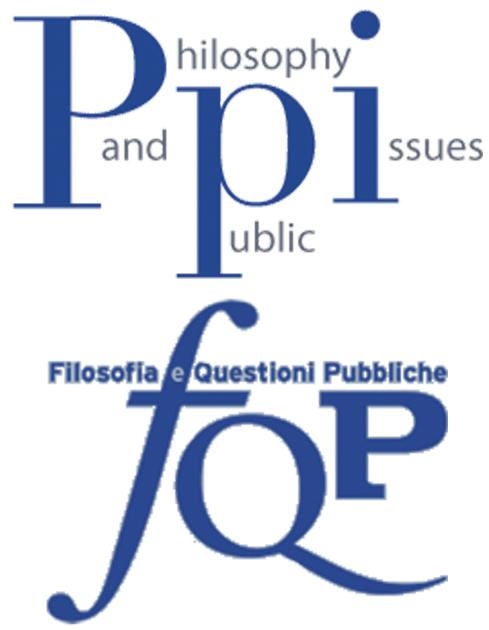


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INDUCING DEMOCRACY
IN THE AGE OF ERIC GARNER

BY

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Inducing Democracy in the Age of Eric Garner

Jennifer Rubenstein

In his insightful and elegant book, *When the State Speaks, What Should it Say?* Corey Brettschneider asks how democratic states should respond to hate speech. He argues that they should usually not respond coercively.¹ Instead, they should engage in “democratic persuasion,” (“DP”), which primarily involves using reasoned argument to convince individuals with “hateful viewpoints” to change their minds and endorse “free and equal citizenship.”² If states engage in DP, Brettschneider argues, they can maintain their balance on the “liberal tightrope,”³

¹ Corey Brettschneider, *When the State Speaks, What Should It Say?* (Princeton: Princeton University Press, 2012). Brettschneider defines coercion as “the state threatening to impose a sanction or punishment on an individual or group of individuals with the aim of prohibiting a particular action, expression, or holding of belief” (p. 88). While Brettschneider thinks that the state can sometimes justifiably engage in coercion, it should not manipulate (*When the State Speaks, What Should It Say?*, p. 70). There is much to say about what counts as manipulation and whether the state can avoid it, especially when it comes to addressing implicit bias. I leave these important issues to one side here.

² Ibid., p. 4.

³ The “liberal tightrope” is Sarah Song’s term (see Song, “The Liberal Tightrope: Brettschneider on Free Speech,” *Brooklyn Law Review* 79, no. 3 (2014)). In his reply to Song, Brettschneider does not dispute her use of this term, so I take it to be a reasonably accurate characterization of his view. Brettschneider, “Democratic Persuasion and Freedom of Speech: A Response

avoiding both the Scylla of the “Invasive State” that constrains free speech too much and the Charybdis of the “Hateful Society” that constrains free speech too little.⁴

Hate speech, and the violent hate crimes often associated with it, are of course horrifying. They are also ongoing, as the recent mass murder of nine people at the Emanuel African Episcopal Church in Charleston, South Carolina by white supremacist Dylann Roof vividly and painfully reminds us.⁵ Yet explicit hate speech and violent hate crimes are not the only types of harmful bias. This is especially so for anti-Black racial bias in the contemporary United States.⁶ Indeed, without denying the importance of explicit hate speech and hate crimes, scholars, commentators, and activists in the US have, in recent years, begun to pay much more attention to institutional and structural racism, hidden racism, subconscious racial bias, and informal or *de facto* racism.⁷ They have shown how these forms of racial bias manifest in police violence, the “carceral state,” housing and

to Four Critics and Two Allies,” *Brooklyn Law Review* 79, no. 3 (2014), 1059-1089.

⁴ Brettschneider, *When the State Speaks, What Should It Say?* p. 10-13.

⁵ wrote this essay in late 2014/early 2015 and revised it slightly in July 2015, just after the Charleston shooting.

⁶ I here use “racial bias” as an umbrella term to refer to all forms of racism and racial inequality. Other terms are possible, cf. Melvin Rogers’ defense of the term “White Supremacy,” in “Social Equality and the Afterlife of White Supremacy,” *The Contemporary Condition* (January 16, 2015), URL = <<http://contemporarycondition.blogspot.com/2015/01/social-equality-and-afterlife-of-white.html?m=1>>.

