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Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies

Corey Brettschneider

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Corey Brettschneider[†]

INTRODUCTION

Liberalism demands robust rights to free expression. In American jurisprudence, the liberal state is bound by one of the world's strictest rules protecting free speech, the doctrine of "viewpoint neutrality."[1] This doctrine requires the state to protect all speech regardless of beliefs or political content. Viewpoint neutrality is commonly thought to be based on a neutralist theory of liberal democracy that requires the state not to favor any set of values.[2]

Feminist critics of neutralist liberalism resist what they regard as an overemphasis on unlimited freedom of expression

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[1] Bd. of Regents v. Southworth, 529 U.S. 217, 233 (2000); Rosenberger v. Rector, 515 U.S. 819, 828-29 (1995). For further background, see also Virginia v. Black, 538 U.S. 343, 360-62 (2003) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)); Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969).

[2] For discussions of the doctrine of viewpoint neutrality as being essential to the meaning of First Amendment free speech protection, see MARTIN H. REDISH, THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY 105-14 (Stanford, CA: Stanford University Press, 2013). Larry Alexander takes a more neutralist position in *Free Speech and "Democratic Persuasion": A Response to Brettschneider*, *in* PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS (Rowan Cruft et al. eds., forthcoming Sept. 2014), *available at* http://ssrn.com/abstract=2277849. For a defense of neutralism as a political theory, see generally BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

rights. Catharine MacKinnon, for instance, claims that free speech and the value of equality are on a "collision course."[3] According to these critics, while rights to free speech matter, rights to equality are equally, if not more, important and should sometimes limit free speech rights when the two conflict. Almost all democracies outside of the United States follow this "prohibitionist" approach.[4] They limit free speech when hateful expression attacks equal respect for minorities or the value of democracy itself. The prohibitionist approach tries to correct the alleged inability of liberalism to defend the core values of democracy.

In my book, *When the State Speaks*, I offer an account of liberal democracy that combines the neutralists' protection of rights with the feminists' and prohibitionists' concern for the equal status of citizens.[5] I call this third view of liberalism and free speech "value democracy." It grounds viewpoint neutrality on an ideal of free and equal citizenship. On my account, the state should be neutral in protecting the right to express all viewpoints. But it should not be neutral in the values that it supports and expresses. Value democracy thus embraces viewpoint neutrality in protecting the right to free expression of all beliefs, but rejects neutralism as a theory of what the state should say. The state must favor some substantive values, namely the ideal that all citizens should be treated as free and equal.

It is not enough, however, to recognize this commitment in the abstract. Liberal democracy must also find a way to protect the substantive values on which it is based. Otherwise, it will run into the problem that neutralist liberals face of "being unable to take their own side in an argument" when the free and equal status of women, minorities, gays, and other citizens is attacked. In these cases, liberal democracy must be able to articulate the "reasons for rights" that justify respecting free speech rights and viewpoint neutrality in the first place.

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[3] CATHARINE A. MACKINNON, ONLY WORDS 71–73 (1993). For another example of the "collision course" view, see Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 53, 57–58 (Mari J. Matsuda et al. eds., 1993).

[4] *See* ERIK BLEICH, THE FREEDOM TO BE RACIST?: HOW THE UNITED STATES AND EUROPE STRUGGLE TO PRESERVE FREEDOM AND COMBAT RACISM 97-105 (2011); *see also* Adam Liptak, *Outside U.S., Hate Speech Can Be Costly: Rejecting the Sweep of the First Amendment*, N.Y. TIMES, June 12, 2008, at A1 (describing differences in the way the United States and other countries, such as Canada and Germany, treat potentially offensive speech).

[5] COREY BRETTSCHNEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY (2012) [hereinafter BRETTSCHNEIDER, WHEN THE STATE SPEAKS].

When the State Speaks thus offers an account of "democratic persuasion" that requires the state to protect all viewpoints from coercion or prohibition. But when it "speaks" in statements by public officials, when it educates, when it uses its spending power, and when it confers the tax privileges of non-profit status, the state must affirmatively take the side of upholding free and equal citizenship. Democratic persuasion, I argue, is not just something that the state is permitted to do. It is a matter of political obligation. Our constitutional jurisprudence, including the doctrine of viewpoint neutrality, must be tailored to permit the state to pursue its duty of democratic persuasion. At the same time, democratic persuasion places limits on state speech. It prohibits the state from speaking in ways that undermine its commitment to the values of freedom and equality.

The proper place for viewpoint neutrality, I argue, is in preventing government coercion or censorship of viewpoints. Citizens should be allowed to hear and endorse all viewpoints, even hateful ones. While I think threats and speech that might incite imminent violence can be prohibited under the First Amendment, generalized viewpoints cannot be banned. I argue, however, that the state should not be viewpoint neutral in its own expression. The state should protect free speech out of respect for the freedom and equality of citizens. Citizens are free and equal in having the capacity to debate and decide on matters of personal and political principle. The state should find a way not only to uphold free speech, but also to defend the democratic values that justify protecting free speech in the first place. For example, the state has an obligation to advance civil rights through education and public holidays. We rightly dedicate a holiday to Martin Luther King, not to the southern segregationist Bull Conner. Likewise, the public schools are justified in teaching students racial equality.

An even stronger measure that the state should take is to use its spending power to advance democratic values. I therefore defend the IRS decision to deny the subsidies that come with non-profit 501(c)(3) status to Bob Jones University, which the Supreme Court upheld in *Bob Jones v. United States*.[6] The IRS already requires that, for non-profits to receive the subsidies of tax-exemption, they must have a "public benefit."[7] That is, such organizations must provide services to the public that offset the cost of the tax-exemption.

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[6] 461 U.S. 574 (1983).

[7] Regan v. Taxation without Representation, 461 U.S. 540, 542-44 (1983).

In the book, I argue that the IRS should make its public benefit more specific, and explain that being a hate group is inconsistent with having a public benefit. This clarification of the meaning of public benefit should be made by Congress rewriting the 501(c)(3) statute. The IRS should thus be required by law to deny the tax subsidies of 501(c)(3) to hate groups that directly oppose the democratic values of free and equal citizenship. When the state uses its spending powers, it should promote democratic values and not be bound by viewpoint neutrality.

While the Court's decision in *Bob Jones* is consistent with my view, the Court has since moved in the wrong direction in expanding viewpoint neutrality in other cases that concern state spending. In *Christian Legal Society v. Martinez*,[8] the Supreme Court held that it was constitutional for Hastings Law School to withdraw funds from a student group that discriminated against gay students. In her majority decision, Justice Ginsburg claimed that the funding policy of requiring non-discrimination in admissions for student groups was consistent with the state's viewpoint neutrality. She wrote that the policy was based on an ideal of toleration, which she claimed was a neutral value. Although I agree with the Court's result in *Christian Legal Society*, I suggest its reasoning wrongly tried to show that requiring non-discrimination in admissions is consistent with the doctrine of viewpoint neutrality. Non-discrimination and toleration are non-neutral viewpoints. Their non-neutrality can be seen in how those viewpoints are attacked by discriminatory groups. The problem with the Court's reasoning was that it assumed that the state must be viewpoint neutral in its expression. I argue in the book that non-discrimination and toleration are non-neutral viewpoints that the state should advance through its own speech. In sum, while viewpoint neutrality has a place in limiting government coercion, it should not limit the state's ability to promote democratic values.

