

When the State Speaks, What Should It Say?

HOW DEMOCRACIES CAN PROTECT EXPRESSION AND
PROMOTE EQUALITY



COREY BRETTSCHEIDER

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Can Protect Expression
and Promote Equality

Corey Brettschneider



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When the State Speaks, What Should It Say?

For my mother, Susan Brettschneider

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Acknowledgments

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**When the State Speaks,
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Contents

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<i>Acknowledgments</i>	ix
Introduction	
Averting Two Dystopias <i>An Introduction to Value Democracy</i>	1
Chapter One	
The Principle of Public Relevance and Democratic Persuasion <i>Value Democracy's Two Guiding Ideas</i>	24
Chapter Two	
Publicly Justifiable Privacy and Reflective Revision by Citizens	51
Chapter Three	
When the State Speaks, What Should It Say? <i>Democratic Persuasion and the Freedom of Expression</i>	71
Chapter Four	
Democratic Persuasion and State Subsidy	109
Chapter Five	
Religious Freedom and the Reasons for Rights	142
Conclusion	
Value Democracy at Home and Abroad	168
<i>Notes</i>	175
<i>Bibliography</i>	199
<i>Index</i>	207

INTRODUCTION

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Averting Two Dystopias

AN INTRODUCTION TO VALUE DEMOCRACY

A RECENT REPORT FROM the Southern Poverty Law Center suggests that hate groups advocating racist ideologies have been on the rise in the United States since the election of the first African American president.¹ In the advanced democracies of Europe, studies of public opinion show that anti-Muslim hostility is a growing problem.² As evidence mounts of increasing bigotry on both sides of the Atlantic, questions of how to respond to hate speech have become more pressing.

Traditionally, political and legal theorists have proposed two types of responses to hate speech. Some thinkers have stressed the need for a neutral approach to rights protection.³ This group broadly defends the United States Supreme Court's current free speech jurisprudence, which does not protect threats or "fighting words," but does protect what I call "hateful viewpoints." Hateful viewpoints are opinions that are openly hostile to the core ideals of liberal democracy. In defining hateful viewpoints, it is important to emphasize that there is a distinction between the emotion of hate and the content of hateful viewpoints. Hateful viewpoints are defined not necessarily by their emotion, but by their expressing an idea or ideology that opposes free and equal citizenship. Those who hold hateful viewpoints seek to bring about laws and policies that would deny the free and equal citizenship of racial, ethnic, or religious minorities, women, or groups defined by their sexual orientation. The neutralist approach upholds free speech and protects hateful viewpoints from coercive sanction, despite their discriminatory content, because neutralism claims that the state should not endorse any values.⁴

In contrast to the neutralists, other thinkers have argued that free speech rights should not protect viewpoints that are hostile to the values of a liberal democratic society. Thinkers in this second group, the "prohibitionists," broadly endorse the kind of legal limits on hate speech that are found in most liberal democracies outside of the United States.⁵ Although there are free speech protections in these countries, there is no legal doctrine of "viewpoint neutrality" that would extend the right of free speech to all viewpoints, including hateful ones. Some viewpoints are deemed

too extreme to be tolerated, and they are prohibited, often by criminal law. For example, many liberal democracies believe that they cannot risk tolerating the fascist ideology that ultimately gave rise to the Nazi regime. They ban Holocaust denial and other viewpoints that are associated with the fascist ideology.

Most liberal democracies outside of the United States prohibit not only the fascist ideology, but the expression of hateful or discriminatory viewpoints more generally. These prohibitionist laws go beyond banning threats against specific individuals, and outlaw speech that displays hatred or animus toward ethnic, racial, or religious groups. For instance, section 319(2) of the Canadian Criminal Code bans public communication that “willfully promotes hatred against any identifiable group.”⁶ In the influential *Keegstra* case, the Supreme Court of Canada upheld the conviction under the Criminal Code of a teacher who had expressed and taught anti-semitic views.⁷ The teacher had hatefully described Jews as “subversive” and “sadistic” “child killers” who had “created the Holocaust to gain sympathy.”⁸ Like the Canadian government, Australia has adopted national and regional human rights laws forbidding racist speech. The country’s Racial Discrimination Act of 1975 prohibits public acts that “offend, insult, humiliate or intimidate people on the basis of their race, colour or national or ethnic origin.”⁹ The Federal Court of Australia ruled in 2002 that the Racial Discrimination Act banned Holocaust denial, and it ordered a defendant to remove material denying the Holocaust from an Internet site. In France, the former actress Brigitte Bardot has been convicted five times for violating hate speech laws, and fined up to 15,000 euros (equal to \$23,000), for her anti-Muslim remarks. Bardot had referred to Muslims as “this population that is destroying us, destroying our country by imposing its acts.”¹⁰ Besides Canada, Australia, and France, other countries that ban hate speech include Britain, Germany, India, the Netherlands, and South Africa.¹¹

