

# Liberty, Equality, and State Responsibilities

## REVIEW OF COREY BRETTSCHEIDER'S *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?*

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Corey Brettschneider's *When the State Speaks* confronts a core dilemma for liberalism and indeed for liberal states: how (and whether) liberal states should respond to the existence of hateful speech and practices, and the groups that sponsor and promote them. Brettschneider advocates for an approach that checks the damage the hateful speech does to underlying liberal principles of free and equal citizenship, while at the same time respecting the rights of the speakers and groups that engage in it. He rejects what he considers to be the two polar responses that pervade state responses, both in the U.S. and elsewhere, to this dilemma, and that virtually exhaust the scholarly treatment of the issue, at least in the U.S., the U.K., and Canada.

On the one hand, Brettschneider rejects the civil libertarian (or “neutralist”) claim, popular in the United States, that private speech is just that—private—and therefore of no concern or relevance to public values, public deliberation, or public law. He likewise rejects the “militant democrats” (his phrase), some feminists, and most of the European liberal democracies, who argue that private hateful speech has very harmful and fully intended consequences and should be banned or censored in some meaningful way to stop its noxious spread.<sup>1</sup>

These two poles, Brettschneider argues, veer toward one or the other of two dystopian visions of the relation of the state to its citizens. The “militant egalitarian’s” view, which urges greater criminalization of hate speech, risks what he calls the “Invasive State,” meaning a state overly involved in our private

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<sup>1</sup> COREY BRETTSCHEIDER, *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?: HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY* 1-3, 5 (2012).

lives—the traditional bogeyman of civil libertarians everywhere.<sup>2</sup> The liberal or neutralist view, on the other hand, according to which the state is and should be fundamentally unconcerned with the content of private speech, no matter how hateful or indeed how consequentially harmful, risks what he calls the “Hateful Society.”<sup>3</sup> In this dystopia, all rights and liberties are vigorously protected, but hate runs like an open sewer, undercutting the reasons we have rights in the first place. Under such a regime, some groups of citizens—women, racial minorities, gay and lesbian citizens—are frequently and even routinely subjected to hateful practices and utterances.<sup>4</sup>

The question Brettschneider raises and tries to answer in the book is how we can steer a middle course between these undesirable societies. On the one hand is the Hateful Society, in which rights are protected but hate runs rampant, resultantly feeding a lesser regard for the equality of citizens. On the other is the Invasive State, in which hate is checked but the state is a far-too-intrusive censor into our private lives, risking the protection of all speech, and thus compromising the joy and value those deeply human activities and attributes bring.

Brettschneider’s provocative suggestion is to introduce a third possibility, fully captured by his introduction and descriptive account of the “Persuasive State.” The Persuasive State, unlike the Invasive State, refrains from coercion, and thus avoids the invasive state’s pitfalls. However, it also recognizes the relevance to public values of privately held and promulgated hateful beliefs, including those promulgated within the family and within religious traditions.<sup>5</sup> It can thereby at least attend to, though it is uncertain whether it can fully counter, the dangers of the Hateful Society.

Brettschneider argues that the state should seek to persuade citizen holders of hateful beliefs to transform, modify or drop their hateful beliefs, to whatever extent those beliefs conflict with public democratic values, notably, values of free and equal citizenship. Thus, in effect, the Persuasive State counters hateful speech with argument—argument that hateful beliefs undercut the very values of free and equal citizenship that undergird the rights enjoyed by the holders of those beliefs

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<sup>2</sup> *Id.* at 10.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 10-11.

<sup>5</sup> *Id.* at 12-19.

themselves. Perhaps those with hateful views will be persuaded, and will drop the views. But even if not, other citizens will hear the dialogue, the result being that the state will have been respectful of the equal rights of all and will not have been complicit in the spreading of beliefs that fundamentally undercut liberal democracy. Indeed, the state has a moral responsibility to engage in this speech; it owes it to the victims of the hate speech it protects, and to the greater mandates of constitutionalism and liberalism. It is essential to the stability, fraternity, and equality of the community that the hate speech it protects seeks to undermine.

