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BOOK SYMPOSIUM

Brettschneider and ‘democratic persuasion’

Larry Alexander*

What should be the liberal state’s response to illiberalism – illiberal speech, illiberal religions and illiberal associations? If there is one thing that the liberal state cannot take a neutral stance towards, it is liberalism itself. Illiberal speech, religion and associations are, from the liberal state’s perspective, flat out wrong. If the basic precepts of liberalism are correct, then those who deny them must be mistaken.

On the other hand, if the liberal state countenances only pro-liberal speech, pro-liberal religions and pro-liberal associations, how is the liberal state ‘liberal’? For are not freedom of speech, religion and association the very essence of liberalism?

Liberalism, then, appears to be paradoxical. Its supporters would appear to be, as the poet Robert Frost famously quipped, ‘too broad-minded to take [their] ... own side in a quarrel’.¹

Corey Brettschneider, in his *When the State Speaks, What Must It Say?*,² thinks otherwise. He believes that he has found the sword that can cut the Gordian Knot at the heart of this paradox of liberalism. For he distinguishes between the state’s employing coercion against illiberal speech, religion and association, which liberalism arguably forbids, and the state’s speaking out against illiberal ideas and subsidising only liberal ones, which, Brettschneider contends, is permissible and perhaps even required. The organs of the state can teach and preach the tenets of liberalism; and, as the US government did in the Bob Jones University case with

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1 http://www.barrypopik.com/index.php/new_york_city/entry/a_liberal_is_a_man_too_broad_minded_to_take_his_own_side_in_a_quarrel/. Elsewhere, I have diagnosed the problem as one that stems from the impossible-to-realise idea of evaluative neutrality that defines the liberal freedoms: Larry Alexander, *Is There a Right of Freedom of Expression?* (Cambridge University Press 2005). I there argued that the paradox was real and insoluble: see ch 8.

2 Corey Brettschneider, *When the State Speaks, What Should It Say?* (Princeton University Press 2012).

the Supreme Court's blessing, the state may and should withhold monetary support from illiberal groups and speakers.³ In short, on Brettschneider's view, liberalism is not a suicide pact. Although it may not extirpate its enemies through coercion, it may employ the non-coercive tools at its disposal to stave off its existential threats.

That is the thesis of Brettschneider's book. Although the book is 174 pages of text in length, with another 24 pages of endnotes, it is largely repetitious, its basic thesis repeated over and over. But despite the apparent simplicity of the thesis, there are a number of difficulties and complexities that the simplicity masks and that Brettschneider fails to address, much less resolve.

Indeed, although I believe Brettschneider has made a valiant attempt at solving the paradox of liberalism, the sword he has wielded has left the knot that is the paradox intact. Indeed, Brettschneider's sword is, I believe, more dangerous to liberalism in today's world than the illiberalisms that generate the paradox.

ARE GOVERNMENT SPEECH AND GOVERNMENT SUBSIDIES NON-COERCIVE?

At the core of Brettschneider's thesis is the idea that unlike the punishment of illiberal speech and illiberal associations, government counterspeech and the withholding of government subsidies are non-coercive measures that are consistent with liberalism's freedom of speech, religion and association. But is that true? Government speech and subsidies require resources, and those resources are extracted coercively through taxation. When illiberals are taxed to support liberal speech and organisations, they are left with fewer resources to support their own ideas and practices. Bob Jones University may not have been criminally punished for its religiously-based policy on interracial dating, but the denial of tax exempt status surely handicapped it relative to other universities in terms of available resources. Similarly, if an illiberal group wishes to pull its children out of the public schools because of its objections to the curriculum, it will have to fund its own schools out of the money left over from the taxes its members paid to finance the public schools. And if a group wishes to publish views opposing the government's views, it will have to do so without the money it was taxed to finance the government's speech. In all these cases, the coercion by the government is less direct than is the case where advocating illiberal views is itself punished, but coercion is nonetheless present.⁴ Brettschneider writes as if government speech and subsidies are non-coercive, but this is definitely not the case, if one considers the taxation of people to support views they oppose.

