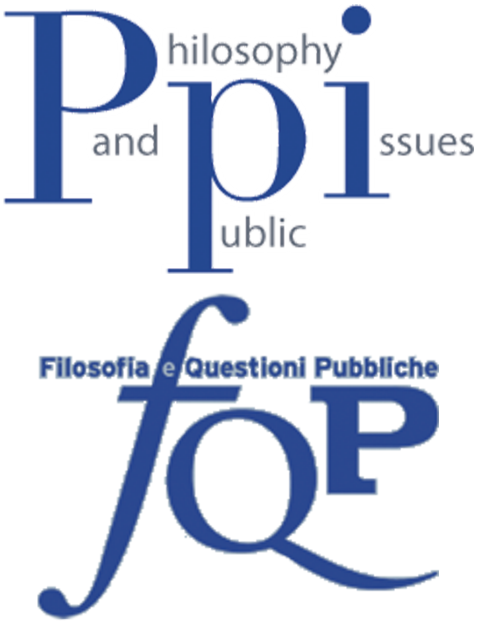
SYMPOSIUM

ILLIBERAL VIEWS IN LIBERAL STATES



RELIGIOUS FREEDOM AND THE REASONS FOR RIGHTS

BY

KEVIN VALLIER

© 2016 – *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016): 9-24
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

[THIS PAGE INTENTIONALLY LEFT BLANK]

Religious Freedom and the Reasons for Rights

Kevin Vallier

In *When the State Speaks, What Should It Say?*, Corey Brettschneider argues that there is a middle-path between the conceptions of the roles of the democratic state offered by "neutralists" and "militant democrats."[1] In contrast to neutralists, the state is required to promote core democratic values even against those who reject those values, and in contrast to militant democrats, it must employ relatively non-coercive means to realize those goals. Thus, while the state cannot use coercion to restrict hateful views that threaten to undermine the basis of liberal democracy (namely the value of free and equal citizenship), it can use "democratic persuasion" to help maintain the integrity and vivacity of liberal democratic institutions over time. The values underpinning liberal democracy also generate duties of "reflective revision" where citizens have an obligation to rethink and revise their beliefs when those beliefs are publicly relevant and incompatible with the ideal of free and equal citizenship. The core case of illustration is the federal government's denial of tax-exempt status to Bob Jones University in order to compel them to end their ban on interracial dating. Bob Jones had a public purpose granted via its tax-exempt status, and public purposes in a liberal democracy must not frustrate free and equal citizenship. Consequently, the state was permitted to

[1] Princeton University Press, 2012, hereafter referred to as "WSS."

© 2016 – *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016): 9-24
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

engage in democratic persuasion to bring their public behavior into line with public democratic values.

Chapter 5 of the book brings this approach to bear on religious freedom. It is clear from the book that religious groups challenge the compatibility of democratic persuasion with liberal democracy. Many religious groups seem to endorse "hateful" views, but liberal democrats are typically hesitant that use democratic persuasion to change theological convictions. Theological commitments are not on the table.

Brettschneider thinks the state may nonetheless use democratic persuasion. In contrast to the "static" view of religious freedom, where current beliefs and practices of a religious are thought to merit protection, "religious beliefs should not be exempt from the principle of public relevance" (WSS: 143). Because religious beliefs affect the culture of liberal democracy, hateful religious views are publicly relevant for state tinkering. Thus, if religious beliefs oppose free and equal citizenship, "democratic persuasion is justified in order to transform these beliefs."

A subsidiary aim of the chapter is to show that by making religious beliefs subject to democratic persuasion, Brettschneider has not thereby adopted an objectionably secularist approach to liberal democracy. To demonstrate, Brettschneider stresses the "substance-based" and "means" limits on democratic persuasion. Substance-based limits hold that Brettschneider's democracy is limited to promoting the shared political values of free and equal citizenship and prohibited from promoting religious or non-religious comprehensive values. The means limit implies that democratic persuasion is limited to the state's "expressive and subsidy capacities" and does not include "its coercive capacities" such that religion cannot be subjected to coercive transformation

(WSS: 143). By emphasizing these limits, Brettschneider hopes to defang the objection from secularist bias.

In this essay, I will argue that Brettschneider has not successfully avoided secularist bias. To vindicate my thesis, I will first lay out Brettschneider's argument for applying democratic persuasion to religious groups. I will then argue that the state lacks both the pragmatic capacity and moral authority to transform theological beliefs on political liberal views like Brettschneider's. It is unable to make the necessary theological distinctions to correctly transform religious belief and the subjects of "transformation" have no reason to accord the state's persuasive power moral authority over them. I end by considering an objection.

