Printed in U.S.A.
Northwestern University Law Review
Vol. 107, No. 2

VALUE DEMOCRACY AS THE BASIS FOR VIEWPOINT NEUTRALITY: A THEORY OF FREE SPEECH AND ITS IMPLICATIONS FOR THE STATE SPEECH AND LIMITED PUBLIC FORUM DOCTRINES[†]

Corey Brettschneider

ABSTRACT—The doctrine of viewpoint neutrality is central to First Amendment jurisprudence. It requires the state to not treat speech differently based on a speaker's political or philosophical opinions. The doctrine has recently come under attack, however, for protecting hate speech and other views inimical to liberal democracy. Critics note that most democracies outside of the United States have rejected the doctrine of viewpoint neutrality, while still endorsing a right to free speech. In stark contrast to these critics, Martin Redish has offered a clear and robust defense of this doctrine, which he grounds in an account of "epistemic humility."

In contrast to these positions, my theory of "value democracy" suggests a new approach to viewpoint neutrality. I suggest the doctrine rightly protects rights of people to make up their minds and speak while keeping them free from the threat of coercive punishment. I add, however, that the state has an obligation to use its expressive capacities to defend the values that underlie these rights and to criticize expressions of hate that oppose them.

Value democracy therefore highlights two aspects of free speech. First, it develops an account of how the values of free and equal citizenship—autonomy and equal respect—ground the doctrine of viewpoint neutrality. To respect the equal autonomy of citizens, the state should not coercively ban hate speech. Second, it articulates an expressive role for the state in defending the values of free and equal citizenship. The state should defend these values by criticizing hate speech and other viewpoints that seek to undermine the freedom and equality of citizens. Using its expressive capacity, the state can respect rights at the same time that it checks the spread of illiberal viewpoints, thus avoiding complicity with the hate

[†] This Essay draws from COREY BRETTSCHNEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY (2012). Parts I and II draw additionally from a related article, Corey Brettschneider, *When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion*, 8 PERSP. ON POL. 1005 (2010).

speech it protects. I suggest, moreover, how value democracy can help us to rethink the First Amendment doctrines of the "limited public forum" and "state speech," as presented in *Bob Jones University v. United States*, *Rust v. Sullivan*, *National Endowment for the Arts v. Finley*, and *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*.

AUTHOR—Professor of Political Science, Brown University.

INTRODUCTION

The doctrine of viewpoint neutrality is central to First Amendment jurisprudence.[1] It requires the state to not treat speech differently based on a speaker's political or philosophical opinions. The doctrine has recently come under attack, however, for protecting hate speech and other views inimical to liberal democracy. Critics point out that most democracies outside of the United States have rejected the doctrine of viewpoint neutrality while still endorsing a right to free speech. These democracies admit the importance of respecting diverse political and philosophical opinions, but they do not give wholesale protection to viewpoints that attack the freedom and equality of citizens. For example, Germany bans fascist speech, Holocaust denial, and the advocacy of racism under its principle of "militant democracy."[2] Similarly, France prohibits speech that disparages racial, ethnic, or religious groups.[3] Canada, in the *R. v. Keegstra* case, prosecuted a teacher for imparting racist views during a classroom lesson.[4] In contrast, under the American doctrine of viewpoint neutrality, such government opposition to hate speech would not pass constitutional muster.

Following the example of other democracies, several legal scholars in the United States have urged the Court to reconsider viewpoint neutrality. Jeremy Waldron's recent book, *The Harm in Hate Speech*, rejects the doctrine for allowing minority groups to be exposed to discrimination and humiliation, undermining their equal inclusion in society.[5] Other thinkers, like Catharine MacKinnon and Charles Lawrence, believe that viewpoint

[1] For discussions of the doctrine of viewpoint neutrality as core to the meaning of First Amendment free speech protection, see MARTIN H. REDISH, THE ADVERSARY FIRST AMENDMENT (forthcoming 2013). I focus later in this Essay on discussions of *Virginia v. Black*, 538 U.S. 343 (2003), and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

[2] *See* ERIK BLEICH, THE FREEDOM TO BE RACIST? 97–105 (2011); *see also* Adam Liptak, *Outside U.S., Hate Speech Can Be Costly: Rejecting the Sweep of the First Amendment*, N.Y. TIMES, June 12, 2008, at A1 (describing differences in the way the United States and other countries, such as Canada and Germany, treat potentially offensive speech).

[3] *See* BLEICH, *supra* note 2, at 17–18, 40.

[4] [1990] 3 S.C.R. 697 (Can.).

[5] JEREMY WALDRON, THE HARM IN HATE SPEECH (2012).

neutrality is inconsistent with the Constitution's commitment to the equal protection of the law.[6]

In stark contrast to these critics, Martin Redish has offered a clear and robust defense of the doctrine of viewpoint neutrality. As he explains in his important forthcoming book, *The Adversary First Amendment: Free Expression and the Foundations of American Democracy*, there are two reasons to uphold viewpoint neutrality as a central constitutional and First Amendment value.[7] The first reason is to respect autonomy, defined as individual choice; viewpoint neutrality protects the ability of individuals to choose their own opinions. A second reason for viewpoint neutrality is "epistemic humility," or the belief that the state must be modest and refrain from endorsing any particular substantive values.