Indeed, the Supreme Court has been quite tough on schemes that force some to pay for others' speech with which they disagree. In a series of cases it has held such

³ Bob Jones University challenged the Internal Revenue Service's denial of tax-exempt status in the Supreme Court but lost. *Bob Jones University v United States* 461 US 574 (1983).

⁴ See Alexander (n 1) 101–102.

schemes to be violations of the freedom of speech of the dissenters.⁵ And it has also held violative of freedom of speech laws that penalise speech beyond a certain amount by forcing the speakers to fund opposing speech.⁶

Brettschneider might believe those cases were wrongly decided. However, even he, I suspect, would object to a government speech campaign on behalf of, say, classical liberalism, with government urging support of classical liberal candidates and subsidising classical liberal groups but not more redistributionist liberal groups.

Of course, he will likely reply that government should only oppose hate groups and should only support a 'thin' version of liberalism. I will discuss that point in due course. The point here, however, is that if Brettschneider thinks it wrong and violative of his right of free speech for government to be partisan on behalf of liberal principles that he opposes, it must be because he believes such government partisanship is akin to a penalty on those who oppose it. And members of illiberal groups would feel no differently about governmental opposition in the form of speech or discriminatory subsidies.

In short, it is a mistake to think that Brettschneider's speech and subsidy approach to illiberal groups is not coercive. It does not, it is true, send people to jail for voicing illiberal views. But it does coercively extract resources from them to support views they oppose, leaving them with fewer resources with which to advance their own views.

SHOULD GOVERNMENT SPEAK?

Brettschneider writes as if government speech is to be taken for granted. But should it be? Do we want government to speak, and if so, to what extent?

Surely we do want government to provide us with certain information. We want to know what laws it has enacted. We want to know how to file our tax returns or whether we qualify for social security. We want to know what the population of the United States and of our state is. We want to know what the courts have decided and why. And so on. Government possesses a lot of information that is usefully made available to the public.

In addition to reporting facts and figures, governments run educational systems. Public schools have been the loci of many ideological battles, such as over the teaching of evolution, the portrayals of American history and the selection of assigned literature. Brettschneider would like the public schools to teach the tenets of liberalism and to oppose illiberal views.

But Brettschneider also envisions a role for governmental advocacy on behalf of liberalism beyond that which appears in the curricula of the public schools. It is not entirely clear the form that this advocacy will take. Public service announcements on the radio, television and the internet? Ads on billboards and in newspapers? In any

⁵ See e.g. *Abod v Detroit Board of Education* 431 US 209 (1977); *Keller v State Bar of California* 496 US 1 (1990); *United States v United Foods, Inc.* 533 US 405 (2001); *Knox v Service Employees Int'l Union* 132 S.Ct. 2277 (2012).

⁶ See *Arizona Free Enterprise Club's Freedom Club PAC v Bennett* 131 S Ct 2806 (2011).

event, Brettschneider assumes that such government propaganda campaigns are a good thing, at least if they are promoting liberalism and opposing illiberalism. But he never asks whether it is a good idea for government to take on the role of propagandist. He merely takes it for granted.

WHEN GOVERNMENT SPEAKS, *WHO* IS SPEAKING?

One sometimes gets the picture from reading Brettschneider that the state is a monolith that speaks with one voice. The reality, of course, is that when government speaks, it is always some group or some person within the government who is writing the script. History books for public education are chosen by the state boards of education, then by local school boards, and ultimately translated and filtered by the classroom teacher. Someone in the US Department of Defense decides on the script for the Army's 'be all you can be' advertising campaign. Someone in the Internal Revenue Service decides whether Bob Jones University can have tax exempt status. Brettschneider wants to have 'government' speak in support of liberalism and against illiberal views; but the actual speakers will be particular factions or individuals within government, with their own idiosyncratic takes on what liberalism is and requires.

WHAT IS A SUBSIDY?

