

## ***Democratic Equality and Freedom of Religion: beyond coercion v. persuasion***

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Symposium on Corey Brettschneider's *When the State Speaks, What Should It Say?*

According to Corey Brettschneider, we can protect freedom of religion and promote equality, by distinguishing religious groups' claims to freedom of expression and association from their claims to financial and verbal support from the state. I am very sympathetic to this position, which fits well with my own views of democratic rights and duties, and with the importance of recognizing the scope for political choice which democratic politics offers to governments and to citizens.<sup>1</sup> This room for political choice, I believe, is necessary if people are to have any chance of reconciling the conflicting moral and political obligations they are likely to face, however idealized our conception of democracy or morality. Granted that no amount of personal and political choice will ever guarantee that we do not encounter tragic choices, and painfully conflicting moral demands, it is an important feature of democracy – or so I believe – that its rights reflect the importance of mitigating these conflicts so that people are able, as a rule, to act as they ought, so that they do not experience their moral sentiments, beliefs and capacities simply as grounds for recrimination, alienation and despair. I therefore believe that democracies have good reason not to force the consciences of the undemocratic and the intolerant, where it is possible to accommodate such people without threatening the rights of others.

However, the fact that I share many of Brettschneider's intuitions and beliefs does not mean that I share them all. In particular, I find his conception of democracy unduly narrow, and unduly based on a rather idealized conception of the American constitution which is unlikely to appeal to those whose conceptions of democracy are more republican, more socialist, more pragmatic and more international than his. I have explained these worries elsewhere and drawn out some of their implications for his arguments about privacy and judicial review.<sup>2</sup> There is no need to repeat them

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<sup>1</sup> Annabelle Lever, 'Taxation, Conscientious Objection and Religious Freedom', *Ethical Perspectives*, 20.1, (March, 2013), 144-153. 'Symposium and Debate'.

► [http://poj.peeters-leuven.be/content.php?url=article&id=2965130&journal\\_code=EP](http://poj.peeters-leuven.be/content.php?url=article&id=2965130&journal_code=EP) and 'Equality v. Conscience? Ethics and the Provision of Public Services', *forthcoming*, the *Philosophers Magazine* 69. (July, 2015).

<sup>2</sup> Annabelle Lever, 'Privacy and Democracy: What the Secret Ballot Reveals', *forthcoming Law, Culture and the Humanities*, 11 (2), (June 2015) Available in 'online first' version at

here. I will also set to one side my worries about his uninflected, overly abstract and rather reified characterization of the State, in the hope that others will discuss this and that, in the end, a more nuanced conception of the State and a more lively appreciation of the conflicting people, institutions, histories and norms which make up most states, will prove consistent with his arguments.

Finally, I do not propose to enter into a detailed discussion of the difficulties of Brettschneider's overly abstract and reified conception of State 'speech' and 'expression' which, while motivated by the language of American constitutionalism, appears to cover pretty much anything a government might do, from raising and spending taxes, to accepting judicial interpretations of contested constitutional provisions, or to affirmatively pronouncing on the goals that will animate its legislative agenda and its aspirations for citizen's lives. Again, while I would have wished for a more nuanced and analytical discussion of so central a concept as 'expression' and, in particular, expression by 'the State', I am uncertain that anything fundamental in Brettschneider's account of citizen rights and duties would be altered in the process. Instead, then, I want to focus on points in Brettschneider's argument that intrigue, and sometimes puzzle, me the most and where issues of nuance and clarification might make a substantial difference to our views of equality and religious freedom.

The key theoretical claim that animates Brettschneider's book is the idea that we can reconcile freedom of religion with equality if we adopt 'viewpoint neutrality' as the proper way to determine when coercion can be used to limit religious freedom, and take 'democratic persuasion' as our guide to the ways that we may permissibly act, as citizens, within those broad, but not infinitely permissive, constraints. (p. 3, 170, 173).