It should be emphasized, however, that democratic persuasion places limits on what the state can say. Democratic persuasion prohibits the state from speaking in ways that undermine the ideal of free and equal citizenship. For example, it would be wrong for the president, legislators, and the courts to speak in favor of racial discrimination. I therefore favor an expansive reading of the equal protection clause and the

[8] 130 S. Ct. 2971 (2010).

establishment clause to limit some forms of state speech. For instance, I argue that *Rust v. Sullivan*[9] was wrongly decided, because the state did not have the right to deny information to women about to their rights to an abortion as guaranteed by *Roe v. Wade* and *Planned Parenthood v. Casey*. I also endorse Michael Dorf's view that it would not be constitutional for states to fly the Dixie flag, because it would be a form of state speech on behalf of the discriminatory values that flag represents.[10]

Several of the essays in this symposium attempt to push my view toward one of the opposing poles of neutralism or prohibitionism. On the more neutralist side, Steve Calabresi worries that I have abandoned traditional liberal commitments to respect the independence and autonomy of religious citizens.[11] Although he endorses much of value democracy, he wants to see greater reticence in democratic persuasion to limit its application to religious organizations. While Calabresi accepts a central role in liberal democracy for a more reserved form of democratic persuasion, Andrew Koppelman denies that the state has a duty to pursue democratic persuasion. At most for him, it is a "second best" set of tools for the state to use in some circumstances, especially given his skepticism about whether it is necessary or effective.[12]

Robin West[13] and Sarah Song[14] push in the opposite direction of prohibitionism. On their view, I am right to seek to persuade citizens to change hateful viewpoints. They share my commitment to a political theory that challenges discrimination and seeks to promote ideals of equality in the family and civil society. But they worry that I have not gone far enough in my account. West believes that democratic persuasion does not act strongly enough to protect equality.[15] Song questions how I might respond to critics, like Susan Okin and other liberal feminists, who argue that the state should promote more extensive changes in civil society than is permissible in democratic persuasion.[16]

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[9] 500 U.S. 173 (1991)

[10] Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1316-23 (2011).

[11] Steven G. Calabresi, *Freedom of Expression and the Golden Mean*, 79 BROOK. L. REV 1005 (2014).

[12] Andrew Koppelman, *You're All Individuals: Brettschneider on Free Speech*, 79 BROOK. L. REV. 1023 (2014)

[13] Robin West, *Liberty, Equality, and State Responsibilities: Review of Cory Brettschneider's* When the State Speaks, What Should It Say?, 79 BROOK. L. REV. 1047 (2014).

[14] Sarah Song, *The Liberal Tightrope: Bretschneider on Free Speech*, 79 BROOK. L. REV. 1047 (2014).

[15] West, *supra* note 13.

[16] Song, *supra* note 14

In response to these critics, I suggest that value democracy and democratic persuasion offer a third way forward in thinking about the role of values in liberalism. I attempt to show that value democracy strikes what Calabresi aptly calls "the golden mean" between neutralism and prohibitionism. My defense and elaboration of value democracy and democratic persuasion are aided by excellent essays from Frank Michelman[17] and Josiah Ober.[18] I begin by highlighting how Michelman's essay underscores the strengths of my view that a legitimate state has an obligation to engage in democratic persuasion. His focus on legitimacy offers an important reply to theorists who want to see greater reticence in democratic persuasion, including Calabresi and Koppelman. Ober's essay responds powerfully to concerns about the effectiveness of democratic persuasion and its respect for citizens. Finally, I address West's and Song's calls for a more radical form of democratic persuasion, suggesting that the cautionary arguments from Calabresi and Koppelman can be used to push back against West and Song.

I. MICHELMAN ON DEMOCRATIC PERSUASION AND LEGITIMACY

Frank Michelman explains both the uniqueness of my view and its place in the liberal tradition. He focuses on my claim that the duty of democratic persuasion stems from an ideal of legitimacy.[19] Neutralist liberals might resist democratic persuasion on the grounds that the state should be neutral toward different values. However, the point that Michelman rightly emphasizes from *When the State Speaks* is that legitimacy is more fundamental to liberalism than neutrality. If the state is to be neutral in some cases, that neutrality must be justified in terms of legitimacy. What makes the state legitimate is its commitment to the status of all citizens as free and equal.

In my theory of value democracy, the state's legitimate power must be justified by its respect for an ideal of free and equal citizenship. In *When the State Speak*s and in my first book, *Democratic Rights: The Substance of Self-Government*, I argued that state coercion must always be made consistent

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[17] Frank I. Michelman, *Legitimacy and Autonomy: Values of the Speaking State*, 79 BROOK. L. REV. 985 (2014).

[18] Josiah Ober, *Democratic Rhetoric: How Should the State Speak?*, 79 BROOK. L. REV. 1015 (2014).

[19] Michelman, *supra* note 17.

with this ideal.[20] As Michelman explains, my "thin" conception of legitimacy requires rights-based limits on government action.[21] These limits include equal protection, robust free speech protections, and a broad right to privacy. As Michelman explains, I reject the notions of legitimacy based on the empirical question of whether there is widespread compliance with the state. Legitimacy in value democracy is instead a normative concept regarding whether the state has the right to rule or coercively enforce its laws.

My claim that the requirements of legitimacy limit coercion places my theory of value democracy squarely in the tradition of liberal democracy. But *When the State Speaks* makes the case for an even broader conception of legitimacy than in other liberal theories. At times, this commitment requires the state to be neutral, as in its protection of the right of free speech for all viewpoints. The state does this to respect citizens as free, or as able to exercise their moral powers to debate, choose, and pursue conceptions of the good life and of justice. But at other times, the commitment to the status of citizens as free and equal might require the state not to be neutral. When confronted by hateful expression, the legitimate state cannot be neutral in its own speech. The legitimate state must pursue democratic persuasion to defend the free and equal status of the women, minorities, gays, and other citizens facing attack.

In addition to ensuring that the values of free and equal citizenship limit coercion, the legitimate state should use democratic persuasion to promote these values and work to have them adopted by citizens. Michelman anticipates the objection that legitimacy does not depend on democratic persuasion alone.[22] Indeed, I agree that perhaps the most fundamental part of legitimacy is the content of the laws and whether it complies with the demand to respect rights. But, as Michelman reports, I argue that democratic persuasion might add to a government's legitimacy, helping to move it closer to what he regards as the proper threshold for the right to rule. While Michelman views legitimacy as being "categorical"—the state either has it or lacks it entirely—liberal theorists who view legitimacy as being "scalar" or a matter of degree might endorse the idea that democratic persuasion contributes to a

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[20] COREY BRETTSCHNEIDER, DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT (2007) [hereinafter BRETTSCHNEIDER, DEMOCRATIC RIGHTS].

[21] Michelman, *supra* note 17.

[22] *Id.*

state's legitimacy. When hate speech attacks citizens, democratic persuasion defends their status as free and equal.

An important point raised by Michelman is that, in keeping with the fundamentality of legitimacy, conceptions of neutrality, specifically an account of viewpoint neutrality, must themselves be grounded in a liberal theory of legitimacy.[23] Building on this point, *When the State Speaks* explains that there are three reasons why the legitimate state has an obligation to engage in democratic persuasion. Reviewing these reasons will set up my argument later in this essay against the belief that liberal reticence ought to override democratic persuasion.

First, a liberal democracy with widespread illiberal beliefs would have questionable stability.[24] Without democratic persuasion, government decisions might respect free and equal citizenship, but these decisions would be at odds with the views of the populace. As Steve Calabresi points out, such a society would resemble Weimar Germany, where democracy failed because it was not supported by the widespread endorsement of democratic principles.[25] This argument for stability is "instrumentalist" in my terms, or "consequentialist" as Michelman says. The legitimate state ought to pursue democratic persuasion to prevent the decline of liberal democracy. But Michelman correctly notes that this instrumental argument might not satisfy more deontological theorists who want an explanation of how democratic persuasion shows respect for individual persons.[26]

Michelman thus highlights the deontological character of my second and third arguments for why the legitimate state ought to pursue democratic persuasion.[27] The second is an argument from transparency for a state role in articulating and defending the reasons for rights. Citizens have an entitlement to be given a justification for the laws that bind them, out of respect for their autonomy or their capacity to reason about justice. This notion of transparency builds on the widely accepted principle that laws and the reasons for them must be promulgated publicly. Value democracy extends the transparency requirement from the law to the basic values of liberal democracy.

