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SYMPOSIUM

Legitimacy and Autonomy

VALUES OF THE SPEAKING STATE

Frank I. Michelman[†]

INTRODUCTION

A. *Aims of This Essay*

When, if ever—on behalf of what sorts of causes, using what sorts of instruments and powers—ought the state engage in political debates, or be required, invited, or permitted by law to do so? In *When the State Speaks, What Should It Say?*,¹ Corey Brettschneider’s message is that the good state will sometimes find itself obliged, prudentially and morally, to assume an active role as partisan in highly charged political controversies. Brettschneider urges, accordingly, that we will do best to read—and, as necessary, to change—our constitutional law to keep or bring it in line with that view.

These propositions are contentious. In support of them, Brettschneider urges that riding on their acceptance is no lesser a stake than the legitimacy of the state. Surprisingly, though, our author nowhere really stops to spell out what “legitimacy” *is*—to say what it *means* to judge a political practice as legitimate or not, or why we should care about such judgments. My aim in this commentary is partly supplementary: to fill this gap in Brettschneider’s exposition. It is also partly critical: to see how (or whether) the gap can be filled in a way that will actually support the philosophical and constitutional-legal

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

stances of *State Speaks*. I think it can be done, but perhaps only by ascribing to Brettschneider a somewhat novel (but I do not say necessarily mistaken) conflation of a liberal-theoretic notion of normative political legitimacy with a personal-ethical value of autonomy.

B. A State Duty of Political Partisanship?

Provocative as Brettschneider's claims surely are meant to be, they nevertheless start out from a set of premises that will likely strike most readers as both innocuous and right-minded. Somewhat loosely restated, and pending more precise analysis to follow below, these initial premises run as follows.

State political regimes, including democratic ones, are designed to impose a measure of coercive rule on citizens. The legitimacy (in the sense of the moral justification) of any state's practice of coercive rule is closely tied to the visibility within that practice of a commitment to conform its operations to certain principles of regard for the freedom and equality of citizens.² Actors in civil society—persons and organizations—nevertheless can, and they sometimes do, emit messages of contradiction and rejection of these legitimacy-sustaining principles. Such messages and the ideas they carry are what the book calls “hateful.”³ Persons and groups sometimes send around hateful ideas by the sentences they utter, and sometimes by the policies and practices they adopt and follow. Of course there will always be controversy over which words and practices do and do not cross the line of contradiction of the legitimacy-sustaining values of free and equal citizenship (partly because there will always be controversy over exactly how to define those values).⁴ But wherever you or I would draw the line of contradiction, we might be tempted, at least, by this key thought of Professor Brettschneider: where the state stands silent in the face of the exhibition of ideas that flagrantly cross the line of contradiction, that silence can possibly cloud the visibility and certainty of the state's own commitment to the contradicted values, with attendant risk of a resultant loss of societal attachment to those values.⁵

All of that, as far as it goes, will doubtless make good enough sense to most readers. Where many will want to enter a

² See, e.g., *id.* at 49.

³ See *id.* at 1 (classifying as “hateful” those views or viewpoints that express “an idea or ideology that opposes free and equal citizenship”).

⁴ See *id.* at 47, 90.

⁵ See, e.g., *id.* at 39.

strong cautionary reservation is at the point of the book's further claim: that the state stands under some kind of necessitation to depart from a posture of silence in the face of hateful speech.⁶ That does not follow, the doubters will say, for two interconnected reasons: primarily and decisively, because the "silence" in question is in line with a principle of state neutrality on the field of political debate, which is itself a basic (or even a legitimacy-sustaining) commitment of liberal democracy;⁷ secondarily and supportively, because attentive observers will accordingly construe the state's silence as an act of fidelity to that principle and therefore not as the state's condonation of hateful views.⁸

And so we draw near to what is controversial in Professor Brettschneider's book. In *State Speaks*, Brettschneider asserts the state's obligation—"obligation" is his repeated word of choice⁹—to respond to hateful speech by its own engagement in a type of expressive activity that he labels "democratic persuasion."¹⁰ Democratic persuasion comprises the state's use of a congeries of communicative means to denounce and oppose the propagation of "hateful" ideas that plainly and sharply contradict a somewhat thinly defined, "political" ideal of free and equal citizenship.¹¹ By Brettschneider's argument, the state is profoundly duty-bound to defend that political ideal against attack and attrition, for the particular reason that a continued public commitment to it provides the necessary foundation for the state's legitimacy: "If . . . hateful doctrines were left to prevail, they could subvert the basic principles of a legitimate democratic state."¹² The

⁶ See, e.g., *id.* at 6 ("[T]he state has the obligation to use its expressive capacities to defend the values of free and equal citizenship . . .").

⁷ See *id.* at 9 (describing, while rejecting, "neutralism" as the political doctrine that "the state should not promote or express any particular set of values").

⁸ But see *id.* at 43-44 (asserting that "[a] state that fails to answer" hateful views would "risk being seen as . . . complicit in" those views); *id.* at 84 (same).

⁹ See, e.g., *id.* at 6, 47, 111, 122. Brettschneider also sometimes (and apparently equivalently) speaks in this connection of a "duty" of the state. See, e.g., *id.* at 18, 114, 119.

¹⁰ See *id.* at 25 ("[T]he state rightly engages in democratic persuasion when it exercises its expressive capacity to promote the values of free and equal citizenship.").

¹¹ See *id.* at 14 (initially defining this strictly political ideal, as distinct from "comprehensive" conceptions of metaphysical or social equality); *id.* at 42-49 (recounting various expressive means available to the state for defending the ideal against attack).