Brettschneider approves of the government's not subsidising illiberal groups even if otherwise comparable groups are receiving government subsidies. In the *Bob Jones* case, the subsidy at issue was the tax exempt status granted to charitable and educational institutions. On Brettschneider's view, tax exempt status is government largesse and equivalent to a monetary grant. For him, treating illiberal groups unequally with other groups with respect to such largesse is perfectly acceptable and indeed commendable.

To determine whether some benefit is a subsidy, however, we need to know what the baseline is. If the baseline is that charitable and educational organisations pay taxes on the donations they receive, and the donors get no tax deductions, then Bob Jones University did suffer the withdrawal of a subsidy, as Brettschneider contends. Perhaps the proper baseline for determining subsidies, which would explain the *Bob Jones* outcome, is that it is the worst condition in which the government could constitutionally place the organisation. If the government could deny tax exempt status and charitable deductions across the board, then the baseline for Bob Jones University is no tax exempt status. That status was a subsidy, which has now been withdrawn.

Suppose, however, that Bob Jones University needs a level of fire and police protection, the cost of which exceeds the share of its taxes that goes to pay for fire and police services. If the government provides Bob Jones with the fire and police protection it needs, is it thereby subsidising Bob Jones? Could it then withdraw police and fire protection beyond the amount Bob Jones's taxes pay for as a withdrawal or withholding of a 'subsidy'?

My point here is only that if certain groups because of their views or practices need not be subsidised by government, we need to know when they are being subsidised. And it will not be an uncontroversial matter whether a group denied some governmental benefit or service is having a subsidy withdrawn or withheld or is instead being penalised for its illiberal views.

Here is a further complication. We might imagine that subsidies exclusively consist of monetary benefits, such as cash, services or exemption from taxation. However, there are other forms subsidies can take. For example, in *Police Department of City of Chicago v Mosely*,⁷ the teachers' unions were exempted from a regulation banning picketing near a school in session. The Supreme Court held that the exemption unconstitutionally treated some speakers (the teachers' unions) better than others (everyone else). The Court in another contemporaneous case (*Grayned v City of Rockford*)⁸ had approved of a complete ban on demonstrations, such as picketing, near schools. So if the latter decision was correct, the unions in *Mosely* were receiving a subsidy, one that the Court thought illegitimate. For exemption from regulations that comparable others are subject to *is* a subsidy, albeit a regulatory rather than a monetary one.

It follows from this that on Brettschneider's view of *Bob Jones*, illiberal groups could be singled out for regulations that did not apply to any other groups – so long, that is, that it would have been permissible to subject everyone to such regulations. If all groups of comparable income could be taxed at a 95% rate, then illiberal groups could be taxed at that rate even if other comparable groups were not taxed at all. Once we know the extent of the permissible regulatory regime, we can subject illiberal groups to its full extent while regulating all other groups with a much lighter hand. For we are 'subsidising' the latter groups rather than penalising the former.

In his book, Brettschneider attempts to allay this concern. He argues there that hate groups have a right, not just to advocate their views, but to have the resources necessary for such advocacy. If, for example, other groups are allowed to hold rallies under conditions that impose costs on the public, hate groups must also be allowed to do so.⁹ I think Brettschneider is being inconsistent here. If the costs to the public are such that all groups could have been denied the right to hold rallies at the times and places in question, then the groups that are allowed to do so are receiving a regulatory subsidy, which the hate groups can, by Brettschneider's hypothesis, be denied.

WHOSE VERSION OF LIBERALISM SHOULD BE ADVOCATED?

The core of liberalism for Brettschneider, underlying the freedoms of speech, religion and association as well as democracy, is the notion of free and equal citizenship. That notion, however, can either be regarded as a 'thin' one or a 'thick' one. Regarded as a 'thin' notion, free and equal citizenship would be consistent with libertarianism, the welfare state, luck egalitarianism, thoroughgoing egalitarianism,

⁷ 408 US 92 (1972).

⁸ 408 US 104 (1972).

