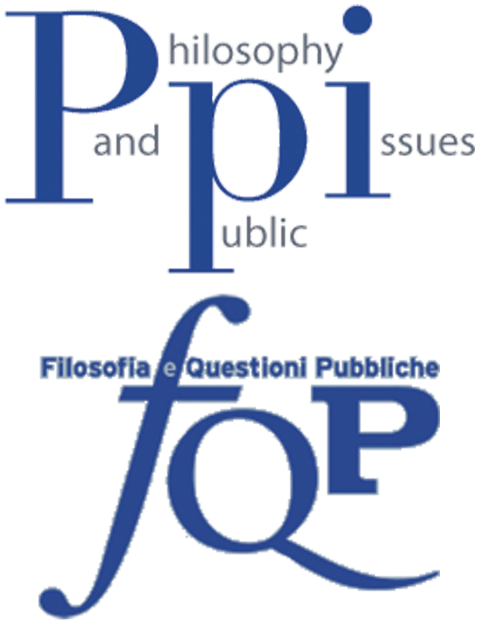
SYMPOSIUM

ILLIBERAL VIEWS IN LIBERAL STATES




# A PRÉCIS OF *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?*

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© 2016 – *Philosophy and Public Issues (New Series)*, Vol. 5, No. 1 (2016): 3-8
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

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# A Précis of *When the State Speaks, What Should It Say?*

Corey Brettchneider

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

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

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

[2] For discussions of the doctrine of viewpoint neutrality as being essential to the meaning of First Amendment free speech protection, see Martin H. Redish, *The Adversary First Amendment: Free Expression and the Foundations of American Democracy* (Stanford, CA: Stanford University Press, 2013) 105-114. Larry Alexander takes a more neutralist position in "Free Speech and "Democratic Persuasion": A Response to Brettschneider," *in Philosophical Foundations of Human Rights* (Rowan Cruft et al. eds., forthcoming Sept. 2014), *available at* http://ssrn.com/abstract=2277849. For a defense of neutralism as a political theory, see generally Bruce A. Ackerman, Social Justice in the Liberal State (New Haven: Yale University Press, 1980).

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

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

[3] Catherine A. MacKinnon, *Only Words* (Cambridge: Harvard University Press, 1993), 71-73. For another example of the "collision course" view, see Charles R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus, in Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment, ed. Mari J. Masuda et al (Boulder: Westview, 1993), 53, 57-58.

[4] See Erik Bleich, *The Freedom to Be Racist?: How the United States and Europe Struggle to Preserve Freedom and Combat Racism* (New York: Oxford University Press, 2011), 97-105; see also Adam Liptak, "Outside U.S., Hate Speech Can Be Costly: Rejecting the Sweep of the First Amendment," N.Y. TIMES, June 12, 2008, at A1 (describing differences in the way the United States and other countries, such as Canada and Germany, treat potentially offensive speech).

[5]Corey Brettschneider, *When the State Speaks, What Should it Say? How Democracies Can Protect Expression and Promote Equality (*Princeton: Princeton University Press, 2012).

theory of what the state should say. The state must favor some substantive values, namely the ideal that all citizens should be treated as free and equal.

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

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

The proper place for viewpoint neutrality, I argue, is in preventing government coercion or censorship of viewpoints. Citizens should be allowed to hear and endorse all viewpoints, even hateful ones. While I think threats and speech that might incite imminent violence can be prohibited under the First Amendment, generalized viewpoints cannot be banned. I argue, however, that the state should not be viewpoint neutral in its own

expression. The state should protect free speech out of respect for the freedom and equality of citizens. Citizens are free and equal in having the capacity to debate and decide on matters of personal and political principle. The state should find a way not only to uphold free speech, but also to defend the democratic values that justify protecting free speech in the first place. For example, the state has an obligation to advance civil rights through education and public holidays. We rightly dedicate a holiday to Martin Luther King, not to the Southern segregationist Bull Conner. Likewise, the public schools are justified in teaching students racial equality.

An even stronger measure that the state should take is to use its spending power to advance democratic values. I therefore defend the IRS decision to deny the subsidies that come with non-profit 401(c)(3) status to Bob Jones University, which the Supreme Court upheld in *Bob Jones v. United States*.[6] The IRS already requires that, for non-profits to receive the subsidies of tax-exemption, they must have a "public benefit."[7] That is, such organizations must provide services to the public that offset the cost of the tax-exemption. In the book, I argue that the IRS should make its public benefit more specific, and explain that being a hate group is inconsistent with having a public benefit. This clarification of the meaning of public benefit should be made by Congress rewriting the 501(c)(3) statute. The IRS should thus be required by law to deny the tax subsidies of 501(c)(3) to hate groups that directly oppose the democratic values of free and equal citizenship. When the state uses its spending powers, it should promote democratic values and not be bound by viewpoint neutrality.

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

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

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

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

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

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

The essays in this symposium attempt to push my view toward one of the opposing poles of neutralism or prohibitionism. In response to these critics, I suggest that value democracy and democratic persuasion offer a third way forward in thinking about the role of values in liberalism. I attempt to show that value democracy strikes a "the golden mean" between neutralism and prohibitionism.[11]

*Brown University*

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

[10] Michael C. Dorf, "Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings," Va. L. Rev. 97 (2011): 1316-23.

[11] This précis reprises material from my book and from another response to critics essay published in the Brooklyn Law Review as "Democratic Persuasion and the Freedom of Speech," Vol. 79, issue 3 (Spring 2014): 1059-1089.

If you need to cite this article, please use the following format:

Brettschneider, Corey, "A précis of *When the State Speaks, What Should It Say?*" *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016), 3-8, edited by S. Maffettone, G. Pellegrino and M. Bocchiola