¹² *Id.* at 7. The message recurs in the book like a drum-beat. See *id.* at 4 ("These democratic . . . values [of free and equal citizenship] should be . . . promoted by the state because they ground the legitimacy of government and justify protecting rights . . ."); *id.* at 18 (ascribing to any "legitimate democracy" a duty to promulgate values that justify rights); *id.* at 34 (calling "central to legitimacy" the idea that "citizens should all be treated as free and equal"); *id.* at 39 (explaining when considerations of "democratic legitimacy" require efforts by the state to influence public

approved means of defense encompassed by democratic persuasion stop short of direct coercive muzzling of hateful speech, but they do include viewpoint-discriminatory grants and refusals of state financial support that many might construe as punitive or regulatory, in purpose or effect.¹³

This positive duty to defend might not be strictly a *legal* one. While Brettschneider affirms that “the ideal of democratic persuasion . . . provides a guide to identify when state speech is appropriate,”¹⁴ I have found nothing in *State Speaks* to say that a court should ever treat a state’s failure to speak as a violation of constitutional law.¹⁵ Rather, when Brettschneider refers to a state’s obligation, it seems he has in mind a higher calling of moral or ethical responsibility.¹⁶ Be that as it may, Brettschneider plainly does mean for recognition of this calling to carry over into our practice of judicially enforced constitutional law, at least to this extent: he means for it to serve as a decisive reason for *not* reading the Constitution in ways that would *prevent* the state’s due engagement in democratic persuasion—for why, in other words, “it should be constitutionally permissible for the state to speak in favor of values of free and equal citizenship”¹⁷

C. A Question of Legitimacy?

Readers will ponder and doubtless will differ over how far, if at all, our author’s claims and proposals depart from

opinion); *id.* at 44 (calling it “essential in a legitimate society” for the state to explain the reasons for protecting rights); *id.* at 66 (affirming the state’s proper role in articulating “values that “are central to its own legitimacy”); *id.* at 79 (denying that the state can be neutral with regard to “defense of values central to its own legitimacy”); *id.* at 91 (affirming the state’s role of defending against attack values that “are central to the legitimacy of the state”).

¹³ See *id.* at 109-41 (chapter four).

¹⁴ *Id.* at 4.

¹⁵ Brettschneider writes that “citizens . . . have a fundamental entitlement for the justification [for law] to be articulated,” and that “[s]uch an [entitlement] is required by rights,” *id.* at 43, but I doubt that he means either that citizens have a *legal* entitlement or that “required by rights” means the entitlement is itself a legal right. Rather, the entitlement is correlative to an obligation of the state to “promote the reasons for rights,” *id.* at 47, which obligation is never presented as a *legal* obligation.

¹⁶ Brettschneider’s text sometimes couples the state’s “duty” or “obligation” to engage in democratic persuasion with the “duties” or “obligations” of citizens to criticize the hateful views of others and furthermore to engage in “reflective revision” of their own hateful-tending beliefs, see, e.g., *id.* at 7, 21, 28, 93, and he neither plausibly could nor does in fact regard the citizens’ duties as cognizable or enforceable in law. See *id.* at 37 (simultaneously asserting both citizens’ “obligation” of reflective revision and right to “be free to reject” democratic ideals); see *id.* at 63 (observing that reflective revision must be an extra-legal, “voluntary” duty because “coercion would deny the kind of autonomy required for reflective revision”).

¹⁷ *Id.* at 122.

broad-sense liberal political morality, political wisdom, and sound constitutional law. Those will not be my questions here.¹⁸ I shall rather be looking upstream in Brettschneider's argumentation, specifically at his reliance on a political-theoretic notion of legitimacy to help him move his proposals safely past predictable resistance from (some) liberal ideologists and American constitutional lawyers.

Brettschneider writes, after all, as a dedicated disturber of a widely prevailing, prescriptive imagery of the American state as neutral umpire in a free contest of ideas. He classes his work as critical in tenor, fraught with calls for changes (more politely "reinterpretations") in the extant jurisprudence of the Supreme Court.¹⁹ He explains with care how his interventions will likely be found to deviate from American constitutional law as currently construed by the Court.²⁰ He faults the Court's work in general for excessive submission to a doctrine of state neutrality.²¹ He expects his views to be contentious among liberal mainstreamers, with whose outlook he does himself, as a liberal, feel a strong tug of sympathy.²² He anticipates objection both from those who worry that viewpoint-discriminatory deployment of the state's vocal powers (and of course even more so its powers of the purse) is already past the limit of coercive control over political opinions that is tolerable in a democracy,²³ and from those who

¹⁸ For what it is worth, I would generally associate myself with the views of Professor Calabresi in this Symposium, see Steven Calabresi, *Freedom of Expression and the Golden Mean*, 79 BROOK. L. REV 1005 (2014).

¹⁹ See BRETTSCHEIDER, *supra* note 1, at 144.

²⁰ See *id.* at 98-99 (faulting the Supreme Court's application of the Bill of Rights in *Wisconsin v. Yoder*, 406 U.S. 205 (1972)); see also *id.* at 115-25 (faulting the Court's neutralist groundings for decisions in regard to the state's management of "limited public forums," its impositions of conditions on recipients of state funds, and its selective refusals of display-space on state real estate).

²¹ See *id.* at 47 (finding the Court's "jurisprudence" to be "often couched in excessively value-neutral terms").