Broadly speaking, Brettschneider argues, states and the citizens that they are supposed to represent, have two forms of political action open to them: 'coercion' and 'persuasion'. What is required to justify coercion is very much more onerous than what is necessary to justify non-coercive policies which may significantly affect people's lives, liberties and social standing, but which stop short of forcing people to change their behavior. Following the plausible intuition that it takes much more to justify coercion than persuasion, because coercion is so much greater a threat to our autonomy and equality than are efforts to persuade us – annoying and constraining those these may be – Brettschneider believes that political power cannot be used to force us to affirm one particular religious or secular point of view, however democratic or otherwise appealing, nor can it be used to proscribe public statements of faith on the grounds that these rest on beliefs which are false, hateful or undemocratic. We are not, of course, entitled to libel others, to intimidate or threaten them, to engage in blackmail or to invade people's privacy simply because these acts involve the use of words. These are all acts that we should prevent and, if necessary, punish even when (or if) they take non-verbal forms, and the fact that they sometimes involve words, rather than pictures or other forms of communication, is no reason to change our judgment of them. However, according to Brettschneider, the fact that we can influence people's behavior by persuasion, rather than by coercion, means that public officials, rules and institutions can, and sometimes should, be used to shape individual behavior in democracy-promoting ways,

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► <http://lch.sagepub.com/content/early/2012/10/12/1743872112458745> and 'Democracy and Judicial Review: Are They Really Incompatible?' *Perspectives on Politics* 7.4. (Dec. 2009) 805-822.

even if such persuasion foreseeably has the result of favouring some people's beliefs, ideals, associations and ambitions over others.

Brettschneider's position, here is generally persuasive. It avoids the twin evils of supposing that governments must stand helplessly by, unable to encourage or promote democratic principles, simply because they may not ram these down the throats of the unwilling. But it also accepts that respect for citizens precludes governments from actively engaging in proselytism or propaganda for one of the many different, but reasonable, approaches to morality that democratic citizens may adopt. Of course, there is a fine line between citizens organizing in order to contest political power with a vision of the collective good, or of the proper way to use collective resources, and the activities of proselytism and propaganda. Clearly, at the borders these distinctions may be difficult to make, as will the differences between coercive offers and threats, on the one hand, and persuasion, on the other. Still, the lines along which Brettschneider hopes to reconcile claims to religious freedom and to equality are reasonably clear, and appear to reflect both the difficulty, and the importance, of protecting both democratically.

But does the dichotomy between persuasion and coercion adequately capture the variety of ways in which political power shapes or constrains people's beliefs? Is public education, for instance, adequately characterized as *either* an instance of state coercion or an example of state persuasion? Democracies tend to force parents to send their kids to school – though generally parents are entitled to send their kids to a variety of quite different types of school, and even to create new schools and forms of education for them. The reasons why parents are forced to send their kids to school, however, are varied, in ways that illuminate the limits of the coercion/persuasion distinction. Some governments may believe that their job is to promote educated citizens and that compulsory attendance at public schools or their equivalents is an appropriate expression of their political rights and duties. On such a view, education requirements are frankly coercive but the justification for such coercion, if it exists, is assumed to lie in the political mandate that the government was given when it was elected.

However, other governments may not see education requirements this way. Instead, they may believe that compulsory education is merely a means to ensure that vulnerable parents and children are not forced to eschew educational opportunities that they value because it is inconvenient for the rich and powerful, or because education is looked on unfavourably by their social group, their religion or their families. On such a view, the coercive aspects of laws that require parents to educate their children are incidental to the goal of protecting the freedom of parents and children to act as they wish, and it may be an open question whether, in fact, any kids are forced to be educated in the face of their parents' opposition. Put simply, what looks like coercive regulations from one perspective may simply be permissive ones from another; and the fact that legislation which looks paternalistic may have an egalitarian rationale – protecting against free-riding, for example, or undue social pressure – suggests that government action is not reducible to the dichotomy of either impermissibly *requiring* or *forbidding* a particular viewpoint (as with paternalism or perfectionism), or permissibly *encouraging* democratic values. This is because governments can affect our behavior – and our beliefs – by *creating new opportunities* for us, which enable us either to act on our underlying preferences in ways that were previously impossible, or because new options create new desires, and reorder our preferences and beliefs in ways that are not reducible to coercion or persuasion.

