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You're All Individuals: Brettschneider on Free Speech

Andrew Koppelman[†]

INTRODUCTION

Brian: No, no. Please, please please listen. I've got one or two things to say.

The Crowd: Tell us! Tell us both of them!

Brian: Look, you've got it all wrong. You don't need to follow me. You don't need to follow anybody! You've got to think for yourselves! You're all individuals!

The Crowd (speaking in impressive unison): Yes! We're all individuals!

Brian: You're all different!

The Crowd: Yes! We are all different!

Man in crowd: I'm not . . .

Man in crowd: Shhh!

Brian: You've all got to work it out for yourselves.

The Crowd: Yes! We've got to work it out for ourselves!

Brian: Exactly!

The Crowd: Tell us more!¹

Liberalism, Corey Brettschneider tells us, is uneasily poised between two dystopias, which he calls the Invasive State and the Hateful Society. The Invasive State constantly and intrusively monitors and punishes ordinary citizens for saying and doing anything, even in private, that is antagonistic to the values of free and equal citizenship. The Hateful Society is

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¹ MONTY PYTHON'S LIFE OF BRIAN (Sony Pictures 1979).

characterized by a discriminatory culture that generates political inequality. “It has seemed that we are faced with a dilemma”² between these two choices.

The solution—*the* solution, Brettschneider argues—is that the liberal state must allow hateful speech, but must also publicly condemn it. “Although citizens should retain rights to disagree with antidiscrimination laws, the state has the obligation to use its expressive capacities to defend the values of free and equal citizenship against criticism from hateful or discriminatory groups and individuals.”³ This expression by the state evidently is both necessary and sufficient to avoid both dystopias: “In this way the state can protect the right to express all viewpoints and, at the same time, it can defend the values of freedom and equality against discriminatory and racist challenges.”⁴

It isn’t that simple.

I. ONE SIZE FITS ALL

Brettschneider is offering an ideal theory: in a well-functioning society, the state will tell citizens to reject hateful ideas. The citizens will think what the state tells them to think. Although “there should be a wide role for citizens in defending the core liberal democratic values,”⁵ the state has little discretion about whether or when to exercise its persuasive capacities. State-sponsored condemnation of ideas that oppose free and equal citizenship is a “duty . . . as a matter of political morality.”⁶

This ideal is not contingent on how effective government speech is likely to be—something that certainly varies from one society to another. Nor is it contingent on how prevalent such ideas happen to be in any particular society. That varies too. Prejudice against the Irish used to be pervasive in the United States. Now it is nearly nonexistent. But if, anywhere in this vast land, there is a single lonely crank who casts aspersions on the liberty and equality of the Irish, government has a duty to hunt him down and denounce him.

Brettschneider thinks the state’s exercise of its moral authority will “effectively counter the spread of hateful

² COREY BRETTSCHEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY 170 (2012).

³ *Id.* at 6.

⁴ *Id.* at 3-4.

⁵ *Id.* at 13.

⁶ *Id.* at 119.

viewpoints,”⁷ and that this authority should “counter the concerns”⁸ of those who worry about the stability of democracy. Does he really believe that this alone will guarantee that minority rights will be respected in democratic politics?⁹ He never explicitly says that, but he endlessly repeats variations on the sentences I just quoted, and he presents this and nothing else as the solution to the dilemma he describes.

Brettschneider’s most innovative proposals call for the state to expressly discriminate against hateful views in the granting of subsidies and nonprofit status, and accordingly to abandon neutrality in limited public fora. If it does not do this, he claims, it could be perceived as endorsing the hateful views that it is protecting.¹⁰ But linguistic meaning always depends on the background assumptions shared by speaker and audience. When the Westboro Baptist Church is granted the same tax-exempt status as every other church, does anyone really think that the state is endorsing its hateful antigay and anti-Catholic views?¹¹

Sometimes state pedagogy is helpful to the cause of liberal democracy. But this is a non-ideal state of affairs. In his earlier, much better book, *Democratic Rights*, Brettschneider defended judicial review, but argued that it is decidedly a second-best solution: respect for individual rights ideally emerges from an unfettered electoral process rather than from being imposed from above.¹² That respect also ideally emerges from civil society, rather than being dictated by the state.¹³ The state is not a reliable source of moral wisdom. Good liberal citizens know that.

Brettschneider’s idea that the government, in particular, has a duty to speak implies that the state is uniquely authoritative.