²² Brettschneider defends a strict constitutional rule against viewpoint-discriminatory restrictions on speech. He thus takes sides with civil-libertarian liberals, against objections that such a rule effectively bars the state from its most straightforward means of combating the kind of "hateful" speech that he, himself, sees as posing a threat to values essential to legitimacy. His position is that, at least as long as a regime is committed to the state's due engagement in democratic persuasion, its incorporation of a strict rule against coercive restrictions on viewpoints counts distinctly in favor of its legitimacy. See BRETTSCHEIDER, *supra* note 1, at 80-81, 105; *infra* Part II.A.4.

²³ See BRETTSCHEIDER, *supra* note 1, at 7 (addressing those "who are concerned about excessive state power"); at 12 (same); at 94 (addressing the view that "state action—even when limited to expression—falls into the category of coercion per se").

start with a strong intuition that, coercion entirely aside, strict state neutrality is essential in a just political regime.²⁴

Neither group will be initially disposed to draw much comfort from the suggestion that the state is morally licensed to speak only in defense of “the right values.”²⁵ And how, then, will our author hope to convert the liberal doubters? I have already told you a key part of the answer: “Legitimacy!” A due regard for that sovereign political-moral value should lead reluctant liberals toward acceptance of a departure from “neutrality” in deference to a higher necessity of the state’s due engagement in democratic persuasion.²⁶

I. THE ARGUMENT FROM LEGITIMACY

A. *A Standard Liberal Discourse of Legitimacy*

Whatever Brettschneider means by “legitimacy,” it must be a value of relatively urgent concern to liberals. But what exactly is this value?

Common political discourse applies the terms “legitimate” and “legitimacy” to any of a number of different objects.²⁷ These can range from particular acts or behaviors of specific institutional components of a legal system (say, a decision of the Supreme Court), to entire political orders or regimes, as perhaps represented by a country’s constitution or body of constitutional laws.²⁸ The discourse furthermore uses these terms to target any of a number of different virtues or merits in or of those objects.²⁹ Some measure of ambiguity, therefore, must attend upon Brettschneider’s invocations of “legitimacy” in support of his prescriptions for state engagement

²⁴ See *id.* at 9 (addressing the “neutralist” doctrine that “the state should not promote . . . any particular set of values”); *id.* at 73 (same).

²⁵ *Id.* at 123.

²⁶ See authorities cited in note 12, *supra*.

²⁷ See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1802 (2005). For a thorough and meticulous survey and analysis of these usages and their complex (often subtle) interconnections, including references to a wide sweep of the literature, see *generally id.*

²⁸ See, e.g., JOHN RAWLS, POLITICAL LIBERALISM 137 (1993) (casting a “liberal principle of legitimacy” in terms of the appearance within a country’s constitution of certain “essential” provisions). *But see* Frank I. Michelman, *Ida’s Way: Constructing the Respect-Worthy Governmental System*, 42 FORD. L. REV. 345, 360-62 (2003) (questioning a strict equation, for this purpose, of a state’s regime with its strict-sense constitution).

²⁹ See Fallon, *supra* note 27, at 1790-91 (differentiating among “legal,” “sociological,” and “moral” legitimacy); *id.* at 1792 (differentiating between “ideal” and “minimal” moral legitimacy).

in democratic persuasion, until we have narrowed down to one each (a) the class of targeted objects and (b) the desired virtue or merit in objects in that class, to which Brettschneider means those invocations to refer. To this end, we rely as closely as possible on Brettschneider's texts, construing them in the light of the apparent needs of his argument.

1. The Object Class: Legitimacy of the State Political Order

We can deal quickly with object classes. Words and purposes conspire to show that Brettschneider's concern is with attributions of merit to entire, constitution-bound, state-centered practices of social ordering maintained, in part, by coercive laws. His text consistently refers, in terms, to the question of the legitimacy of "the state" (or, equivalently, of the "government," "society," or "democracy" in question).³⁰ His claims characteristically turn on an idea of *the state's* special calling to uphold the terms and conditions on which *its* legitimacy is said to depend.³¹ Such usages are standard within the common discourse.³² And of course Brettschneider's argument to reluctant liberals becomes orders of magnitude more urgent when taken to mean that the meritoriousness (in some sense) of an entire constitutional order (not just of one or another specific institutional act or arrangement within that order) depends on a state's due engagement in democratic persuasion.

2. The "Moral" (Not Merely "Sociological") Legitimacy of the State Regime

We come, then, to the question of the particular meritorious character—the particular targeted virtue of a political regime—at which a legitimacy judgment (in

³⁰ See authorities cited in note 12, *supra*. Brettschneider does twice speak of the Supreme Court treating "certain laws" as legitimate (or not), see BRETTSCHEIDER, *supra* note 1, at 82, or striking down certain "laws" as illegitimate, see *id.* at 149. These applications of legitimacy judgments to individual laws are best understood as parasitic on their application to state level regimes or constitutions: an "illegitimate" law being simply a law that fails to conform either to a legitimate constitution or to principles that any legitimate constitution supposedly would contain. (Thus, in striking down certain laws as illegitimate, the Supreme Court does so "because the reasons and beliefs for such laws violate public principles that are central to the state's own legitimacy." *Id.* at 149.)

³¹ See authorities cited in note 12, *supra*.

³² See Fallon, *supra* note 27, at 1796 ("The leading theories of moral and political legitimacy have primarily addressed the legitimacy of constitutions or governmental regimes . . .").

