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Jeff Spinner-Halev¹

In “A Transformative Theory of Religious Freedom: Promoting the Reasons for Rights,” Corey Brettschneider argues that the liberal state has the right to try to transform certain beliefs: “it is those beliefs, religious and otherwise, that are openly hostile to or implausibly consistent with the values of equal citizenship that the state should seek to transform” (195).¹ This is a strong statement that Brettschneider qualifies in important ways, since he does not believe that state should wantonly seek to transform illiberal beliefs. He argues that when citizens try to impose their religious views on others through legislation that they should be stopped by the Court, and also told why it was wrong to try to do so, which is that it violates the tenets of equal citizenship (193). If being rebuked by the Court results in a transformation of their beliefs, all the better. Further, Brettschneider argues that a religious organization that receives state funds or tax-exempt status must adhere to the principles of equal citizenship.

My dispute with Brettschneider is not with the idea of transformation itself, or the relatively uncontroversial idea that some religious groups should not be allowed to impose their views on others. But in cases where imposition is not an issue, we liberals should not be so quick to look to the state to directly transform practices that seem incompatible with equal citizenship. In looking at one notorious case, where Bob Jones University had its tax-exempt status revoked for its racially discriminatory policies (that have since been changed), Brettschneider announces: “What makes Bob Jones’s policy subject to transformation is its direct affront to the ideal of equal citizenship. The

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university does not merely object to a law or even a basic right, but rather, because of its racist policy directly challenges the very idea of equal citizenship” (202). If we generalize Brettschneider’s argument—something he does not do—it would mean that the tax-exempt status of many organizations should be revoked. I do want to defend the Court’s ruling in *Bob Jones*, but on much narrower grounds than Brettschneider’s principle. I will argue that the equal citizenship standard that Brettschneider seems to have in mind is the right standard for organizations that receive direct government funding, but that a looser standard is appropriate when tax-exempt status is at issue. Only in cases of invidious discrimination, which I explain below, should a group’s tax-exempt status be revoked.

Brettschneider does not precisely define what he means by equal citizenship but the examples he uses suggest that discrimination based on certain characteristics—race, sexual orientation, and gender—violates equal citizenship. On this standard, the government would have to take away the tax-exempt status away of many organizations—the Catholic Church, the Southern Baptists, Orthodox Jewish organizations, many Islamic organizations, and so on, since so many discriminate against women in some way. Indeed, Susan Okin criticizes William Galston for supporting the U.S. Supreme Court’s decision to revoke the tax-exempt status of Bob Jones University because of its racially discriminatory policies, but opposing taking away the tax-exempt status of schools that discriminate against women teachers.² One might think that the liberal state should take the route suggested by Okin (and include discrimination against women in any way, not just teachers): after all, Brettschneider argues that the state should work to transform organizations whose principles violate equal citizenship, and he cites Okin approvingly, as a transformation theorist (197).³

This argument treats a direct subsidy by the state the same as granting tax-exempt status, but there are reasons to think of them differently. Government subsidies are usually given for specific purposes: to fund cancer research or a transportation study, or to facilitate adoptions. When this occurs, the agency is acting for the government. It is doing the government’s bidding and performing a specific public service. In these cases, it is usually appropriate that strings come with the governments’ funding. Organizations that have tax-exempt status, however, are not performing a direct public service. They are not doing the government’s bidding. Instead, one important argument for non-profit status is to encourage and support a rich associational life, and one that can shift with people’s views and preferences. The idea here is simple and well known: that a vibrant democracy has a wide variety of charitable and volunteer organizations within it. With a vibrant civil society comes

increased trust among citizens while giving citizens a diverse set of choices, allowing citizens to readily choose to support different causes and charities, and ensuring important places of dissent.⁴

Brettschneider ignores the civil society argument in his focus on equal citizenship. Unless a liberal democracy chooses to grant tax-exempt status to a select few organizations, scrutinizing each application carefully (or perhaps getting rid of such status altogether), the civil society argument is the best rationale for tax-exempt status. In the United States, tax-exempt status is granted rather freely: there are more than 1.5 million non-profit organizations in the United States, and there has been an explosion of applications for groups that want tax-exempt status, with nearly all applications accepted.⁵ Under these circumstances, the emphasis of the IRS bureaucrats should be on fraudulent applications (people who use non-profit status as a way to shield income from taxes) or on those who abuse non-profit status to pursue political activities, rather than determining if a particular non-profit supports or detracts from the idea of equal citizenship.⁶ When our attention moves to the interplay between civil society and citizenship, several reasons to be skeptical of Brettschneider's argument arise.