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[23] *Id.*

[24] For an analysis of the state's duty to pursue democratic persuasion, based on the arguments from stability, transparency, interconnection, and public trust, see BRETTSCHNEIDER, WHEN THE STATE SPEAKS, *supra* note 5. The kind of stability that I am invoking here is what Rawls calls "stability for the right reasons" in JOHN RAWLS, POLITICAL LIBERALISM xl, 391, 495 (Columbia Univ. Press expanded ed., 2005).

[25] Calabresi, *supra* note 11.

[26] Michelman, *supra* note 17.

[27] *Id.*

The legitimate state must publicly justify and promulgate the reasons for democratic values. This argument does not mean, as Koppelman seems to suggest, that the legitimate state needs to rebut every random disagreement with the core values of free and equal citizenship. Rather, as Michelman explains it, I argue that there is a generalized obligation of the state to make clear the democratic values on which its legitimacy is based. This duty applies most strongly when hate speech or discriminatory beliefs are not random but affect people's standing as free and equal citizens.[28] At times democratic persuasion might take the form of broadly promulgating democratic values. At other times, when necessary, it might mean criticizing and giving reasons to reject hate speech and discriminatory beliefs.

A third set of reasons for democratic persuasion as a requirement of legitimacy concerns what I call the arguments from "interconnection" and "public trust." According to the argument from public trust, government officials who make and implement policy have a great deal of discretion. The laws might conform formally to democratic values, but if some officials do not endorse these values, they may act in ways that undermine the freedom and equality of citizens. Democratic persuasion is needed to promote greater acceptance of democratic values among citizens, including current and future public officials. The ideals of free and equal citizenship are independent of what any public official says. If there is an official, such as a state governor, with discriminatory beliefs, my theory would require other officials, including officials from other U.S. states and the federal government, to criticize those discriminatory beliefs. Indeed, on my reading of the Constitution, hateful state speech by public officials would be prohibited by the equal protection clause.

The argument from public trust draws attention to the "vertical" relations between citizens and the state. The argument from interconnection focuses instead on the importance of the "horizontal" connection between citizens. The problem, which Robin West highlights, is that citizens might act in civil society to attack the free and equal status of women, minorities, and gays.[29] I argue in the book that citizens can undermine equal status by advocating hateful beliefs, or by making discriminatory decisions about whom to hire, promote, and mentor. The law's formal respect for free and equal

[28] For an excellent study on the persistence of racism in modern America, see ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION (2010). I would argue that Anderson's study shows the continuing need for democratic persuasion.

[29] West, *supra* note 13.

citizenship is insufficient to counter this problem. The argument from interconnection is that democratic persuasion is needed to promote more widespread acceptance of democratic values in civil society. Citizens have an obligation to treat each other in accordance with the democratic values of free and equal citizenship, and the state has an obligation to use its expressive capacities to encourage citizens to do so. Otherwise, these values will be undermined in the way that citizens treat each other. The argument from interconnection attempts to redress claims about what is called "structural racism" that takes place outside the formal boundaries of law.

As Justice Harlan argued in his famous dissents in the *Civil Rights Cases* and in *Plessy v. Ferguson*, citizenship must permeate the culture and cannot remain a merely formal ideal if we are to live in a true democracy in which people enjoy equal status.[30] I agree with Harlan and argue that civil rights laws are important in prohibiting discrimination in the workplace and universities. The Civil Rights Act of 1964 is properly understood as being constitutional and compatible with free association rights. At the same time, I endorse current First Amendment jurisprudence, which distinguishes between the legitimate regulation of the workplace, schools, and public accommodations, where discrimination can be prohibited, versus private organizations, which have rights of free association. The Court has ruled that the right of free association and free speech protect private organizations and religious groups, such as the Boy Scouts of America and the Westboro Baptist Church, in their freedom to determine who is a member of their organization as well as what message they wish to embrace. Such groups, unlike businesses or public accommodations, enjoy the free speech right to promote illiberal ideals. That does not mean the state must stand idly by.

Even when free speech rights, privacy, and free association rights protect private groups from anti-discrimination laws, the liberal state should still address discriminatory and hateful viewpoints as being publicly relevant. Democratic persuasion aims to promote more widespread respect for the free and equal status of citizens, even when other rights keep the state from promoting and protecting such beliefs through coercive law. As Michelman writes, a "crucial component" of my theory is that citizens should affirm democratic principles.

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[30] Plessy v. Ferguson, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting); The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

Citizens as individuals move toward realization of an ideal that Michelman, following Rawls, calls "full autonomy" when the state they jointly support speaks up on behalf of civic obligations of respect for all as free and equal.

I take these deontological arguments to suggest that democratic persuasion does not disrespect citizens by disagreeing with them. Rather it respects the way citizens should be treated in democracy and the way they should treat others. Democratic persuasion criticizes the viewpoints of people who advocate racial and sexual discrimination, but it respects their status as citizens. This stance of criticizing the viewpoint but respecting the person and his or her ability to reason can be understood by a helpful analogy. If I hold a mistaken view, such as the earth being flat, it does not disrespect me to argue against my view and to provide evidence for the earth being round. Rather, it recognizes my ability to reason. Similarly, it does not disrespect citizens to argue against their hateful or discriminatory beliefs. If they use their free speech rights to attack the free and equal status of other citizens, they are undermining the very principle of legitimacy that gives them the right in the first place. To point this out is not to disrespect them. Rather, it upholds the status that all citizens should have in a legitimate democracy. What is crucial here when it comes to state speech is that democratic persuasion must not insult individuals, but rather give reasons that appeal to values central to democratic legitimacy. A state that promulgates the justification for its basic laws and rights engages in reason-giving speech that is respectful, not insulting, to citizens.

II. IS DEMOCRATIC PERSUASION TOO AGGRESSIVE? A RESPONSE TO CALABRESI

Recognizing the three reasons why democratic persuasion is required as a matter of legitimacy, and that legitimacy is prior to neutrality in liberalism, I will respond to several criticisms raised about my view. I begin with the concern that democratic persuasion is too aggressive in criticizing and seeking to transform views that oppose free and equal citizenship. The worry is that democratic persuasion strays too far from the traditional liberal distinction between the public and the private.

Steven Calabresi believes that I have successfully identified the structure of First Amendment free speech

protection.[31] He agrees that the grounding of viewpoint neutrality must be value based. He endorses a limited conception of democratic persuasion that includes a role for the state in defending the core values of freedom and equality. But Calabresi is worried that I overextend democratic persuasion in two areas that upset the traditional liberal reticence to intervene in the private sphere.[32]

First, he worries about my claim that the state should not extend the tax privileges of 501(c)(3) status to discriminatory groups, such as the Boy Scouts.[33] He argues that nonprofits should be off-limits from government criticism because the diversity of those organizations supports a robust liberal society. He suggests that extending democratic persuasion to decisions about tax exemption will lead to the politicization of the IRS and even possibly a partisan cultural war, with conservatives seeking to revoke the non-profit status of pro-gay rights groups.[34]

I agree with Calabresi in respecting the right of all groups in civil society to organize around any principle or viewpoint they wish. I go so far as to defend the right of groups such as the Ku Klux Klan and the American Nazi party to march and organize.[35] Nothing in my proposal suggests banning discriminatory groups. To the contrary, the right to hold hateful viewpoints is encompassed by democratic citizenship and in particular the requirement that everyone should be entitled to have and decide upon their own beliefs, out of respect for their autonomy. I endorse Meiklejohn's suggestion that democratic autonomy demands a viewpoint neutral protection of the right of free speech against government prohibitions of expression. Indeed, I am with the most liberal of free speech theorists in that I suggest my approach is compatible with the Supreme Court's holding in *Boy Scouts of America* v. *Dale*, defending the right of private associations to discriminate in their membership policies based on sexual orientation.[36] These rights protect a realm of civil society from coercive control.