Brettschneider's usage) is aimed. A sufficiently complete response will take us through several steps. The first is that Brettschneider here is not just talking about legitimacy in what has been called a "sociological" sense of that term, referring to current facts of acceptance by the populace of the regime's claim to merited political authority.³³ Rather, he means legitimacy in its *normative* or *regulative* sense of a standard of "rightful rule"³⁴—a measure of the regime's moral "worthiness to be recognized"³⁵—that we as external evaluators bring to the table.³⁶

As between a descriptive–sociological and a regulative–moral construction of legitimacy judgments, only the latter will fit comfortably with both our author's words and his argumentative purposes. Brettschneider carefully differentiates "the crucial value of legitimacy" from the value of (mere) "stability."³⁷ "Legitimacy," in his pages, comes regularly coupled with "justification." In order for the state "to be legitimate and for the laws to be justifiable to all," he writes, the state must be committed to the equal status of citizens.³⁸ "Central to the legitimacy of the democratic state" is the idea that coercion of citizens by law requires sufficient "justifying reasons."³⁹

The apparent point of these remarks is to supply reluctant liberals with a super-compelling reason to give ground on what they have been accustomed to regard as a main principle of democratic political rectitude: strict state neutrality on the field of political debate. Avoidance of a loss to the state's moral-sense legitimacy undoubtedly supplies a reason of that kind.⁴⁰ Avoidance of a substantial risk of loss of the state's sociological legitimacy might also, of course, supply such a reason, but only if we are shown credible grounds for belief that such a risk is really pending. I believe few readers would think it plausible to

³³ See *id.* at 1790, 1795 (defining a "sociological" usage for "legitimacy").

³⁴ COREY BRETTSCHEIDER, *DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT* 18 n.23 (2007).

³⁵ Fallon, *supra* note 27, at 1796 n.25 (quoting JÜRGEN HABERMAS, *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 178 (Thomas McCarthy trans., Beacon Press 1979) (1976)).

³⁶ See *id.* at 1797-98 (noting several kinds of evaluative theories that various evaluators employ).

³⁷ See BRETTSCHEIDER, *supra* note 1, at 107 ("If we focus solely on the value of stability and ignore the crucial value of legitimacy, we would have no way of distinguishing between a stable Hobbesian leviathan and a stable rights-protecting liberal society."); *id.* at 30 & 180 n.4 (endorsing John Rawls's distinction between a "*modus vivendi*" and "stability for the right reasons" and equating the latter with a regime's legitimacy).

³⁸ *Id.* at 14.

³⁹ *Id.* at 49.

⁴⁰ See *infra* Part I.A.5.

maintain, and Brettschneider at no point suggests any reason to believe, that the American state's sociological legitimacy has been placed at risk by the state's obvious failure, to date, to commit to a policy of engagement in democratic persuasion, up to, or anywhere near the level prescribed in *State Speaks*.⁴¹

3. Legitimacy as the Test of Our Moral License for Support of the State Regime

Brettschneider's "legitimacy," we have so far rather comfortably discerned, calls for a regulative, not a merely descriptive, judgment aimed at entire state-level regimes of political rule. And so we come to a third point, which also, like those first two, fits easily into the common discourse: to wit, the legitimacy judgment is specifically concerned with the presence or absence of moral justification for the coercive aspects of legal ordering by and under the regime in question. In a prior book, Brettschneider wrote that a certain, normative conception of democracy provides "the best way to legitimize the state's use of force."⁴² In *State Speaks*, he writes that "central to the legitimacy of the democratic state" is the idea that "[c]itizens should be coerced" only in accordance with certain kinds of reasons.⁴³

Thus, Brettschneider endorses a standard line of liberal thought, which runs, in short, as follows⁴⁴: Effective legal ordering is a very great political value. In pursuit of this value, the state must be able to exert credible and effective demands on everyone for a general regularity of compliance with its duly issued laws, like or agree with them or not. Such a demand requires a degree of further justification before supposedly free and equal citizens.⁴⁵ To judge a state regime legitimate is to say that it contains a sufficient set of justice-serving or human-serving structures, assurances, and commitments to give everyone prevailing reasons for compliance—and thus to make morally supportable our own

⁴¹ In further support of a regulative construction of Brettschneider's use of "legitimacy" in BRETTSCHEIDER, *supra* note 1, we may take note of his use of "legitimacy" in a prior book to mean the standard of "rightful rule" or of "the justifications of coercion" or of "the state's use of force." BRETTSCHEIDER, *supra* note 34, at 8, 11, 18 n.23, 24, 54, 59.

⁴² *Id.* at 11.

⁴³ BRETTSCHEIDER, *supra* note 1, at 49.

⁴⁴ See Michelman, *supra* note 28, at 345-47 (recapitulating this standard line of liberal thought); see also Fallon, *supra* note 27, at 1798 (describing in similar terms a class of "minimal" theories of moral legitimacy as applied to political regimes).

⁴⁵ See BRETTSCHEIDER, *supra* note 1, at 54 (calling it "bedrock" in liberal political theory that "state action must be justified to individuals who are recognized as free and equal citizens").

collaboration with the regime's demand for compliance—despite everyone's awareness of unresolved uncertainties and disagreements about the justice or other merits of this, that, or the other of the state's laws and legislative policies. "Legitimate" connotes compliance with a "threshold" standard, "above which legal regimes are [deemed] sufficiently just to deserve the support of those who are subject to them in the absence of better, realistically attainable alternatives."⁴⁶

4. Legitimacy as a Categorical Judgment

Judgments regarding legitimacy are "categorical" if they allow only "yes" and "no" as answers. They are "scalar" if they allow for adverbially inflected answers such as "highly," "weakly," and so on. Judgments regarding "sociological" legitimacy are scalar.⁴⁷ By contrast, a judgment regarding the moral-sense legitimacy of a state must be categorical, because it is simultaneously a judgment regarding our moral permission to call on others to go along with a regime that cannot credibly claim to be fully just in the eyes of many (if any) of its constituents. Permission cannot be more or less; either you have it or you don't. The judgment regarding permission may be close and doubtful or plain and certain, but it has to be made, yes or no, one way or other. "Out" or "safe," "goal" or "no goal," there is nothing in between. Collaboration with the regime is either permitted—it is "adequately morally justified"⁴⁸—or it is not.

