

2014

Freedom of Expression and the Golden Mean

Steven G. Calabresi

Follow this and additional works at: <http://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Steven G. Calabresi, *Freedom of Expression and the Golden Mean*, 79 Brook. L. Rev. (2014).

Available at: <http://brooklynworks.brooklaw.edu/blr/vol79/iss3/2>

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized administrator of BrooklynWorks. For more information, please contact matilda.garrido@brooklaw.edu.

Freedom of Expression and the Golden Mean

Steven G. Calabresi[†]

Corey Brettschneider's splendid new book, *When the State Speaks, What Should it Say?*,¹ is a refreshing and magnificent reinterpretation of the application of First Amendment principles to speech by the government and to hate speech more generally. Professor Brettschneider's book addresses an extremely difficult and important problem: How should a liberal society approach the topic of hate speech? Professor Brettschneider posits two dystopias that we need to avoid.² The first is the dystopia of the Invasive State, which is so eager to militantly protect democracy that it regularly invades people's rights.³ The second is the dystopia of the Hateful Society, which is so tolerant that it will not even intervene to defend its core norm of tolerance.⁴ Professor Brettschneider describes the harms inherent to each before proposing a new solution designed to occupy the ideological middle ground that protects both expression and the rights of citizens to be free and equal members of society.

Both of the dystopias Professor Brettschneider describes have existed in major constitutional democracies during the last century. The United States, for example, was an Invasive State during the red scares of World War I and during the Senator Joe McCarthy period, which followed World War II and continued in some form throughout the 1950s. The U.S. Supreme Court ratified the dystopia of the Invasive State in cases like the

[†] Clayton J. and Henry R. Barber Professor of Law, Northwestern University; Visiting Professor of Political Science Brown University; Visiting Professor of Law, Yale University. I would like to thank my Dean, at Northwestern, and John Tomasi and the Political Theory Project at Brown University for creating the working environment that made it possible for me to get to know Corey Brettschneider and to write this essay.

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

² *Id.* at 10.

³ *Id.*

⁴ *Id.* at 10-11.

unanimous 1919 opinion in *Debs v. United States*,⁵ which upheld a 10-year jail sentence and lifetime disenfranchisement for Socialist Party leader Eugene V. Debs for making a seditious speech critical of U.S. involvement in World War I. The government's specific complaint in the case was that Debs, in a speech, had sought to stir up public non-compliance with the military draft in violation of the Espionage Act of 1917. Debs was convicted and imprisoned, though his speech merely expressed a viewpoint and arguably was not intended to stir up imminent lawless action. While in prison, Debs ran for President of the United States as the Socialist Party candidate and received 919,799 votes (3.4% of the total popular vote), thus confirming the fact that his views had some degree of popular support.

Another landmark U.S. Supreme Court case ratifying the dystopia of the Invasive State is *Dennis v. United States*.⁶ In 1951, the Supreme Court upheld the conviction of Eugene Dennis, the General Secretary of the Communist Party USA, in a six to two decision.⁷ Dennis's crime was that he had argued, in the abstract, for the overthrow of the United States government by force and violence, even though he had not incited any specific imminent unlawful action. A plurality of the Court upheld the conviction under the clear and present danger test. This ruling was overturned, *de facto*, by the Supreme Court in its 1969 decision in *Brandenburg v. Ohio*.⁸

A final famous example of the Supreme Court endorsing the Invasive State is the Court's 1959 decision in *Barenblatt v. United States*.⁹ In that case, the Supreme Court held that the House Un-American Activities Committee had the power to hold Lloyd Barenblatt, a college professor, in criminal contempt for refusing to answer questions about his membership in the Communist Party and for refusing to identify other Communists who happened to be college professors. Once again, Barenblatt, like Debs and Dennis, was incarcerated for expressing views on political matters while not attempting to incite imminent lawless action.

All three of these Supreme Court majority opinions—*Debs v. United States*, *Dennis v. United States*, and *Barenblatt v. United States*—are overwhelmingly viewed today as having been wrongly decided, and they form a paradigmatic instance

⁵ 249 U.S. 211 (1919).

⁶ 341 U.S. 494 (1951).

⁷ *Id.* at 495.

⁸ 395 U.S. 444, 449-50 (1969).