I

The *Lukumi* Principle

Brettschneider builds his case for the state transformation of religious belief around the "*Lukimi* principle" following the Supreme Court case *Church of the Lukimi Babalu Aye v. City of Hialeah*, where the Supreme Court ruled that the Hialeah city council did not have the legal authority to restrict animal sacrifice practices characteristic of the Santeria religion. The lesson of the case, Brettschneider argues, is that the SCOTUS did not merely strike down the law but articulated the "reasons for rights" of religious freedom in the case, scolding the city council for a failure to recognize the value of religious freedom. In doing so, the SCOTUS engaged in permissible democratic persuasion aimed at altering the city council's supposedly Christian view that they had the legal authority to ban animal sacrifice. The ban was based on "animus" or hatred, and so was subject to democratic persuasion.

Note that the court did not criticize Christian beliefs generally. Instead, they only criticized those beliefs that impacted negatively and directly on the ideal of free and equal citizenship. In other words, they implicitly distinguished (as Brettschneider wishes to explicitly distinguish) between publicly relevant religious beliefs and those properly cordoned off from public concern.

The discussion eventuates in the *Lukumi* principle, which holds that the commitment to religious tolerance in value democracy has two elements:

> First, it entails the protection of the right to express religious beliefs and to practice one's religion free from coercive sanction, even when that religion espouses principles at odds with the ideal of free and equal citizenship.
>
> Second, the *Lukumi* principle entails that the state should explain why the democratic values underlying religious freedom are incompatible with religious beliefs that contradict the values of free and equal citizenship (WSS: 148).

The *Lukumi* principle is compatible with both the substance-based and means limits of democratic persuasion. But it has the controversial implication that insofar as a religious belief is hateful, discriminatory, and impacts the expression of free and equal citizenship, to that extent it is the object of public, state concern. If the result is that religious doctrine is a matter of government oversight, so be it.

II

Undermining the *Lukumi* Principle's Apparent Secularist Bias

Brettschneider then argues that the *Lukumi* principle does not exhibit secularist bias because applying the *Lukumi* principle does

not threaten to extinguish religion. Transformational dialectics does not require an all-or-nothing choice between religion and secularism. Instead, Brettschneider's view attempts to synthesize democratic and religious values, rather than replacing the former with the latter. Second, the transformation is not forced on any group.

Brettschneider also claims that state expression and financial incentives should not be coercive, further dissolving the appearance that his view is overly secularist. Freedom of association means that groups have a right to resist democratic persuasion via their own organizational and theological decisions. For instance, in 2006, the Roman Catholic Church withdrew its facilitation of adoption services rather than "comply with a state law requiring adoption agencies not to discriminate against gay families." (WSS: 166). Brettschneider argues that the state was permitted to impose this requirement and that the freedom of the Catholic Church was preserved by its right to withdraw. All the state did was use its power of the purse to promote the value of equality, which it was permitted to do based on Catholic Charities' reliance on state funds. But the Catholic Church had a right to resist, despite the fact that the state should not accept or promote their discriminatory views.

III

The Persuasive State Lacks Competence on Theological Matters

Critical to Brettschneider's argument is the claim that the state has both the *pragmatic ability* and *moral authority* to judge whether theological views are hateful and publicly relevant. But he has not adequately defended either claim. Consequently, Brettschneider's

conception of democratic persuasion of religious groups cannot meet the test of public justification.

In Brettschneider's discussion of *Christian Legal Society v. Martinez*, he combats a potential argument that the Christian Legal Society does not discriminate against homosexuals. Brettschneider suggests that the CLS may have distinguished between a ban on homosexual acts as opposed to a ban on gay citizens as such (WSS: 119). In other words, the CLS would discriminate based on behavior rather than "status." Here is Brettschneider's reply, which I think is emblematic of his approach to religion,

> But I believe that such an attempted distinction between status and choice of behavior is inconsistent with the ideal of free and equal citizenship. … It is not a choice to be gay, any more than it is a choice to be heterosexual. Discrimination against gay citizens, based supposedly on their actions, thus amounts to status discrimination. The Christian Legal Society cannot treat gays as equals while banning them on the basis of their most intimate bonds and relationships (WSS: 120).

In this passage, Brettschneider wades into complex moral and theological matters. Distinguishing between status and behavior is inevitably rooted in complex theological conceptions of the body and personal identity.