⁷ While scholars and activists have been interested in these issues in an ongoing way, we might date the latest iteration of the public debate to Hurricane Katrina in 2005. It continued through Barack Obama’s victory in 2008 US presidential election (in debates about whether the US was now “post-racial”) and carries on in the present day in discussions of police violence, the carceral state, and other issues.

school segregation, mandatory sentencing laws that affect African-Americans disproportionately, and the tendency for African-Americans to have shorter life spans, worse health, and less wealth, income, and schooling than members of other social groups.⁸

Brettschneider argues that states should fight explicit hate speech because it threatens the well-being of members of stigmatized groups, due to its adverse psychic and physical effects, e.g. laying the groundwork for violent hate crimes.⁹ Yet for African-Americans, at least, forms of racial bias other than explicit hate speech and hate crimes almost certainly pose a greater threat in this regard. For example, Brettschneider states that in 2012, “nearly 6,000 hate crimes, including assaults, rapes, and murders,” were committed in the US. He then “cite[s] just one example”: “a gunman ‘followed his victim, Mark Carson, for several blocks, taunting him with antigay slurs, before killing him.’”¹⁰ Contrary to what Brettschneider implies, however,

⁸ See Christopher Lebron, *The Color of Our Shame* (Oxford: Oxford University Press, 2013); Michelle Alexander, *The New Jim Crow* (New York: The New Press, 2012); Vesla Weaver and Amy Lerman, *Arresting Citizenship: The Democratic Consequences of American Crime Control* (Chicago: University of Chicago Press, 2014). On hidden racism, see MTV Research/David Binder Research (2014), online at https://www.evernote.com/shard/s4/sh/5edc56c3-f8c8-483f-a459-2c47192d0bb8/a0ba0ce883749f4e613d6a6338bb4455/res/5cff2161-7c98-4c9a-9830-a900c7496644/DBR_MTV_Bias_Survey_Executive_Summary.pdf.

On health effects, see David R. Williams, “Race, Socioeconomic Status, and Health: The Added Effects of Racism and Discrimination,” *Annals of the New York Academies of Sciences* 896 (December 1999), 173-88.

⁹ In “Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies,” Brettschneider implies that hate speech contributes to violent hate crimes. See also Brettschneider, *When the State Speaks, What Should It Say?*, p. 11.

¹⁰ Brettschneider, “Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies,” quoting from the *New York Times*.

Carson's murder was not a typical hate crime: while there were 6,000 hate crimes in the US in 2012, only ten of those crimes were murders.¹¹ Ten is, of course, ten too many. Yet in that same year, 5,000 more African-Americans were murdered in *non-hate-crimes* than would have been murdered if murders were distributed proportionately across racial groups.¹² It is highly likely that many of these 5,000 “extra” murders of African-Americans were caused in part by institutional and subconscious racism (e.g. because these forms of racism contribute to Blacks living in poor, high-crime areas where murders are more likely to occur).¹³ So insofar as Brettschneider is concerned about hate speech because of its harmful psychic and physical effects on African-Americans, he should also be concerned—indeed, he should perhaps be *more* concerned—about less dramatic, but more insidious and far-reaching, forms of racial bias.

¹¹ “FBI Releases 2012 Hate Crime Statistics,” November 25, 2013, URL = <<http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2012-hate-crime-statistics>>.

¹² There were 12,755 non hate-crime murders in the United States in 2012. Of these, 51.1% of the victims were Black, even though Blacks comprised only 13.6% of the population.

See “Expanded Homicide Data,” URL = <<http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide>>. On percentage of the population, see “Black (African-American) History Month: February 2012,” URL = <https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb12-ff01.html>. If murders were distributed proportionally across racial groups, there would have been 1,735 murders of African-Americans (13.6% of 12,755). Instead, there were 6,518 (51% of 12,755). I suspect that an analogous analysis of other types of violent crime would yield a similar result.

¹³ See Michael C. Dawson, *Not in Our Lifetimes: The Future of Black Politics* (Chicago: University of Chicago Press, 2011), pp. 53-4. This is not to deny that hate speech also contributes indirectly to these “extra” murders.

In this response, therefore, I will try to extend Brettschneider’s argument about hate speech to other forms of anti-Black racial bias. In so doing, I will show that not only is Brettschneider’s central concept of DP unlikely to be effective in addressing many types of racism; it also doesn’t acknowledge important aspects of the challenge that states face in fighting racial bias, such as the need to navigate among potentially conflicting strategies, and the need to fight their own racial biases. However, other features of Brettschneider’s account are relevant to racial bias more generally; indeed, their value becomes even more apparent when applied to this broader set of concerns.