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[31] Calabresi, *supra* note 11.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] The Court allowed the Ku Klux Klan to burn crosses if there was no intent to intimidate in *Virginia v. Black*, 538 U.S. 343, 363 (2003). The Court held that the American Nazi Party had a free speech right to hold a march in *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 43-44 (1977). On my defense of free speech for hateful viewpoints that are not threats, see BRETTSCHNEIDER, WHEN THE STATE SPEAKS, *supra* note 5, at 74-75.

[36] 530 U.S. 140, 655-56 (2000).

But a right to free association does not entail either a right to be publicly subsidized or a right to be free from criticism by the state. Organizations that discriminate or advocate hateful beliefs should not enjoy the tax privileges that come with 501(c)(3) status. That status comes with publicly supported tax benefits, including the deductibility of donations. Status under 501(c)(3) is, in effect, an indirect subsidy to these groups. Such subsidies should be reserved for groups that pursue a public good.[37] Discrimination groups such as the American Nazi Party, the Klan, or the Westboro Baptist Church (which has declared that God hates gays) are not pursuing, and are in fact attacking, the public good of free and equal citizenship. We can respect the right of discriminatory groups to exist without endorsing or publicly supporting them by revoking their tax advantages. Denying these subsidies does not deny pluralism in civil society. To be clear, the proposal is to end a privilege or subsidy that discriminatory groups receive. This would only lead to their paying the same taxes that ordinary citizens pay. Departing from that tax rate should require extra justification, as Justice Rehnquist recognized in *Regan*, because subsidies place additional burdens on other citizens, who must make up for the lost tax revenue. Of course, these groups have the right to continue to exist without subsidy. In fact, *Bob Jones* continues to operate without 501(c)(3) status.

In addition to his concern about pluralism, Calabresi also worries that my proposal may trigger a culture war over who receives 501(c)(3) status.[38] Much of Calabresi's concern here could be answered by detailing how legislation could be written that would clarify the terms upon which non-profit status might be revoked for discriminatory groups. The potential for a culture war exists in the status quo because of the vagueness of the current statute. In my view, there would

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[37] Regan v. Taxation with Representation, 461 U.S. 540, 550 (1983). Justice Rehnquist wrote in his unanimous decision that tax exemptions were forms of state subsidy, and that they should be reserved for groups that "promote the public welfare." *Id.* at 544 (footnotes omitted) ("Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions. The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.").

[38] Calabresi, *supra* note 11.

be a way of codifying the non-profit proposal to provide the IRS with less discretion than they already have under the laws governing 501(c)(3). The 501(c)(3) requirements currently include a need to show "charitable purpose" or, as the Court has understood it, promotion of the "public good."[39] I argue that the statute might be amended to clarify that opposition to ideals of equal citizenship constitutes a failure to meet this public good requirement. Codifying the ideal in this way would offer a significantly clearer standard for the IRS in defining what constitutes a "public good." Using respect for free and equal citizenship as the standard would posit a clear rule that the courts could use to counter government abuse. My proposal would thus reduce the risks of government abuse compared to the current, vague standard of groups having to promote the "public good" to qualify for non-profit tax-exemptions.

This proposal also might answer some of Calabresi's worry that conservatives might begin to use the statute to revoke the status of Ivy League universities that are perceived as being too liberal. As Calabresi recognizes, this would be a blatant abuse of power. Clarifying the meaning of charitable purpose and public good would correct against that sort of abuse. Courts could be entrusted to push back on such abuse by relying on a reformed 501(c)(3) statute that clarifies the "charitable purpose" or public good requirement.

Although Calabresi wants to interpret 501(c)(3) along neutralist lines, all three legitimacy arguments for democratic persuasion support using free and equal citizenship as the standard for groups to receive the privileges of tax-exemption. On consequentialist grounds, the proposal would promote free and equal citizenship without denying rights. The clarification of the meaning of "charitable purpose" and "public good" would promulgate and make transparent the reasons for rights. The policy would also address concerns about interconnection and public trust by using subsidies to promote a culture based on respect for free and equal citizenship. The proposal helps to

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[39] See *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983), and *Bob Jones University v. United States*, 461 U.S. 574, 587-88 (1983), both interpreting the text of 501(c)(3) as requiring an organization receiving tax exemption to have a "charitable purpose" or to "promote the public welfare." In *Bob Jones*, the Court held that the Internal Revenue Service could discontinue 501(c)(3) tax status to Bob Jones University because the university's policy of banning interracial dating was at odds with the public purpose of educational institutions. *Id.* at 605. The IRS made the right decision on my view, given Bob Jones's explicit opposition to rights to interracial marriage. Opposition to rights of interracial marriage does not promote the public welfare, since it undermines the ideal of equal citizenship.

transform civil society and promote core values of legitimacy without violating the rights to free associations and speech of civil society groups.

A separate worry raised by Calabresi is that I do not exempt religious organizations from being subject to democratic persuasion when they oppose basic values of freedom and equality.[40] In his view, religious organizations themselves are protected not only by the guarantee of free exercise but also on grounds of equal protection. The concern is that subjecting religious groups to democratic persuasion might violate both guarantees.

A test case for Calabresi, however, is *Bob Jones University* v. *United States*. In *Bob Jones* the IRS revoked the 501(c)(3) status of a racist university with a religious affiliation.[41] The Court upheld that equal protection and free speech did not entitle the university to tax exempt status. The Court ruled that the IRS could discontinue tax subsidies to Bob Jones because the university banned interracial relationships. This opinion rightly made it possible for the state to engage in democratic persuasion in its tax exemption policies.

Calabresi and I both agree that the *Bob Jones* case was correctly decided, and that tax exemptions should not have been continued for a university that banned interracial relationships. We differ, however, on the analysis of the case. Calabresi argues that the university was not actually a religion, and so tax exemption could be conditioned on non-discrimination.[42] By contrast, I am willing to grant that Bob Jones University is a religious organization, but I conclude that the religious nature of a discriminatory group does not automatically exempt it from criticism. Regardless of the details of this case, it seems clear that racist, sexist, and homophobic religions have attacked the equal status of minorities, women, and gays under the law. For example, the Westboro Baptist Church has picketed funerals for gay murder victims, including Matthew Shepard, declaring that they deserved to die. The Westboro Baptist church is a religious organization. But its core doctrine advocates capital punishment for gays. We therefore cannot escape the challenge here of whether they should receive 501(c)(3) status by denying they are a religion, or by denying, as the Kansas Court of Appeals did, that the church's core activity of protesting military and gay funerals is central to their religious

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[40] Calabresi, *supra* note 11.

[41] *Bob Jones Univ.*, 461 U.S. at 605.

[42] Calabresi, *supra* note 11.

mission.[43] Hateful religious groups are still religions. While religious hate groups are entitled to protection from coercive interventions that ban them from speaking or organizing, they should not be exempted from democratic persuasion.

The argument for subjecting religious groups to democratic persuasion is grounded in an ideal of pluralism. As Michelman clarifies, the conception of pluralism for a legitimate democracy should guarantee freedom and equality for all.[44] These are the democratic values that the state must defend against its opponents, religious or otherwise. The ideal of equal status is the value that best explains and justifies the protection of religious freedom in the first place. Free exercise and the ban on establishment are based in a deeper concern to offer people equal respect. This is the reason we allow them to exercise their religion as they wish. Without such a concern we would be hard pressed to explain why some religions must be limited when they seek to restrict the rights of other religions. Religious groups that want to curtail the rights of others have a right to speak, but they should be criticized for attacking the premises of the fundamental freedoms that they enjoy. Just as free speech is grounded in an ideal of free and equal citizenship, so too is the guarantee of free exercise.

Democratic legitimacy is based on protecting equal respect for all citizens. But for equal respect to be secured, clearly discriminatory or hateful religious groups should not be exempt from democratic persuasion, as Calabresi suggests. Democratic persuasion should apply to discriminatory religious groups in the consequentialist hope of bringing about the kind of pluralistic society in which all religions are respected, and in which there is transparency about how the protection of religious freedom is grounded in deeper values of legitimacy.