⁹ Brettschneider (n 2) 113–14.

perfectionist liberalism and a number of other versions of liberalism. The ‘thin’ notion is analogous to the Rawlsian overlapping consensus among reasonable views of the Good.

Free and equal citizenship might, however, be regarded as a thick notion, with definite implications for the choice among liberalisms. My own view, which I shall merely state but not defend here, is that thin views are philosophical cop-outs. ‘Free and equal’, to be defensible, should have thick normative implications. And if it does, then much more speech will be illiberal than will be on a thin notion.

Moreover, if free and equal is a thick notion, but there is disagreement over *which* particular thick notion it is, then when government speaks out against illiberal speech and religion, its speech will reflect the partisan views of whoever has managed to take control of propaganda. If those who are currently in control of the government believe, say, that ‘free and equal’ entails luck egalitarianism, they will deem advocacy of libertarianism and thoroughgoing egalitarianism to be illiberal speech. On Brettschneider’s view, then, government should speak out against those views and refuse to subsidise groups that promote those views. When those with a different conception of ‘free and equal’ ascend to power, however, the tables will be turned, and the luck egalitarians will have their government subsidies withdrawn and their views publicly denounced.

One can see why Brettschneider would prefer a thin conception of free and equal citizenship, as it makes his endorsements of government counter-speech and withdrawals of subsidies more palatable.¹⁰ Only ‘unreasonable’ views, those outside the liberal overlapping consensus, would be the targets of governmental speech and subsidy policies. But whether ‘free and equal’ can be given a coherent and non-arbitrary thin reading is, as I said, a matter about which I have a serious doubt.

Here is a related point. Just when does speech qualify as illiberal hate speech even on the ‘thin’ conception of free and equal? What if someone speaks out against gays, not because he denies their equal worth, but because he believes gay *sex* is immoral? Or what if he believes gay men serving as Boy Scout leaders or as infantry men, being sexually attracted to persons of the same sex, will be more prone to improper or disruptive sexual liaisons than heterosexual men? If he speaks out on these subjects, has he engaged in illiberal hate speech? Or what if one urges that Muslims not be hired by the CIA, not because he denies their equal worth, but because he believes their beliefs make them security risks? Or what if one urges discrimination against blacks or women based on statistical predictions rather than bigotry? Illiberal hate speech?¹¹

10 Indeed, Brettschneider makes it clear that advocacy of libertarianism is not a denial of free and equal citizenship even though it is obviously not Brettschneider’s own conception of liberalism: *ibid* 36. Thus, he favours the ‘thin’ notion of free and equal citizenship: *ibid*, 14, 19–21, 53–55.

11 In this regard, consider debates over profiling. Many people denounce profiling on the basis of race or religion and regard it to be tantamount to bigotry. But many others disagree. See e.g. David Boonin, *Should Race Matter? Unusual Answers to the Usual Questions* (Cambridge University Press 2011) 308–47 (defending profiling); Frederick Schauer, *Profiles, Probabilities, and Stereotypes* (Harvard University Press 2006).

ARE ILLIBERAL SPEECH AND ILLIBERAL GROUPS REALLY AN EXISTENTIAL THREAT TO LIBERALISM IN THE US?

Brettschneider writes as if the major illiberal threats were hate speech and hate groups. Although he isn't clear on this point, I take Brettschneider to view the threat of hate speech to stem from the possibility that unless it is countered, enough others might be persuaded by it to eventually abandon the key values of liberalism and deny equal rights to the targets of hate speech. I do not take his principal worry to be that hate speech might offend its targets and cause them emotional upset. Although the emotional upset caused by offence is undoubtedly painful, that is not the harm that concerns Brettschneider. Plenty of speech that he would protect can cause emotional pain.

Brettschneider's examples of illiberal hate groups and speakers are typically Nazis, the Klan, the producer of an anti-Muslim video and Bob Jones University, a small college that banned interracial dating. In all truth, the purveyors of hate that Brettschneider identifies are realistically no threat to anyone's status as a free and equal citizen. They are beyond marginal. (The only substantial group Brettschneider attacks as a hate group is the Boy Scouts because of their exclusion of gays – but not because of their exclusion of girls, or the Girl Scouts for their exclusion of boys.)