I

Hateful Viewpoints

As Brettschneider’s Primary Object of Concern

The main practical problem motivating *When the State Speaks, What Should It Say?*, is the existence and expression of what Brettschneider calls “hateful viewpoints” in liberal democracies. These hateful viewpoints are extreme, conscious, located in the minds of individual racists, and expressed in the form of hate speech—and, potentially, violent hate crimes. (Hateful viewpoints are “extreme instances of discriminatory views,”¹⁴ which in turn are “views that oppose or are inconsistent with the ideal of free and equal citizenship.”¹⁵

Brettschneider is most concerned about extreme cases of hate speech.¹⁶ He does not aim to transform the views of “each

¹⁴ Brettschneider, *When the State Speaks, What Should It Say?*, p. 4.

¹⁵ Ibid..

¹⁶ Ibid., p. 6. See also p. 44.

solitary crank.”¹⁷ Indeed, he writes that the purpose of DP is not only “to change the minds of the opponents of liberal democracy,” but also and “more broadly, to persuade the public of the merits of democratic values.”¹⁸ Thus, the dystopic “Hateful Society” that Brettschneider thinks liberal democratic states must struggle to avoid is characterized not only by individual racists, but also by some elements of institutional and hidden racism, for example discrimination against minorities in financial institutions and minorities being “silenced.”¹⁹ That said, on Brettschneider’s account, these forms of racism seem to emerge quite directly from the viewpoints of individual racists.²⁰ Because he wants to focus largely on extreme cases, and because he sees institutional racism as largely the result of individuals’ racist beliefs, the viewpoints of explicitly racist individuals appear to be Brettschneider’s main target.

Brettschneider sometimes seems to suggest that DP, will also address other problems, or at least have other benefits. For example, when a state engages in DP, it not only changes the minds of individual racists; it also reduces its own “complicity” with their hateful viewpoints and reduces psychological harm to members of despised social groups.²¹ Because Brettschneider thinks that DP does all of this simultaneously, i.e., because he

¹⁷ Brettschneider, “Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies.”

¹⁸ Brettschneider, *When the State Speaks, What Should It Say?*, p. 6.

¹⁹ Ibid., p.11.

²⁰ This comes across in Brettschneider’s narrative of how the Hateful Society develops. Cf. Sharon R. Krause, “Beyond Non-Domination: Agency, Equality, and the Meaning of Freedom, *Philosophy & Social Criticism* 39, no. 2 (February 2013), 187-208, who argues that “much of the racism and sexism and other cultural biases that currently constrain the life-chances of members of subordinate groups in the USA are largely unconscious and unintentional, and they do not always involve control.”

²¹ Brettschneider, *When the State Speaks, What Should It Say?*, p. 44.

thinks that, in this respect, all good things go together, he does not see any need to specify whether goals such as state non-complicity with individual racists and protecting the mental health of members of stigmatized groups are more, less, or equally important as persuading racists to change their minds. I return to this issue below. The important point for now is that, while he gestures toward broader issues, Brettschneider’s primary concern appears to be altering the conscious hateful viewpoints of individual extreme racists.

Brettschneider’s focus on explicit hate speech by individuals has an important further implication. Most liberal states do not engage in extensive explicit hate speech, at least of the kind that concerns Brettschneider. Brettschneider therefore ends up worrying about the state being too invasive, but not about it being racist.²² As we will see, this inattention to the state as a potential source of racism becomes more problematic if we broaden our focus to include forms of racial bias other than hate speech, of which liberal democratic states are regularly guilty.

II

Democratic Persuasion

As I noted above Brettschneider’s proposed strategy for altering the hateful viewpoints of individual racists is DP. The core of DP is reason-giving, especially giving “reasons for rights.”²³ It might therefore seem that the next question we should ask is: how well does reason-giving work as a strategy for addressing institutional, structural, hidden, and other forms of racial bias? However, while reason-giving is the central core of

²² I thank Jacob Levy for discussion of this point.

²³ Brettschneider, *When the State Speaks, What Should it Say?*, p. 4.