III. IS DEMOCRATIC PERSUASION EFFECTIVE AND RESPECTFUL? A RESPONSE TO KOPPELMAN DRAWING ON OBER

I welcome Andrew Koppelman's commentary as an opportunity to respond to his consequentialist objections and to

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[43] *In re* Westboro Baptist Church, 189 P.3d 535, 541-42 (Kan. Ct. App. 2008) (holding that the Westboro Baptist Church could not receive a tax deduction for a truck that it used during protests). The Court ruled that the truck was being used for political and not religious expression. For discussion, see BRETTSCHNEIDER, WHEN THE STATE SPEAKS, *supra* note 5, at 154, 194 n.17.

[44] Michelman, *supra* note 17.

explain why a purely consequentialist framework does not fully capture the legitimacy arguments for democratic persuasion. Koppelman pushes in the direction of neutralism on the grounds that democratic persuasion is supposedly ineffective and unnecessary. I respond that democratic persuasion is necessary for the state to meet its duty to be transparent about the democratic values that justify its own legitimacy. It is also the most effective means of transforming beliefs while respecting rights.

Part of Koppelman's concern about effectiveness is based on a basic misunderstanding. He seems to think that democratic persuasion is my only response to racism, sexism, and homophobia.[45] This overlooks the other strong measures that I endorse in the book to defend the free and equal status of citizens. As I write, "[v]alue democracy accepts that the state's coercive power might be appropriate for protecting rights in certain cases, such as using the police to stop violence or enforcing the Civil Rights Act to uphold non-discrimination in the workplace."[46] Democratic persuasion should be understood as part of a larger liberal defense of citizens' rights.

What democratic persuasion contributes to this defense is a way of protecting free and equal citizenship from attacks in a traditionally vulnerable flank. Civil society groups like families and churches are highly influential, but are not covered by anti-discrimination law. They are protected by robust rights to free speech and association that prohibit using coercion to ban hateful expression and discrimination in their membership. I defend liberal rights to free speech and association, but I criticize the purely naturalistic approach that would have the state remain silent in the face of hateful expression. Neutralism would allow a culture of inequality to emerge unchallenged. The status of citizens as free and equal would then be threatened by two problems. First, the *problem of public trust* is that state officials, such as police officers, who learn discriminatory beliefs in civil society might use their discretion to undermine free and equal citizenship. For example, they might fail to enforce laws against domestic violence or rape. Second, the *problem of interconnection* is that discriminatory beliefs would not be narrowly contained in civil society, but would undermine free and equal citizenship more broadly. With their discriminatory views unchallenged by the

[45] For an example of this misunderstanding, see Koppelman's claim that "[Brettschneider] presents this and nothing else as the solution to the dilemma he describes." Koppelman, *supra* note 12, at 1025.

[46] BRETTSCHNEIDER, WHEN THE STATE SPEAKS, *supra* note 5, at 25.

state, people might act on views that regard minorities, women, and gays as inferior, such as by making prejudiced choices in hiring, promoting, and mentoring. Anti-discrimination laws can help, but these laws can only go so far without widespread endorsement of equality by citizens. For the free and equal status of citizens to be protected, the state should use democratic persuasion to argue against discriminatory beliefs, while respecting the rights of free speech and association.

Koppelman ignores my defense of rights, even though I uphold free speech even more categorically than he does. He supports free speech rights only conditionally on consequentialist grounds.[47] The consequentialist might be open to abandoning rights when faced with the threat of the Hateful Society.[48] Koppelman seems to take this position, writing that free speech defenders need "to be open to the possibility that those grounds are overridden if the consequences are bad enough."[49] Unlike Koppelman, I make a non-consequentialist argument for free speech based on a legitimate democracy's respect for the autonomy of citizens, or their capacity to reason about justice and the good.

Koppelman might reply that democratic persuasion is not needed, because discriminatory and hateful beliefs are marginal, like the views of a "single lonely crank" in his memorable language.[50] He claims that "[o]vert racism has been nearly eliminated during the period when the First Amendment was construed to give strong protection to racist speech."[51] In contrast to Koppelman, Robin West shows in her essay how the contemporary United States still faces continuing harms from racism, sexism, and homophobia. The statistics on hate crimes support West's argument. According to the FBI, nearly 6,000 hate crimes, including assaults, rapes, and murders, were committed in 2012.[52] To cite just one example, the *New York Times* reports that last year, a gunman "followed his victim,

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[47] *See* Koppelman, *supra* note 12.

[48] Koppelman takes a consequentialist approach to free speech and other rights. As he argues, "[a]ny consequentialist case for a given liberty is likely to rest on some combination of optimism (about what will happen absent regulation) and distrust (of the government actors who would regulate the liberty in question). The warrant for either of these will vary from one society to another." Koppelman, *supra* note 12, at 1030 (footnotes omitted).

[49] *Id.* at 1029.

[50] *Id.* at 1024.

[51] *Id.* at 1030.

[52] Press Release, Federal Bureau of Investigation, FBI Releases 2012 Hate Crime Statistics (Nov. 25, 2013), *available at* http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2012-hate-crime-statistics.

Mark Carson, for several blocks, taunting him with antigay slurs, before killing him." As the Manhattan district attorney, Cyrus Vance Jr., said, "This young man's tragic death serves as a reminder of the discrimination that many of our family members, co-workers, and friends still face."[53] These crimes did not take place in a vacuum, but were motivated by hateful beliefs. Even in cases without direct acts of violence, these beliefs teach women, minorities, and gays to hate themselves. These individuals internalize the message of contempt and inferiority. Instead of standing idly by, the state has a duty to engage in democratic persuasion to criticize the message of hate and abuse. As I noted in the last section, this generalized obligation does not, as Michelman correctly clarifies, mean the state is mandated to respond to each solitary "crank." It is a generalized obligation to promote the ideal of free and equal citizenship when democratic values are undermined by hateful and discriminatory groups.

At this point, Koppelman might admit that democratic persuasion is needed, but question whether state officials should engage in it. He suggests relying entirely on groups in civil society to argue against hateful beliefs. This view frames democratic persuasion as a mutually exclusive alternative to robust discussion among citizens. Josiah Ober and I argue instead that democratic persuasion can promote discussion in civil society.

Ober, who is one of the most insightful theorists of classical rhetoric and politics writing today, explains in his essay how carefully crafted speech by public officials has succeeded in changing minds.[54] Persuasive speech has transformed minds and practices, supporting significant cultural change in favor of equality. Ober gives the example of President Lyndon Johnson, who spoke in favor of the Civil Rights Act of 1964.[55] Engaging in democratic persuasion was essential to convincing Congress, building public support, working with civil society groups, and ultimately passing legislation to protect the equal status of citizens. The state was not silent or neutral, but made persuasive arguments that justified the proposed laws in terms of the values of freedom and equality.

The passage of the Civil Rights Act demonstrates why state speech and civil society are not isolated zones that are separated by a no-man's-land. There is considerable interaction.

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[53] Russ Buettner, *Gunman Boasted of Killing Man He Taunted with Antigay Slurs, the Police Say*, N.Y. TIMES, June 18, 2013, at A.24 (quotations omitted).

[54] Ober, *supra* note 18.

[55] *Id.*

For example, President Johnson and his Congressional allies worked with civil society leaders like Martin Luther King Jr. and the NAACP to lobby undecided votes and Congressional opponents of the legislation. They used democratic persuasion to criticize arguments by the Klan and other discriminatory organizations that opposed the passage of the Act and its goal of racial equality. They spoke persuasively for the Civil Rights Act against significant opposition. Democratic persuasion has long been crucial to enacting legislation that protects the rights of citizens, including laws against discrimination, sexual harassment, and domestic abuse. Neutralism would deprive political leaders of the persuasive tools they need to pass legislation like the Civil Rights Act. It would hardly be persuasive or even coherent for political leaders to propose protective laws without invoking the democratic values that justify those laws in the first place.