For instance, on some Christian views, there is *no such thing* as a sexual identity; all forms of identity are subsidiary to one's identity in Christ, and identifying with disordered impulses is incompatible with Christian identity. While individuals may have inescapably biological homosexual sexual *orientations*, they are not in their essence gay. In fact, in the next life, they will have no sexual desires (neither will heterosexuals). Thus at our deepest level, we are neither gay nor straight, and so a distinction between status and behavior is perfectly natural. The Christian identity is

that of a redeemed child of God; our behavior, gay or straight, is less important.

In the passage quoted, Brettschneider simply asserts, without consulting any major theological traditions, that the distinction between status and choice can be dismissed because asking gay citizens not to have gay sex as a condition of group membership is status discrimination. Such a judgment is hasty and bound to unsettle citizens of faith with a developed theology of sexuality, the body, and family life.

By giving the state the right to make these judgments, however, Brettschneider has effectively given the state the general power to make explicit, pedagogical distinctions between publicly relevant religious beliefs that violate free and equal citizenship and beliefs that either are not publicly relevant or do not violate free and equal citizenship. But giving the state the right to make these judgments forgets that *the state is a bad theologian*, even when staffed by well-meaning officials. Even the Supreme Court does not have the general knowledge necessary to determine how to separate some religious beliefs from others. They are similarly poorly equipped to determine whether theological objections are based on animus or whether they are due to a deep, sincere theological opposition to the contemporary secular liberal's historically anomalous view of human sexuality and social identity.

Thus, the democratic state's pedagogy is bound to be ham-handed at best and offensive and authoritarian at worst. And this concern is not idiosyncratic to me. It is raised repeatedly in discussions of constitutional law on religious freedom, as Kent Greenawalt makes plain in his *Religion and the Constitution* volume

on free exercise of religion.[2] Unfortunately, Brettschneider provides no genuine assessment of the state's theological abilities in the book.

IV

The Persuasive State Lacks Normative Authority on Theological Matters

My concern is not merely pragmatic, however. I am also concerned about the state's rightful authority to engage in democratic persuasion. Brettschneider assumes the democratic state is *entitled* to make judgments determining when certain religious beliefs contradict an admittedly vague and contestable ideal like free and equal democratic citizenship. This entitlement is likely based on the foundations of Brettschneider's notion of value democracy.[3] But I can see little reason to think that it has this authority.

To see why, let's review a bit of Rawls. The later Rawlsian project, as I understand it, is an attempt to show that a political conception of justice can be congruent with, supportive of or else not in conflict with a series of reasonable comprehensive doctrines in contemporary liberal democratic societies.[4] As a result, theorists not only engage in a substantive determination of the content of the political conception of justice but also determine whether the political conception is fully justified to

[2] Kent Greenawalt, *Religion and the Constitution, Volume 1: Free Exercise and Fairness* (Princeton: Princeton University Press, 2009), 1-34.
[3] Corey Brettschneider, *Democratic Rights: The Substance of Self-Government* (Princeton: Princeton University Press, 2010), 7-27.
[4] John Rawls, *Political Liberalism*, expanded edition (New York: Columbia University Press, 2005), 11.

each reasonable comprehensive doctrine (though most of the determination of fit is left to each person.[5] On Rawls's view, there is a genuine possibility that reasonable comprehensive doctrines *might reject* a reasonable political conception. And there is a critical reason for this: the entire point of political liberalism is to create a focal point of values, reasons and exegetical principles by which free and equal people who deeply disagree about matters of right and good can live together on moral terms. If comprehensive doctrines lacked this power, they would be superfluous (and in a way some political liberals, like Jon Quong, recognize this, though they respond to it differently than I would).[6]

In political liberalism, the determination relation between the political conception and comprehensive doctrines is not uni-directional. Comprehensive doctrines can provide reasons to reject certain interpretations of political values. Political conceptions, after all, do not interpret themselves. And that means members of those comprehensive doctrines have a say in how their political institutions are to interpret the ideal of free and equal citizenship. The proper interpretation of free and equal citizenship is not written in the heavens. For an interpretation to be authoritative, then, it must comport with reasonable comprehensive doctrines in a particular society.

Brettschneider's foundational views differ from Rawls's. But there is good reason to agree with Rawls on allowing different comprehensive doctrines to help provide the authoritative interpretation of political values. There is a kind of respect manifested in not presuming to dictate to citizens how to understand their comprehensive doctrines. When theorists

[5] Ibid., 386.