I am largely sympathetic to this project. I think it is entirely right for us to recognize the relevance of private hateful beliefs to public values such as equality and freedom, equal respect, and due regard. I also agree that it is entirely right for us to shift our focus somewhat from concerns about the state's overuse of its coercive role to the possible good a state can do when it acts in its persuasive capacity. And I think it is right and extremely important that we move our attention from debates over individuals' rights to engage in hate speech to the state's responsibilities to respond to it and what the state should say in response.

This is a refreshing change of focus. Brettschneider shows us how to think of the state as a fully moral actor in this ongoing liberal project, leaving behind the two roles our traditional debates on this issue have articulated for it: roles as the generator of unconstitutional laws that inhibit speech, or the sometimes overly zealous protector of individual rights to engage in it. The state is more complex than this simplistic dichotomy and can multi-task with the best of us. One thing the state can and should do, Brettschneider wisely points out, is publicly make the case for the liberty and equality for which rights exist. This is particularly important where the speech those rights protect undermines the values free speech is designed to serve. That insight alone, and that prescriptive suggestion for change, is a contribution to First Amendment doctrine and theory, as well as to our understanding of equality.

However, there are problems, largely of coherence, that make it hard to understand the full import of Brettschneider's proposal. I will focus on three such problems, as well as some more substantive objections, providing suggestions for addressing these issues.

First, it is truly difficult to understand who and what Brettschneider is talking about when he talks about state speech, or what he could possibly envision by suggesting that the state

take up and use the microphone pictured on the front jacket cover of this book. The state does, after all, already “speak” and attempt to persuade *constantly*; it is *never* quiet. The state speaks when it passes laws; when it justifies them in judicial decisions; when it promulgates administrative regulations and adjudicates those regulations; when it imposes sanctions in civil cases; when it educates children in public schools; and when it imprisons, fines, and executes people. Almost all of that speech, furthermore, is “persuasive.” Persuasive state speech is as present as air. Of course the state could and should use its rhetorical powers to promote liberal values of equality and freedom, equal respect, due regard, and human dignity. It already does this, but there is no reason it should not be urged to do so both more, and more reflectively and effectively. There is also no reason that the state should not do so in the specific context of hate speech and pornography. This is what I take Brettschneider to be urging, and I support the effort.

It would be a much clearer proposal, though, if he specified what sort of “speechifying” he has in mind. In the last chapter, he suggests doctrinal changes to our First Amendment case law that would give executive branch officials greater latitude to deny tax exemptions and deductions (as well as affirmative grants) to even purportedly religious groups that engage in hate speech.<sup>6</sup> This is the first example Brettschneider provides of the sort of persuasive state speech he is urging, finally giving some context to an otherwise vague suggestion: “persuasion” apparently includes the act of denying tax exemptions and withholding economic tax dollar support, and the “Persuasive State” apparently includes the state that so withholds.

But Brettschneider seems to have in mind more than this doctrinal change that comes late in the book and late in the argument. It would have been helpful if he had simply provided more examples of the sorts of state speech he envisions. For example, a thorough treatment of issues surrounding public education (which he does give some cursory attention)<sup>7</sup>—from struggles over the content of curricula and school textbooks, to the merits and perils of unregulated homeschooling—might have been a good place to start in putting a bit more meat on the bones of what is otherwise a somewhat empty, although aspirational, exhortation: the state should engage in more liberal moralizing.

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<sup>6</sup> *Id.* at 161-63.

<sup>7</sup> *Id.* at 96-104.

Second, there seems to be something unrealistic, and a bit naïve-sounding, about the nature of the hate speech Brettschneider seeks to both protect (through traditional First Amendment doctrine) and counter (through the persuasive efforts of the liberal state). Brettschneider writes as though that speech is largely ideological, spawned in political groups such as the KKK, private organizations such as the Jaycees, or in families that have and transmit to children overtly racist or sexist world views.<sup>8</sup> The counter to such bad ideas, Brettschneider sensibly maintains, are good ideas. What the state should do, then, about these groups with their wrongheaded and inegalitarian ideologies, is not censor them, but persuade their members that they should abandon their beliefs, at least to whatever degree they conflict with a thin and liberal conception of equal and free citizenship. That is, families that teach their daughters to accept a lesser and subordinate role than men,<sup>9</sup> groups such as the Jaycees that teach their members to accept discriminatory membership policies, the Boy Scouts with their homophobic refusal to acknowledge the full humanity of gay men and boys,<sup>10</sup> and groups such as the KKK that spread genocidal messages of hatred and contempt,<sup>11</sup> should not be censored. Rather, their members should be exhorted not to harbor their false beliefs. The members should in turn listen, and then change their beliefs accordingly. (It sounds a bit like Romney’s “self-deportation” solution to the immigration problem.) The state should, in effect, reason and argue, not punish. If it does, it will win the argument, and that’s that.