DP, Brettschneider also states that DP includes forms of expression other than reason-giving (e.g. visual images, rousing song, dramatic storytelling); DP is also “*not limited to pure expression*. [It] is a term of art meant to describe the various capacities of the state and citizens that can be employed to transform hateful viewpoints...”²⁴

Even though Brettschneider sometimes suggests that DP encompasses a wide range of non-coercive state practices, at other points he seems deeply ambivalent about extending DP beyond reason-giving. For example, he argues that “democratic persuasion should always include reasoning,”²⁵ and he discusses only a few state “capacities” to transform hateful viewpoints other than expression, most notably the state’s capacity to provide subsidies, grants, and tax privileges to civil society organizations.²⁶ Moreover, in discussing these capacities, Brettschneider frequently emphasizes their expressive, rather than conceive, aspects. For example, after clearly distinguishing “state subsidies” from “expression,” Brettschneider nonetheless writes that “the state rightly *uses grants to advance a message* of respect for democratic values...”²⁷

On my reading, then, Brettschneider is ambivalent about using a) forms of expression other than reason-giving, and b) non-coercive strategies other than expression, to change individual hateful viewpoints. One place where this is especially clear is in the stark contrast that Brettschneider draws between “coercion” and “expression.” Setting up what will be a central theme of the book, Brettschneider writes that we should “distinguish between a state’s coercive power, or its ability to place legal limits on hate

²⁴ Ibid., p. 109. My italics.

²⁵ Brettschneider, *When the State Speaks, What Should It Say?*, p. 109.

²⁶ Ibid., Ch. 4, esp. p. 111.

²⁷ Ibid., pgs. 110 and 111, my emphasis.

speech, and its expressive power, or its ability to influence beliefs and behavior by ‘speaking’ to hate groups and the larger society.”²⁸ Crucially, this dichotomy between coercion and expression elides the very existence of non-coercive activities other than expression. This elision, in turn, prevents Brettschneider from following through on the implications of his deeper argument about the role of the state in a liberal democratic society. He tells us that the state should seek to prevent the rise of a “Hateful Society” without being too “invasive,” and that it can do this by persuading racists to change their minds. But there are many ways for states to fight racial bias non-coercively other than through persuasion—or expression more generally. These “capacities” are relevant to efforts to fight explicit hate speech; they are absolutely essential when we expand our inquiry to include other forms of racial bias. By implying that expression is the main alternative to coercion, Brettschneider makes it more difficult to notice and examine the full range of these non-expressive, non-coercive capacities. To summarize: as a strategy for fighting all forms of racial bias, DP has three main limitations. First, it construes liberal democratic states primarily as potential solutions for racial bias, not as potentially racist themselves. Second, because DP privileges reason-giving over other forms of expression, and expression over other non-coercive strategies for transforming hateful viewpoints, it does not say enough about non-expressive, non-coercive strategies for changing hateful viewpoints. As a result—this is the third problem—it does not attend to possible ways in which strategies for fighting racial bias might compete or conflict with each other.

²⁸ Ibid., p. 3. Brettschneider also writes that “democratic persuasion should focus on giving reasons as an alternative to state coercion” (Ibid., p. 43).

III

Democratic Induction

In light of these limitations, I turn now to sketching an alternative that is inspired by Brettschneider's account, but that largely avoids the three problems just described. Drawing on a term that Brettschneider uses in passing, I call this alternative "Democratic Induction" (DI).²⁹

While DP focuses on explicit hate speech, DI is a response to all forms of racial bias. Therefore, while DP highlights how non-racist states can reform racist citizens, DI highlights how the state can work on its citizens and on itself, and how citizens can work on the state. Likewise, while DP focuses on *extreme* cases, where "extreme" means loudest and/or most disparaging, DI focuses instead on cases that are most *serious*, because forms of racial bias such as institutional racism, hidden racism, and implicit bias are most troubling when they are hidden.

In Figure 1, circle (1) represents reason-giving aimed at changing the hateful viewpoints of individual racists.

²⁹ E.g. Brettschneider mentions "an inducement that goes beyond pure expression" (*When the State Speaks, What Should It Say?*, p. 109). See also pgs. 112, 165, 166. "Induce" is from the Latin *indūcere*, meaning "To lead (a person), by persuasion or some influence or motive that acts upon the will" ("Induce," The Oxford English Dictionary(December 2014 Edition), URL = <<http://www.oed.com/view/Entry/94758?redirectedFrom=induce>>, myitalics). In ordinary language, however, induction does not always act on the will. For example, doctors induce labor, and exercise induces asthma. I mean induction in this broader sense. While my concept of "Democratic Induction" excludes manipulation and coercion by definitional fiat, I am happy if the term induces some discomfort about how one distinguishes between manipulative and non-manipulative and coercive and non-coercive state action.