⁹ 360 U.S. 109 (1959).

of the Invasive State, which Professor Brettschneider warns us against. The Supreme Court's hyper-strong First Amendment case law today¹⁰ is, in effect, a response to the dystopia of the Invasive State.

The dystopia of the Hateful Society is epitomized by the German Weimar Republic, which held power in Germany from the end of World War I until the rise to power, in 1933, of Adolf Hitler and the Nazis.¹¹ The Weimar Republic was rife with anti-Semitism and was characterized by the existence of powerful political parties and groups that were openly opposed to democracy, constitutionalism, and tolerance.¹² The officer corps of the German army during this period was disdainful of democracy and yearned for a return of the autocratic and imperial German monarchy. The army refused to protect the government from coup attempts, and many officers blamed German democrats for the army's loss in World War I.¹³ In addition, there were politically powerful parties in the German parliament that were committed to the overthrow of the democratic regime.¹⁴ The German Communist Party and Hitler's Nazi Party loathed the Weimar democracy and would sometimes form so-called red-brown coalitions to vote down democratic measures or bring down the government in parliament.¹⁵

Freedom of speech during the Weimar era led to a flourishing of the arts, but it also led to a flourishing of hate speech in an increasingly poisonous political climate. Professor Cindy Skach describes the climate in Weimar, Germany, well:

[T]here was a rather exuberant and creative society . . . 'When we think of Weimar, we think of modernity in art, literature, and thought; we think of the rebellions of sons against fathers, Dadaists against art, Berliners against beefy philistinism, libertines against old-fashioned moralists; we think of *The Threepenny Opera*, *The Cabinet of Dr. Caligari*, *The Magic Mountain*, the *Bauhaus*, Marlene Dietrich. And we think, above all, of the exiles who exported Weimar culture all over the world. Indeed, Weimar Germany is still often remembered for

¹⁰ See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (striking down, in an 8 to 1 vote, a tort judgment for intentional infliction of emotional distress as violating the First Amendment because the speech in question was about a public issue on a public sidewalk).

¹¹ THE BREAKDOWN OF DEMOCRATIC REGIMES: CRISIS, BREAKDOWN AND REEQUILIBRATION (Juan J. Linz & Alfred Stepan eds., 1978) (discussing the breakdown of democracy in the Weimar Republic).

¹² CINDY SKACH, BORROWING CONSTITUTIONAL DESIGNS: CONSTITUTIONAL LAW IN WEIMAR GERMANY AND THE FRENCH FIFTH REPUBLIC 31 (2005).

¹³ See THE BREAKDOWN OF DEMOCRATIC REGIMES, *supra* note 11.

¹⁴ See *id.*

¹⁵ See *id.*

producing some of the most brilliant scholars, artists, and free thinkers in the framework of a golden age

And yet, not all political parties or all of this flourishing society was enthusiastic about democracy. Several groups remained loyal to the idea of restoring the monarchy, and this included a substantial part of the landed classes, the Lutheran Church, and the nation-building elites that remained a part of the state bureaucracy.¹⁶

In 1925 and 1926, Adolf Hitler published his manifesto *Mein Kampf*—“Struggle”—which was filled with anti-Semitism and warnings about “the Jewish menace.”¹⁷ The book had sold 240,000 copies by the time Hitler came to power in 1933, and its publication played an important role in the breakdown of the Weimar Republic. Weimar Germany thus typifies what Professor Brettschneider quite accurately calls the dystopia of the Hateful Society.

The extension of political freedoms and First Amendment-type rights to the Nazis and the Communists during the Weimar Republic is widely viewed as a monumental mistake and a catalyst for World War II and the Holocaust. Present day Germany’s doctrine of Militant Democracy that bans totalitarian political parties as well as hate speech is widely seen today as an effective and necessary response to what Professor Brettschneider calls the dystopia of the Hateful Society. Professor David Currie explains that “the concept of militant democracy (*streitbare*’ or *wehrhafte Demokratie*) [is seen as being necessary because of] the bitter experience of the Weimar Republic, in which antidemocratic forces took advantage of political freedoms to subvert the constitution itself.”¹⁸ Militant Democracy in Germany, today, is thus a direct response to what Professor Brettschneider calls the dystopia of the Hateful Society in Weimar, Germany before the rise to power of Adolf Hitler and the Nazis.