Democratic persuasion is therefore far from being a solitary solution to the problem of protecting the equal status of citizens, as Koppelman seems to think.[56] The full and varied tools of democratic persuasion include speeches by political leaders, public education, the use of the state's financial resources through grants, and the extension of non-profit status. Democratic persuasion works together with the laws that protect citizens from violence and discrimination. The point is that the diverse strategies of democratic persuasion, combined with the persuasive rhetoric that Ober describes, can effectively promote free and equal citizenship while respecting rights. Besides President Johnson's successful speeches to pass the Voting Rights Act and the Civil Rights Act, another example of effective democratic persuasion was the discontinuation of tax subsidies to Bob Jones University for its ban on interracial dating. Bob Jones ended its ban in 2000, and apologized in 2008 for its previous discriminatory policies.[57]

In the book, I identify a potential difficulty with the right of free speech, namely its "inverted" character.[58] The reason for protecting free speech is to respect the freedom and equality of citizens. Citizens are equal in having autonomy, or the capacity to reason freely about justice and conceptions of what

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[56] Koppelman writes regarding democratic persuasion, "[d]oes [Brettschenider] really believe that this alone will guarantee that minority rights will be respected in democratic politics?" Koppelman, *supra* note 12, at 1025.

[57] *Bob Jones Univ. Apologies for Racist Policies*, NBCNEWS.COM, Nov. 21, 2008, http://www.nbcnews.com/id/27845030/#.UsXVQvRDuSo.

[58] BRETTSCHNEIDER, WHEN THE STATE SPEAKS, *supra* note 5, at 71-108.

makes for a good life. The content of hate speech, however, is inverted or opposed to the reasons for protecting rights. Hate speech seeks to deny the freedom and equality of a targeted group of citizens. The danger is that citizens might mistake the state's protection of the right to express hateful viewpoints with its indifference or even approval of those views. The state could then be seen as being complicit with the hateful viewpoints that it shelters. To clarify that it does not agree with the hate speech that it protects, the state should engage in democratic persuasion to show that it supports free and equal citizenship.

Koppelman might argue that this problem of complicity simply does not exist. He has asserted that citizens do not regard the state's protection of free speech as signaling its indifference toward hateful expression. He ignores the evidence that citizens and even the courts often conflate the state's viewpoint neutrality in protecting free speech rights with its neutrality toward the content of that speech. As I argued in a piece in *Foreign Policy*, riots broke out around the world to protest the U.S. government's protection of the free speech rights of an anti-Muslim group.[59] These protests conflated the state's protection of free speech rights with its indifference to hateful, anti-Muslim values.

In the end, Koppelman agrees with value democracy's claim that free speech rights are based on substantive values of freedom and equality.[60] But he treats the state's non-neutrality toward values as an obvious point when it is actually controversial in constitutional jurisprudence, the academic literature on free speech, and popular debate. Koppelman overlooks how neutrality in rights protection has too often been thought to signal the state's neutrality toward the values expressed by hate speech. This conflation is made not only by the people who protested anti-Muslim hate speech, but by constitutional lawyers and the Court itself. Prominent constitutional lawyers, including Larry Alexander and Martin Redish, base their thinking about free speech on the idea that the state should be neutral in the values it expresses.[61] The Court itself has repeated the view multiple times that "when it comes to

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[59] Corey Brettschneider, *Born Free, Not Indifferent*, FOREIGN POLICY, Dec. 12, 2012, http://www.foreignpolicy.com/articles/2012/12/12/born_free_but_not_indifferent#sthash.CZV13J4r.dpbs.

[60] Koppelman, *supra* note 12.

[61] *Id. See supra* note 2 and accompanying text.

the First Amendment there is no such thing as a false idea."[62] Court decisions like *Christian Legal Society* v. *Martinez* mistakenly claim that neutrality about the state's values is required by the right of free speech.[63] The state needs to engage in democratic persuasion to clarify that it is not neutral toward the hateful values that it protects. Democratic persuasion would promulgate or make transparent the reasons for protecting rights, and the state's own non-neutral promotion of equality.

Koppelman's final worry is that democratic persuasion seems to disrespect the free thinking of citizens or their capacity to reason.[64] The concern is that citizens might be expected to conform to official views. Value democracy has two responses to this worry. First, democratic persuasion provides standards to evaluate and criticize state speech itself. The "substance-based limit" requires the state to use state speech only in ways that are consistent with respect for citizens' freedom and equality. If the state speaks in a way that promotes discriminatory views, that would be condemned by the normative standards that must guide democratic persuasion. Democratic persuasion includes not any act of state speech, but only speech that defends the democratic values of free and equal citizenship.

A second response is that democratic persuasion criticizes hateful viewpoints in a way that is consistent with respect for the capacity of citizens to reason. Josiah Ober's excellent essay explains this point well. President Johnson's speeches on civil rights were critical of the discriminatory viewpoints of the southern segregationists. Johnson argued that these views contradicted the core values of democracy and the American Constitution. Many segregationists disagreed with equality for African-Americans. But were the segregationists disrespected as citizens when their discriminatory viewpoints were met with reasons, evidence, and arguments for equality? Although President Johnson criticized the segregationists' denial of African-Americans' right to vote, this kind of criticism does not disrespect citizens. They are respected because democratic persuasion appeals to their reason, continues to include them in democracy, and protects their right of free expression.

President Johnson in his speech to Congress on the Voting Rights Act defended the importance of voting rights for all, even as he criticized the discriminatory views that would

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[62] REDISH, *supra* note 2, at 167 ("Under the First Amendment there is no such thing as a false idea." (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974)).

[63] Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 3009 (2010).

[64] Koppelman, *supra* note 12.

deny the vote to African-Americans. As he declared, it is wrong "to deny any of your fellow Americans the right to vote in this country."[65] President Johnson's criticism of discriminatory views was not disrespectful. Rather, democratic persuasion vindicated a deeper idea of respect for the freedom and equality for all citizens that is at the heart of democratic legitimacy.

IV. IS DEMOCRATIC PERSUASION TOO RETICENT? A RESPONSE TO ROBIN WEST ON TORT AND HYPOCRISY

I have responded to concerns about democratic persuasion from a neutralist direction. Robin West raises concerns from the opposite side. She thinks that the logic of my argument should open room for even more extensive kinds of democratic persuasion beyond what I would endorse.[66] In particular, she argues for using tort law to allow private citizens to sue and inflict civil penalties on hate groups. Jeremy Waldron and Catharine MacKinnon have similarly suggested that people who are subject to hate speech could sue for damages.[67] A tort-based approach has recently been taken up by Justice Alito. Dissenting in *Snyder v. Phelps*, Alito acknowledges that the state cannot prohibit the Westboro Baptist Church's hate speech, but he suggests that a private tort might be allowed against the church.[68]

I recognize that these proposals are intended as ways of criticizing hate groups and promoting the values of free and equal citizenship. But I am skeptical about using private torts as a means of pursuing democratic persuasion for two reasons. First, it is crucial to my proposal that individuals be able to effectively exercise a right to dissent from democratic persuasion and to resist it. Unlike Michael McConnell and some of the Court's jurisprudence, I have argued that this right does not entitle the advocates of hateful or discriminatory viewpoints to public subsidies of their views.[69] However, torts

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[65] President Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965), *available at* http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650315.asp.

[66] West, *supra* note 13.

[67] *Id.*; *see also* JEREMY WALDRON, THE HARM IN HATE SPEECH 11 (2012); Catharine MacKinnon, *Model Antipornography Civil Rights Ordinance*, *in* CONSTITUTIONAL LAW AND AMERICAN DEMOCRACY 675-79 (2011).

[68] Snyder v. Phelps, 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting).