⁷ *Id.* at 110.

⁸ *Id.* at 17. He acknowledges that in some “emergency situations” his solution may not be adequate. *Id.* at 18.

⁹ In South Africa, the government has been a world leader in gay rights, but violence against gay people is pervasive, and police ignore it. “Corrective rape,” the practice of raping gay men and lesbians in an effort to change their sexual orientation, is not only common, but is frequently abetted by the victims’ families. Clare Carter, *The Brutality of “Corrective Rape,”* N.Y. TIMES, July 27, 2013, <http://www.nytimes.com/interactive/2013/07/26/opinion/26corrective-rape.html>.

¹⁰ BRETTSCHEIDER, *supra* note 2 at 16, 84, 113, 138-39.

¹¹ *Id.* at 133-34.

¹² See COREY BRETTSCHEIDER, *DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT* 136-59 (2007).

¹³ At one point, Brettschneider concedes this: “Ideally, reflective revision might be prompted by the persuasion and reasoning of one’s fellow citizens in civil society.” BRETTSCHEIDER, *supra* note 2 at 66. But this ideal sits uneasily beside the incessantly repeated claim that the state has an “obligation” to speak. In arguing for a distinctive state role, he also observes that “only a representative of the people as a whole . . . can speak on behalf of the polity in condemning and apologizing for past injustices.” *Id.* at 41. That is certainly true, but it is a minor part of the state speech he has in mind.

That premise is a familiar part of the legitimizing mythology of the modern state, which imagines itself as a kind of secular God—a uniquely stabilizing and valid source of obligations.¹⁴ That mythology is a fact of life, and sometimes liberals will need to deploy it rhetorically. But they should never do so without disgust.

Brettschneider is oblivious to these objections. The counterarguments he sees fit to address are often silly. Does anyone really believe that what happens in civil society ought to be immune from criticism?¹⁵ That the state has an “obligation to guarantee the equal success of all viewpoints”?¹⁶ That any criticism of specific objectionable tenets of a particular hateful religious group will pressure citizens to abandon religion itself?¹⁷ He critiques these claims at length, but his citations offer no evidence that they have any proponents.

The question of just how the proper operation of a liberal society—a complex system with a complex range of possible pathologies—is to be promoted is one that presents different specific problems, and so requires different strategies from one time and place to another. Sometimes the Monty Python joke I quoted at the beginning really is the appropriate path. Post-World War II Japan under U.S. General MacArthur looked a lot like that: liberal prescriptions issued by a military dictator.¹⁸ The problem Brettschneider raises calls for a rich variety of strategies. What would you think of someone who claimed that whatever goes wrong with your car can be fixed by replacing the transmission fluid?

II. FREELY THEY STOOD WHO STOOD

What does not vary is the fact that there is no way to be *certain* that citizens will not abandon the values that (Brettschneider has nicely shown in *Democratic Rights*) are integral to democracy. “If citizens are protected in their ability to say and believe whatever they wish by a set of liberal rights, there is no guarantee that they will engage in reflective revision [of hateful beliefs], as shown by the spread of hate groups in the United States and Europe.”¹⁹ Yes. There is no guarantee. Ever.

¹⁴ See WILLIAM T. CAVANAUGH, *THE MYTH OF RELIGIOUS VIOLENCE: SECULAR IDEOLOGY AND THE ROOTS OF MODERN CONFLICT* 128-29 (2009).

¹⁵ BRETTSCHEIDER, *supra* note 2 at 27, 52, 69, 110, 166, 168.

¹⁶ *Id.* at 80; *see also id.* at 79, 110, 112. This one is not only silly but incoherent.

¹⁷ *Id.* at 157, 159-60.

¹⁸ WILLIAM MANCHESTER, *AMERICAN CAESAR: DOUGLAS MACARTHUR 1880-1964* 460-70 (1978).

¹⁹ BRETTSCHEIDER, *supra* note 2, at 43.

The problem cannot be solved by state speech or by anything else. People with free will can make bad choices.