In this Essay, I aim to defend a modified form of viewpoint neutrality. I agree with Redish that individual autonomy is fundamental to understanding the doctrine of viewpoint neutrality and the right of free speech more generally. For the state to respect individual autonomy, it should allow citizens to make up their minds and speak about politics without the threat of punishment. I add that the ideal of autonomy should be complemented by the value of equal respect. The state upholds equal respect of individuals when it does not discriminate on the basis of their race, gender, or sexual orientation. I refer to autonomy and equal respect as the values of "free and equal citizenship," since they are among the core values of liberal democracy.[8]

Unlike Redish, however, I reject epistemic humility's attempt to avoid endorsing any substantive values. I argue that viewpoint neutrality in rights against coercion should be grounded in a set of core constitutional values, in particular equal respect and autonomy, and not epistemic humility. Redish notes that the Court took an approach that seems to favor epistemic humility when it claimed that, in regards to the First Amendment, "there is no such thing as a false idea."[9] But I will argue that autonomy and equal respect are substantive values. The substantive nature of these values, which underlie viewpoint neutrality, is shown in how they conflict with opposing substantive viewpoints that advocate treating minorities unequally or depriving them of their autonomy. Interpreters of the First Amendment must therefore choose between a commitment to epistemic

---

[6] *See, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS 71–73 (1993); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* WORDS THAT WOUND 53, 57–58 (Mari J. Matsuda et al. eds., 1993).

[7] *See* REDISH, *supra* note 1.

[8] On free and equal citizenship, see JOHN RAWLS, POLITICAL LIBERALISM 29–35 (expanded ed. 2005).

[9] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974); *see also* REDISH, *supra* note 1, ch. 6 (citing *Gertz* for the proposition that the Court favors epistemic humility as a justification for viewpoint neutrality).

humility, which requires the state to refrain from endorsing any substantive values, and a substantive ideal of free and equal citizenship.

Faced with this choice, why should we choose autonomy complemented by equal respect and not epistemic humility? The problem with epistemic humility is that it fails to respond to an important challenge from the critics of viewpoint neutrality—the "paradox of rights."[10] The paradox is that the right of free speech protects the ability of all individuals to express their own opinions without the threat of state coercion. However, some individuals might use their right of free speech to attack rights or their equal application to all citizens. Liberal democracies that practice epistemic humility risk being unable to defend rights from being undermined by those who reject the central commitments of liberal democracy itself. The paradox of rights thus captures the common concern that liberal democracy "cannot take [its] own side in an argument,"[11] even against hateful or discriminatory viewpoints.

Epistemic humility faces two problems in addressing the paradox of rights. First, epistemic humility leaves the state incapable of defending liberal democracy. Hateful ideologies might then spread unchecked, undermining the protection of rights. Second, the state might be seen as being complicit in hateful or discriminatory speech that it protects but does not criticize. The state's neutrality in extending the right of free speech to hateful viewpoints might then be mistaken for its neutrality towards the discriminatory values expressed by those viewpoints. Both of these problems with epistemic humility stem from its refusal to allow the state to endorse any substantive values.

To answer the challenge from the paradox of rights, I argue that we must justify the doctrine of viewpoint neutrality using a set of substantive, non-neutral values, such as autonomy and equal respect. On my account, the state should find a way to defend these substantive values against viewpoints that challenge the basic ideal of free and equal citizenship. Hateful and discriminatory viewpoints should be viewed as "false" under the Constitution and criticized as such. The question, then, is how to defend the substantive values of autonomy and equal respect—thereby addressing the paradox of rights—while still upholding viewpoint neutrality in rights against coercion.

I propose that two features of what I call "value democracy" can answer the paradox of rights. First, I provide an account of how the doctrine of viewpoint neutrality is grounded in deeper, non-neutral, substantive values. Second, I argue that a liberal democratic state that embraces the doctrine of viewpoint neutrality must find a way to defend the reasons for rights at the same time it upholds the right of free speech. The

[10] WENDY BROWN, STATES OF INJURY 98 (1995).

[11] BRETTSCHNEIDER, *supra* note †, at 6.

state can best accomplish this by relying on its expressive and not its coercive capacities. On my account, the doctrine of viewpoint neutrality rightly protects all viewpoints from coercive sanction, but such protection should be complemented by a robust role for the state in promoting the values of autonomy and equal respect. These values form the "reasons for rights" that justify why the state protects the right of free speech. I argue that the state should use its expressive capacities, including court opinions, public holidays, and government subsidies, to criticize the hateful and discriminatory speech that it simultaneously protects from coercive sanction. I call this role for the state in defending the values of liberal democracy "democratic persuasion" to emphasize the importance of the state using its expressive and not its coercive capacities. The state should be viewpoint neutral in rights against coercion, but it should not be neutral in its own speech.

In Part I, I begin by articulating a theory of how the substantive values, or reasons for rights, underlie the doctrine of viewpoint neutrality. I pursue this task by closely analyzing *Virginia v. Black*. In Part II, I go on to offer an account of the state speech doctrine as being central to the state's ability to articulate the reasons for rights. I suggest why the state speech doctrine would have been a better frame for the Court's decision in *Christian Legal Society v. Martinez*.[12] I criticize the Court's reasoning in the *Christian Legal Society* case, although I defend its conclusion and central holding. I am also critical of the Court's approach to viewpoint neutrality in *National Endowment for the Arts v. Finley*, but here too I support its conclusion and general holding.[13] Although I use these cases to emphasize the importance of allowing the state to promote the values of free and equal citizenship, I add that state speech should be subject to substantive limits. In particular, I criticize the Court's decision in *Rust v. Sullivan* for undermining the entitlement of citizens to know their basic rights.[14]

In sum, I aim to highlight two expressive aspects of free speech. First, I develop an account of how the values of free and equal citizenship—autonomy and equal respect—ground the doctrine of viewpoint neutrality. To respect the equal autonomy of citizens, the state should not coercively ban hate speech. A coercive ban would restrict the autonomy of citizens to make up their minds and express their opinions. Second, I articulate an expressive role for the state in defending the values of free and equal citizenship. The state should not be neutral in regard to autonomy and equal respect. Rather, it should defend these values for all citizens in its expressive capacity. The state should be free to criticize hate speech and

[12] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971 (2010).