There are two problems with this part of Brettschneider’s prescriptive claim. First, at least sometimes, hate speech is motivated not by worked out noxious ideologies, such as a doctrinaire belief in white supremacy or male superiority, or any other set of beliefs, but rather, by literal hate, pure and simple. Its targeted audience is not society in general, reachable through marches or rallies in the public square with signs and cross burnings, but rather a particular teenage girl, or a gay boy, or an insecure and vulnerable tween, targeted through harassing speech and images on Facebook. That harassing and harmful speech spawns not just feelings of inferiority, but self-inflicted cuttings, eating disorders, and suicides.

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<sup>8</sup> *Id.* at 8, 72.

<sup>9</sup> *Id.* at 54.

<sup>10</sup> *Id.* at 130-32.

<sup>11</sup> *Id.* at 8.

What prompts it? Of course, sometimes ideology plays a role: the harasser thinks, wrongly, that women or gay boys or black children are of lesser worth. If he or she could simply understand the wrongness of that belief the behavior would stop. But, at least sometimes and perhaps more often than not, that speech is the product of twisted psyches rather than noxious beliefs—not the sort of mindset to be changed through persuasive state-sponsored speech. Brettschneider seems to have forgotten, or just underplayed, the role of the “hate” in the hate speech he rightly deplores. Hate speech is not solely the product of wrong beliefs; it is also the product, in part, of hate.<sup>12</sup>

Second, and relatedly, it is difficult to buy into Brettschneider’s insistence on the moral responsibility of people who hold these noxious views to change them so that they accord with the minimal decency required by liberal principles, and that the state should be engaged in the project of exhorting them to do so. Is it really morally incumbent upon everyone who harbors these false beliefs to listen to the state’s arguments against them and change their beliefs accordingly? Consider the families that keep their children home so as to avoid the liberalizing content of a public school education, and teach their daughters submissive and lesser roles, or the boy who torments his gay peers, or the white housewife who despises her black neighbors and lets them know it. Presumably, these individuals dislike the egalitarian, assimilationist, and integrated liberal state and its exhortative, persuading ways, at least as much or more as the loosely liberal feminist and egalitarian ideas of gender and race equality the liberal state promulgates.<sup>13</sup> Like teenagers who are spurred on to double their consumption of cigarettes and alcohol by public health campaigns, surely illiberalists will be spurred to greater contempt for any state that tries to persuade them out of their entrenched habits of thought, feeling, and child raising—habits that have at their core, not periphery, fear of and contempt for a state that preaches liberal values.

It is difficult to comprehend what is meant by the claim that the liberal state should exhort people who hate the liberal state precisely because of its tendency toward exhortation of views they despise. It seems imprudent to advocate that the state’s solution to citizens stating, for example, “I hate the state

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<sup>12</sup> For a very different description, see DANIELLE CITRON, *HATE 3.0: THE RISE OF DISCRIMINATORY CYBER HARASSMENT AND HOW TO STOP IT* (forthcoming).

<sup>13</sup> For an account from a judicial decision adjudicating a conflict between such a family and a public school, see *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

because it beats up on me,” should be to continue bullying these citizens until they change their beliefs that a bullying state that beats up on them is something they hate. The very attempt at persuasion may very well underscore precisely what extreme anti-liberals find so hateful about the liberal state; it is what spurs the fringes among them to arm themselves in defense against black helicopters. Persuasive exhortatory politically correct talk by the liberal state, in other words, will backfire—just ask any teenager. Thus, Brettschneider’s proposal would have been stronger had he specified more carefully the kind of hate speech he is targeting, and the kinds of responses that are envisioned, when he speaks of acts of state persuasion.

