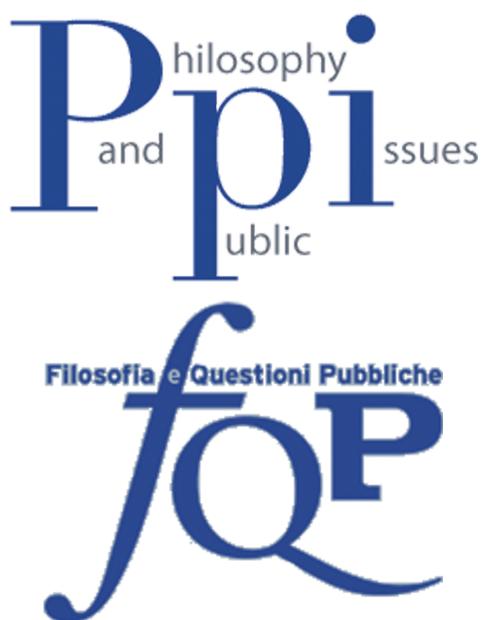


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IN DEFENSE OF THE (SOMEWHAT MORE)
INVASIVE STATE

DISCUSSION OF COREY BRETTSCHEIDER'S
WHEN THE STATE SPEAKS,
WHAT SHOULD IT SAY?

BY

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**In Defense of the
(Somewhat More) Invasive State**
Discussion of Corey Brettschneider's
When the State Speaks, What Should it Say?

Sarah Conly

Brettschneider explores the familiar and vexing problem of what a democratic state should do about citizens who promote anti-democratic values—racism, or religious intolerance, or sexism. While many believe that the state should remain neutral when it comes to competing values among its citizens, Brettschneider argues that on the contrary, the government should use its varied powers (including its powers to spend and subsidize) to promote the ideal of equal citizenship and to discourage the promotion of values that are antithetical to democracy. The state should take a stand, and persuade citizens that some political beliefs are wrong-headed. We need to promote democratic congruence, “the consistency between democratic public values and personal commitments...” since “democratic legitimacy is based not only on whether the state protects democratic rights, but also on democratic endorsement or citizens’ agreement with the values that justify rights.” (38) These are the values of free and equal citizenship: “For a democratic ideal to be fully realized, it is important for those values to be endorsed and embraced by the citizenry, and not only instantiated in public policy.” (39)

Brettschneider makes his argument clearly and convincingly, and I agree that his conclusion is correct: a state founded on the principles of democracy has an obligation to give public support to democratic values. Some find the degree of state intervention that Brettschneider allows to be controversial. Not only should the state express symbolic support of equality, on his account, it should take away tax exempt status from organizations that oppose equality for all citizens, and if this causes those organizations to fail, so much the worse for them: the state should protect freedom of speech in certain ways, but has no obligation to help these organizations get their message out. To some this will seem too much interference by the state in public opinion, but again, I find Brettschneider's argument convincing. My only quarrel with Brettschneider is, on the contrary, that he is too restrained in what he wants the state to do. Given both the goals and the principles he articulates, he should allow more action in the service of value democracy

Brettschneider wants to avoid what he calls the Hateful State, where anti-democratic values abound among citizens, and the Invasive State, where the government intervenes too much in its attempt to stamp out undemocratic values. To avoid the hateful state the government delivers persuasive messages about the wrongness of anti-democratic values. To avoid the Invasive State, Brettschneider outlines two sorts of limits his value democracy must observe in its attempt to persuade people of properly democratic beliefs. One limitation is of means, the methods the state can use to persuade people to give up undemocratic values and adopt values consistent with belief in the equality of all citizens. The second limitation is one of substance: the state ought not to try and persuade us of just any values, and not just any truly good values, but only those directly implied by the acceptance of democracy. The state must convey the message that we are all equal in the *political* sphere—not necessarily that we

are all have equal value, but that we all have equal value as citizens. Thus, discrimination against any set of citizens in the public realm must be addressed, but private beliefs, insofar as these have no political significance, are off limits to state suasion. In this way the state prevents itself from being too intrusive—a hateful state—and manifests the same respect for equal rights that it demands of its citizens.

This seems reasonable, as far as it goes. I will argue, however, that Brettschneider draws his lines—between acceptable means, and unacceptable means, and between those of an individual’s values that are open to public scrutiny, and those which are off limits—in the wrong places.