It would therefore help me to understand how far Brettschneider is willing to allow governments to promote egalitarian values and discourage inegalitarian ones if he would explain whether or not States are entitled to subsidise more democratic religious sects, as compared to their less democratic, but more established, competitors; and whether he believes that citizens can ask their representatives to use public money actively to *solicit* the formation of more democratic religious variants of established religious churches or organisations? Put simply, are democratic states entitled to deprive the Catholic Church of subsidies, on the grounds that its public and organized opposition to contraception and abortion devalues the lives of women and has cost millions of needless deaths worldwide, but actively to support and fund existing ‘reformist’ movements in the Catholic Church which seek to make its teaching and practices more democratic? And if the answer to that question is ‘yes’, may states actively seek to create, through funding opportunities and support, such ‘reformist’ movements where they do not exist, or are too small yet to take organized form?

As Brettschneider persuasively argues, Catholic agencies have no right to state subsidies for their adoption activities, in so far as Catholic agencies insist that they cannot place children for adoption with gay parents (pp.167) What is unclear to me, however, is whether Brettschneider believes that the state may *never* subsidise such agencies – for example, in cases where enough gay-friendly adoption agencies, but where there is insufficient provision for heterosexual adoptions<sup>3</sup> - and whether he thinks it would be wrong for the state to fund ‘breakaway’ adoption agencies made up of people who see and call themselves ‘Catholic’, but who actively contest and seek to change Catholic teaching on contraception, abortion, gay marriage and adoption? In short, I am curious about the extent of political choice available to citizens, their representatives and agents, in responding to conflicts between religious freedom and equality, given that the case for allowing religious practice, but refusing to subsidise it, leaves open a variety of quite different avenues by which states might seek to promote equality, while protecting freedom.

I take it that our answers to these questions do not depend on particular hostility or support for the Catholic Church, but would have to be applicable to other established and important religious groups, and to any secular equivalents which seek to respond to the spiritual needs, aspiration and beliefs of their members. Thus, my question can be rephrased to apply to the differences between Orthodox and, especially, Ultra-Orthodox, and Reform Jews. Granted that a democratic state must allow people to practice their religion, even though that religion may actively discourage the exercise of democratic rights, while not openly challenging democratic norms – how far can a democratic state subsidise such religious organisations, in order to make certain health or social services available and acceptable to its members? And how far, if at all, may a democratic state actively seek to support reformist and more democratic currents within the religion, as a counterweight to its more powerful, established, but discriminatory forms?

These questions strike me as important, but I do not find them easy to answer. However, I am struck by Brettschneider’s reluctance to say that democratic states may remove all subsidies from the Catholic Church, despite its active opposition to abortions necessary to protect the health of women; and the willingness of some members of its hierarchy to threaten prominent Catholic

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<sup>3</sup> For a discussion of this issue see A. Lever, *Philosophers Magazine* 69, forthcoming July 2015.

politicians with excommunication for not publicly adopting the official Church line on abortion when acting civically. Thus, at p. 136 he states that ‘democratic persuasion is not appropriate in the form of denying non-profit status to the Catholic Church or to the Orthodox [Jewish] community, since they do not dissuade women from participating in the broader democratic society as equal citizens...’ - a claim that begs the question of how ‘Orthodox’ as distinct from ‘Ultra-Orthodox’ Jews are defined, and how far he wants to treat them differently. However, it is hardly *encouraging or promoting* democracy to insist that ‘no group should receive the subsidies of non-profit status if it opposes the ideal that all citizens are to be equal under law’ (p. 137) – a statement that treats the bare minimum necessary for democratic government as a statement about what is in the public interest. But it is also unclear why a group must qualify for a special tax-exempt status in order to be deemed worthy of receiving government funds for some rather specific, targeted purpose.