I also identified some substantive problems with the proposal itself: that the state’s response to hate speech, contra the censorship urged by militant democrats and contra the blind eye turned by civil libertarians, should be to engage in various acts of persuasion. There are three separate problems that I see. The first is a general worry about the way Brettschneider has characterized the Persuasive State as an alternative to his two dystopias: the Invasive State on the one hand and the Hateful Society on the other. Brettschneider’s Persuasive State is a well-intentioned, completely functional, and thoroughly liberal state, not beset by public choice woes, or administrative capture, or excessive corporate and private power, or know-nothing voters, politicians and their political parties, or noxious factionalism, or sagging economies, or even external threats. It’s a pretty utopian state. Of course, it is also a hypothetical and idealized construct, meant to rhetorically counter the two dystopias he portrays, and which are implied by the poles of debate he is seeking to interrupt. It is not intended to describe any actual state, liberal or otherwise. Nevertheless, there is an odd blindness in Brettschneider’s project to the distinctive dystopic possibilities to which his own utopian alternative might give rise.

Bluntly, it seems to me that in addition to the two dystopias that drive Brettschneider’s project—the Invasive State and the Hateful Society—he might have added a third, implied by his own proffered alternative: the Hypocritical State. Just as the Invasive State is the dystopia masked by the egalitarians’ political aspirations, and the Hateful Society, the dystopia implied by the civil libertarians’, so the Hypocritical State, I suggest, is the dystopia possibly masked and legitimated by Brettschneider’s proffered alternative. Sometimes, when actual liberal states speak of the values of equality, diversity, and liberty, they are doing so at the very moment they are pursuing

profoundly inegalitarian, stultifying and oppressive ends. All that egalitarian persuasion might be toward the end of distracting people from the inegalitarian acts it is undertaking. In this dystopian vision of Brettschneider's proffered alternative, "state persuasion" is designed, roughly, to drive the listener crazy, by insisting the state is doing the opposite of what it is doing at that very moment. Sometimes, the Persuasive State's egalitarian and freedom-respecting rhetoric is cover for actions that are viciously inegalitarian and disrespectful—even hateful. Sometimes, to use the critical language of the 1970s and 1980s, the Persuasive State is the "legitimizing state"—its equality and freedom-promoting rhetoric is a cover for deeply illiberal impulses.<sup>14</sup> In my view Brettschneider should have worried about that possibility, at least a little.

We need look no further in our own contemporary society than the very high-minded liberal, liberty enhancing, and thoroughly moral justifications that various state actors—Supreme Court Justices, ninth grade civics teachers, state and federal prosecutors, pro bono lawyers from prestigious private law firms, judicial opinions by the bucket-load, and academic lawyers in the field—proffer, when discussing norms of our criminal law and procedure. Juxtapose all that equality and liberty-promoting rhetoric about presumptions of innocence and the dignity-protecting rights of the worst criminal defendants, with the reality of our grotesquely dysfunctional criminal justice system, promulgated by those same state actors, that incarcerates more citizens per capita than some of the most ghastly, illiberal, and totalitarian dictatorships on the planet. The same "state" that speaks of the dignity, equality, and respect owed to criminal defendants, when justifying criminal law, imposes penalties for the possession of crack cocaine at one hundred times the harshness as possession of powder cocaine, and life sentences for trivial and victimless as well as unproven crimes, executes prisoners in the face of proffered and

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<sup>14</sup> For examples from critical literature, see, e.g., Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (legitimizing function of antidiscrimination rights and rhetoric); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 220 (1987) (legitimizing function of contract rhetoric of freedom and equality, while law in fact serves ends of economically dominant); Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 398-99 (1988) (legitimizing function of rights to serve propertied interests); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1387 (1984) (legitimizing function of first amendment rhetoric of freedom of speech and thought, while law serves corporate ends); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1408-09 (2009) (legitimizing function of privacy rights).

unexamined evidence of innocence and does so in a way that disproportionately kills African American citizens, and targets citizens abroad for execution on hidden evidence of their alleged complicity with terror presented in secret tribunals.