[13] 524 U.S. 569 (1998).

[14] 500 U.S. 173 (1991).

other viewpoints that seek to undermine the freedom and equality of citizens. This expressive role for the state in defending the values of free and equal citizenship allows it to respond to the paradox of rights. Using its expressive capacity, the state can respect rights at the same time that it checks the spread of illiberal viewpoints and avoids complicity with the hate speech it protects.

I. NEUTRALITY AND COERCION

In this Part, I aim to demonstrate that viewpoint neutrality itself is theoretically grounded in the non-neutral democratic value of free and equal citizenship. Viewpoint neutrality prohibits bans on the expression of viewpoints based on their substantive message. For instance, while the doctrine of viewpoint neutrality would not protect the atrocities committed by the Nazis, it would protect the right to express Nazi ideology. It is often thought that the doctrine is protective of "hate speech," but it is worth clarifying precisely what kind of "hate speech" is protected under the doctrine of viewpoint neutrality. Often, the term is used to refer to a variety of speech that can range from threats to the expression of viewpoints. Although viewpoint neutrality requires protecting the right to express certain hateful viewpoints, it does not require the protection of threats. The Supreme Court recently helped to clarify this distinction between protected expression and unprotected threats in *Virginia v. Black* by distinguishing between two kinds of cross burning.[15] The Court ruled that an act of cross burning could be prohibited if it threatened particular individuals and constituted "intent to intimidate."[16] Justice O'Connor suggested in her opinion that it is consistent with the First Amendment to outlaw threats, even if they are based on a specific viewpoint. For example, one of the incidents considered in the case involved a cross that was burned on a family's yard. O'Connor's opinion suggested why this type of cross burning could qualify as a threat, which would allow it to be legitimately outlawed consistent with the protection of free speech. Her opinion sought to distinguish this type of cross burning from cross burnings that were not threats and were thus protected by the First Amendment.[17] O'Connor's opinion could be interpreted as carving out an exception to the doctrine of viewpoint neutrality when she recognized that threats could be prohibited, even if they were also expressive.

While Justice O'Connor allowed the state to prohibit cross burning that occurs on a person's yard with intent to intimidate, her decision clarified that other kinds of cross burning were protected speech. For example, the Court protected a cross burning on a field during a rally in

---

[15] *See* 538 U.S. 343, 361–63 (2003).

[16] *Id.* at 362.

[17] *See id.* at 365–66 (plurality opinion).

which no individuals were singled out as targets of the hateful expression.[18] The Court ruled that this was not a direct threat but instead expressed a political viewpoint with no intent to intimidate, albeit a viewpoint with a deeply inegalitarian message. O'Connor argued that banning this kind of cross burning would unconstitutionally depart from viewpoint neutrality.[19]

I call the kind of speech that is not a threat, but that expresses a message inimical to the values of free and equal citizenship, a "hateful viewpoint." Speech that does constitute a threat, however, falls into its own category. Consistent with the Court's rulings,[20] while hateful viewpoints should be protected from coercive bans, in my view, threats can and should be prohibited. It is important to emphasize, however, that there is a distinction between the emotion of hate and the content of hateful viewpoints. I define hateful viewpoints not by the emotion behind them, but by their expression of an idea or ideology that opposes free and equal citizenship.

The Court's distinction between threats and viewpoints in *Virginia v. Black* echoed *Brandenburg v. Ohio*, which upheld the right of the Ku Klux Klan to express its hateful viewpoint.[21] *Brandenburg* overruled the Court's previous "clear and present" standard, which had given the state greater power to ban viewpoints. Under that standard, the Court interpreted the First Amendment as allowing the state to ban viewpoints that it considered subversive and likely to cause long-term destruction to the security of the United States.[22] The *Brandenburg* decision replaced the clear and present danger standard with a stricter viewpoint-neutral standard that allows limits on speech only in cases of imminent harm, such as speech that might immediately incite a riot.[23] *Virginia v. Black* reinforced *Brandenburg*'s

[18] *See id.* at 348–50 (majority opinion). Justice O'Connor later noted that "[b]urning a cross at a political rally would almost certainly be protected expression." *Id.* at 366 (plurality opinion) (alteration in original) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 402 n.4 (1992) (White, J., concurring)).

[19] *See id.* at 366–67.

[20] *See, e.g.*, Chaplinksy v. New Hampshire, 315 U.S. 568 (1942).

[21] Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). In this case, the Supreme Court struck down the Ohio Criminal Syndicalism Act on the grounds that it violated First Amendment protections of free speech. *Id.* at 448–49. The Court ruled that freedom of expression protects viewpoints that advocate violence against particular groups, but it permitted speech to be banned if it incited imminent violence. *Id.* at 449. *Brandenburg* effectively ended the clear and present danger test and protected a wide variety of viewpoints against coercive bans, even when those viewpoints oppose the values of liberal democracy.