The core insight of Professor Brettschneider’s book is that we need to find a Golden Mean that lies somewhere between the two dystopias. Aristotle describes many of the virtues he writes about in *The Nicomachean* and *Eudemian Ethics* as existing as a Golden Mean between two vices. He thus defines courage as being a Golden Mean between the vices of recklessness and cowardice. Aristotle explains in *The Nicomachean Ethics* that:

¹⁶ SKACH, *supra* note 12, at 30-31.

¹⁷ See ADOLF HITLER, *MEIN KAMPF* 308, 310-11 (Ralph Manheim trans., First Mariner Books 1999) (1925).

¹⁸ DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 214-15 (1994).

[The virtues] are naturally destroyed through deficiency and excess, just as we see in the case of strength and health . . . : excessive as well as deficient gymnastic exercises destroy strength, and, similarly, both drink and food destroy health as they increase or decrease in quantity, whereas the proportionate amounts create, increase, and preserve health. So it is too with moderation, courage, and the other virtues: he who avoids and fears all things and endures nothing becomes a coward, and he who generally fears nothing but advances toward all things becomes reckless. Similarly, he who enjoys every pleasure and abstains from none becomes licentious; but he who avoids every pleasure, as the boorish do, is a sort of “insensible” person. Moderation and courage are indeed destroyed by excess and deficiency, but they are preserved by the mean.¹⁹

Similarly, in *The Eudemian Ethics*, Aristotle describes courage as being the Golden Mean between recklessness and cowardice; modesty as being the Golden Mean between shamelessness and bashfulness; truthfulness as being the Golden Mean between boastfulness and dissimulation; friendliness as being the Golden Mean between flattery and curmudgeonliness; and wisdom as being the Golden Mean between unscrupulousness and unworldliness.²⁰

Similarly, Professor Brettschneider correctly intuits that the right approach to freedom of expression is one that falls in between the two dystopias of the Invasive State and the Hateful Society. Constitutional democracies must strive to both protect freedom of expression, and actively affirm the free and equal citizenship of all of their citizens. This is the Golden Mean between the Invasive State and the Hateful Society.

I agree with this sentiment entirely. There is a Golden Mean with respect to freedom of expression that we should strive to attain. I agree with Professor Brettschneider that—given our history during the Red Scares and the McCarthy era—the United States should not criminally punish hate speech because there is more of a danger that the government will persecute individuals unjustly than there is a danger that hate groups will take over our complex federal republic with all its checks and balances. There may be societies, like West Germany after World War II, where it is necessary to outlaw hate speech and anti-regime political parties, but the United States is not such a society. I thus emphatically agree with *Brandenburg v. Ohio* (raising the bar on prosecutions for incitement of lawless action);²¹ *New York*

¹⁹ ARISTOTLE, *NICOMACHEAN ETHICS* bk. II, at 28-29 (Robert C. Bartlett & Susan D. Collins trans., Univ. Chicago Press 2011) (c. 384 B.C.E.).

²⁰ ARISTOTLE, *EUDEMIAN ETHICS* bk. II, at 20-21 (Brad Inwood & Raphael Woolf eds. & trans., Cambridge Univ. Press 2013) (c. 384–322 B.C.E.).

²¹ 395 U.S. 444 (1969).

Times v. Sullivan (imposing First Amendment constraints on libel suits against public figures);²² and *R.A.V. v. City of St. Paul* (constitutionally protecting hate speech).²³

At the same time, however, I also emphatically agree with Professor Brettschneider that we should not expect that, when the government itself speaks, its speech must always be viewpoint neutral. As Professor Brettschneider's book points out, we celebrate great men and women and great events in our history for value-laden reasons and that is precisely as it should be. We *should* celebrate Martin Luther King's birthday, and not Robert E. Lee's, because it is vital that our government actively affirm the ideal of free and equal citizenship for all its citizens. This is a way of affirming that ideal. Similarly, the president and other high government officials should praise democracy and civil rights, and should not give equal time in their remarks to hateful or opposing viewpoints.

I would add that public colleges, universities, and secondary schools could not even function if they did not choose to praise some viewpoints and criticize others. The praising of some things and the disapproving of others is basically at the core of what education itself is all about. The Corporation for Public Broadcasting, PBS, National Public Radio, and the National Endowment for the Arts are among the many examples of governmental institutions that do not censor their speech to make it viewpoint neutral. Obviously, these entities are all of great value, and they should be retained.