The Hypocritical State or the Legitimizing State (or the lamp-posting state) legitimates all of this mayhem and random violence it inflicts with high-flying language justifying its sanctions in terms completely congenial to liberal rights. It employs the rhetorical mechanisms of persuasion, in other words, so as to coercively impose its mandates in ways that express its utter contempt for the very moral and liberal values it self-righteously, loudly, and repeatedly extols.

Surely the Hypocritical State is a danger worth attending. But Brettschneider does not at all address this possibility. Rather, the Persuasive State of Brettschneider's imagination utters and deeply believes liberal and democratic values, particularly the value of equal and free citizenship. There is no risk of hypocrisy anywhere in sight. The extraordinary gap between the liberal persuasive state and the liberal carceral and executing state may be the largest in the criminal justice field, but it by no means resides solely there. It may, in fact, also reside in the distance between the rhetoric of equality that it deploys, and that Brettschneider wants it to deploy more loudly, and the wide berth it gives to the hate speech it tolerates. In other words, the Persuasive State of Brettschneider's imagining might just be protesting a bit too loudly. It seems to me that particularly those of us attracted to the idea of the Persuasive State, and its potential for good, need to worry about this legitimating function of the Persuasive State, and to try to find ways to counter its influence.

The second substantive problem regards the myriad purposes served in Brettschneider's book by the line drawn between the Persuasive and the Coercive State, or the state when it is acting in its "expressive" mode, and when it is acting in its coercive mode. The distinction is a vital one in the book, not just theoretically but practically. It lies at the heart of the most helpful doctrinal reform Brettschneider advocates: that First Amendment law, and particularly the unconstitutional conditions doctrine, be redrawn so as to unequivocally permit the state to refuse to fund groups that sponsor illiberal beliefs—even where those groups do so under cover of religious dogma—through withholding either direct grants or tax exemptions and deductions.

The liberal state cannot and should not censor the expression of offensive beliefs. The liberal state should not slide into the Coercive State and, for the most part, cannot by virtue

of the First Amendment. The Persuasive State, though, can and should respond to the content of the ideas it is required to protect, and one way it can respond is by refusing to assist those groups in the marketplace of ideas. This important suggestion, though, obviously depends quite heavily on the distinction, if it can be maintained, between the “Coercive State” and the “Persuasive State.”<sup>15</sup> According to Brettschneider, “persuasion” includes, notably, the act of withholding tax exempt status, and refusals to extend grants.<sup>16</sup> However, as he notes, the Supreme Court for the most part disagrees, as do many commentators.<sup>17</sup> A bit more development of the meaning of “persuasion,” “coercion,” or both, might have helped bridge the gap between them.

More generally, though, the distinction Brettschneider draws between the coercive and persuasive states is a little too black and white, even aside from its application to the problem of tax exemptions for religious or other groups that promulgate hate. The state does many things, at least some of which are not easily categorized as clear examples of coercion or persuasion. Tax deductions and exemptions are just one such close case. There are other borderline cases as well. The state also regulates and coordinates across vast areas of social life, all of which can be understood as either “coercion” or “persuasion” under sufficiently broad definitions of either term.

Here is one example of a potentially ambiguous case, which is completely undiscussed in Brettschneider’s book, but which is of direct relevance to his general thesis. The “state” administers a system of private law, including an array of tort remedies, so that citizens can pursue, through actions for monetary damages, some measure of corrective justice when they have been wronged without turning to the punitive “coercive” arm of the state. The state obviously facilitates these private actions. It is also in some sense responsible for the doctrine under which those actions proceed. It isn’t clear, though, in Brettschneider’s treatment, where this private-rights-and-private-remedies-providing function falls. Does the state’s provision of tort remedies for private wrongs constitute “persuasion” or “coercion?” It is not clear. It is also not clear where Brettschneider might think it falls, particularly given that he considers the construction of incentives and disincentives created through tax structures or the withholding of largesse from

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<sup>15</sup> BRETTSCHEIDER, *supra* note 1, at 13, 109.

<sup>16</sup> *Id.* at 128-40.

<sup>17</sup> *Id.* at 137-40.

the public purse, examples of “persuasion” despite their arguably categorically coercive consequences.