Perhaps the most prominent case of prosecuting a particular ideology was found in the Netherlands. Dutch prosecutors in 2010 announced that they would try Geert Wilders for the crime of inciting hatred against Muslims. A sitting member of the Dutch parliament, Wilders had produced a film and had made repeated statements claiming that Islam was an inherently evil religion with no place in Dutch society. Although he was ultimately acquitted, Wilders would have faced two years in prison and the equivalent of more than \$25,000 in fines if he had been convicted. According to prosecutors, Wilders’ hate speech was incompatible with the egalitarian ideal at the heart of Dutch democracy.

The Dutch controversy regarding Wilders is striking in its differences from American political discourse. If a similar case occurred in the United States, the Supreme Court would most likely strike down any laws pro-

hibiting a political viewpoint, no matter how heinous. An indictment like Geert Wilders' would be met by a chorus of criticism claiming that the government was attacking freedom of expression. Free speech advocates would be quick to argue that citizens, especially elected officials, have the right under the First Amendment to express their political viewpoints, even when those viewpoints are hateful or discriminatory. On this issue, the Dutch and American approaches to hate speech seem to be worlds apart. In the Netherlands, a focus on the ideal of equality makes it possible for the state to seek to defend equal citizenship by banning hateful speech. In the United States, an emphasis on rights of free expression makes such a proposal almost beyond consideration.

I find both of these approaches problematic. The neutralism popular in the United States fails to answer the challenge that hateful viewpoints pose to the values of freedom and equality—values that are essential to the legitimacy of the democratic state. As Simone Chambers and Jeffrey Kopstein point out, the viewpoints of hate groups such as the Ku Klux Klan and American Nazi Party constitute “bad civil society,” in that they seek to undermine freedom and equality and thus oppose the core values of liberal democracy.¹² The problem for the neutralists is that hateful viewpoints threaten not simply any political ideal, but the very freedom and equality that justify protecting the rights of free speech for hate groups in the first place. In other words, hate groups attack the most basic ideal of public equality that underlies liberal democracy, an ideal I refer to as free and equal citizenship.

Although the neutralist approach to hate groups is problematic, the alternative approach, favored by the “prohibitionists,” has its own drawbacks. The prohibitionist strategy of having the state coercively ban hate speech overlooks the fact that the core democratic values of freedom and equality require the state to allow citizens to develop and affirm their own political views. The prohibitionists fail to heed the importance of Meiklejohn's argument that free citizens need to be able to debate arguments, even those that challenge the foundations of liberal democracy. Without this freedom, citizens cannot endorse democracy itself.

I aim in this book to develop and defend a third position that resolves these problems. I suggest that we distinguish between a state's coercive power, or its ability to place legal limits on hate speech, and its expressive power, or its ability to influence beliefs and behavior by “speaking” to hate groups and the larger society. On my view, the state should simultaneously protect hateful viewpoints in its coercive capacity and criticize them in its expressive capacity. The state should respect the rights of these groups, but it should also use its expressive capacities to criticize their hateful views. In this way the state can protect the right to express all viewpoints and, at the same time, it can defend the values of freedom and equality

against discriminatory and racist challenges. I use the term “discriminatory viewpoints” to refer to views that oppose or are inconsistent with the ideal of free and equal citizenship. “Hateful viewpoints” are extreme instances of discriminatory views. While individuals and groups are entitled to have their rights respected, they have no right to have their discriminatory or hateful views left unquestioned. I refer to the process of defending the values of free and equal citizenship as “democratic persuasion.”