Professor Brettschneider's book is a breath of fresh air when it comes to First Amendment scholarship because he recognizes an obvious truth which has not been adequately recognized until now—that when the government speaks it ought to speak in support of democracy, and free and equal citizenship. At some level, we all probably know that, but Professor Brettschneider brings the point out into the open and explains where it comes from. It is true that the government could in theory use its bully pulpit to attack free and equal citizenship or individual liberty, but I think Professor Brettschneider is right in his intuition that this is not a concern, at least in the U.S. context. I therefore think that Professor Brettschneider comes close to striking the right balance in avoiding the dystopias of the Invasive State or the Hateful Society in the U.S. today.

²² 376 U.S. 254 (1964).

²³ 505 U.S. 377 (1992).

I do, however, disagree with Professor Brettschneider on the ease with which he would revoke 501(c)(3)²⁴ tax exempt status from groups like the Boy Scouts that he rightly thinks are engaged in speech that denigrates free and equal citizenship.²⁵ My disagreement with Professor Brettschneider here is more practical than normative, but attaining a Golden Mean between two dystopias often requires attention to practical concerns. I do not think that groups like the Boy Scouts that denigrate free and equal citizenship deserve a 501(c)(3) tax subsidy, but I do fear that once government officials get in the business of evaluating which 501(c)(3)s ought to lose their tax exemption on the basis of political alignment, a very rabid partisanship will set in which will be destructive of the goals of free and equal citizenship that Professor Brettschneider and I favor.

An effort to revoke the tax exempt status of the Boy Scouts, in my opinion, would rapidly lead to a counter effort by social conservatives to revoke the tax exempt status of groups that support, for example, gay rights. It would politicize the Internal Revenue Service, which, as we can see from current events in the government today under President Obama, is not something we should want.²⁶ IRS officials who know they have more power to revoke 501(c)(3) status might be more likely to audit the returns of political opponents—the Eugene V. Debs of the current day—and to excuse tax code violations by political supporters of the regime in power. A politicization of the IRS would be bad for civil liberties and bad for the government because it would undermine support for paying taxes. This seems to be, in my opinion, prudentially, a dangerous road to go down.

Many political conservatives would leap at the chance to eliminate 501(c)(3) status for liberal universities and foundations if they thought this behavior was tolerable. We should *not* go down that road. America's huge not-for-profit corporate sector is one of the many things that makes the United States so much stronger than Europe and Japan. Section 501(c)(3) organizations are what Edmund Burke called “mediating institutions.”²⁷ They mediate between the power of the state and the power of the

²⁴ See Internal Revenue Code, 26 U.S.C. § 501(c)(3) (2012).

²⁵ See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

²⁶ See Jay Sekulow, *IRS Scandal Hits 3 Month Mark—Where's the Accountability, Mr. Obama?*, FOXNEWS.COM (Aug. 8, 2013), <http://www.foxnews.com/opinion/2013/08/08/irs-scandal-hits-3-month-mark-where-accountability-mr-obama/>.

²⁷ For a discussion of the way in which political parties function as mediating institutions, see Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479 (1994).

people.²⁸ Mediating institutions between the government and the people include: the family; churches, synagogues and mosques; charitable associations; civic associations such as the League of Women Voters; labor unions, family owned and other small businesses, local government units such as New England town hall meetings, and political parties. They are invaluable assets, and should be left alone.²⁹

Professor Brettschneider may at some level recognize that, because he further argues in his book that the Boy Scouts should lose their tax exempt status but that the Catholic Church should not, even though both organizations oppose free and equal citizenship with respect to sexual orientation. I find it hard to discern a principle here given that the Boy Scouts now admit gay scouts whereas the Catholic Church would presumably excommunicate a gay church member who refused to pledge not to engage in same-sex relationships. (Perhaps Pope Francis' recent statements on not judging gay people indicate a change in what has been the Catholic Church's position until now.) To be clear, I think it is a violation of the rights of free and equal citizenship for the Boy Scouts to ban gay scoutmasters, and I would vote for a federal law that banned sexual orientation discrimination in employment so long as it exempted religious organizations. I am just not persuaded by the book that there is a significant difference between the position of the Boy Scouts and the position of the Catholic Church, at least prior to Pope Francis.

