

Brooklyn Law Review

Volume 79

Issue 3

SYMPOSIUM:

When the State Speaks, What Should It Say?

Article 3

2014

Democratic Rhetoric: How Should the State Speak?

Josiah Ober

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

Recommended Citation

Josiah Ober, *Democratic Rhetoric: How Should the State Speak?*, 79 Brook. L. Rev. (2014).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol79/iss3/3>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

Democratic Rhetoric: How Should the State Speak?

Josiah Ober[†]

INTRODUCTION

I agree with most of the substantive arguments in Corey Brettschneider's book *When the State Speaks, What Should It Say*: I think that the middle ground, between a highly activist coercive and invasive state (the Intrusive State) and a fully neutral state that allows hateful speech to go unanswered (the Hateful Society), is the right "solution space" for liberal democracy. I applaud Brettschneider's emphasis on free and equal citizenship as the core value that a liberal democracy must defend. Indeed, I would go further, and say that any democracy that deserves the name, whether liberal or not, must defend that ground.

My comments will not focus on the theoretical foundations of the book's argument, but on possible extensions of it. At the core of my response is the thought that a lot more can be done by a state (by its representatives) in the way of expressive articulation of what Brettschneider calls "reasons for rights."¹ So I will be focusing on an issue that does come up in the book, but does not seem to get its full due: once we have decided the substance of what the state should say (public justifications for free and equal citizenship, and public refutations of those who would deny the relevant sorts of political freedom and equality to citizens) and once we have agreed on the means (persuasion, not coercion) by which the state will say it, *how* ought the state to speak?

My primary concern is that Brettschneider leaves to one side what I see as the centrally important issue of democratic rhetoric: once we have decided what the state should say, we

[†] Stanford University. Constantine Mitsotakis Professor in the School of Humanities and Sciences, Professor of Political Science and Classics. Author of books and articles on Greek history, classical political thought and practice, and democratic theory.

¹ COREY BRETTSCHEIDER, *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?: HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY* 4-5, 12-14, 20-21 (2012).

need to ask whether, when the state speaks, anyone will be persuaded. The answer is surely, “only if the state speaks persuasively.” That raises the question of how and why speech persuades—which is, of course, what rhetoric is all about. While contemporary analytic political theory (in stark contrast to classical political theory) tends to avoid the topic of rhetoric, perhaps because of its association with misleading and pernicious speech, studying democratic speech without attending to democratic rhetoric is rather like studying an automobile without attending to its engine—rhetoric is the engine of democratic politics; if we ignore it we will never understand what makes the thing go.²

Brettschneider offers two main answers to the question of how the state ought to speak. First, public officials ought to speak out against attacks on equality (notably against racism, sexism, and gay-bashing) and they ought to honor historical movements that pushed in the direction of greater freedom and equality for citizens (e.g. by national holidays and monuments and school curricula). Second, the state ought to be more selective about its subsidies to private organizations, including religious organizations; organizations that reject or denigrate free and equal citizenship ought to be denied public money and tax breaks.

It is the first of these two categories that most interests me—and that seems to get somewhat short shrift in the book. One of Brettschneider’s important points is that there is a qualitative difference between the duty of citizens to speak out in defense of democratic rights—the point was strongly made by John Stuart Mill and brilliantly exemplified by Martin Luther King, Jr.—and the duty of agents of the state to do so. And yet, the book does not seem to offer a very detailed road map that might guide us in thinking about what that special duty of representatives of the state would mean in democratic practice.