Is Brettschneider on board? Does he really mean that a state's failure of active democratic engagement, when the occasion calls, results in a cancellation of our moral permission to support the existing state order's demands for compliance in general with its laws? The question merits some discussion.

Consider Brettschneider's account of the state's obligation of respect for individual rights of expression, association, and conscience. In the name and service of legitimacy, Brettschneider calls for a strict constitutional rule against direct, viewpoint-discriminatory restrictions of speech by the state.⁴⁹ His claim, however, is specifically *not* that state legitimacy is categorically dependent on the adoption of such a rule. Rather, he says that an otherwise well-formed regime can *improve* its legitimacy-score by

⁴⁶ See Fallon, *supra* note 27, at 1798.

⁴⁷ See *id.* at 1796 (commenting that legitimacy in the "sociological" sense is "a variable, not a constant").

⁴⁸ *Id.* at 1799.

⁴⁹ See, e.g., BRETTSCHEIDER, *supra* note 1, at 12, 22, 73.

incorporating such a rule. No doubt the rule may cost something in reduced protection against the spread of hateful views, but, still, allowing in this way for recognition of individual rights can, in the right conditions, yield an “increase” or “gain” to democratic legitimacy “overall.”⁵⁰

Is Brettschneider then treating judgments of a state’s moral-sense legitimacy as scalar? I do not think so. We ought not to read him as meaning, nonsensically, that we could be “a little bit permitted” to collaborate as opposed (say) to “very permitted.” We should rather read him as saying, with perfect good sense, that restricting the state to combating hateful views by means that also respect individual freedom rights makes it likelier than otherwise that we will conclude a complex weighing of pros and cons by finding—categorically—in favor of permission.

5. Interim Summation of Brettschneider’s “Legitimacy”

According to our findings so far, Brettschneider’s “legitimacy” means an external moral standard, applicable to an entire state regime or to its constitution, by which we judge the following: first, the regime’s moral entitlement (or lack of it) to claim from its citizens or subjects a general disposition to comply with its duly enacted laws, just because they are its laws; and, second, our own moral permission (or lack of it) to give our continuing support to that regime. It should be clear how neat is the fit between this typical-liberal notion of legitimacy and Brettschneider’s argumentative needs. When our author invokes *legitimacy* in support of his prescriptions regarding the state’s energetic engagement in democratic persuasion, in defense of the ideal of free and equal citizenship, he is suggesting to reluctant liberals that a rejection of those prescriptions sets us well on the way toward forfeiture of our moral license to support the extant rule-of-law regime in our country. That surely would give anyone a super-compelling sort of reason to reconsider whatever resistance to those prescriptions he or she might otherwise be feeling. But of course the reason will hold *for you or for me* only insofar as *we* find persuasive the proposition that the state’s due engagement in democratic persuasion, in defense of a political ideal of free and equal citizenship, really is a requirement of state legitimacy. We now turn our attention toward that question of persuasiveness.

⁵⁰ See *id.* at 16, 80-81, 105.

B. Toward a Problem for Brettschneider

1. Legitimacy: “Strong” or “Weak”?

We asked rhetorically, above, whether Brettschneider “really means” that a certain kind of failure of our state and its officials—to engage sufficiently in a vocal, pedagogical defense of a certain ideal of free and equal citizenship—can result in a cancellation of our moral permission to support the existing state order’s demands for compliance in general with its laws. The answer, so far, is that indeed Brettschneider does mean that. The question then becomes, for each of us, whether *we* believe it. Is that, to us, a plausible proposition?

Notice, now, that the answer may depend on how strong and demanding—or, oppositely, how weak and forgiving—is our conception of a standard for the legitimacy of a state regime. The lower the level of demandingness at which we set the standard, the less likely are we to conclude that any given feature of the state or its operations is a make-or-break requirement for its fulfillment. If (say) all that is required for the legitimacy of a state regime is its credible constitutional commitment to periodic elections of officials and respect for such libertarian fundamentals as freedom from arbitrary arrest and freedom from censorship of political expression—a “weak” standard—then Brettschneider’s claim that legitimacy depends on a state’s active engagement in a vocal defense of free and equal citizenship will ring hollow. But if, to the contrary, the standard of legitimacy incorporates every true element of political and social justice as you or I might understand them—a “strong” standard—the claim could have a good deal more traction. It follows, interestingly, that to the extent we might find Brettschneider himself endorsing the idea of a weak legitimacy standard, we will also find him, to that same extent, impeaching the credibility of his claim that legitimacy stands or falls with the adequacy of the state’s engagement in democratic persuasion in support of free and equal citizenship. And that extent, as we are about to find, is considerable.