I

Means

In looking at the methods the state can use to persuade us of the value of political equality Brettschneider makes two distinctions. The first is between coercive methods—making an action illegal, with the threat of sanctions—and the less intrusive “expressive” means of persuasion. We want to emphasize the “central role of the state’s persuasive, as opposed to its coercive, capacities.” (13) This is because valuing democracy requires valuing the ability of citizens to make decisions for themselves: “In contrast to coercion, reasoning with individuals differs because it respects their capacity as free and equal citizens to decide upon their own conception of the good and their conception of justice. Unlike force, reasoning attempts to change minds through the active participation and free thought of the citizens whom one is seeking to persuade.” (66)

The second distinction is between different kinds of expressive persuasion. It is preferable, on Brettschneider's account, to appeal to reason when expressing the state's views, rather than using non-rational means of persuasion—better to articulate the reasons that a particular sort of behavior or a particular set of beliefs is wrong than doing something else, like an appeal to the emotions, that might bring about the same belief. This way, a person will use her abilities as a rational agent to reassess her own say, racially prejudiced beliefs, and will see that they are not in fact compatible with support for democracy. Brettschneider thinks a good example of an appeal to reason is a court decision that spells out the particular ways in which a behavior—say, segregation in schools—is contrary to the principle equal citizenship. Non-rational means, on the other hand, obviously bypass the reasoning ability that makes us fit for democracy and appeals to less exalted parts of our psyche. The example Brettschneider gives several times of a non-rational means of suasion is that of subliminal messages that tell us what to do, presumably effecting a change in attitude without our knowing that we are being exposed to such a force for change. In the end, coercive methods and non-rational expressive methods share the same failing --they do not address the agent's reason, but simply try to push him towards right behaviors and right beliefs without any understanding on his part.

These two parts distinctions as to means is not neat, though. First, we may consider the distinction between coercive and non-coercive methods. One objection Brettschneider makes to coercive means is that they may not respect rights, and we want our persuasive methods to respect rights appropriately. This is true. However, since this book is intended to show us more properly just how to delineate our rights, this isn't much of a guideline: he is, after all, willing to say that some non-profit organizations should be denied tax exempt status because of the

values they hold, and some would argue that that violates rights. Do we have a right to produce and to view violent pornography, for example? We have decided that we don't have this right when it comes to child pornography, and some would argue violent pornography where women are cut apart with chainsaws might fit into the same category. So, while it is certainly true that we don't want to violate rights, that does not serve at this point as much of a guideline as to when it is appropriate to make something illegal.

The second argument against the use of coercion is that it won't induce belief. He says coercion might cause citizens "who hold these views to go underground and to become even more hostile to liberal democratic regimes." (17) Brettschneider may be thinking of Locke, who argues that enforced conformity to state religious practice won't in itself bring about the desired orthodox belief, which is really what the religious reformer wants from the recalcitrant citizen: "For no man can, if he would, conform his faith to the dictates of another," and if we are forced to act as if we believe what we do not in fact believe "we add unto the number of our other sins those also of hypocrisy."¹

However, while action and thought are certainly logically distinct, and commanding someone to change a belief simply because you've commanded it seems ineffective as well as excessively intrusive, there is some connection between coercion and rational thought. Coercive action often leads to reflection, and this may induce belief. For one thing, when we are forced to do something, or under a threat that we will be forced, we very often think about whether and why this is justified. The Court decisions that Brettschneider praises are often in service of coercive laws, either making or unmaking them. And outside the

¹ John Locke, "A Letter Concerning Toleration," in "The Second Treatise of Government and A Letter Concerning Toleration," Dover Publications, Mineola, NY, 2002, p. 119

judiciary, the fact that something is a law, or that it may become a law, prompts just the sort of public discussion that Brettschneider praises. This may be especially true when the law in question provokes some opposition. The 1973 *Roe v. Wade* decision, while it did not coerce individuals into having abortions, did coerce states into making abortion legally accessible, and that has prompted a huge amount of discussion about privacy, personhood, states' rights, and a number of related issues. As I write, the prospective American law that would coerce unwilling landowners to accept the presence of the Keystone Pipeline has prompted a great deal of debate over the environment, over the importance of endangered species, over the power of the oil lobby, over the proper use of presidential vetoes, and other matters.