[22] *See* Schenck v. United States, 249 U.S. 47, 52 (1919). In this case, Justice Holmes announced the "clear and present danger" test in explaining why the distribution of leaflets opposing the draft during World War I was not protected by the First Amendment. The case upheld the conviction of Schenck, the secretary of the Socialist Party of America, under the Espionage Act of 1917. *Id.* at 53. For almost half a century, the clear and present danger test, or versions of it, was used to uphold the criminalization of certain viewpoints that were largely to the left of center and believed to be at odds with the interests of the United States, as in *Schenck*. My account of value democracy, like the Court's decision in *Brandenburg*, rejects the clear and present danger test.

[23] *Cf., e.g.*, Hess v. Indiana, 414 U.S. 105, 108–09 (1973) (per curiam).

viewpoint-neutral standard by once again protecting the Klan's hateful expression on the grounds that the First Amendment applies to all viewpoints, provided they are not threats or incitements to imminent harm.

Should a liberal democracy endorse the protection of all viewpoints equally by the right to free expression given its premise that all citizens should be regarded as free and equal? Viewpoint neutrality protects the right to express hateful viewpoints, even though they directly challenge value democracy's commitment to freedom and equality. If these hateful viewpoints were to prevail, they could subvert the basic principles of a legitimate democratic state. It might seem, then, that the appropriate response would be to protect free and equal citizenship by abandoning viewpoint neutrality. I hope to suggest, however, that viewpoint neutrality as a doctrine of free speech can be complemented by the state's use of democratic persuasion in defense of free and equal citizenship. While value democracy's account of free expression strictly protects free speech for all viewpoints, it provides for a robust state role in promoting democratic values and criticizing hateful or discriminatory viewpoints.

Value democracy reinterprets viewpoint neutrality by grounding it in a commitment to treat persons as free and equal. This reinterpretation, drawing on the work of John Rawls, Ronald Dworkin, and Alexander Meiklejohn, connects viewpoint neutrality with a wider set of values that are required for political legitimacy, in particular what I refer to as the value of free and equal citizenship.

In developing this argument, it is helpful to begin with the value-based defenses of viewpoint neutrality developed by Rawls, Meiklejohn, and Dworkin. According to Rawls, political equality requires a respect for the "two moral powers" of all citizens to develop and exercise what he calls a "capacity for a sense of justice" and a "capacity for a conception of the good."[24] Citizens must be free from coercive threat as they develop their own notions of justice and the good. Otherwise, they would not be able to affirm and choose their own ideas about the most fundamental matters of politics (the just) and what constitutes, in their view, a valuable life (the good).[25] Rawls's argument could be interpreted to support viewpoint neutrality because the value of equality would be violated if some, but not all, citizens were free to develop their moral powers. Government discrimination or non-neutrality among viewpoints would make respect for the exercise of the moral powers unequal, and it would deny political freedom to the coerced citizens. Non-neutrality would undermine the equal treatment, not only of the citizens whose viewpoints were banned, but also of the citizens who could potentially listen to and argue with those viewpoints. The state would undermine equal treatment by failing to respect the capacity of citizens to make the free decision to accept or reject

[24] RAWLS, *supra* note 8, at 302, 332.

[25] *See id.* at 334–35.

any viewpoint. Viewpoint neutrality is therefore necessary for the full and equal exercise of the two moral powers of citizens.[26]

A similar line of egalitarian justification for this doctrine can be found in the work of Meiklejohn and Dworkin. These thinkers may be interpreted as defending viewpoint neutrality in the right of free expression, even for the hateful viewpoints held by the Nazis and the Klan, because neutrality is required in order to respect the democratic autonomy of citizens to develop their own political opinions.[27] Meiklejohn famously employs the metaphor of a town meeting to argue that all viewpoints must be protected in a democracy.[28] On his view, while the moderator of a town meeting could limit speakers for reasons of time and to ensure that they stay on point, censoring speakers based on the substance of their comments would limit the meeting's democratic aims. Such censorship would prevent meeting participants from hearing a variety of arguments for and against the measure under consideration and would constrain their ability to express their own views. This kind of censorship would impede the ability of citizens to be the source of their own democratic decisions and so would undermine the democratic ideal.

Like Rawls, Meiklejohn argues that any attempt to discriminate based on the content of a particular viewpoint would threaten a regime's democratic credentials, even if those viewpoints were themselves deeply undemocratic. Coercively limiting or banning an illiberal viewpoint would prevent citizens from actively affirming the core values of democracy. According to this argument, we must have the option to consider and reject even democratic values if we are to be truly free to affirm them. As Ronald Dworkin puts it:

> [A] majority decision is not fair unless everyone has had a fair opportunity to express his or her attitudes or opinions or fears or tastes or presuppositions or prejudices or ideals, not just in the hope of influencing others, though that hope is crucially important, but also just to confirm his or her standing as a responsible agent in, rather than a passive victim of, collective action.[29]

In short, the right to hear and make all political arguments is a fundamental component of equal citizenship. Viewpoint neutrality should therefore not

---

[26] Rawls endorses viewpoint neutrality: "So long as the advocacy of revolutionary and even seditious doctrines is fully protected, as it should be, there is no restriction on the content of political speech, but only regulations as to time and place, and the means used to express it." *Id.* at 336. However, the literature on Rawls is divided over whether viewpoint neutrality extends to hate speech, since he does not address the issue explicitly in his work. *See* SAMUEL FREEMAN, RAWLS 72 (2007).

[27] This view of democratic autonomy corresponds with one of Rawls's moral powers, the capacity for a sense of justice. *See* RAWLS, *supra* note 8, at 334–35.

[28] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22–27 (1948).

[29] Ronald Dworkin, *A New Map of Censorship*, INDEX ON CENSORSHIP, no. 1, 2006, at 130, 131.

be confused with a justification for free speech; it is rather a doctrine that offers guidance regarding whether it is appropriate to limit coercion.