Thus, from a democratic perspective I wonder whether the constraints that Brettschneider would put on governments are not at once too loose and too tight. They seem too loose, in so far as the qualifications for charitable or tax-exempt status seem excessively weak (even if an improvement on what currently applies). On the other hand, they seem unreasonably tight, in so far as they treat the claim to charitable or tax-exempt status as a requirement for *any* government use, support or subsidy of a religious group, however limited. Moreover, the extent of permissible government action, on Brettschneider’s view, still needs clarification: because it is one thing to say that no more than bare toleration is owed to discriminatory religious groups who seek to undercut democratic rights and duties, and it is another to say what the state may do to redress the balance of power amongst groups, whether discriminatory or not, given that this existing balance of power arguably has little, if anything, to do with democratic principles. It is therefore likely that government action could enlarge and facilitate democratic action by citizens without itself seeking to persuade people to act democratically, or forcing them to do so.

To see the problem one needs simply to consider the case of the Catholic Church in America, and the very significant hold that it has had over public life, public officials and over citizens. As Garrow shows, the Catholic Church was not reluctant to wield that power in order to prevent the liberalization of state regulations on marriage, divorce, contraception and abortion in those states, such as Connecticut and Massachusetts, where it had traditionally held a great deal of influence.<sup>4</sup> Whatever else one might wish to say about it, the current strength and wealth (though greatly diminished) of the Catholic Church is not a tribute to democratic principles or support – and so democratic principles give us no reason to favour it over other providers of public services, or to suppose that the state should not remove any subsidies it receives and, instead, offer them to religious or secular groups whose message and/or organization fit better with democratic principles.<sup>5</sup> Indeed, it would seem to be legitimate to remove such subsidies and to offer them elsewhere even if we imagine the case of a revised and fully democratic Catholic Church, since its current ability to provide needed public services (hospitals, adoption services, food kitchens) better than other groups, if it exists, is largely the result of unjustified benefits in the past, along with unjustified constraints on other types of association.

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<sup>4</sup> David J. Garrow, *Liberty and Sexuality and the Making of Roe v. Wade*, California University Press, 1998) especially ch. 22

<sup>5</sup> For arguments to this effect see Lever *Ethical Perspectives and Philosophers Magazine* supra.

Of course, the problems for religious freedom and democratic equality, caused by the legacy of our undemocratic pasts, applies as much to secular as to religious groups – to unions and political parties, as well as to Churches and religious associations. So whatever ‘state action’ or ‘state expression’ is justified by a commitment to democratic principles, it is important to insist that the state is not a privileged agent of democratic action, or immune to the problem that dubious and discriminatory beliefs, past and present, risk obscuring, or actively undermining democratic principles. That is why it is important, I think, to recognize that the state can *facilitate* democratic values without itself promoting them through education or persuasion, or trying to nudge or force them on those who do not already accept them.

Now one might suppose that the fact that our state institutions and competitive political organisations suffer from many of the same problems as religious groups and associations means that we should try to limit the discretion of state actors, and to narrow down, as far as possible, the scope for political choice in the regulation of religion. But though this makes sense intuitively, I think it would be a mistake. It is often genuinely difficult to know how best to protect people’s freedom and equality, whether one is concerned with problems generated by ideal theory, or thrown up by our rather un-ideal world. It is by no means clear that strictly limited political choice, or official discretion, improves rather than impedes our understanding of democratic freedom and equality, and our hopes correctly of identifying and protecting both. It is therefore possible that more sophisticated forms of political accountability, combined with broader scope for political choice and action, might better protect democratic values than dichotomising ‘viewpoint neutral coercion’ and ‘democratic persuasion’. It is doubtful that there is only one democratic response to hate speech and holocaust denial, or even to pornography that celebrates violence and makes it look sexually exciting and fulfilling. In addition, democracy seems to involve acceptance of the ways that mutually incompatible collective choices can be legitimate and an expression of people’s freedom, equality, solidarity and rationality. If that is so, it is uncertain that democrats must adopt the dichotomy between viewpoint neutrality and democratic persuasion that Brettschneider favours, or that we can adequately understand what democracy requires without considering which demands for redistribution, redress and, even, for revolution may be justified on democratic principles by the long shadow of our societies’ undemocratic pasts.