The real threats to liberalism and to the free and equal citizenship of all come not from hate speech, and surely not from the marginal characters Brettschneider identifies. The real threats are more likely the advocacy of policies that will threaten national bankruptcy or persistent high unemployment, or that force major religious groups to bend to governmental demands they oppose in conscience. Economic stagnation and decline might usher in wholesale scapegoating of certain groups. It might lead to a coup and autocracy. Think about Weimar Germany or Argentina in the 1930s. Measures opposed by religions with a significant number of devout adherents might likewise threaten to bring down liberal democracy.

Indeed, it could plausibly be argued that racist and sexist speech, Brettschneider's usual villain, is far less likely a threat to free and equal citizenship than the current millet regime of preferences for various groups. The latter foster an unhealthy identity politics that balkanises the populace and pits groups against one another in a competition over scarce benefits. My guess is that these group preferences are a far greater threat to free and equal citizenship than the tiny number of Nazis, Klansmen and their sympathisers. Indeed, most illiberal measures today are found on college campuses, where Stalinist speech codes are prevalent and invited speakers are shouted down with impunity; yet Brettschneider utters not a word about these illiberal tactics.

If this is a correct diagnosis of where the real threats to free and equal citizenship reside, what would Brettschneider urge the government to do – assuming, of course, that it is the opposition, not the government in power itself, that is advocating these dangerous (to liberalism) policies? Speak out against monetary and fiscal excesses? Speak out against intruding too much on religious conscience? Speak out against group preferences? Refuse to subsidise groups that advocate imprudent spending

measures, measures vehemently opposed by some religions, or group preferences? Do we really want government qua government, as opposed to politicians and citizens, to enter these battles over policy? The outcomes of these battles, however, and not the kinds of hate speech and hate groups that Brettschneider identifies, are likely the truly consequential ones for the future of free and equal citizenship.

IS BRETTSCHEIDER'S ATTACK ON ILLIBERAL SPEECH AND GROUPS SUSPICIOUSLY SELECTIVE?

Even on a thin conception of free and equal citizenship, however, Brettschneider seems to lack the courage of his convictions. As I said, the principal purveyors of hate speech that he mentions are anti-black and anti-Semitic groups like the Klan and the Nazis. And, the one example of withdrawal of a subsidy that serves as his model for a proper subsidy policy is the Internal Revenue Service's denial of tax exempt status to Bob Jones University because of its rule against interracial dating.

To repeat, the Nazis, the Klan and Bob Jones University are truly fringe groups. What is curious is why Brettschneider singles out them rather than much more significant groups. For example, he never mentions the virulent anti-white and anti-Semitic views of Black Muslims and the New Black Panthers, nor the anti-gay and misogynistic views of Muslims more generally. Nor does he mention the homophobic views heard in many black churches. And although he endorses the withdrawal of the subsidies for Bob Jones University for its religiously motivated policy of racial segregation in dating, he gives a pass to the sex discrimination of the Catholic Church and the sex segregation in Orthodox Judaism.¹²

Brettschneider's arguments for not withholding subsidies and tax exempt status from the Catholic Church and Orthodox Judaism, and for not urging the government to publicly gainsay the tenets of Catholicism and Orthodox Judaism, are quite strained.¹³ He distinguishes between a church's theological doctrines that have implications only for matters within the church and those that implicate statuses in the wider society. However, the Catholic Church's ban on women priests and opposition to gay marriage, and Orthodox Judaism's similar distinctions between men and women and straights and gays, surely spill over into public policy positions, particularly with respect to gay marriage. Moreover, Brettschneider's position regarding Catholicism and Orthodox Judaism seems flagrantly inconsistent with what he says about the Christian Legal Society, the group that lost its suit for recognition as an officially recognised student group at Hastings Law School.¹⁴ CLS did not deny anyone membership and only banned from leadership positions persons who had engaged in extramarital sex. (Because gay marriage was not available at the time, the rule against extramarital sex impacted gays more severely than others; but non-gays were also excluded, and gays who were chaste were not.)