2. The “Substance-Based Limit”: Defense Only of a Political Ideal, Thinly Defined

Brettschneider imposes what he calls a “substance-based limit” on the state’s moral calling, and corresponding constitutional license, to engage in democratic persuasion. The calling and license only cover responses to clear, unmistakable

attacks on a strictly political (as opposed to “comprehensive”) ideal of equal citizenship.⁵¹ For example, expressions of views opposing egalitarian economic policies, or denying that the races, or the sexes, or the sexual orientations, have been created equal, or that they are equally fit for social companionship, or that secular liberals have truer ideas than devout Christians about the path to the good life, would all easily fall on the “comprehensive” side of the line and would fail to activate the state’s limited license to respond.⁵² Such expressions are to be distinguished from attacks on the strictly political proposition of civic equality, equality before the state and its law. This means an equality of all persons in matters of rights, of citizenship, of public official and legal standing; it is an equality, therefore, of attribution to persons of entitlements to civic respect and, correspondingly, of their endowments with the “moral powers” that engage and make meaningful the enjoyment by persons of all those forms of public and legal recognition.⁵³

“Hateful” speech, in Brettschneider’s vocabulary, includes only speech that more-or-less flagrantly transgresses the thinly defined, political ideal of civic equality.⁵⁴ Speech that is otherwise more comprehensively inegalitarian does not activate the state’s license to respond. Doubtless, there are hard cases. The line will not always be clear or easily drawn. That fact does not obscure Brettschneider’s ambition to restrict his claim of an active state duty to the protection of an ideal that is “public” as opposed to “comprehensive,” “political” as opposed to “metaphysical”⁵⁵—thin (as we may say) as opposed to thick.

Why so? The Rawlsian vocabulary (not to mention the express appeals to the authority of John Rawls⁵⁶) point straight to the answer. It seems that Brettschneider, like Rawls and like “political” liberals more widely, is in search of basic terms of social cooperation that leave the maximum possible latitude for the moral autonomy of citizens, and so could be found acceptable by citizens holding widely differing, conflicting, even irreconcilable views about some of the deepest questions humans can face about the right and the good.⁵⁷ From there, it would seem

⁵¹ See *id.* at 14, 47, 89-90.

⁵² See *id.* at 14, 18, 36.

⁵³ See *id.* at 8, 31, 34-35, 88.

⁵⁴ See *id.* at 47, 90.

⁵⁵ *Id.* at 14, 30-31.

⁵⁶ See *id.* at 30, 34, 35 & 178 n.10, 52 & 180 n.4, 53 & 180 n.5.

⁵⁷ See, e.g., RAWLS, *supra* note 28, at xx (inquiring how “free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical,

to follow that Brettschneider will join political liberals, as well, in their advocacy of a relatively weakened standard of state legitimacy. The next two sections will briefly explain why.

3. Legitimacy as a “Weakened” Standard

What, after all, are we doing with this normative–regulative notion of a state regime’s “legitimacy?” Why don’t we simply speak in terms of the regime’s compliance (or not) with the principles of *justice* for a state regime, and have done with it? A key to the answer, surely, is our knowledge that, in modern free societies, citizens will divide, gravely and intractably, not only over their conceptions of the right and the good, but over their conceptions of what justice truly requires of a state regime in exactly those circumstances: regarding, say, affirmative action, campaign-finance controls, socioeconomic rights, gay marriage, assisted suicide, vouchers for religiously affiliated schools, and on we go.⁵⁸ Fifty years hence the list will be different but no shorter. The point of introducing a regulative concept of political legitimacy, to stand beside our various, competing conceptions of justice, is to open a path to morally justified collaboration, by citizens and officials, in demands for a prevailing regularity of compliance by everyone with constitution-conforming laws and policies, regardless of expected, persisting conflict regarding the compliance with justice of this policy or that one, or indeed of this or that feature in the constitution itself. Obviously, in order to do that work, the standard of legitimacy will have to be weaker, less demanding, more forgiving, than will be many, if not all, of the competing conceptions of full-fledged justice that various citizens and parties may support.

It is important, for our purposes, to note that the liberal-theoretic fallback from full and perfect justice to a standard of legitimacy is not simply a practical-minded compromise with human frailty. It is furthermore and distinctly, in the minds of many, a *morally principled* response to perceived facts of reasonable disagreement or “pluralism” in modern liberal

and moral doctrines” can find a way to “live together and all affirm the political conception of a constitutional regime”).

⁵⁸ See JEREMY WALDRON, *LAW AND DISAGREEMENT* 1 (1999) (pointing to the fact of intractable disagreement over what would constitute “justice,” or “fair terms of social co-operation,” among citizens who disagree deeply among themselves over questions of the right and the good); Frank I. Michelman, *Morality, Identity, and Constitutional Patriotism*, 76 DENVER U. L. REV. 1009, 1022-23 (1999) (making a comparable point in regard to questions of constitutional interpretation).

societies. Legitimacy, then, is the notion that aims to allow for a reasonable convergence by everyone on the regime's minimum-baseline moral worthiness of support,⁵⁹ while at the same time conveying due respect and regard for all parties to intractable disagreements about the justice and other merits of the regime and its various legislative stances.⁶⁰ Brettschneider's sympathy with views of this kind is plain on the face of his text.⁶¹ Such views, as we see, inevitably point toward a relatively lax and forgiving standard of legitimacy.

4. Legitimacy and Transparency

There remains yet a further word to say on this point, and one that goes to deepen somewhat our doubt of the plausibility of the claim that a state's energetic engagement in democratic persuasion could be make-or-break for a standard of legitimacy that is sufficiently relaxed to do the work we want it for. In the political-liberal view with which Professor Brettschneider associates himself, a standard of legitimacy represents a kind of lower common denominator of core liberal principles of political right and wrong. The standard cannot be excessively demanding or detailed and still do the work we want it for—which is to provide a publically viable standard of justification for collaboration in the country's practices of coercion by law, in the face of severe and protracted political disagreement, including disagreement about what justice ideally does or does not require. Nor, if it is to do that work, can the standard of legitimacy contain requirements that are excessively prone to reasonable interpretive disagreement at the point of application. This concern for transparency-in-application of the standard of legitimacy goes far, for example, to explain the hesitation of liberals to incorporate into their standard of legitimacy a positive duty of the state to exert itself toward fulfillment of acknowledged demands of economic-distributive justice, whether cast in terms of basic-needs satisfaction or of materially fair equality of opportunity.⁶²

⁵⁹ See Fallon, *supra* note 27, at 1798-99.