Part of this book will focus on how liberal democracy should respond to hateful viewpoints. But my broader ambition is to propose a liberal democratic theory, called “value democracy,” that accomplishes two purposes: first, it should defend robust rights of free speech, religion, and association. This requires the state to refrain from coercively banning political viewpoints, religious groups, or civil associations, though the state should be allowed to coercively stop violence or threats against particular persons. Second, value democracy should articulate the reasons that justify why rights should be respected in the first place, and it should attempt to convince citizens to adopt the democratic values of freedom and equality as their own. These reasons for rights explain why the state and its citizens should uphold the rights of free speech, association, and religion for all persons who are subject to the coercive power of the government. In contrast to other democratic theories that are value neutral, my account bases democracy on the affirmative values of free and equal citizenship. These democratic values should be adopted by citizens and promoted by the state, because they ground the legitimacy of the government and justify protecting rights.

According to value democracy, all viewpoints should be protected by rights of free speech from coercive bans or punishment. But the state also has an obligation in value democracy that extends beyond protecting freedom of speech. It should engage in democratic persuasion, actively defending the democratic values of freedom and equality for all citizens when it “speaks.” The notion of state speech is common in First Amendment jurisprudence. It often refers to the various non-coercive functions of the state, ranging from pure expression, such as speeches, to issues of funding. My wider theory of democratic persuasion draws on that doctrine to defend the active promotion of democratic values. But I want to clarify that the title of the book is not about the factual question of what the state does say. Rather, it refers to the normative question of what the state should say. The ideal of democratic persuasion is meant to answer that normative question. It provides a guide to identify when state speech is appropriate, to elaborate its content, and to define its proper limits. I thus emphasize that not all state speech qualifies as democratic persuasion. State speech only qualifies as democratic persuasion when it promotes the democratic values of free and equal citizenship, and is consistent with what I call

the “substance-based” and “means-based” limits on what the state can express. The means-based limit bars the state from punishing or coercing citizens who express viewpoints that dissent from the fundamental values of democracy. The substance-based limit requires state speech to be compatible with free and equal citizenship and prohibits the government from promoting a particular sectarian view or comprehensive doctrine.

I also want to clarify that the notion of state speech should not be confused with the claim that there is only one state actor that speaks on behalf of democratic values. As the book argues, no single part of the state has a monopoly on interpreting the core values that are central to democratic legitimacy. Rather, a variety of state actors, as well as democratic citizens, should engage in democratic persuasion. It is common to the president, Supreme Court justices, legislators, local officials, and ordinary citizens protesting unjust state action that they can invoke, and attempt to articulate, the ideal of free and equal citizenship. In this book, an important example of a citizen who pursues democratic persuasion on behalf of the ideals of freedom and equality is Martin Luther King Jr. The state can support the efforts of citizens like King to engage in democratic persuasion not only by protecting their right of free speech, but also by actively affirming the values of freedom and equality. For example, the state can recognize King’s defense of democratic values by dedicating an official holiday and public monuments to him, and by teaching the lessons of the civil rights movement in public schools. Both citizens and state officials can therefore engage in democratic persuasion.

By using democratic persuasion to articulate the reasons for rights, value democracy aims to answer the critics who contend that liberalism cannot defend its most basic values or counter the threat to equality that might come from hate groups in civil society. In particular, I reply to the common criticism that liberalism is plagued by an alleged “paradox of rights.”¹³ According to this paradox, the neutrality implicit in liberal defenses of free speech, association, and religion leads liberalism to be complicit in its own demise. These rights are said to commit liberal democrats to a form of neutrality that protects the opponents of liberalism.

One worry, expressed by “militant democrats,” is that liberalism can do nothing about the rise of groups that advocate the dismantling of liberal democracy. Militant democrats, like Karl Loewenstein, argue that the only way to ensure the stability of liberal democracies is to limit the rights of hate groups that threaten the foundational values of these regimes.¹⁴ Militant democracy differs from liberalism in advocating not only limits on hate speech, but also restrictions on rights of hate groups to associate freely and to participate in the democratic process. Another kind of criticism suggests that even if liberal regimes do not literally fail, they are flawed in that they can offer no response to the critics who attack them.

This concern is often expressed by the worry that “a liberal is a person who cannot take his own side in an argument.” On some accounts, liberalism’s silence about hateful and illiberal views constitutes a kind of tacit complicity with the enemies of free and equal citizenship.