[6] See Jonathan Quong, *Liberalism Without Perfection* (New York: Oxford University Press, 2011), 161-191.

presume how to understand the theological views of others, they arrogate themselves to a position of expertise and authority that they lack. State officials are no better. They also lack any special access to how political values and theological values fit together. State intervention implies a lack of respect for citizens by presuming to dictate to them which features of their comprehensive doctrines are hateful, which are publicly relevant and which are inessential to their core commitments.

If so, it is dubious that adherents of reasonable religious views have reason to acknowledge the state's theological judgments as authoritative, including judgments necessary to articulate a doctrine of public relevance according to which religious beliefs would be subject to state transformation. This would be to give the state the authority to lord its interpretation of the essentials of a group's theology over the group itself. And such authority would invariably be affected by fleeting fads and politically motivated considerations. Given this, it is hard to see why citizens should leave it up to the state to determine which parts of their beliefs have public relevance and which do not. It is even harder to see why citizens should let the state put pressure on them to *change their views* when they sincerely believe their views are morally well grounded.

For example, Roman Catholics who have theological reason to separate homosexual sexual acts from sexual identity and to downplay sexual identity in favor of spiritual identity have reason to reject the coercive pressure Brettschneider's state would impose upon them. It seems to me appropriately liberal to hold that Roman Catholics are entitled to appeal to their deep theological commitments to make this sort of determination for themselves. The state should not subject them to manipulative persuasion if they fail to agree with the views of those in power.

In sum, it is hard to see how the use of persuasive power is publicly justified to those who are the object of persuasion.

Perhaps Brettschneider can reply that the state's expressive powers are not the subject of public justification, just its coercive powers. But he repeatedly emphasizes that the judgments of the Supreme Court, for instance, exemplify public reason (WSS: 45). From my understanding of the public reason tradition, exemplifying public reason means being sensitive to the fact that groups not only have the authority to determine their own organizational structure and teachings but a strong presumption in favor of making its own determinations about the public relevance of its theological doctrines.

In sum, Brettschneider's democratic state cannot respect persons as free and equal citizens and exercise this sort of pedagogical and exegetical authority over them, as such authority is neither publicly justified nor pragmatically trustworthy.

V

An Objection

In discussion, Brettschneider has argued that he is merely defending a set of democratic values that might or might not conflict with theological values.[7] This is not the same as making theological judgments, though it may have an impact upon them. Brettschneider is seeking to defend the reasons for rights like the right to free exercise of religion. That right is ultimately based on the ideal of free and equal citizenship. So to defend religion, we

[7] See Brettschneider's reply in an online reading group hosted by the Public Reason blog here: http://publicreason.net/2013/04/08/state-speaks-symposium-responses-to-chambers-chapter-3-rubinstein-chapter-4-vallier-chapter-5-and-stiltz-chapter-5/

are required to defend these values even if religious people oppose them. This means we must make political judgments about the meaning of religious freedom, but we are not required to make theological judgments.

However, Brettschneider acknowledges my point that some religious groups will find that democratic persuasion impinges on their theological commitments. Some groups will undoubtedly come to hold that their theological commitments are not compatible with the state promoting the ideal of free and equal citizenship. As a result, if the state is promoting equal treatment of gays and lesbians, and some religions oppose that, then religious practice will be affected. But given the state's duty to promote equal treatment of all, it must engage in education and persuasion, and if it turns out that requires modifying religious views, then so be it.

So Brettschneider maintains that even if we know that the state must engage in democratic persuasion to change theological beliefs, this does not mean the state engages in theology or endorses theology. Instead, the state is merely promoting shared democratic values when it conflicts with religious values.

But my concern is narrower than Brettschneider's. I do not claim that the state must shrink back from ensuring that all citizens are treated as free and equal. Instead, I argue that the idea of free and equal citizenship is *reasonably contestable*. Reasonable people can offer different reasonable interpretations of the ideal. Roman Catholics widely claim to strongly endorse the ideal of free and equal citizenship, but they do not *interpret* this ideal as requiring the public recognition of gay marriage. Catholics frequently defend this point on two grounds. First, they appeal to political values like promoting the common good to defend

traditional marriage.[8] Catholics root this idea in their own doctrine of natural law; but having a private, comprehensive grounding for promoting the common good is not the same as appealing to non-political values. Second, Catholics typically deny that they fail to treat gays and lesbians as equals by publicly claiming that homosexual sex is disordered and unnatural. And this is because Catholic theologians typically deny that one's desire to have homosexual sex is an intrinsic part of your ultimate identity as one who seeks the Good, understood as communion with God. Such an identity is not inherently sexualized. As a result, fulfilling desires for homosexual sex cannot possibly count as realizing one's identity either as a natural creature or as a child of God. Traditional Roman Catholics of the sort I describe simply disagree with Brettschneider's *interpretation* of the ideal of free and equal citizenship and so object to the state promoting a conception of free and equal citizenship that prevents them from living lives compatible with their own theological commitments.