⁶⁰ See RAWLS, *supra* note 28, at 229 (arguing on those grounds that the standard of legitimacy must mainly be limited to the "central ranges" of certain basic liberties on which all reasonable citizens can be expected to agree).

⁶¹ See BRETTSCHEIDER, *supra* note 1, at 63, 81, 105.

⁶² See SANDRA LIEBENBERG, SOCIO-ECONOMIC RIGHTS 63-76 (2010) (describing reasons for resistance and suggesting responses). A leading exemplar is John Rawls, who both asserts that a principle of materially fair equality of opportunity is a strict requirement of justice for a regime and declines to treat such a principle as an "essential" component of a

A hesitation of that kind would have obvious application to the question of making a state's commitment to a practice of Brettschneider-style democratic persuasion into a major test for state legitimacy. An attentive reading of *State Speaks* shows how complex, delicate, and potentially divisive would be a judgment about whether the Obama Administration, say, has been applying the right amount of anti-hateful persuasive torque to the elbows of civil society: enough but not too much, in response to true but not false occasions of need (as defined by Brettschneider's "substance-based limit"),⁶³ and just up to but not across the line that separates persuasion from coercion (as defined by Brettschneider's "means-based limit").⁶⁴ It seems to me unlikely in the extreme that Brettschneider could mean that every American who sincerely answers "no" to that question has thereby thrown into grave danger his or her moral license for continued general loyalty to the regime of American law.

II. TOWARD A BETTER READING

But if Brettschneider does not mean that, then what does he mean by his invocations of legitimacy as a compelling reason for reluctant liberals to give ground? Accept with me that he does, indeed, use "legitimacy" to mean a standard (i) to be applied categorically (ii) to entire political regimes as (iii) a relatively relaxed, regulative test for the moral supportability of a regime that no one could reasonably, in the face of disagreement, presume to certify as free of serious defect from the standpoint of justice. And so he also means (if you accept my reading) that a regime that we would honestly judge to *fail* such a test is one that we would lack a moral permission to support. What Brettschneider nevertheless does *not* mean (or so I want now to suggest) is the implausible claim that a state or government risks forfeiture of its claim to our support by reason of its rejection, by word or deed, of a commitment to democratic persuasion *à la* Brettschneider.

legitimation-worthy constitution. See RAWLS, *supra* note 28, at 6, 227-29; Frank I. Michelman, *Poverty in Liberalism: A Comment on the Constitutional Essentials*, 60 DRAKE L. REV. 1001, 1016 (2012) (describing and explaining this Rawlsian stance).

⁶³ See *supra* Part I.B.2.

⁶⁴ See BRETTSCHEIDER, *supra* note 1, at 87-88 (defining a "means-based limit" on proper democratic persuasion so as to rule out the use of threats and sanctions against exercise of "fundamental rights" of freedom of expression, association, or conscience); *id.* at 116 (proposing to distinguish "persuasion" by "refusal of a subsidy" from impermissible sanction or threat).

Brettschneider does not ever actually put his claim in those terms, as far as I can see.⁶⁵ What he does plainly say is that a regime that allowed its signature operations to stray too far, for too long, from the committed pursuit of *the conditions of free and equal citizenship* would thereby forfeit its claim to legitimacy. It is *that* moral fact (supposing you accept it as such)—and *not* a claimed moral fact that a state's failure of due engagement in democratic persuasion amounts, just in itself, to a forfeiture of legitimacy—that Brettschneider believes should strongly motivate a demand from us that our governments live up to a policy of due engagement. The point merits recapitulation: Brettschneider is best understood to argue not that a state's *failure of a due-engagement test* is, just in itself, a fact that strips it of legitimacy, but rather that a regime's more-or-less egregious *failure in the pursuit of free and equal citizenship, thinly defined*, would render it non-legitimate. It is the latter sort of moral fact that is supposed to give us a compelling reason to want our governments to be energetically engaged in democratic persuasion.

A. *A Consequentialist Version*

And what, then, would be that compelling reason? How would it run? Most obviously and directly, it would be consequentialist in form: a regime that fails of a sufficiently robust commitment to the state's engagement in democratic persuasion thereby courts an excessive risk of attrition of both its own and the society's commitment to free and equal citizenship, perhaps eventually to a point where the regime could no longer claim to pass a categorical test of minimal moral legitimacy. That would be a cogently formed, consequentialist argument proceeding from a moral-categorical conception of legitimacy. Brettschneider quite explicitly makes this argument. "If . . . hateful doctrines were left to prevail," he writes, "they could subvert the basic principles of a legitimate democratic state."⁶⁶ The argument does not lack for force. It could well make good headway with a sizeable fraction of Brettschneider's readership.

It may not, however, make much of a dent on the resistance of those principled, reluctant liberals who enter the debate braced by strong intuitions that no form of nudge from the

⁶⁵ Cf., e.g., *supra* note 12 and accompanying text.