This has been a persistent anxiety in free speech theory, and it is one that we will always have to live with.²⁰ It is already present in John Milton's germinal defense of free speech. Milton's principal reason for opposing the licensing of printing is religious: free will means the freedom to choose evil. Salvation is to be achieved only by struggle against temptation. "Assuredly we bring not innocence into the world, we bring impurity much rather: that which purifies us is trial, and trial is by what is contrary."²¹ It follows that "all opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is truest."²²

Like Brettschneider, Milton was sanguine about the consequences of unregulated speech:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and

²⁰ It is not, however, a "paradox," as Larry Alexander alleges:

If it outlaws illiberalism, its credentials as a liberal state appear to be undermined. If it permits illiberalism, it licenses Robert Frost's derogatory quip that liberalism can't take its own side in an argument. Either way, liberalism appears self-contradictory and incoherent. It must either betray its principles or betray itself (and thereby betray its principles). Liberalism both appears to be possible—we've seen it done—and impossible (it can't be done).

Larry Alexander, *Free Speech and 'Democratic Persuasion': A Response to Brettschneider* (June 11, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2277849. I can take my own side in an argument without needing to hit anyone who disagrees with me. The incoherence is present only if one presumes that human will finds intolerable the existence of other beings with free will. Jean-Paul Sartre argued this, see Andrew Koppelman, *Sex Equality and/or the Family: From Bloom vs. Okin to Rousseau vs. Hegel*, 4 YALE J.L. & HUMAN. 399, 427-28 (1992), but he wasn't a liberal.

²¹ JOHN MILTON, AREOPAGITICA (1644), reprinted in COMPLETE POEMS AND MAJOR PROSE 716, 728 (Merritt Y. Hughes ed., 1957).

²² *Id.* at 727. The importance of a free choice between good and evil is likewise emphasized in JOHN MILTON, PARADISE LOST, bk. 3, l. 102-10 (1674), reprinted in COMPLETE POEMS AND MAJOR PROSE 173, 260 (Merritt Y. Hughes ed., 1957). The speaker here is God the Father, explaining why it was right to allow the rebel angels and, later, Adam to transgress:

Freely they stood who stood, and fell who fell.
Not free, what proof could they have giv'n sincere
Of true allegiance, constant Faith or Love,
Where only what they needs must do, appear'd,
Not what they would? what praise could they receive?
What pleasure I from such obedience paid,
When Will and Reason (Reason also is choice)
Useless and vain, of freedom both despoil'd,
Made passive both, had serv'd necessity,
Not mee.

prohibiting to misdoubt her strength. Let her and Falsehood grapple;
who ever knew Truth put to the worse, in a free and open encounter.²³

But Milton's confidence also depended on his religious views. Vincent Blasi observes:

Milton's sweeping generalization about the strength of truth was not offered in the spirit of empirical demonstration, nor even that of didactic history. Milton here was simply affirming, once again, his faith in divine providence.²⁴ This faith "can have no secular analogue."²⁵

Milton did not rely on the state as a source of moral (which for him meant religious) authority. He doubted the state's reliability,²⁶ but he also thought that even correct religious doctrine would not bring about salvation if it was the consequence of blind conformity rather than active engagement with religious questions. "A man may be a heretic in the truth; and if he believe things only because his pastor says so, or the Assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes his heresy."²⁷ Milton's ideal citizens are, in this respect, better liberals than Brettschneider's.

Alexander Meiklejohn, on whom Brettschneider relies, exalts free will for Miltonic reasons. In modern free speech theory, there has been a persistent problem about whether those who reject democracy are entitled to free speech.²⁸ Meiklejohn offered the best response: "A government is maintained by the free consent of its citizens only so long as the choice whether or not it shall be maintained is recognized as an open choice, which the people may debate and decide, with conflicting advocacies, whenever they may choose."²⁹ Meiklejohn's argument is essentially

²³ MILTON, *supra* note 21, at 746.

²⁴ Vincent Blasi, Milton's *Areopagitica* and the Modern First Amendment, 1, 9 (Yale Law Sch. Legal Scholarship Repository: Occasional Papers 1995), available at <http://lsr.nellco.org/yale/ylsop/papers/6>.

²⁵ *Id.*

²⁶ See generally JOHN MILTON, CONSIDERATIONS TOUCHING THE LIKELIEST MEANS TO REMOVE HIRELINGS OUT OF THE CHURCH (1659), reprinted in COMPLETE POEMS AND MAJOR PROSE 856, 878-79 (Merritt Y. Hughes ed., 1957).

²⁷ MILTON, *supra* note 21, at 739. Milton's caricature of deference to religious authority anticipates Monty Python. *Id.* at 739-40.

²⁸ See Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 31 (1971); Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 186-89 (1956).