First, many religious organizations perform some good, and even enhance citizenship, but may still violate the tenets of equal citizenship. Many Baptist churches are patriarchal, yet they give many women important opportunities to learn a variety of citizenship skills, since women participate in church activities in larger numbers than men.⁷ The schools of the patriarchal Catholic Church provide an important relatively low-cost alternative to subpar public schools to many inner-city children; its social services help the poor in many ways. If the state revokes the Church's tax-exempt status, fewer children will be able to enroll in their schools, and the Church will help fewer poor people. The response cannot be that the state should then do a better job providing these services; the point is that the state does not do so. The Church clearly helps many people who suffer from what many of us would call unequal citizenship.

Second, the relationship between discrimination and equal citizenship is sometimes opaque. Is an all-girl chess club a violation of equal citizenship? Is a reading group for only boys discriminatory, or an important attempt to close the gender gap in reading scores? Some might say that these are instances of recognizing differences, not discrimination, but the line between the two is often hard to see, both philosophically and practically. More pointedly are attempts to combine tradition with the modern idea of equality. Pope John Paul II argued that the patriarchy in the Church does not undermine gender equality: "As far as personal rights are concerned, there is an urgent

need to achieve *real equality* in every area: equal pay for equal work, protection for working mothers, fairness in career advancements, equality of spouses with regard to family rights and the recognition of everything that is part of the rights and duties of citizens in a democratic State. This is a matter of justice but also of necessity.⁸ I am uncertain how gender equity coheres with the Church's patriarchy, but I do not think we liberals should assume that working through this tension is like trying to square the circle. We should welcome the idea that the Church advocates equal citizenship in such clear terms. There are also interesting conversations taking place in Jewish Orthodox circles, where Jewish Orthodox women are challenging many long-held patriarchal assumptions.⁹ Democracy is better off when Jewish women (and men) work out what it means to be a Jewish Orthodox Feminist, and when Catholic women and men try to figure out a Catholic doctrine of equality. Debate and discussion are virtues of citizenship that should not be blithely dismissed because these groups do not already embrace the liberal ideal of equality. It is challenging to figure out how the modern idea of equality can cohere with traditional religious doctrine, but the state should encourage these attempts, and not just insist that modernity trump tradition.

Third, Brettschneider baldly claims that the racist policies of Bob Jones challenge equal citizenship, yet he never explains how this is the case. Instead of Orthodox Judaism, the Catholic Church, and the Southern Baptists challenging equal citizenship, the reverse is more likely the case today: the idea of equality challenges these religious organizations to rethink their own policies and values. Brettschneider would welcome such a transformation, but my quarrel is with the unargued assumption that the inegalitarian policies of one nonaffiliated university undermine equal citizenship. Perhaps the idea of equality, at least formal equality in terms of race and gender, is so widely accepted now that inegalitarian institutions are swimming upstream. Stephen Macedo argues "that the Catholic encounter with America led to the eventual liberalization of the Catholic Church," making the Church a positive force for liberal democracy around the world.¹⁰ Racism and sexism certainly exist in the United States, but the public norm of equality means that nearly all organizations today publicly affirm the idea of equality; racist and sexist appeals are generally implicit.¹¹ It is the Catholic Church that is espousing strong affirmations of gender equality, not the state that is endorsing patriarchy. When the state is firmly committed to equality, it is more likely that church and synagogue members will feel empowered to argue and discuss—it also means that the idea of exit is a real one, that citizens can leave religious organizations if they so choose, and that they can certainly avoid a particular university if they want.

Fourth, Brettschneider overplays the need for the state to directly push institutions to accept the idea of equal citizenship, and underplays indirect ways, to the point where his argument may undermine equal citizenship. Brettschneider agrees with the decision in *Mozert v. Hawkins*, where fundamentalist Christians lost their battle to exempt their children from classes where their children were taught “role reversal,” and exposed them to a variety of viewpoints and lifestyles without insisting that the fundamentalist interpretation of the biblical way of life was superior (200). The idea of equal citizenship was seemingly upheld in this case, but this is a pyrrhic victory. With the onset of Christian private schools, many Christian parents take their children out of school when they are not accommodated. While liberals should bemoan resistance to books that have men cook and women work outside the home, it is better when the children of these resisters are in public schools where they will meet and befriend other children whose fathers cook and mothers work outside the home, rather than pushing them to flee to more insular schools. Brettschneider might respond that the state should revoke the tax-exempt status of these schools as well, but then home-schooling is also an option. While Brettschneider might argue against this option, he runs against democratic politics and the reality of many mediocre public schools. Transformation can often occur in indirect ways, which means liberals should often use restraint in employing the state to directly transform those with whom we disagree.

Fifth, Brettschneider assumes that the inequality within a religious organization will have public effects, undermining equal citizenship. This is surely sometimes true, but there is no reason to think that it is always or even often true. Brettschneider’s argument assumes that values must be coherent and seamless throughout all institutions, but he does not show why it needs to be. There are Jewish Orthodox women who sit separately and often in the back or upstairs in synagogue, but who are equal partners with their husbands at home. Many Catholics do not take the patriarchy of the Church to mean there must be patriarchy in the home. To be sure, many did, and some still do; but there is no logical reason why patriarchy in a church or synagogue must have effects on people’s views on political or social equality—and often, they do not.