One might ask, however, whether it is empirically necessary for citizens to have the option to choose inegalitarian principles to develop Rawls's two moral powers or to deliberate about policy. Perhaps individuals living under censorship would select the same policy views and conceptions of justice and the good that they would choose living under freedom. However, I do not read the defenders of viewpoint neutrality as making an empirical argument, but rather as presenting a claim about what it means to respect citizens as free and equal. It is not that the protection of all viewpoints is empirically necessary to develop the two moral powers or the capacities for democratic citizenship. Rather, such protection from hateful viewpoints would disrespect the independent judgment of free and equal citizens, who are regarded as having the two moral powers, if the state were to restrict their options. Even if citizens ought not choose views that are at odds with an ideal of equal citizenship, it is essential to the legitimacy of value democracy that they *could choose* to embrace inegalitarian principles and policies.[30] Value democracy is not indifferent to whether citizens do choose values of free and equal citizenship. It argues that they should not only choose democratic values, but they should also engage in a process of reflective revision to scrutinize their beliefs, including their "private" beliefs, in light of democratic values. But it is essential to this process that citizens are free to choose to endorse the values of freedom and equality rather than being coercively forced to do so.

Much of my emphasis, and that of the familiar free speech tradition following John Stuart Mill, is on the problems posed by coercive or criminal bans on speech. Such bans are blunt instruments with harmful effects. As Mill reminds us, coercive bans risk the loss of partial truths that might, as part of public discourse, serve to enlighten, despite being couched in arguments that are generally wrong.[31] Coercive sanction merely tries to bury opinion and therefore misses the grievances that might be held legitimately even by those with deeply racist views.[32] Mill reminds us too that coercive sanction denies citizens the opportunity to clarify what is

---

[30] In *Democratic Rights*, I defend the idea that respect for free and equal status requires a respect not only for democratic rights of participation, but also a respect for other substantive rights protections. *See* COREY BRETTSCHNEIDER, DEMOCRATIC RIGHTS (2007).

[31] *See* JOHN STUART MILL, ON LIBERTY 109 (Gertrude Himmelfarb ed., Penguin Classics 1987) (1859). As Mill writes, "Such being the partial character of prevailing opinions, even when resting on a true foundation, every opinion which embodies somewhat of the portion of truth which the common opinion omits ought to be considered precious, with whatever amount of error and confusion that truth may be blended." *Id.*

[32] *See* Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 89 (1994).

wrong with hateful views.[33] As Nancy Rosenblum argues, it also has the potential to force these views underground.[34] It would be better for hateful viewpoints to be publicly seen, tracked, and refuted.

I have sought to emphasize why value democracy's defense of viewpoint neutrality should be couched in a wider, non-value-neutral concern to protect the core values of freedom and equality, which a legitimate society must respect. It follows from the grounding of viewpoint neutrality in a wider, non-neutral theory that the legitimate state can and should protect some views that are at odds with its own core values. A ban on certain viewpoints would disrespect the moral powers of free and equal citizens because it would, through threat of punishment, force people to come to particular conclusions about politics.

However, there is a tension between hateful viewpoints and the democratic values that require protecting those viewpoints. For instance, the Klan has been devoted since its founding to opposing racial equality under law. Indeed, its founding ambition in the nineteenth century was to oppose precisely the kind of guarantees that the Equal Protection Clause of the Fourteenth Amendment provides. The Equal Protection Clause is the clearest constitutional guarantee of the ideal of equal status, an ideal that also serves as a basis of the freedom of speech.[35]

The question of whether to protect the Klan's right to peaceably articulate its viewpoint therefore offers a clear illustration of a possible tension between the doctrine of viewpoint neutrality as a means of limiting state coercion and the values and reasons underlying that doctrine. There is a clear conflict between the viewpoint of the Klan, which is protected by a right to free speech, and the reasons to protect that viewpoint in the first place. In short, the Klan opposes the values of political equality and autonomy for all persons subject to law, and these values are the very basis for the protection of its rights.

On my view, it is important to retain a doctrine of viewpoint neutrality, but also to give expression to the reasons that underlie that doctrine. Thus, the state should protect the rights of hate groups while also criticizing their discriminatory views. To see why there is an interest in both protecting and criticizing the Klan's viewpoint, it is important to consider three perspectives that reflect the different interests related to free speech: those of the speaker, the listener, and the democratic polity as a whole.

---

[33] *See* MILL, *supra* note 31, at 76 ("If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.").

[34] *See, e.g.*, NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS (1998).

[35] See in particular the discussion of the founding of the Klan in *Virginia v. Black*, 538 U.S. 343, 352–58 (2003).

Dworkin describes the interest of citizens as speakers in being able to say whatever they wish. If citizens want to articulate a view that is at odds with the basis for the state's legitimacy, coercively preventing them from doing so would directly limit their autonomy. Denying speakers the ability to say what they want restricts one of the most basic capacities of citizens to decide and express their own political positions.[36] Dworkin therefore emphasizes the importance of the citizen qua speaker in his defense of viewpoint neutrality. His view clearly articulates why the affirmative value of autonomy requires respect and protection of all viewpoints expressed by speakers.

In addition to the interest of speakers, another interest at stake in free speech rights is that of listeners, as Meiklejohn points out in his account of viewpoint neutrality.[37] To fully exercise their rights to autonomy and to form their own opinions, citizens in a democracy must be free to hear and consider any viewpoint they wish free from government intrusion. Indeed, this interest of the listener might be held by citizens who are critical of hateful viewpoints. For instance, if I want to argue against a hateful viewpoint, I should be free to seek it out, understand it, and then criticize it.