²⁹ Alexander Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461, 468 (1953). Another, similarly Miltonic formulation: "If men are not free to ask and to answer the question, 'Shall the present form of our government be maintained or changed?'; if, when that question is asked, the two sides of the issue are not equally open for consideration, for advocacy, and for adoption, then it is impossible to speak of our government as established by the free choice of a self-governing people." ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 123 (1960).

the same as Milton's: in order for the choice of good to be authentic, there must be a real option to choose evil. Meiklejohn, however, is curiously evasive about the dangers. He does not have Milton's assurance of God making it all right in the end.³⁰

If autonomy is the only thing that matters, of course, then this is not a problem. T.M. Scanlon argued that respect for citizens' autonomy entails that speech cannot be prohibited simply because it results in listeners having false beliefs, or in listeners coming to believe that they ought to perform certain harmful actions, however bad the consequences of such beliefs might be.³¹ He later recanted, precisely because the principle was too cost-insensitive. It may be that there should be some restriction on the costs that government should take as a justification for restrictions on speech, he wrote, but such an argument "must itself be based on a full consideration of all the relevant costs."³² Scanlon invoked Milton's concern about authentic choice, but he retreated from his absolutism, because he lacked Milton's assurance that authentic choice is more important than anything else.³³ You can still support free speech on the grounds Scanlon articulated—I do—but you have to be open to the possibility that those grounds are overridden if the consequences are bad enough.

Brettschneider is in this tradition. Toleration of illiberal speech is demanded by respect for the independent judgment of free and equal citizens: "[I]t is essential to the legitimacy of value democracy that they could choose to embrace inegalitarian principles and policies."³⁴ But the whole project demands that they not do so. It is inescapably consequentialist.

Milton accepted the dangerous consequences of his doctrine, because he believed there is an ultimate Guarantor to

³⁰ Other early proponents of free speech were more explicit about the hazards of the undertaking. Justice Holmes wrote that free speech "is an experiment, as all of life is an experiment." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Brandeis thought that maintaining a free society required courage. *Whitney v. California*, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring); see Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988).

³¹ Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213-14 (1972).

³² T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 533 (1979).

³³ Frederick Schauer's critique of Scanlon misses his Miltonian dimension: Schauer thinks that if the state can deem some conduct impermissible, it logically follows that it can censor speech advocating that conduct. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 70-71 (1982). By this logic, God should not have permitted the serpent to communicate with Eve.

³⁴ BRETTSCHEIDER, *supra* note 2, at 77.

assure us that the dangers are worth it. Brettschneider, on the other hand, has no assurance that one day Christ will return and make everything okay. Happy talk about state speech is a poor substitute.

There is no way to be sure that the freedom that is argued for will not be used to bring about the consequences that are feared. Somehow the citizens must be persuaded to use their freedom well. Perhaps government can do the persuading. But it is better if the ideas of freedom and equality are so deeply ingrained in the culture that the government has no work to do.

Any consequentialist case for a given liberty is likely to rest on some combination of optimism (about what will happen absent regulation) and distrust (of the government actors who would regulate the liberty in question).³⁵ The warrant for either of these will vary from one society to another. Too much optimism and you have the Hateful Society. Too little distrust and you have the Invasive State.

In the United States, as it happens, there is plenty of evidence that supports optimism about a regime with robust free speech protection.³⁶ Overt racism has been nearly eliminated during the period when the First Amendment was construed to give strong protection to racist speech, and it is not at all clear that the state's tutelary function, rather than vigorous discussion within civil society, was responsible.³⁷ The growth of religious tolerance, too, is largely the product of private initiative rather than state speech.³⁸ Maybe state speech can help, but assessing when and whether this is so requires a more nuanced understanding of the cultural basis of liberalism than Brettschneider offers.

³⁵ ANDREW KOPPELMAN WITH TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION 2-3, 64-80 (2009).

³⁶ See Andrew Koppelman, *Waldron, Responsibility-Rights, and Hate Speech*, 43 ARIZ. ST. L.J. 1201, 1215-21 (2011).

³⁷ The most important state intervention was probably the Civil Rights Act of 1964, but it did considerably more than lecture citizens about equality.

³⁸ See KEVIN M. SCHULTZ, *TRI-FAITH AMERICA: HOW CATHOLICS AND JEWS HELD POSTWAR AMERICA TO ITS PROTESTANT PROMISE* (2011).