The positive examples that Brettschneider offers of the proper use of non-fiscal democratic persuasion by agents of the state are overwhelmingly drawn from U.S. Supreme Court opinions and jurisprudence. Yet, as Brettschneider rightly and repeatedly points out, Supreme Court opinions are not generally models of persuasive public speech. Almost no one outside of the tribe of political theorists and constitutional lawyers reads

² See Carnes Lord, *Aristotle and the Idea of Liberal Education*, in *DEMOKRATIA: A CONVERSATION ON DEMOCRACIES, ANCIENT AND MODERN* 271, 283-84 (Josiah Ober & Charles Hedrick eds., 1996) (noting the central concern of classical political theory was with rhetoric). See generally JOSIAH OBER, *MASS AND ELITE IN DEMOCRATIC ATHENS: RHETORIC, IDEOLOGY AND THE POWER OF THE PEOPLE* (1989) (discussing the importance of rhetoric in classical democracy).

them, and it seems unlikely that many citizens who do read them alter their viewpoints on rights as a result. The other examples I found in the book were the establishment of Martin Luther King Day; history standards that mandate teaching about the civil rights, women's rights, and gay rights movements; Bill Clinton's apology for the Tuskegee experiments; Michael Bloomberg's chastisement of anti-Muslim speech related to the Cordoba Center; and Barack Obama's lukewarm support for Iranian democracy. I will stipulate, without much fear of objection, that none of these belongs on any plausible list of the top ten moments in the history of pro-democratic, rights-justifying political speech.

I. TOP TEN PRO-DEMOCRATIC SPEECHES

What would Brettschneider say about examples of public speech that *do* have a good claim to belong on a top ten list? Although there are many candidates for inclusion on the top ten list, here (in chronological order, and limited to Athens, England, and the USA) are ten candidates that come to mind:

1. Solon, 594 B.C.E. Elegiac poetry justifying his legal reforms. "[R]ules of law alike for base and noble."³
2. Pericles, 431 B.C.E. *Funeral Oration*. "Its administration favors the many instead of the few; this is why it is called a democracy."⁴
3. Demosthenes, 346 B.C.E. Speech 21 *Against Meidias*. "[T]he laws are strong through you and you through the laws."⁵
4. Edmund Burke, 1774. Speech to the Electors of Bristol. "Parliament is a *deliberative* Assembly of *one* Nation, with *one* Interest."⁶

³ ARISTOTLE, *ATHENIAN CONSTITUTION* ch. 12, § 4 (H. Rackman ed. & trans., Harvard Univ. Press 1952) (c. 594 B.C.E.) (quoting Solon), *available at* <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0046%3Achapter%3D12%3Asection%3D4>.

⁴ Pericles, *Funeral Oration*, in THUCYDIDES, *PELOPONNESIAN WAR* bk. 2.34-46, *INTERNET ANCIENT HISTORY SOURCEBOOK* (Paul Halsall ed., Aug. 2000) (c. 431 B.C.E.), *available at* <http://www.fordham.edu/halsall/ancient/pericles-funeralspeech.asp>.

⁵ Demosthenes, Speech 21: *Against Meidias* § 224 (A. T. Murray trans., Harvard Univ. Press 1939) (c. 346 B.C.E.), *available at* <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0074%3Aspeech%3D21%3Asection%3D224>. Demosthenes was not *stricto sensu* speaking an agent of the state, but as prosecutor, Demosthenes was serving a public function.

5. Abraham Lincoln, 1863. Gettysburg Address. “[O]f the people, by the people, and for the people.”⁷
6. Dwight Eisenhower, 1957. Address on the events at Little Rock. “Mob rule cannot be allowed to override the decisions of our courts.”⁸
7. John F. Kennedy, 1963. Speech in Berlin: “Ich bin ein Berliner.”⁹
8. Lyndon Johnson, 1965. Address to a joint session of Congress on voting legislation. “[We] shall overcome.”¹⁰
9. Ronald Reagan, 1987. Speech at Brandenburg Gate: “[T]ear down this wall!”¹¹
10. Barack Obama, 2013. Speech on race in America: “Trayvon Martin could have been me.”¹²

These speeches are not all focused specifically on free and equal citizenship per se, but each seems to me, one way or another, to invoke rights, and reasons for rights (or in the Greek examples, quasi-rights), and democracy. So my question for Brettschneider is this: which speeches pass the test of appropriate democratic persuasion, which fail the test, and why?