A third perspective, according to Charles Beitz and T.M. Scanlon, is that of the citizenry as an audience in a democratic polity.[38] The interest of citizens as an audience is distinct from their interest as listeners. The perspective of citizens as listeners is an individual one, whereas the perspective of citizens as an audience regards them collectively and emphasizes the importance of the whole democratic polity. Citizens as a democratic audience have interests at stake in deciding what beliefs should prevail in their democracy. In particular, they have an interest in seeing that democratic values thrive in the polity as a whole so that the right to vote and other procedural and substantive democratic rights are preserved for all citizens.

However, if these institutions are to be preserved, the democratic values that support them must also be defended. Some viewpoints, such as the Klan's, oppose the values of free and equal citizenship and are hostile to the values that underlie democratic institutions. On my view, the appropriate response by the state to this conflict is to protect the free speech rights of citizens to make all arguments as speakers and to hear all arguments as listeners. At the same time, the state should criticize antidemocratic and discriminatory viewpoints to uphold the interests of citizens as an audience in preserving democracy.

It might be objected that my view is unfair to discriminatory viewpoints because it does not allow them the equal chance to spread.

---

[36] *See* Dworkin, *supra* note 29, at 131–32.

[37] *See* MEIKLEJOHN, *supra* note 28, at 25.

[38] *See, e.g.*, CHARLES R. BEITZ, POLITICAL EQUALITY 212 (1989); T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 524–27 (1979).

However, this objection rests on a mistaken conception of fairness. Respect is owed not to specific viewpoints per se but to individual citizens. Viewpoint neutrality requires that the state not coercively limit the free speech rights of citizens, but it does not oblige the state to be neutral when it comes to the expression and defense of the values central to its own legitimacy. Viewpoint neutrality does not mean value neutrality. On my account, the state should protect the right to freely express all viewpoints, but it should not be neutral in its own expression or endorsement of values. The state and its citizens should promote the democratic values of free and equal citizenship while at the same time criticizing hateful or discriminatory values.

It would be implausible to interpret neutrality as instead guaranteeing equal success for all viewpoints. This misguided interpretation of neutrality would commit the state to bolstering viewpoints that seek to deny the rights of some citizens. Consider, for instance, whether the state should seek to revive Nazi ideology. If neutrality were interpreted as a state obligation to guarantee the equal success of all viewpoints, it would require the state to affirmatively promote Nazi ideology and other racist beliefs that are contrary to its most basic democratic values. The state's promotion of racism would contradict citizens' interest as an audience in preserving the institutions and entitlements of democracy, and in ensuring that the democratic values of freedom and equality are widely shared and endorsed. Thus, the proper interpretation of viewpoint neutrality and of the state's obligation to protect the right of free expression does not imply that everyone has an entitlement for the state to ensure that his own views prevail. On the contrary, the state has no obligation to ensure the equal success of hateful viewpoints but instead has an interest, on behalf of the democratic citizenry as an audience, in seeing that the viewpoints consistent with the values of free and equal citizenship succeed while those inimical to these values fail.

I have outlined the tension between two sets of interests: the interest of speakers and listeners in viewpoint-neutral protections, and the interest of the citizenry as a whole in ensuring that democratic values have a prominent place in public discourse and that hateful viewpoints are combated. One way to resolve this tension is to simply go the way of militant democrats and ban the speech. Indeed, Jeremy Waldron has argued in a recent series of articles and a recent book that there would be no loss in legitimacy from banning racist ideological viewpoints like those of the Klan.[39] Waldron asks whether societies that do ban the expression of hateful viewpoints have less legitimate law, and he argues that they do not.

[39] *See* Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596 (2010) [hereinafter Waldron, *Dignity and Defamation*]; Jeremy Waldron, *Free Speech and the Menace of Hysteria*, N.Y. REV. BOOKS, May 29, 2008, at 40 (reviewing ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE (2007)); *see also* WALDRON, *supra* note 5.

For instance, Waldron's position would suggest that in countries where hateful viewpoints are banned, the power to tax or to enforce the law is no less legitimate.[40]

I agree with Waldron that some viewpoints risk undermining and challenging the equal status of all citizens. As I have emphasized, there is no entitlement of a viewpoint to succeed. I also agree with Waldron that it would go too far to claim that a society that lacks a doctrine of viewpoint neutrality would lack legitimacy in all its laws. But in my view, there would be an increase in the degree of democratic legitimacy in a society if it could counter hateful viewpoints while still maintaining viewpoint neutrality when it comes to protecting speakers from being punished for expressing their views.

To determine whether protecting free speech for hateful viewpoints would enhance legitimacy, we would do well to consider whether there is a difference between a society that has free speech and few hateful viewpoints and a society that limits free speech and has an equal number of hateful viewpoints. If it is possible to counter hateful viewpoints while still protecting free speech, there would be an overall gain in the degree of democratic legitimacy. Specifically, the gain would come from preserving the entitlement of individuals to make and hear any opinion they wish. Such guarantees would enhance legitimacy by respecting the autonomy of citizens as speakers and listeners. It would also avoid the limits on autonomy that would come from coercively punishing some speakers. A society that offers this kind of viewpoint-neutral protection of free speech would also more fully realize political equality because it would extend free speech protections to all citizens. The task, then, is to devise a way for the state to protect the entitlements of citizens as speakers and listeners to say and listen to whatever they desire at the same time that it combats hateful viewpoints that seek to undermine the values of free and equal citizenship. The aim is to ensure that the interests of speakers, listeners, and the "audience" of the democratic citizenry as a whole are all respected and realized.