Not all religious organizations will struggle with how to combine their traditional doctrine with the idea of equality. One might ask then if some groups are adamantly committed to patriarchy, why give them any kind of state support, direct or not? Instead of Brettschneider’s equal citizenship standard, I suggest that the IRS revoke the tax-exempt status of organizations that practice invidious discrimination. What I mean by invidious is systematic discrimination within a group that is part of a larger, unambiguous

institutional effort to undermine the basic idea of the equality of citizens. The *Bob Jones* case was a matter of invidious discrimination because of the time and place in which it took place. In 1970, based on its interpretation of the 1964 Civil Rights Act, the IRS prohibited private schools that practiced racial discrimination from receiving tax-exempt status. The *Bob Jones* case arose the following year, though the case was not finally settled until 1983. This case emerges out of the 1960s, with the U.S. Government's attempts to outlaw school segregation, and its worries about the common Southern response of establishing private schools in order to preserve de facto segregation. Further, the racial discrimination within Bob Jones was not conducted by an aberrant official but was a systematic school policy. In this context, racial discrimination seems particularly invidious. And in these kinds of cases, there is no working out the tensions between modernity and tradition.

I agree with Brettschneider when direct state funds are involved: in these cases, the standard should simply be, with few exceptions, nondiscrimination. The reason for a more rigid standard of equal citizenship when direct government funds are involved is the need for a strong public commitment to equal citizenship. The indirect route of transformation that I support is only likely to happen when the government is clear that its policies and funds support equal citizenship.

If Brettschneider wants a more relaxed standard of equal citizenship, yet one that would still have some teeth—something between the standard for direct government funding and non-profit status—he will quickly run into implementation issues. Do we want the IRS determining the meaning of equality? Furthermore, this argument leads to IRS employees, under the direction of a political appointee, determining the meaning of equal citizenship as it is applied to well over a million organizations. My objection is not only to government employees scrutinizing the tens of thousands of religious organizations—or the hundreds of thousands of non-profit organizations—to determine whether they practice discrimination, but subjecting this to the vagaries of democratic politics. General standards are easier to apply and can avoid being politicized past their philosophical foundations. One general standard that ought to be protected is the idea that tax-exempt status should support the rich and varied civil society that liberal democracy provides.

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Notes

1. Corey Brettschneider, "A Transformative Theory of Religious Freedom: Promoting the Reasons for Rights," *Political Theory* 38, no. 2 (2010): 187. All other references to the article will be in parenthesis in the text.
2. Susan Moller Okin, "'Mistresses of Their Own Destiny': Group Rights, Gender, and Realistic Rights of Exit," *Ethics* 112, no. 2 (2002): 205-30; William Galston, "Two Concepts of Liberalism," *Ethics* 105, no. 3 (1995): 516-34.
3. Okin suggested that illiberal groups in the liberal state would have to be transformed, or become extinct—Brettschneider distances himself from the latter suggestion. Susan Moller Okin, "Feminism and Multiculturalism: Some Tensions," *Ethics* 108, no. 4 (1998): 680.
4. Robert Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton: Princeton University Press, 1993). In his concurrence in *Walz v. Tax Commission*, Justice Brennan argued there were two reasons for exempting religious organizations from taxes. The first is that they contribute "to the well-being of the community in a variety of nonreligious ways." The second reason parallels part of my argument here: religious organizations contribute "to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society." *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970).
5. Rob Reich, "Anything Goes: Approval of Nonprofit Status by the IRS," *Stanford University Center on Philanthropy and Civil Society* (2009): 37.
6. Michael Lou, and Stephanie Strom, "Donor Names Remain Secret as Rules Shift," *New York Times*, September 21, 2010, p. A1.
7. Sidney Verba et al., *Voice and Equality: Civic Voluntarism in American Politics* (Cambridge: Harvard University Press, 1995), 304-33.
8. Letter of Pope John Paul II to Women. http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii_let_29061995_women_en.html (accessed September 8, 2010). Emphasis in the original.
9. Tova Hartman, *Feminism Encounters Traditional Judaism: Resistance and Accommodation* (Waltham, MA: Brandeis University Press, 2008); Tamar Ross,

Expanding the Palace of Torah: Orthodoxy and Feminism (Waltham, MA: Brandeis University Press, 2004).

10. Stephen Macedo, "Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism," *Political Theory* 26, no. 1 (1998): 67.
11. Tali Mendelberg, *The Race Card: Campaign Strategy, Implicit Messages, and the Norm of Equality* (Princeton: Princeton University Press, 2001).

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