Brettschneider’s core claim for democratic persuasion is that it must articulate the reasons for rights. I believe the speeches I have listed do that, one way or another, but they use very different kinds of rhetoric than analytic political theorists are used to employing in professional scholarship. In brief, we write in a deliberately-measured, not to say arid, prose that is largely stripped of appeal to sensibilities other than reason

⁶ Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), *transcript available at* <http://www.econlib.org/library/LFBooks/Burke/brkSWv4c1.html>.

⁷ Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *transcript available at* <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>.

⁸ Dwight Eisenhower, Address on Little Rock, Arkansas (Sept. 24, 1957), *transcript available at* <http://historymatters.gmu.edu/d/6335/>.

⁹ John F. Kennedy, Speech in Berlin (June 26, 1963), *transcript available at* <http://millercenter.org/president/speeches/detail/3376>.

¹⁰ Lyndon B. Johnson, Special Message to Congress: The American Promise (Mar. 15, 1965), *transcript available at* <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650315.asp>.

¹¹ Ronald Reagan, Speech at the Brandenburg Gate (June 12, 1987), *transcript available at* <http://www.historyplace.com/speeches/reagan-tear-down.htm>.

¹² Barack Obama, Remarks by the President on Trayvon Martin (July 19, 2013), *transcript available at* <http://www.whitehouse.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin>.

itself. The rhetoric of the speeches listed above is, I believe, grounded in appeals to reason, but in each case it goes well beyond the bare appeal to reason, appealing to an array of positive, non-hateful emotions and to an array of civic virtues. They use techniques of narrative, invention, style, and delivery that are familiar from classical rhetoric (as canonized by, for example, the Latin writers Cicero and Quintilian). Brettschneider alludes briefly to legitimate uses of emotional appeals, noting that “the requirement that democratic persuasion include explicit reasons does not mean that it must avoid emotion or rhetorical persuasiveness.”¹³ But that tip of a hat to rhetoric is bracketed by much more extensive discussion of worries about manipulation, subliminal messages, propaganda, and so on. It appears that Brettschneider is nervous about letting the rhetorical camel’s nose into the tent of public reason—a nervousness that he shares, I dare say, with many members of the political theory tribe.

There is reason enough for that nervousness—after all, rhetoric can be and sometimes is divorced from reason-giving in ways that can devolve into overt manipulation and propaganda. The fear of bad rhetoric begins with the founding works of western political theory—most notably of course with Plato (especially in his dialogues *Gorgias*, *Phaedrus*, and *Republic*), who drew a bright line between philosophy as the realm of truth and reason, and rhetoric as the realm of opinion and deception.

II. A NEW THEORY OF RESPONSIBLE PUBLIC RHETORIC

Once we have set our foot on the road, as Brettschneider urges us, of using persuasion rather than coercion to achieve important public ends—to resist devolution into the Hateful Society without bringing in the heavy artillery of the Intrusive State—we need to take a fuller inventory of the tools in the toolbox of persuasion. No doubt denying subsidies is one powerful tool. Expressing reasons for rights in the austere technical languages of analytic liberal political philosophy and Supreme Court jurisprudence may also be tools of sorts. But surely we cannot afford to overlook the potential tools of rhetorical persuasion. Nor, if we are to take up the theoretical challenge of democratic persuasion, can we afford to simply leave rhetoric to disciplines other than political theory or to political practitioners.

There is nothing intrinsically odd about saying that political theory should take rhetoric seriously, given that

¹³ BRETTSCHEIDER, *supra* note 1, at 88-89.

rhetoric was once a major part of political theory. Plato not only criticized the misuse of rhetoric, he understood it deeply and his dialogues are masterpieces of persuasive rhetoric—how many of us got started in political theory in part because we fell in love with the Socrates of the *Apology*, *Crito*, and *Republic*? Aristotle's great trilogy on political theory concludes with the *Art of Rhetoric*. And of course Cicero was a political philosopher, theorist, and practitioner of political rhetoric; ditto Machiavelli and Hobbes.