¹² See *ibid* 134–6.

¹³ *ibid*.

¹⁴ *ibid*, 117–20. The case is *Christian Legal Society v Martinez* 561 US 661 (2010).

Brettschneider incredibly dismisses the distinction between status and conduct with the offhand remark that ‘such an attempted distinction between status and choice of behavior is inconsistent with the ideal of free and equal citizenship’.¹⁵ I call that remark incredible because it would imply that any organisation that requires particular conduct or forbearance from particular conduct as a condition for membership, particularly if it advocates that conduct or forbearance as a public ideal, has engaged in hate speech, inimical to free and equal citizenship. Thus, if one’s organisation takes a stand against adulterers or polygamists, not to mention murderers and rapists, it should be publicly denounced and denied tax exempt status! (Is condemning adultery hate speech directed at adulterers because of their status? Can we not hate the sin but love the sinner?) I find it hard to believe Brettschneider really believes that condemning conduct is condemning status, but what he says about the Christian Legal Society surely suggests that he does.

Nor does Brettschneider mention the satirising of Mormonism in the Broadway musical, *The Book of Mormon*, even though I suspect he would have condemned as hate speech a similar satire of blacks or Muslims – indeed, he mentions the anti-Muslim video as an example of hate speech. There’s much more than a whiff of political correctness in this. It is far more palatable to pick on the Klan, the Christian Legal Society and Bob Jones than on Catholics and Orthodox Jews, Black Panthers and Black Muslims, or successful Broadway musicals.

My point here is that identifying hate speech that government qua government should, according to Brettschneider, publicly condemn, will likely turn out to be much more partisan a matter than Brettschneider imagines. Experience on campuses with speech codes should alert one to this danger. And the worry is only amplified by Brettschneider’s remarkably selective application of his own theory.

CONCLUSION

So what have I shown in my criticisms of Brettschneider’s views? I have not shown that government speech opposing illiberal groups is necessarily wrongheaded or a violation of anyone’s rights. Nor have I shown that withdrawing ‘subsidies’ from illiberal groups is necessarily wrongheaded or a violation of rights. All I have shown is that these policies, which are the policies Brettschneider advocates, do not escape the paradox of liberalism. They exemplify instead one side of that paradox – liberalism acting illiberally towards illiberal groups. Because the paradox is inescapable, however, the policies Brettschneider advocates cannot be faulted for not escaping it.

To say that these policies are not necessarily wrongheaded is not to say that they are wise. Indeed, they may be quite unwise, even dangerous. As I argued, ‘thin’ versions of liberalism are philosophically unsatisfying. Because of that, there will be an ever-present temptation for those in power to translate the thin values of liberty and equality into the thick versions of liberalism they happen to favour. And a likely, if not strictly necessary, consequence of enforcing a thick version of liberalism will

¹⁵ Brettschneider (n 2) 119–20.

be a tendency to see those who oppose that thick version on behalf of a different thick version as themselves illiberal hate groups. Thin liberalism easily evolves into thick, and thick liberalism easily evolves into illiberalism.

There is plenty of evidence that this is not armchair hysteria. Colleges have labelled those opposing affirmative action as racists and in some cases subjected them to hate speech prosecutions. The same is true of mandated diversity sensitivity training. Indeed, Brettschneider himself unwittingly exposes this tendency in both his selectivity about whom to label as hate groups and in his comments about the Christian Legal Society. It is just far too easy for those in power to convince themselves that those who oppose their policies are, despite their rhetoric, really illiberal haters.

Liberalism, and its central liberties of freedom of expression, religion and association, is a theoretical contradiction. Its successes are instead pragmatic ones. And from my armchair, I have more pragmatic worries about Brettschneider's prescriptions than about the problems for which he offers them.