And of course, even without this recourse to rational discussion of the bases of a law, we might be influenced simply by the fact that a law is a law. Laws themselves have expressive power, and this can affect us in non-rational ways. When we know that a law has been passed, we come to believe that the subject matter of the law must be important to our fellow citizens, and we want to please our fellow citizens.² We often, too, come to believe something just because we think other people believe it.³ Of course, this isn't universal: we may not all feel this desire, and when we do it isn't always the strongest motivation we feel—much as we like to fit in with our society, we

² See Richard McAdams, "An Attitudinal Theory of Expressive Law," *Oregon Law Review*, vol. 79, 2000; see also Robert Cooter, "Expressive law and Economics," *Journal of Legal Studies*, vol. 27, S2, June 1998; see also the seminal psychological studies by S.E. Asch, "Opinions and Social Pressure," *Scientific American* 193, 1955

³ Muzafer Sherif, *The Psychology of Social Norms*, Harper, New York, 1936; Vasily Klucharev, "Brain May be Wired for Social Conformity," *Neuron* (January 15, 2009)

might like even more to embezzle enough money for our Caribbean get-away. And, we may resist the lure of a popular belief about what is right and what is wrong. But the fact that something is law does provide some motivation to act in accordance with the rule the law presents, and also makes us more likely to believe that what the law expresses is true.

Of course, this use of non-rational power runs afoul of Brettschneider's second distinction, that between rational and non-rational means of persuasion. Brettschneider wants us to come to an understanding of democratic values. Accepting them in some emotional sense—finding manifestations of racism repugnant without reflecting on why they are repugnant—doesn't advance our acceptance of democracy per se, even if it leads us to act in ways compatible with democratic values. "Democratic suasion should also avoid manipulation that circumvents citizens' ability to reason."⁽⁷⁰⁾ It may be unavoidable that we are non-rationally swayed by our desire to fit in with prevailing social norms, but a respectful democratic state will not intentionally resort to non-rational suasion.

This differentiation between rational and non-rational persuasion doesn't play out well in practice, however. The distinction is supposed to safeguard us from propaganda and other forms of communication that suggest brain-washing more than the desire to engage an informed citizenry. It needn't be true that non-rational suasion is tantamount to brainwashing, though. Brettschneider refers to subliminal messages as unacceptable, and that seems reasonable. We generally assume that subliminal messages are deceptive: we don't know that we are seeing them. Deceit in government is generally undesirable, because it implies the citizens lack control over the government, and that the government itself celebrates this fact. While even democratic governments take individual actions that citizens may disapprove

of, we don't want to feel that we are entirely shut out of the process. We want to know what is going on. Where there is no transparency, the possibility of abuse is great.

Non-rational suasion needn't be deceitful, however. Some of the means of expression that Brettschneider supports aren't themselves geared towards reasoning, after all: a public statue is not a statement of principle, and a holiday in honor of someone is not a manifesto. They are symbols of approval, and to that extent they not appeals to reason, but we don't mind them because we know what they are. Nor are they manipulative in the pejorative sense of that term: they are designed to affect us, but not to bend us to the evil purposes of an alien will. And of course, the reasoning that lies behind the choice of a particular person to celebrate is available if we choose to pursue it, so we don't need to feel that mysterious machinations are determining public statuary or whose face is on a stamp. The availability of a rationale—that we know we can find out why someone is celebrated, if we choose, and think about that-- may be as close as we can typically come to public reasoning. After all, emotional appeals are effective, and very often the way we communicate. This is why, for example, those who want to drum up support for charitable giving don't just give us statistics, but hone in on particular cases, the particular child you can help. And, emotional appeals—patriotic songs, celebrations, marches—are accessible to everyone. While court decisions may be refined, insightful, and convincing pieces of reasoning, how many people will read them—what percentage of society? Non-rational suasion is more accessible, for many more effective, and for most of us an almost unavoidable influence on our convictions. In the long run, the divide between rational and non-rational suasion is not as great as Brettschneider suggests. Much of our reasoning remains influenced by convictions not based on reason—it's just the way we operate. Whether it's the crying Indian in the famous tv

commercial against littering or a sign by the road that threatens a \$200 fine if we toss trash out the window, our sense of value is influenced by non-rational forces.

Now, Brettschneider is certainly not arguing that coercion is never appropriate. A law that requires that jobs be open to people of all races is of course, coercive, and justly so. He doesn't think we should think of coercion as a primary means of changing beliefs, and here is where we need more thought. Laws often change beliefs when they change practices. Coercive laws make a statement about what we believe is valuable, and this is a statement that can affect us in both rational and non-rational ways.

II

Substance

Brettschneider's second constraint on what the state can rightfully do to change our values concerns substance. There are limits on what sorts of values the state should oppose. Here, he says that the state's job, as a democracy, is to oppose specifically anti-democratic values. Its job is not to impose values more generally, not to persuade its citizens to accept this or that comprehensive view of the good. Rather than concerning all the different values citizens may hold, the state's job is to target only those values that have public relevance. Citizens may have conceptions of inequality between types of persons that can go unchallenged, as long as these do not affect their belief in the political equality of all citizens.