⁶⁶ BRETTSCHNEIDER, *supra* note 1, at 75. Brettschneider devotes pages to explaining the mechanisms by which this might occur. See *id.* at 38-42 (drawing arguments to this effect from socio-political considerations of "congruence," "stability," "interconnection," and "public trust").

state can be construed as non-coercive, so that strict state neutrality becomes in itself (so to speak) a formal requirement for legitimacy.⁶⁷ It seems they would be likely to respond to the consequentialist argument just as many do when, for example, cherished rights of privacy come up against quite plausible assertions of the needs of national security. A legitimate state, they will say, is and only can be one that treats itself as very strongly bound to search out and prefer other ways to meet the risk, even if at some non-negligible cost in reduced expected effectiveness.

It seems, therefore, worth asking whether Brettschneider has anything more or different to say to our group of hard-core principled reluctant liberals. I believe that he has.

B. *The "Full Autonomy" of Reasonable Citizens*

Brettschneider writes, he says, in response to liberal theory's "overemphasis on issues related to the justification of coercion."⁶⁸ "The ideal of free and equal citizenship," he remarks by way of partial explanation, "is not just relevant to justifying coercion; it is relevant to our own moral identities, to the way we order our various public and private commitments."⁶⁹ It is not, please note, *the state's* or *the political collective's* identity, but our own (several) *personal* identities that are being thus bound up with a political ideal of free and equal citizenship. What does Brettschneider mean by this? Perhaps John Rawls, whom we have already seen serving as a guide to Brettschneider in some other respects, could tell us.⁷⁰

Suppose we envisage citizens as possessed of "higher-order interests" in the development and exercise of two so-called "moral powers," in virtue of which they are owed respect as free and equal individuals.⁷¹ The powers comprise both a capacity for embrace of a public sense of justice and a capacity for the pursuit of a self-determined conception of the good.⁷² On that understanding of human personal capability and interest, a convergence of a society's members on a thin set of principles for the conduct of politics among citizens thus constituted could

⁶⁷ See *supra* notes 23-24 and accompanying text.

⁶⁸ BRETTSCHEIDER, *supra* note 1, at 13.

⁶⁹ *Id.* at 58.

⁷⁰ I have drawn the following condensation of John Rawls's idea of a person's full autonomy from Frank I. Michelman, *The Subject of Liberalism*, 46 STAN. L. REV. 1807, 1829 (1994).

⁷¹ RAWLS, *supra* note 28, at 74, 81.

⁷² See RAWLS, *supra* note 28, at 18-20, 74-75, 81-82. Brettschneider is on board. See BRETTSCHEIDER, *supra* note 1, at 34-35.

be a very great good for every participant. Obviously, the conduct of politics in one's society is bound to bear heavily on the values and satisfactions in a person's life, and the existence of the thin consensus could put within everyone's reach the fulfillment of a necessary condition of a satisfying life for persons endowed with higher-order interests in the exercise and development of both the moral powers. The consensus makes achievable by everyone the condition that Rawls calls "full autonomy," in which a person realizes both the moral powers synchronously—grasping and acting upon a public conception of political decency, by and through the same acts of judgment by which she holds to her own self-responsibly determined conception of the goods to be pursued in life.⁷³ The consensus thus further enables satisfaction of what Rawls calls the "conception-dependent desire" to realize in one's person an ideal conception of liberal citizenship.⁷⁴

We have seen how Brettschneider adopts the Rawlsian idea of a thin or "political" conception of justice,⁷⁵ putting that distinction to work in explaining what he calls a "substance-based limit" on state engagement in persuasion.⁷⁶ Remember: it is not every "inegalitarian" view that the state has any proper business opposing, but only those that are openly and directly hostile to a thin, "political" ideal of equal citizenship.⁷⁷ Why so? "Why not 'abandon the limitation of promoting only thin values,' and instead endorse" as a public value "a full-fledged conception of equality in all aspects of life?"⁷⁸ The answer lies in due respect for the moral and ethical autonomy of citizens. "For citizens," writes Brettschneider,

to think freely about whether they endorse the ideal of equal citizenship, it is important that they be able to reflect about what they take to be a good life. Part of equal respect entails a respect for citizens to reflect on matters of the good and to make up their own minds freely The value of equal respect is [thus] central to the idea that we should limit ourselves to a [thin, political] conception of equal citizenship⁷⁹

Read in the light of the Rawlsian lesson on full autonomy, that would explain the connection, alleged by Brettschneider,

⁷³ See RAWLS, *supra* note 28, at 77-78.

⁷⁴ See *id.* at 83-84.

⁷⁵ See BRETTSCHEIDER, *supra* note 1, at 53 ("The state is properly concerned, according to Rawls, with 'thin' political conceptions of free and equal citizenship, and not with comprehensive conceptions of good.")

⁷⁶ See *supra* Part I.B.2.

⁷⁷ See, e.g., BRETTSCHEIDER, *supra* note 1, at 8, 63, 89-90.

⁷⁸ *Id.* at 61.

⁷⁹ *Id.*

between political ideals such as free and equal citizenship and “our own moral identities, . . . the way in which we order our various public and private commitments.”⁸⁰ Establishment of that connection also might make a good start at explaining to reluctant liberals, in non-consequentialist terms, how liberal principles might call for opposition, in a public voice, to corrosive, direct assaults on a thin political ideal of free and equal citizenship. Reduced to the briefest possible summation, the argument would be that the assaulted ideal is a crucial component of a minimal conception of political decency, on the stalwart public affirmation of which the society’s members depend for the possibility of the realization in their lives of a highly valued state of full autonomy. That is, I believe, the deepest argument planted by Corey Brettschneider in the pages of *State Speaks*.

⁸⁰ *Id.* at 58.