Classical rhetorical theory is, however, inadequate to the task of fully explaining the sorts of democratic persuasion Brettschneider envisions. We need a new theory of responsible public rhetoric that is (1) suited to the sort of democratic persuasion that Brettschneider advocates, (2) capable of accommodating the emotional force of great public speeches that have actually had a meaningful impact on citizens in terms of transforming attitudes, and (3) delivered in a way that motivates citizens to change their behavior so as to more reliably act in defense of free and equal citizenship. If we do not develop the analytic tools to understand how and why and when rhetoric moves people, we will never really understand the toolbox of democratic persuasion—much less make it available for use in the real world in which the state speaks to citizens. A new theory of public rhetoric requires expanding the domain of contemporary analytic political theory. Surely, that is exactly what Brettschneider is urging us to do as we mark out the terrain between the Hateful Society and the Intrusive State and seek to learn how that terrain can best be defended.

What does Brettschneider think about the proposition that accepting the core argument of his book demands a substantial expansion of the field of analytic liberal theory in the direction of a new theory of rhetoric? That expansion does *not* require that we reframe Brettschneider's arguments in terms of emotions or virtues,¹⁴ but it does require that we develop a robust theoretical framework capable of determining when appeals to emotions and virtues are, and are not, compatible with offering citizens reasons for rights.

III. POSSIBLE POLICY CHANGES

Brettschneider's chapters on the use of selective subsidy could readily be employed to draft the legislation necessary to

¹⁴ *Id.* at 20 (rejecting arguments based on virtues).

implement the policy changes demanded by his normative arguments. By contrast, there seems to be no very obvious legislative agenda implied by his discussion of the use of public speech by representatives of the government for democratic persuasion—other than perhaps tweaking standards for teaching American history. By way of conclusion, let me offer a few sample policy changes and pose the question of whether (assuming, counterfactually, that they could be passed) Brettschneider would regard these as promoting or violating his conception of legitimate democratic persuasion.

1. Require the president (and state governors) to give a “State of the Citizenship” address each year (or, if we wanted to mimic the Athenians, every year in which citizen-soldiers died in combat). The purpose of the speech would be to give reasons for rights in light of challenges to and advances in rights at home and abroad in the last year.
2. Require that each U.S. Supreme Court justice issue a public justification (or concur in another justice’s justification), expressed briefly and in non-technical language, for each of his or her votes on cases affecting free and equal citizenship. This would be separate from lengthy and often technical legal opinions.
3. Require that elected officials (or maybe all government officials) (1) take a public oath of personal commitment to, and belief in, the fundamental rights of free and equal citizenship (i.e. they not only swear to uphold the laws guaranteeing rights, but affirm their belief in those rights) and (2) make a public statement of their own reasons for their commitment to those rights (which could appeal variously to political or comprehensive conceptions). Those whose public behavior or votes blatantly violated their oath would be appropriately sanctioned (by, for example, public exposure, fines, and loss of office).
4. Require an oath similar to number three above as part of the naturalization process for new U.S. citizens.
5. Seek to ensure (through mandating coverage on all TV stations, emailing every citizen, or similar means) that important expressions of reasons for rights (e.g. numbers one and two above) are privileged, and thus

have a better chance to cut through the chaotic and noisy barrage of information/entertainment to which all contemporary citizens are constantly exposed.

My guess is that Brettschneider would not want to endorse all (or maybe not any) of these policy changes, but if I am right in that, I would like to hear why not. In my view, each of the sample changes seems, on the face of it, to be in line with the core claims of the book (as, for example, demanding commitment oaths of all citizens would not be). In any event, I think that sketching a range of policy changes, and then determining which ones fit and fail to fit Brettschneider's theory of democratic persuasion—along with the test case of the “top ten list” above—would help to put some flesh on the skeleton of a theory presented in Brettschneider's stimulating book.