In my account of value democracy, we can both protect the rights of autonomous citizens and counter the discriminatory messages of hate groups. We can accomplish this by distinguishing between the state's expressive and coercive capacities. When acting in its coercive capacities, the state has an obligation to respect viewpoint neutrality by not coercing any speakers or listeners on the basis of their viewpoint. But when the state acts in its expressive capacities, the legitimate state has an obligation to clarify why some protected viewpoints are at odds with the reasons for free expression in the first place. In this role, the state should both protect and criticize deeply inegalitarian viewpoints. This state duty follows from the

[40] *See, e.g.*, Waldron, *Dignity and Defamation*, *supra* note 39, at 1642–46.

recognition that it is important not only for legitimate law to be justified, but also for the reasons behind the law to be promulgated.

It is often thought that the state should promulgate or make well-known the content of the law. Laws passed in secret and never publicized are rightly thought to be a paradigm of illegitimacy.[41] The content of laws must be publicized so that citizens can predict when their actions might be sanctioned. But citizens should know not only their rights and the rules that are set out by law, but also the *reasons* for these rights and rules. The key issue is how the state might find a way to express the reasons underlying rights, given that the state must also protect citizens' expression of hateful viewpoints that oppose these reasons. One place to look for expression of the reasons for rights is within the decisions of the Court. The Court is ideally an "exemplar" of public reason in the sense that it protects democratic values by striking down unconstitutional laws, like those constraining free expression.[42] In my view, however, the Court acts as an exemplar of public reason in a second sense by promulgating the reasons for rights. Namely, it acts as a model for the wider citizenry, including public officials who deliberate about and make the law, when it explains why certain laws are legitimate or illegitimate and when it speaks in defense of the values of free and equal citizenship. The Court's audience extends to all citizens who are concerned to think and to deliberate publicly about lawmaking. This second notion of the Court as an exemplar of public reason is an instance of the state relying on its expressive capacity to promulgate the reasons for rights. Ideally, the Court should clarify to the citizenry that the state's protection of hateful viewpoints does not imply its approval of these viewpoints, as it has in fact done on some occasions.[43] In other words, the Court should affirm the importance of rights such as free speech while at the same time giving reasons to criticize discriminatory views.

My view is consistent with Redish's claim that individual autonomy (and, I add, equal respect) is central to viewpoint neutrality, but I reject some aspects of what he calls epistemic humility. On Redish's view, the First Amendment requires the state to be reticent in endorsing any idea as "true" or criticizing any viewpoint as "false." Here he draws the argument from *Gertz v. Robert Welch, Inc.* that the Constitution does not admit a view about whether opinions are true or false.[44] But I have argued that

---

[41] *See* LON L. FULLER, THE MORALITY OF LAW 39 (1964).

[42] Rawls terms the Supreme Court an "exemplar" of public reason. It is clear he means to do so in my first sense, but it is unclear whether he would agree with my extension of this term to the second sense, that the Court should be an example for the wider citizenry. *See* RAWLS, *supra* note 8, at 231.

[43] *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011). In this case, while protecting the Westboro Baptist Church's right to demonstrate on public sidewalks, the Court repeatedly referred to the Westboro Baptist Church's activities as "hurtful."

[44] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) ("Under the First Amendment there is no such thing as a false idea."); REDISH, *supra* note 1.

under the Constitution, the values grounding the First Amendment's rights are "true" in the sense that they justify the Court's protection of rights against majorities that would restrict those rights. When the Court strikes down majoritarian legislation, it is holding the value of individual autonomy above the collective autonomy of the people to make policy decisions. The Court has the authority to do so because of the constitutional commitment to preserving individual autonomy over other concerns. The Court's action in protecting rights and striking down legislation must therefore commit the Constitution to the notion that individual autonomy and equal respect are indeed "true ideas" and that viewpoints rejecting them are "false ideas."

Although the doctrine of viewpoint neutrality does call for a certain kind of humility when it comes to coercive action, the Court cannot and should not avoid articulating the values that underlie the doctrine. For instance, in *Virginia v. Black*, Justice O'Connor gave evidence that could be used to criticize the Klan's racist views, although she emphasized the importance of protecting the group when it is expressing a viewpoint.[45] In particular, O'Connor underscored that the Klan was founded to oppose basic legal protections of equality under law.[46] This history highlights why the Klan should be viewed as clearly opposing the ideal of free and equal citizenship. On my account, the Klan and other organizations with a discriminatory message should have the right, under the doctrine of viewpoint neutrality, to speak and hold their views, but they do not have a right to be free from criticism by the state in its expressive capacities. Although the state should be restrained in its coercive capacity so that it respects citizens' autonomy to make their own decisions, the state should be free to explain why it protects rights of free speech. Indeed, a robust role for the state in defending the values that underlie free speech is another way of honoring these values.

I take the idea of promulgating the reasons for rights to be the first step in what I call "democratic persuasion," which is a central feature of value democracy. Although the state should act in a viewpoint-neutral way when exercising its coercive capacity, it has an obligation to explain why it respects viewpoint neutrality in the first place. The state should use democratic persuasion, promulgating or publicly offering the reasons for rights, in an attempt to convince citizens that its reasons are good reasons. Democratic persuasion encourages citizens to engage in reflective revision, with the aim of respecting and incorporating the public values of equal citizenship in their own lives, families, and civic associations. But the state must be careful to make reasoning central and to avoid force when pursuing democratic persuasion.

