading these passages of Mill, it is hard to deny that the state’s use of social stigma and appeal to public opinion

²⁹ BRETTSCHEIDER, *supra* note 1, at 112, 114.

³⁰ JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., Hackett Publishing Co., Inc. 1978) (1859).

³¹ *Id.* at 30-31.

can be a more potent threat to individual liberty than legal penalties. Brettschneider explicitly draws on Mill as an inspiration for *extending* the powers of persuasion from the citizenry to the state itself,³² but it is important to remember that Mill himself favored an active citizenry, not the state, taking the lead in persuading fellow citizens to transform norms and practices. Viewed through this Millian lens, Brettschneider's "transformative theory," in which "the state seeks to transform religious belief" (and other personal beliefs) incompatible with free and equal citizenship, sounds more threatening to individual liberty than the use of direct bans and penalties.³³

CONCLUSION: WALKING THE LIBERAL TIGHTROPE

Perhaps the greatest virtue of Brettschneider's position is the source of its greatest weakness: he paves a middle path between the extremes of the Hateful Society and the Invasive State, but in doing so, he has given us an approach riddled by an uneasy tension between respecting liberty and promoting equality.

Both sides have reasons to fear that he gives with one hand what he takes away with the other. To neutralists, he appears to embrace robust rights protections, only to endanger them through democratic "persuasion" aimed at changing personal beliefs and practices. Religious believers may favor old-fashioned neutralists to Brettschneider's approach when they realize that the latter would devote tax dollars toward "attempting to transform" any discriminatory beliefs they may hold! To prohibitionists, including some feminists, Brettschneider advocates the state's "active" role in criticizing and even condemning hateful viewpoints, only to permit groups espousing hateful viewpoints, such as the Westboro Baptist Church, to speak out and stage protests.

This tension between respecting liberty and promoting equality is endemic to liberalism. It is the tightrope liberals have to walk. No self-respecting liberal can afford to give up on either. While there are moments when Brettschneider's approach seems to lean more to one side or the other, his book is a serious effort at reconciling these twin values and deserves to be widely read and discussed.

³² BRETTSCHEIDER, *supra* note 1, at 13.

³³ *Id.* at 155, 157-58.