[69] On my view, doctrines such as unconstitutional conditions and the limited public forum are mistaken in creating positive rights for viewpoints to be subsidized by the state. *See* Corey Brettschneider, *Value Democracy as the Basis for Viewpoint Neutrality: A Theory of Free Speech and Its Implications for the State Speech and*

would go much further than non-subsidy. While non-subsidy refuses to give additional financial support for hateful viewpoints, torts risk taking away all resources from citizens who engage in hate speech, perhaps to the point of bankruptcy. The aim and likely effect of torts is that the right to free speech would become a mere formality without the resources to exercise it. I would thus reject proposals that aim to prohibit speech, such as a proposal to publicly tax or privately sue hate speech out of existence. Such proposals would violate the right to free speech in a way that would deliberately exclude the real possibility that citizens could dissent. By contrast, non-subsidy allows citizens to continue to dissent. For example, although their tax subsidies were discontinued, Bob Jones University and the Christian Legal Society continued to exist and exercise their right to dissent.

Second, I think that turning to private tort risks losing the clear notion that the state has an obligation to speak in democratic persuasion. Pursuing democratic persuasion through private torts might create the impression that hate speech is only an issue between individuals, rather than an attack on the public, democratic values of freedom and equality that the state has a duty to secure for all citizens. The state makes it clear that it is expressing public democratic values when it criticizes hate groups and refuses to subsidize them. I worry that the turn to private law moves in exactly the other direction, turning hate speech into a private matter rather than one of public relevance.[70] At least as the proposal is stated, it is not clear how West's plan could turn private lawsuits into the kind of public promulgation that I am advocating. It is also not clear how it would be compatible with the right to free speech.

While being sympathetic to democratic persuasion, West also raises the concern that the state might speak in favor of democratic values, while in reality working to undercut them. West calls this the problem of the "hypocritical state."[71] The risk is that democratic persuasion could function as a kind of ideology that masks the real injustices committed by the state. West is right to worry about the hypocritical state. A state that

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Limited Public Forum Doctrines, 107 NW. U. L. REV. 603, 639-40 (2013) [hereinafter Brettschneider, *Value Democracy*].

[70] Ben Zipursky has suggested in conversation that this objection might be met if the attorney general brought the suits to make clear that the public interest is at stake. This is an interesting proposal, and if developed, might indeed answer the objection about public expression, although my other concerns about abridging the right to dissent would remain.

[71] West, *supra* note 13.

attacks democratic values, no matter what it says, would undermine the basis for its legitimacy. Democratic persuasion is a necessary but not sufficient part of what a fully legitimate state must pursue. The legitimate state must respect the value of free and equal citizenship in both its acts and its speech.[72]

West and I both regard the hypocritical state as illegitimate. But we differ in that she seems to regard the hypocritical state as worse than a state that consistently disrespects free and equal citizenship. I would argue that the hypocritical state is highly problematic, but it at least identifies the ideals of legitimacy that its actions fall short in accomplishing. These ideas can then be used by critics of the state to advocate for change. The public officials who verbally affirm democratic values can also be held to the standards that they have already admitted are valid. Jon Elster calls this tendency for verbal commitments to turn into public standards the "civilizing force of hypocrisy."[73] For example, the segregationist government in the United States was a hypocritical state. It espoused ideals of equality that it systematically violated. But pioneers in the Civil Rights Movement and supportive public officials were able to transform that state into one that was more legitimate. They pointed to America's hypocrisy on race to argue for the country to move closer to the ideal of equality. Thus, the legitimacy of the democratic persuasion was actually a lever to bring the practices of the state in line with its own stated ideals. In this sense, the hypocritical state may be preferable to one that holds no pretense of supporting individual rights. At least in the hypocritical state, there is a foothold for reform.

The evolution of constitutional law is often characterized by movements to iron out the contradictions of the hypocritical state and to narrow the gap between rhetoric and reality. But this progress is only possible if the state at least acknowledges the validity of democratic values. Hypocrisy is the midway point on the path from injustice to legitimacy.

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[72] I have argued that the legitimate state must guarantee welfare rights. *See* BRETTSCHNEIDER, DEMOCRATIC RIGHTS, *supra* note 20; Corey Brettschneider, *Public Justification and the Right to Private Property: Welfare Rights as Compensation for Exclusion*, *in* PROPERTY-OWNING DEMOCRACY: RAWLS AND BEYOND (Martin O'Neill & Thad Williamson eds., 2012).

[73] Jon Elster, *Deliberation and Constitution Making*, *in* DELIBERATIVE DEMOCRACY 97, 111 (Jon Elster ed., 1998).

V. IS DEMOCRATIC PERSUASION TOO LIMITED IN SCOPE AND DOES IT IGNORE SUBTLE FORMS OF COERCION?: A RESPONSE TO SONG

Sarah Song, like West, thinks that, far from being too aggressive, democratic persuasion might be too weak.[74] But whereas West focuses on expanding the tools of democratic persuasion, Song seeks to expand the scope of the views that are addressed by it. She argues that democratic persuasion should be committed to cutting off non-profit status to the Catholic Church. In her view, the only thing that seems to distinguish Bob Jones and the Catholic Church is that while the former is a racist institution, the latter is sexist.

In *When the State Speaks*, I suggest that democratic persuasion should argue against viewpoints, including those that are sexist, racist, or homophobic, that attack the public ideal of free and equal citizenship. The Church, however, has taken the position that restricting the priesthood to men does not imply that it opposes the equal status of women. It claims that it is expressing a purely religious doctrine that links the priesthood to Jesus Christ, a male, while welcoming women to serve in high offices in the professions and politics. Song's response is that the case for the non-public nature of the priesthood restriction is "ambiguous" at best.

I agree with Song that the question of whether the Catholic Church opposes free and equal citizenship is complicated and that my argument in their defense might not be obvious. I take the position, though, that when the issue is ambiguous we should give the organization the benefit of the doubt about the consistency of its position with the ideal of free and equal citizenship. Such an approach is called for to avoid the charge of selectivity and partisanship that Calabresi raises. It is also needed to make the kind of pluralism that is central to value democracy as broad as possible.

The Westboro Baptist Church and Bob Jones University before 2000, on the other hand, were not ambiguous about their opposition to the equality of blacks and gays.[75] Bob Jones University banned advocacy for the right to interracial marriage. Westboro has as its stated purpose the belief that gays should be

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[74] Song, *supra* note 14.

[75] Bob Jones University dropped its ban on interracial dating in 2000, and later issued an apology in 2008 for its previous racially discriminatory policies. *See supra* note 57 and accompanying text.

murdered. These are not hard cases of reasonable disagreement and clearly differ from the example of the Catholic Church.

While Song pushes in some parts of her essay toward a more extensive form of democratic persuasion, in other parts she worries that democratic persuasion might be coercive.[76] Song invokes the nineteenth-century English philosopher John Stuart Mill's warnings of the coercive dangers of majority opinion to note that some forms of persuasion might feel coercive to those on the receiving end of it. I think that Mill could not have meant to say, however, that any kind of persuasion is coercive. To say that would be inconsistent with his defense of free speech, in which he rules out coercion, but allows for "remonstrating with [a person], or reasoning with him, or persuading him."[77] Mill makes this remark in the context of allowing others to reason with a person for the sake of his own good. If Mill permits that, he would surely allow others to persuade a person for the sake of protecting the standing of others as free and equal citizens. His distinction between prohibited coercive measures and permissible argument also can only make sense if persuasion is not equated with coercion. It is not coercive to allow good arguments from others to persuade a free citizen to change a belief.

Similarly, I would resist the idea, which Song finds in the work of Robert Nozick, that anything that makes a choice less desirable counts as coercive once that consequence is communicated. She concludes that the policy of withdrawing the privileges of tax exemption for discriminatory groups is coercive, because it makes a choice (continuing to undermine free and equal citizenship) less desirable (it will result in the discontinuation of tax exemption). This definition of coercion is overbroad. As Song herself mentions, it allows any way of making an action "less desirable" count as coercive. For instance, it seems to imply that it would be coercive to have a policy that students should maintain a certain G.P.A. to receive a state-funded college scholarship, since the policy makes having low grades less desirable. I use the term coercion instead to refer to *acts that aim*

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[76] Song, *supra* note 14.