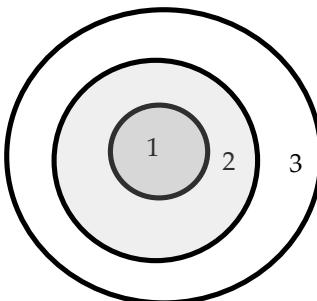


Figure 1. Contents of DP and DI

Circle (2) is broader; it includes not only reason-giving, but also other forms of expression aimed at changing the minds of individual racists. Circle (3) is broader still; it includes not only expression aimed at changing the minds of individual racists, but also other non-coercive activities aimed at changing the minds of individual racists. It also includes strategies for reducing other forms of racial bias. For example, circle (3) includes:

- Non-expressive (or, not only expressive) efforts to change the *viewpoints* of individual racists, such as state provision of incentives to encourage people to live in integrated neighborhoods and attend integrated schools. These incentives can also reduce individuals' subconscious biases and improve other outcomes, such as graduation rates.
- Efforts to change the *behavior* (even if not the viewpoints) of individual racists, for example, state speech aimed at altering what is seen as socially acceptable.
- Efforts to change the *subconscious biases* of individuals, for example, anti-bias training for police officers, teachers, and other public officials; efforts to create institutional mechanisms to mitigate the effects of such biases, and efforts

to ensure that media regulations do not suppress portrayals of diverse characters on television.³⁰

- Other non-coercive efforts (grants, voluntary programs, “nudges,”) to alter institutional structures, practices, and/or substantive outcomes.³¹

As I discussed above, (1) is the central core of DP; Brettschneider mentions, but ultimately seems ambivalent about, (2) and (3). In contrast, DI unambiguously includes all of (1), (2), and (3). That is, it encompasses all non-coercive state action to reduce racial bias. While Brettschneider’s question is, When the state speaks, what should it say?, DI asks a broader question: When the state is acting non-coercively, what should it do (and say)?

III

Navigating Conflicting Strategies of Democratic Inducement

Because it is intended to fight many different types of racial bias, DI includes many kinds of non-coercive activities aimed at reducing racial bias. It therefore foregrounds the possibility that

³⁰ In a recent speech, FBI director James Comey argued that “many people in our white-majority culture have unconscious racial biases” and that police departments should “design systems and processes” to mitigate the effects of these biases. This is an example of a state official seeking to induce better adherence to the principle of free and equal citizenship on the part of a state institution. Text of speech by James B. Comey, February 12, 2015, URL = <<http://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race>>.

³¹ Thaler, Richard and Sunstein, Cass, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven: Yale University Press, 2008).

these activities might conflict with each other, and that states (and citizens) might need to develop the practical judgment necessary to navigate these conflicts. In this respect, DI does not merely complement DP. It suggests that the characterization of the challenge that states face in fighting racism implied by DP—that is, the characterization that is suggested by the kind of solution that DP is—is highly incomplete. For example, after police officers killed an unarmed Black man, Eric Garner, on the street in Staten Island, New York Mayor Bill de Blasio spoke publicly about how he and his wife “had to literally train [their son, who is biracial]... in how to take special care in any encounter he has with the police officers...”³² This statement by a high-profile white public official might have educated some white Americans about the everyday experience of African-Americans. Perhaps it was also comforting to some African-Americans to hear that de Blasio, in some respects at least, understood their experience. However, de Blasio’s comment also seems to have contributed to a significant backlash among police officers, who demonstrated their displeasure by turning their backs on him at several public events and engaging in a work slowdown. If this response was not what de Blasio desired, then he was in a position of having to juggle different and to some extent competing goals: educating white Americans and publicly acknowledging the experience of African-Americans on the one hand, and not alienating the police, on the other.³³

³² See “Transcript: Mayor de Blasio Holds Media Availability at Mt. Sinai United Christian Church on Staten Island,” December 3, 2014, URL = <<http://www1.nyc.gov/office-of-the-mayor/news/542-14/transcript-mayor-de-blasio-holds-media-availability-mt-sinai-united-christian-church-staten>>.