Professor Brettschneider argues in the book that his position is supported by the Supreme Court's opinion in *Bob Jones University v. United States*.³⁰ In that case, the Supreme Court upheld the authority of the IRS to strip Bob Jones University of its 501(c)(3) tax exempt status because of its racist policy of not allowing interracial dating for what the University claimed were religious reasons. I agree that the federal government was within its rights under current law and that it acted correctly in that case in revoking the 501(c)(3) tax exempt status of Bob Jones University. There has never been a religion in the United States under which interracial dating was forbidden as a matter of widespread religious belief. Bob Jones' claim to a church's tax exempt status was therefore

²⁸ EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 315 (Conor Cruise O'Brien ed., 1968). Burke described mediating institutions as being societies' small "platoon[s]." *Id.* at 135.

²⁹ For a fuller discussion of the concept of mediating institutions, see Calabresi, *supra* note 27, at 1479-1533.

³⁰ *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

correctly denied because the interracial dating ban could not have been a matter of religious principle. I would not conclude from this, as Professor Brettschneider does, that the Boy Scouts' tax exemption should be withdrawn because of their refusal to recognize gay rights. I think the Boy Scouts can be and should be publicly criticized for this, but I would ostracize the Scouts rather than withdraw their tax status.

I agree with Professor Brettschneider that free and equal citizenship is the proper goal of the liberal state, but I would go further. I would ban laws or executive actions that deprive people of life, liberty, or property *on the basis of religion* as well as on the basis of race and gender.³¹ Most people are born into their parents' religion, a reality that may be characterized as an immutable characteristic. Secular and Christian people of Jewish descent were stunned to find that Hitler thought them to be Jewish by blood and accordingly sent them to concentration camps. Muslims today are born into their faith and may face charges of apostasy if they try to convert.

I thus disagree with the Supreme Court's decision in *Locke v. Davey*, which held that it was constitutional for Washington State to give scholarships for students doing graduate school work, so long as they were not studying theology or religion.³² This seems to me to be a blatant attempt by the State of Washington to discriminate on the basis of religion. It is objectionable for the same reason it would be objectionable if the State of Washington disallowed funding graduate work at historically African American schools or at an all-women's school. The government deprives individuals of their free and equal citizenship when it discriminates on the basis of religion. Thus, Justices Scalia and Thomas were right to dissent in *Locke v. Davey*.

Similarly, the so-called Blaine Amendments in state constitutions violate the equal protection guarantee of the Fourteenth Amendment. Blaine Amendments are so named after Senator James G. Blaine, a nineteenth-century politician, who supported state and federal constitutional amendments that forbade any government funding from ever going to any religious school, charity, or organizations, even if similar secular schools, charities, and organizations did receive government funds. Many

³¹ Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909 (2013).

³² 540 U.S. 712 (2004).

states passed Blaine Amendments, but the proposed Blaine Amendment to the federal constitution was not adopted.

The equal protection guarantee would also be violated if state schools were run to tolerate a hostile environment with respect to race, sex, or religion. State-run schools cannot be suffused with racism or sexism because the existence and state funding of such schools would violate the free and equal citizenship which is at the core of the Fourteenth Amendment. Similarly, state-run schools cannot be suffused with hostility to religion or militant secularism. The federal and state governments cannot discriminate on the basis of religion, and Title VII of the Civil Rights Act of 1964 forbids private employers from discriminating on the basis of religion as well. It follows that just as Title VII does not allow employers to maintain a workplace that is hostile on account of race or sex, so too they cannot maintain a workplace that is hostile on the basis of religion.

Finally, I would note that the concept of free and equal citizenship that Professor Brettschneider defends does not by definition apply to longtime resident aliens, whether legal or illegal. This would seem to be a flaw. Surely government speech must show respect for the fundamental *human* rights even of non-citizens. It is for this reason that the Fourteenth Amendment's due process and equal protection clauses apply to all persons and not merely to all citizens as does the privileges and immunities clause.³³ I doubt Professor Brettschneider disagrees with this, but he may in the future want to elaborate on the extent to which his ideas are based on fundamental human rights as well as the rights of citizens.

All in all, however, Professor Brettschneider's book is a major step forward. He is absolutely right to seek a Golden Mean between the two dystopias of the Invasive State and of the Hateful Society. I would locate that Mean in a slightly different place than Professor Brettschneider would, but it seems that fundamentally we are in agreement.

³³ The amendment reads:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any state deprive any person of life, liberty, or property, without due process of law; Nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.