[77] J. S. Mill, *On Liberty*, *in* ON LIBERTY AND OTHER WRITINGS 1, 13 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859). Although Song claims that I downplay Mill's worries about the coercive aspects of majority opinion, he did not think that people had a duty to never criticize hate speech. As I wrote in WHEN THE STATE SPEAKS, Mill believes "that when 'the acts of an individual may be hurtful to others or wanting in due consideration for their welfare, without going to the length of violating any of their constituted rights . . . the offender may be justly punished by opinion, though not by law.'" *Id.*

at prohibiting a choice, not merely acts that make a choice harder to make. I employ this narrower definition of coercion as aiming at prohibition to distinguish proper from improper means of democratic persuasion.

Attempting to force people to change their minds violates their right of free expression. But attempting to convince them can be made compatible with their free choice. The use of subsidy and non-profit status also leaves this choice intact. Withdrawing a tax privilege is not coercive in this definition because the state does not aim at prohibiting the existence of these groups. There is no denial of rights in ending these subsidies, since there is no entitlement for groups to receive government subsidy or exemption from common taxation. I have argued at length against a misplaced doctrine of constitutional conditions that reframes free speech as a mistaken kind of positive right to tax subsidy.[78] The continued existence of Bob Jones University and groups like the Christian Legal Society, despite the discontinuation of government subsidy, serves to illustrate that there is no coercion in my sense of the term that comes with denial of subsidy.

In her reply, Song raises an additional argument for a free speech right to receive subsidies. She cites John Rawls' notion of the worth of liberty to suggest that groups might claim 501(c)(3) status and subsidies as a matter of rights.[79] According to Rawls, fundamental rights, to avoid being mere formalities, must be backed by resources that allow individuals to exercise those rights. The literature on unconstitutional conditions and the related "limited public forum" doctrine regard it as coercive when the state denies money on the basis of the viewpoint being expressed.[80] According to this literature, it violates rights to condition funds on private actors endorsing a set of beliefs.[81]

I want to resist, however, any excessively broad defense of a right to receive government subsidies for discriminatory and hate groups based on the worth of liberty. The fact that many of these groups have access to non-government resources to continue expressing their views suggests that ending government subsidies does not deny a substantive right. As I

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[78] Brettschneider, *Value Democracy*, *supra* note 69, at 639-40. For an example of such a doctrine, see, e.g. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1424-25 (1989).

[79] Song, *supra* note 14.

[80] *See, e.g.*, Sullivan, *supra* note 78, at 1428.

[81] *Id.* at 1428, 1506.

have noted above, Bob Jones University and the Christian Legal Society continue to thrive without these subsidies, and so would the Boy Scouts. I have argued in other work that distributive justice in material resources should be an important concern for citizens in a democracy. Citizens should have a right to the basic material resources needed to exercise their rights and liberties.[82] But the right to basic resources does not imply any right to be subsidized in expressing one's viewpoint. Positive rights exist as an entitlement of poor and needy citizens, separate from the issue of non-profit status or government grants for specific purposes. The logic of the worth of liberty animates much of the flawed jurisprudence on unconstitutional conditions and the limited public forum.

I do agree with Song and argue in the book that when the government has a monopoly on a resource, such as that which the U.S. Postal Service once possessed over mailing letters, the denial of that resource might result in the denial of a right. For example, the Supreme Court has ruled that the Postal Service cannot condition mailing letters based on the viewpoints they express.[83] In this case, the denial of a resource denied the substantive right to free speech, given how much the citizenry depended on the Postal Service to send letters. On these same grounds, I would oppose measures that would have libraries ban books or block access to certain internet sites in the supposed name of democratic persuasion. These libraries are the sole access that some users have to information and the internet. To give another example, consider a hypothetical based on the *Christian Legal Society* case. If the Christian Legal Society, as a student group, were barred from meeting on campus, there could be a worth of liberty argument for a free speech violation. Meetings in campus spaces might be the main way to communicate for students, such that denying access to those spaces would deny free speech. However, the right for a student group to meet on campus does not mean that they have a right to the active support of an official state subsidy paid by public taxation.

In sum, I agree with Song that in a limited set of cases there might be a free speech argument based on a concern for the worth of liberty. But these cases are limited to government monopolies. They do not apply to government subsidy of discriminatory or hateful groups. The concern about monopolies

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[82] *See* BRETTSCHNEIDER, DEMOCRATIC RIGHTS, *supra* note 20, at 5-6.

[83] Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965).

serves as yet another bulwark to protect free speech in my theory of democratic persuasion.

CONCLUSION

I began this response essay by highlighting Frank Michelman's arguments for democratic persuasion as a part of the state's legitimacy. He suggests the best way to understand this relationship is that democratic persuasion, while not sufficient on its own for legitimacy, should be seen as contributing to whether a state meets the threshold for being democratically legitimate. What makes a state legitimate is whether it upholds the democratic values of freedom and equality for all its citizens. I emphasized why stability, the duty of transparency, and the arguments for public trust and interconnection all supported a role for the state in promoting and defending its own underlying values.

With these arguments in mind I turned to critics who thought democratic persuasion should be tempered. Steve Calabresi argued that while the theory is essentially correct, it should not discontinue the privileges of tax-exemption for hateful religious groups. I responded by highlighting why a right to be free from coercive bans on speech or religion does not entail a right to be free from criticism or an entitlement to a public subsidy. I also argued that my proposal clarifies the criteria for receiving tax exemption, reducing the potential for abuse of government power compared to existing law.

Koppelman worried that democratic persuasion might be unnecessary, ineffective, and disrespectful to the proponents of hateful viewpoints. I argued that Koppelman confused criticism of hateful viewpoints with disrespect for the reasoning capacity of citizens who express those viewpoints. Democratic persuasion shows respect, even while challenging beliefs, by upholding those citizens' free speech rights, by appealing to their reason, and by continuing to include them in our shared democracy. Drawing on Josiah Ober's essay, I gave examples of the effectiveness of democratic persuasion from the arguments that President Johnson and other political leaders made for the Civil Rights Act and Voting Rights Act. Forcing political leaders to be silent or neutral about democratic values, as Koppelman seems to suggest, would deny them of one of their most powerful tools to pass legislation. I explained that democratic persuasion is part of a larger defense of free and equal citizenship, including laws against discrimination and domestic violence.

While in different ways Calabresi and Koppelman find democratic persuasion to be too strong, Robin West argued I should widen the theory to include tort law. West's proposal would allow private individuals to sue the advocates of hateful viewpoints. Much of what she says suggests an important reply to some of Koppelman's claims that racism may not be much of a problem in civil society. Her arguments reinforce my concern about ways that citizens in their relationships with each other could threaten values of free and equal citizenship. But I resisted her specific proposals to use tort law on the grounds that it would deny the right of free speech and the right to dissent from democratic values.

Song in turn highlighted why I should expand the scope of the theory to criticize the Catholic Church for restricting the priesthood to men. While agreeing that democratic persuasion should criticize beliefs that discriminate against women, I resisted her proposal to condemn the Catholic Church. I distinguished between the Church's position, which welcomes women to serve in professional and political office, from the viewpoint of groups, like the Westboro Baptist Church, that attack free and equal citizenship. Although the strength of the Church's claim to support public equality for women might be questioned by Song, democratic persuasion is limited to clear cases of opposition to democratic values. This distinction allowed me to demonstrate some of the reticence Calabresi calls for without completely exempting religious groups like the Westboro Baptist Church from democratic persuasion.

In sum, I propose democratic persuasion as a "golden mean" between the prohibitionists who would ban hateful viewpoints and the neutralists who would have the state say nothing to criticize discrimination. It defends the standing of all citizens as free and equal while respecting their expressive rights.