³³ I am not suggesting that the slowdown or back-turning episodes were directly harmful to the cause of free and equal citizenship; rather, they are *prima facie* evidence of resentment that is likely to be harmful.

Contrary to what Brettschneider sometimes implies, then, when it comes to fighting racial bias, good things do not necessarily go together; strategies can conflict with each other or have negative externalities. Even if we look only at the realm of expression (rather than other forms of non-coercive state action), public officials will often need to choose between two kinds of rhetorical strategies: those that are most likely to convince extreme racists to change their minds, and those that clearly express the state’s commitment to free and equal citizenship, convey this commitment to members of stigmatized groups so as to reduce their psychological distress, and/or reinforce social norms against the expression of racist viewpoints.³⁴

For example, Josiah Ober argues that a direct implication of *When the State Speaks, What Should It Say?* is that we must study the “emotional force of great public speeches that have actually had a meaningful impact on citizens in terms of transforming attitudes,” such as Lyndon B. Johnson’s 1965 “We Shall Overcome” speech to Congress.³⁵ Brettschneider agrees.³⁶ Yet Ober and Brettschneider’s discussion of this speech differs dramatically from Bryan Garsten’s account of how Johnson actually changed racists’ minds. According to Garsten, “[Johnson’s] accent, his stories and manner of speech, and even sometimes his characterizations of the races all conformed more closely to southern ways than those of the northern civil-rights activists who had come south to preach their cause.”³⁷ Garsten does not

³⁴ There might be conflicts among these latter three objectives as well; I leave those aside for now.

³⁵ Josiah Ober, “Democratic Rhetoric: How Should the State Speak?” *Brooklyn Law Review* 79, no. 3 (2014).

³⁶ Brettschneider, “Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies.”

³⁷ Garsten, *Saving Persuasion: A Defense of Rhetoric and Judgment* (Cambridge: Harvard University Press, 2006), pp. 193-4.

specify what these “characterizations of the races” were, but his broader argument suggests that they did not clearly express the state’s commitment to free and equal citizenship, nor did they likely do much to challenge African-Americans’ perception that most white Southerners saw them as second-class citizens. Indeed, Garsten’s broader argument is that “a politics of persuasion—in which people try to change one another’s minds by appealing not only to reason but also to passion *and sometimes even to prejudices*—is a mode of politics that is worth defending.”³⁸

If Garsten is correct that this sort of politics is sometimes the most effective way, or even the only way, to transform the hateful viewpoints of individual racists, then states and other actors will sometimes have to choose between Garsten’s “politics of persuasion,” i.e., appealing to existing prejudices to change the minds of individual racists, and Brettschneider’s “democratic persuasion,” i.e., clearly expressing the state’s commitment to free and equal citizenship. In addition to these direct conflicts, liberal democratic states will also have to juggle indirect conflicts among different initiatives that all require funding, e.g. incentivizing school integration and mitigating the effects of the implicit biases of state officials. This picture—of a state juggling different and sometimes competing initiatives to fight various types of racial bias, including its own—is quite different from the picture that Brettschneider paints of a state teetering on a liberal tightrope. This is the main point I want to bring out.

Nonetheless, DI retains a defining feature of DP: its thematization of non-coercive state action as a valuable tool in fighting racial bias. The state is, of course, sometimes justified in using coercion to fight racial bias. But non-coercive state action is also an important part of the picture—one that, after reading

³⁸ Garsten, *Saving Persuasion: A Defense of Rhetoric and Judgment*, p. 3. My italics.

When the State Speaks, What Should It Say?, I think is insufficiently explored by political theorists. The question is not only *whether* the state is permitted, or even obliged, to engage in non-coercive action to fight racial bias. It is also and perhaps more pressingly *how* the state should do so: what are the different strategies available to states for non-coercively fighting racial bias—including the state's own racial bias? In what ways do these strategies support or undermine each other and/or strategies for fighting other forms of bias? These are the vitally important questions that *When the State Speaks, What Should It Say?* raises, but does not fully answer. In raising them, Brettschneider shows us that liberal democratic states are not merely wobbly funambulists, struggling to maintain their balance on the liberal tightrope. They are also co-participants, with their citizens, in a high-wire juggling act.³⁹

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³⁹Thanks to Andrew Gates, Jacob Levy, Jennifer Petersen, Allison Pugh, and Melvin Rogers for helpful comments on a previous version of this response.

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