It is a question, though, that is of obvious relevance to the issue that absorbs the book: the regulation, or recognition of hate speech, and the state’s response to it. The distinction between the criminal law—which is clearly coercive—on the one hand, and regulatory or tort regimes—in which the state provides the forum and determines the remedy but private parties bring the actions—has been of vital importance to lawyers seeking to provide remedies for victims of hate speech without encroaching on First Amendment rights.<sup>18</sup> Brettschneider’s overall project is somewhat aligned with that of these lawyers, at least in its goal; he too wants to figure out a way to respond to the anti-equalitarian content of hate speech without offending First Amendment guarantees. Thus, he might have looked a little more closely at some of those campaigns.

For example, at least parts of the failed anti-pornography ordinances of the 1980s pursued by Catherine MacKinnon and Andrea Dworkin were specifically designed so as *not* to employ the punitive arm of the state. What was envisioned in some parts of those ordinances were civil actions for civil remedies, contemplating the imposition of monetary damages to be paid to the victims of pornography by purveyors; not punitive actions involving the criminal law, the state, and jail time. Do those actions, and the state’s facilitation of them, constitute exemplars of “coercion” or “persuasion”? It seemed to the backers of these ordinances that the state’s role in these actions was what Brettschneider calls persuasive, not coercive. I suspect that Brettschneider would disagree. But if so, this needs a defense. Is the state’s role in facilitating private actions for the harms done by hate speech or pornography, so injurious to the rights of purveyors to justify a ban on even such civil actions? This goes quite a bit further than what seems to be argued in the text, which is that criminal sanctions on hate speech would do such injury.

Recognizing the violations of rights arguably occasioned by criminalizing various forms of hate speech by no means implies that a state which permits *civil* actions for those harms, followed by the imposition of monetary damages, also violates those rights. Rather, it appears to require only that the speakers internalize the harms occasioned by that speech, when the

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<sup>18</sup> See Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 804 (1991); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 25 (1985).

speech violates the civil rights of others, with the phrase “civil rights” there understood in its original and ordinary way: rights to dignity, to bodily integrity, and to be free of the fear of assault in both society and cyberspace. The state provides the forum—the courthouse, court personnel, and the cause of action—such that those civil rights can be vindicated in the form of private actions. It seems to me that the state is performing a persuasive, and not a coercive function, when it acts as such. But if there is a claim to be made to the contrary, it isn’t spelled out in this book.

Another way to put this concern is that it isn’t clear where civil actions, as opposed to criminal sanctions, for hate speech and pornography would fall on Brettschneider’s schematic divide between “coercive” and “persuasive” state functions. The state acts through common and constitutional tort law so as to inhibit or deter a wide range of speech acts, involving an equally wide range of types of harms. Thus, the state defines as “tortious” various types of libel, slander, fraud, blackmail, perjury, assault, stalking, harassment, group defamation and intentional infliction of emotional distress. (Some of these, of course, are also crimes.) Likewise, it defines as actionable various breaches of contract, copyright, patent, and trademark rights, virtually all of which also involve nothing or almost nothing but speech and speech acts. All of these torts and contract or copyright violations are occasioned by speech acts, and they all give rise to civil sanctions. The speech in all of these cases, like hate speech, does things, and (arguably) by so doing, causes harm. And the state’s response likewise does something: the state defines torts, and court rules, so as to facilitate a damage award, a punitive damages award, or a restraining order, in response to the harm this speech causes. For the most part, when it does so, it is facilitating a private remedy designed to require the actor to rectify the wrongs done by his actions, and to internalize those costs.

The same would be true of a (hypothetical) civil action for harms occasioned by hate speech or pornography. Yet, only with respect to such harmful speech, are liberals, and possibly Brettschneider (although it is not entirely clear), inclined to close the courthouse door, and preclude not only criminal responses by the state, but also civil responses by harmed citizens. But why? Why is it only with respect to hate speech that the state must not permit civil recourse? Why is it only the harms occasioned by pornography or racist speech that inspire worries that any state that allows civil remedies is thereby acting coercively, rather than persuasively? What is so peculiar about hate speech, and the

harms it occasions, that gives rise to the impulse to shield them with protection against a civil state response?