These two concerns motivate the accusation embodied in the paradox of rights: that liberalism’s commitment to free and equal citizenship in the public sphere is potentially undermined by its protection of inegalitarian beliefs in the private sphere of civil society and the family.¹⁵ A variant of this criticism is made by communitarians, who worry that liberalism’s neutrality and its protection of rights prevent the public values of free and equal citizenship from being affirmed and defended in public.¹⁶

Value democracy answers the paradox of rights by introducing the idea of democratic persuasion as a fundamental commitment of liberal society. Democratic persuasion extends the familiar principle that law, to be legitimate, must be widely publicized. It adds the further obligation that the state should publicize the justification for those rights protected by law—namely, their basis in the values of free and equal citizenship. When these values are attacked, the state should attempt to defend free and equal citizenship against the criticism of hate groups. The state’s defense of democratic values should be “persuasive” in that it should aim to be convincing. This means that democratic persuasion should not merely recite the values that underlie rights; it should argue for them. The aim of democratic persuasion is to change the minds of the opponents of liberal democracy, and, more broadly, to persuade the public of the merits of democratic values. By engaging in democratic persuasion, liberal democracy can avoid the paradox of rights: it offers a way for the legitimate state, without coercively violating rights, to respond clearly to its harshest critics and to challenge the hate groups that oppose the values of free and equal citizenship.

I will suggest in chapter 1 why the ideal of free and equal citizenship requires civil rights protection in the areas of race, gender, and gay rights. These protections use the force of law and coercion to protect racial minorities, women, and gays. Value democracy regards civil rights protections as fundamental. But in upholding the democratic values of free and equal citizenship, value democracy does not limit itself to protecting civil rights. The values of freedom and equality for all citizens should also be articulated and defended through democratic persuasion. Although citizens should retain rights to disagree with anti-discrimination laws, the state has the obligation to use its expressive capacities to defend the values of free and equal citizenship against criticism from hateful or discriminatory groups and individuals.

My theory of value democracy is thus “expressive” in two senses: it protects the entitlement of citizens to express any political viewpoint, and

it emphasizes a role for the state in explaining and defending the ideals that underlie free speech protections. I will extend the argument from freedom of expression to freedom of religion in chapter 5: value democracy protects the expression and practice of any religious view, but it is also committed to persuading citizens of the values that justify protecting religious freedom in the first place. In this persuasive role, the state appropriately employs its expressive powers—as an educator, speaker, and spender—to convince citizens to adopt the values that underlie legitimate law. When it uses these powers, the state does not regulate expression; rather, it expresses itself to defend the very values that underlie rights, including freedom of expression and religion.

One objection to democratic persuasion might come from critics who are concerned about excessive state power. In their view, more power for the state might imply less liberty. However, these critics overlook that the state already engages in expression and persuasion. State officials express the values that are fundamental to our society by building public monuments to civil rights leaders like Martin Luther King, by celebrating official holidays that honor democratic ideals, and by funding efforts to advance freedom and equality for all citizens.¹⁷ In short, an expressive role in promoting democratic values already characterizes many practices of contemporary governments.

My account of democratic persuasion and value democracy offers a coherent justification for these expressive practices. But when the practices of states and political actors oppose free and equal citizenship, my theory also offers a way of criticizing them. Throughout this book, I will suggest the proper aims, scope, and limits of the expressive capacities of the state. I will defend a role for the state in defending and promoting democratic values among the citizenry, as well as a duty for citizens to adopt democratic values as their own.

Another reply to the critics of democratic persuasion comes from a deeper examination of the challenge that the paradox of rights poses to liberal democracy. Specifically, I want to suggest why two attempts simply to define away the paradox will not work. Although I believe that the paradox is resolvable, I also think those who have appealed to it raise an important problem that accompanies robust rights protections in liberal democracies.

According to the paradox of rights, liberalism justifies rights protections based on an ideal of equality, but the liberal state cannot respond to critics of equality who are protected by rights. Some thinkers might try to argue that the paradox of rights does not exist, because there are simply different kinds of equality that, in the end, do not conflict with each other. These thinkers might contend that while some rights-protected viewpoints challenge unequal conditions such as inequality of income, they do not