I think the political liberal is within her rights to insist that, in seeking to ban gay marriage, traditional Roman Catholics are themselves seeking to impose a sectarian, comprehensive conception of the good on others. However, even if this is true, Catholics still have a good reason to insist on maintaining their institutional and theological integrity against a state interested in democratically "persuading" them to change their minds on matters of *eternal* and *unalterable* doctrine. And they have especially strong reason to reject the state using tools like tax-exempt status to engage in such persuasion, as this adds an element of manipulation.

[8] For Catholic teaching on homosexuality, see the U.S. Catholic Church, *Catechism of the Catholic Church* (USCCB Publishing, Random House, 1995), 625-6.

So the real question is whether the state is permitted to impose a *sectarian* interpretation of the ideal of free and equal citizenship on people who reasonably disagree with that interpretation. The issue is not religion vs. equality, but rather religious conceptions of equality vs. secularist conceptions of equality. And there is very good reason for someone to object to her state attempting to prod her into endorsing a conception of equality she strenuously rejects on thought-out conscientious grounds.

There is a further problem here, and perhaps an ironic one. Political liberalism not only forbids imposing comprehensive doctrines on citizens who reasonably reject them, but also prohibits forcing people to comply with interpretations of political values that they reasonably reject. There is no real difference between the two forms of imposition; the latter is in many cases as morally problematic as the former. If so, imposing a controversial and reasonably rejected interpretation of a political value on unwilling but reasonable citizens is authoritarian and so *acts of democratic persuasion will frequently violate free and equal citizenship*. State officials fail to treat their reasonable "persuadees" as equal to themselves. State officials dominate their fellow citizens by imposing publicly unjustified coercion on them.

I anticipate Brettschneider replying as follows. Consider the legal doctrine of "separate, but equal" which was used to justify the obviously unequal treatment of blacks in the Jim Crow South. Couldn't white citizens offer an objection similar to the Catholic citizens I describe? Southern whites could claim, and did claim, that they believe in the ideal of free and equal citizenship, and then argue that free and equal citizenship does not prohibit segregation. Surely the state was justified in imposing an ideal of free and equal citizenship interpreted as incompatible with segregation, so why can't it be similarly justified with respect to Roman Catholics?

The short answer is that racists who made this objection were *obviously unreasonable* because their racism prevented them from recognizing that the legal institutions of separate, but equal could not live up to their "ideal" of equality in political practice. Separation meant inequality. And political liberals can explain part of why this is: the Jim Crow laws were not publicly justified to Southern blacks; so imposing those laws on them was unequal treatment. Roman Catholic doctrinal opposition to homosexual sex is quite different. It is rooted not in mere animus but in careful theological reflection on the nature and purpose of the human body. Sincere, honest and thoughtful people accept the Catholic theology of the body, but only the vicious or ignorant could support segregation.

I conclude, then, that sincere religious groups threaten Brettschneider's doctrine of democratic persuasion. Brettschneider has not removed secularist bias from his view.

VI

Addendum on Brettschneider's Interpretation of *Mozert*

A small but important point: I think Brettschneider misrepresents *Mozert*. It is wrong to say that Vicki Frost wanted to "exclude even knowledge of these [non-Christian] cultures," rather that the Holt Reader was biased against Protestant Christianity by presenting the comprehensive view that all religions were equal and that the paranormal was legitimate, among other things. Brettschneider states that in this case "a mother objected to her child's being subject to curriculum that included a textbook that taught non-biblical literature and presented information about other cultures" (WSS: 163). I do not believe this claim is consistent with Ms. Frost's original testimony, (as opposed to Frost's "new" view Brettschneider

describes on p. 164). So I think we mischaracterize *Mozert* and Ms. Frost by glossing over what was a complex, systematic and well-thought-out series of objections to a particular reader, not a wholesale rejection of diversity education.[9]

Bowling Green State University

[9] For a defense of Ms. Frost along these lines, see John Tomasi, *Liberalism Beyond Justice* (Princeton: Princeton University Press, 2001), 91-2. I discuss the case in Kevin Vallier, *Liberal Politics and Public Faith: Beyond Separation* (New York: Routledge, 2014), 211-3.

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

Vallier, Kevin, "Religious Freedom and the Reasons for Rights" *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016), 9-24, edited by S. Maffettone, G. Pellegrino and M. Bocchiola