More generally, the failure to define coercion, and its reach, has additional normative consequences in Brettschneider's argument. To reverse Robert Cover's insight from decades ago that all state speech takes place on a field of violence,<sup>19</sup> all coercive state actions, from executions to the impositions of regulatory fines, civil sanctions, parking tickets or taxes, also take place within a field of persuasive words. There is often coercion behind state attempts to be persuasive. Think of the interactions between the pregnant woman seeking an abortion and the abortion provider required to educate the woman with respect to various attributes of the fetal life inside her. But there is also often, perhaps very often and maybe even always, persuasion behind the state's attempts to coerce.

The efficacy of persuasive action requires an audience and the state sometimes attempts to coerce attendance. Think again of public education. Is it always wrong to require attendance? If not, this suggests a continuum, rather than a bright line, between acts of the state that are primarily persuasive but accompanied by some measure of coercion—even if just coerced attendance—and acts of coercion accompanied by some measure of persuasion. Sometimes, the persuasion that accompanies coercive state action is just obnoxious and grating and we would be better off without it—just tell me what it will cost me, don't lecture me, when you're imposing a traffic fine. Sometimes, the coercion that might accompany persuasive action, however, is justified. For example, think of the attachment of the salary that accompanies the imposition of a civil or regulatory fine, or as Brettschneider argues in some detail, the withdrawal of a tax exemption from religious views that are hateful. The tax exemption, however, is not an anomaly; it is, rather, simply one example of a pervasive dynamic: persuasive state speech accompanied by some measure of coercion. That dynamic, I think, requires more general treatment.

A final concern goes to the narrowness of Brettschneider's thesis. Why are we focused so exclusively on the role of the persuasive state in promoting race and sex equality, rather than also on values pertaining to a fair or just distribution of resources? Shouldn't the persuasive state pursue, through persuasion, these liberal values as well? The paradox Brettschneider discovers of the state protecting hate speech for liberal reasons, even though the

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<sup>19</sup> Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

speech it protects undermines liberalism, is not limited to the context of speech and speech rights. Much of the dynamic Brettschneider describes—of the back and forth between the dystopic images of an overly invasive state on the one hand or a hateful society on the other—is also true in the realm of economic liberty and justice.

In part for liberal-sounding reasons regarding the dangers of concentrated state power and the values of individualism and entrepreneurship, we tend to let market-generated outcomes lie, even when that results in massive inequalities in wealth, and hence concentrations of economic power, which can squelch true individualism and liberty in the private sector. Perhaps one way out of this box as well as in the speech context would be to look at the role of the persuasive state. A state that can explain its commitment to markets might go some way toward undoing the damage unregulated markets occasion; or on the other side, a state that can explain its commitment to regulating them might also bear a responsibility to explain how that regulation in fact furthers the liberties that it seemingly constrains. A shift in focus away from the pitfalls of the state's coercive role in taxing and redistributing wealth, or in regulating private markets, and toward the potential of the state's persuasive role in these contexts, might yield benefits comparable to the shift in focus that Brettschneider advocates, and largely accomplishes, in the context of hate speech. Were we to try this, however, we'd face some of the problems outlined above.

In addition to the invasive state and hateful society dystopias, we would also have to contend with the inegalitarian state, and the illiberal state, as well as the hypocritical or lamp-posting state. We would have to contend with the various state acts that impact distributive justice concerns, but where the action is neither cleanly coercive nor cleanly persuasive, but some combination of both. Here, the weakness of the "coercive versus persuasive" understanding of the state would come into sharp relief: the main way that the state effects distributive justice is through its regulatory, taxing and spending authority, all of which are viewed by some as fundamentally coercive, and by others as the paradigmatic exercise in persuasive statecraft. Similarly, its laws of inheritance, contract, and property rights, all of which aim to give full sway to private choice, are viewed by some—critical theorists most notably, but more generally, the political left—as so coercive as to be theft, and by others—primarily libertarians and liberals but some communitarians as well—as the heart of civil society.

In all of these areas the state's acts of coercion are so intertwined with acts of persuasion that it will be hard to disentangle them, suggesting, I believe, the limits of the distinction. It might be better in this context, as well as in the context of hate speech, to look in a more granular way at the specific acts the state has taken without categorizing them as coercive or persuasive, and simply ask whether the state is saying the right things when it speaks, as the wonderful title of Brettschneider's book suggests.