What kinds of conceptions of equality would these be, that have no impact on citizenship? Perhaps those that in no way pertain any public issue, but these, I think, will be few when we

are talking about the equal merit of different types of people. Perhaps I believe that only southerners can make good barbecue. This might seem like a personal belief with no public relevance, since barbecuing skill is not a criterion for citizenship, but then we see that if I own a chain of barbecue places and automatically rule out all applicants from north of the Mason-Dixon line, my belief will affect my hiring, and equality in hiring *is* publicly relevant. I don't want to imply that there can be no beliefs concerning the equality of persons that are irrelevant to the functioning of democracy. I do want to imply, though, that beliefs that may seem irrelevant at first glance can be discovered to affect our judgments and actions when it comes to the public role of citizenship.

For example, Brettschneider contrasts the Roman Catholic belief that women and (practicing) gays cannot be priests with beliefs that he thinks are publicly relevant. The Boy Scouts of American should lose their tax exempt status (132, 169) because of their position on homosexuality:

The message of the Boy Scouts toward gay citizens and gay children contradicts the ideal of free and equal citizenship. While the mission of the organization is to teach children about leadership in the society at large, its view seems to be that gay citizens are incapable of such leadership because they refuse to live "cleanly." (132)

The fact that women and gays can't be priests, however, does not bespeak any belief that they are unfit in other ways, and thus

does not constitute a clear violation of free and equal citizenship....The Church does not actively campaign as a matter of policy against either women or gays who seek public office in contemporary American politics. Indeed, it often celebrates Catholic women who attain high political office. ...To the extent that the Church does not oppose the equal status of gays and women in society at large, despite its policy on the priesthood, it should not be subject to democratic persuasion. (134-135)

Can this be right, though? The fact that women and gays cannot be priests does not mean merely that they cannot administer the sacraments. It means they cannot become bishops, archbishops, cardinals, or popes. In other words, they cannot take a role in governing one of the most influential international organizations in the world. Aside from its churches, it's an organization that runs countless schools and hospitals, and sets policies that certainly affect women—like the opposition to contraception and abortion. Nor can women and gays govern in what is a very small, but still independent, state entity, Vatican City. Women and gays are denied both employment and the possibility of a particular political status.

I do understand that the argument for discrimination against women in the priesthood is that Jesus was a man, not a woman, rather than a belief that being woman is simply inferior or sinful in the way that the Church holds homosexuality to be. However, the policy makes too much of the distinction of sex, suggesting that sex is so determinative of one's essence that it fixes even one's proper role towards God. Jesus was not African or East Asian, but if the church declined to allow black or Asian priests on that account I think we would consider it an unjustified and unacceptable show of employment bias. Race, we would say, is irrelevant in the roles a person can play, and acting as if something is relevant when it is not is just what bias is. Brettschneider himself points to equal opportunity in employment being part of equal citizenship (36) and concedes that even religious beliefs can be public relevant. (48) At the very least, on Brettschneider's principles, I think we should deny any church or religious organization tax-exempt status if it discriminates in hiring for reasons of sex or sexual orientation. I think it would be consistent as well to be coercive in this case: to prosecute them for discrimination in hiring. To require equal access to position would not prevent freedom of speech—people

may say what they want, but not display that in discriminatory behavior. As it is, to declare that women and gays are not fit for a particular kind of religious leadership cannot help but affect their ability to lead in other positions.

It is true that these changes in law might not alter the beliefs of those at whom the law, be it coercive or simply a change in tax status, would primarily be directed. The religious hierarchy might hold to the conservative beliefs they were raised with. But as Brettschneider himself points out, often the message of state action is intended more for third parties, for what we might call the onlookers. Our making it illegal to burn a cross on the lawn of an African-American family will not lead dedicated Ku Klux Klanners to embrace ideals of equality, but it can affect other people whose principles are not so compromised. (86-86) Allowing discrimination, on the other hand, sends its own message, one that he describes as one of complicity—a message that the state thinks that the discrimination in question is justified. Saying that even churches cannot practice discrimination, however, would send a powerful message about the centrality of equal status.

III

Conclusion

I think Brettschneider's principles are correct. If our citizens are normal human beings, though, we need to be realistic about their psychology. We are not entirely rational. The differentiation between rational and non-rational means of persuasion is not as wide as we often like to believe. Our substantive ideas of people as citizens and our ideas of them in other capacities, again, are not so strictly differentiated as he seems to think. If we want to bring about an alignment between the values that underlie democracy

and the ideals held by individuals, we need to do that consistently, and we need to use tools that will work.

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