---

[45] 538 U.S. 343 (2003).

[46] *See id.* at 352 ("The Klan fought Reconstruction and the corresponding drive to allow freed blacks to participate in the political process.").

II. FREE SPEECH AS AN INVERTED RIGHT

In this Part, I want to further clarify value democracy's theory of freedom of expression by contrasting it with a noted "expressivist" notion of law. The "expressivist" view was developed in the areas of Establishment and Equal Protection Clause jurisprudence.[47] According to Elizabeth Anderson and Richard Pildes, rights should be understood not as based on the interests of the individual, but rather as delineated by the expressive capacities of the state. Establishment Clause jurisprudence, for example, can be best understood in terms of what the state should or should not express. By this account, a cross in a public school classroom is problematic because it suggests that the state is endorsing Christianity. According to the expressivist view, it is a mistake to think that we should understand why the cross would be problematic by looking to the interests of the students. None of these students are coerced directly, nor are their interests obviously effected. They may, for instance, simply ignore the cross.[48] Instead, displaying the cross in a public school classroom is problematic for the expressivists because it violates what Anderson and Pildes regard as the state's fundamental identity; it implies that the state is Christian.[49] Anderson and Pildes helpfully demonstrate that issues concerning religious establishment are linked to what the state should or should not say when it "speaks." Inevitably, the state will express a message in many circumstances. It is unrealistic that classrooms, for instance, could entirely avoid conveying any state message. Rather the issue, as expressivists demonstrate, is what the state should say given that it will unavoidably express itself.

I do not wish to dispute Anderson and Pildes's influential account of the Establishment Clause here. Instead, I want to discuss a kind of problem that can arise in the tension between state expression and the protection of negative rights against coercive intervention. This problem is distinct from Anderson and Pildes's focus on direct state expression relevant to the Establishment Clause, so it is not surprising that their theory does not address it.[50] The right to be free from state coercion in matters of individual expression requires a distinct kind of expressivist theory because the way that the state conveys its message in protecting free speech is inevitably more ambiguous than in the Establishment Clause context. What is distinctive about the jurisprudence of the rights related to the Establishment Clause is that it concerns direct limits on what the state can say. To the

---

[47] *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1527–51 (2000).

[48] *See id.* at 1547–48.

[49] *See id.* at 1550; *see also* Sch. Dist. v. Schempp, 374 U.S. 203, 215 (1963) ("[W]hile protecting all, [the state] prefers none, and it disparages none." (emphasis omitted)).

[50] My focus is on the right to free speech, but a similar analysis might be given of other negative rights like the right to privacy.

extent that citizens have a right against the establishment of religion, they possess a right against the state endorsing a particular religion. In the Establishment context, the relationship between state expression and rights is perfectly congruent: the citizen's right against establishment of religion correlates with the state's duty not to establish a religion.

Rights to freedom of expression, however, differ in a key sense. In the free speech context, I argue, state expression can at times seem to be "inverted" when rights are used to protect speech that opposes the reasons for the right to free expression itself. For example, the state's protection of free speech rights for hate groups might appear to suggest that there should be no judgment about the racist content of the protected expression. In this sense, there is a possible tension between the implicit message of speech protections and the reasons that are rightly understood to underlie those protections. Given the possible confusion that inverted rights present for the successful promulgation of the reasons for rights, any workable theory of free expression should explain how the state might overcome this challenge.

Value democracy offers an original answer to the challenge of inverted rights. It argues that the state should protect rights in a neutral manner, but that it should not be neutral regarding the values expressed by hateful viewpoints. The state needs to clarify its democratic values due to the risk that state protection of hateful viewpoints might be seen as approving or condoning them. In other words, there is a risk that in protecting the right to express hateful viewpoints the liberal democratic state will be viewed as complicit in these viewpoints. Value democracy's solution to the problem of inverted rights then is for the state to protect the right to free speech while at the same time criticizing hateful or discriminatory viewpoints. The state should engage in democratic persuasion, criticizing hate speech and promulgating the reasons for rights. Democratic persuasion therefore solves the problem of inverted rights by pronouncing the state's criticism of protected but hateful viewpoints. In this way, democratic persuasion serves as a necessary complement to the rights protected under the doctrine of viewpoint neutrality.

Democratic persuasion is distinctive in that it uses the state's expressive capacities to promote the ideal of free and equal citizenship to the audience of citizens while limiting coercion by protecting rights to free expression through the doctrine of viewpoint neutrality. Although it criticizes the viewpoints of discriminatory individuals and groups, it always respects their right to free expression.

It is helpful to contrast my own view with that of the critical race theorist Charles Lawrence, who in turn draws on the work of Richard Delgado. Lawrence believes that the state is always acting in its expressive capacities because all state action, including coercive action, is backed by reasons and value judgments. For instance, Lawrence views the decisions to desegregate lunch counters and to prohibit signs barring entry to African

Americans as themselves expressions of the state's support for the values of equal citizenship.[51] Lawrence takes this approach to argue that the state should use criminal law to limit hate speech and prosecute hate groups.[52] He points out, as have I, that hate groups directly threaten the basic values of a free society and that the state therefore must clearly condemn these groups. Lawrence's approach, however, differs from my own in suggesting that the state should express its condemnation of hate groups through criminal law. Lawrence, like MacKinnon, rejects the doctrine of viewpoint neutrality in favor of a balancing approach to issues of equal protection and civil rights.[53]

The problem with Lawrence's account is similar to that of Pildes and Anderson's; it does not recognize the distinction between the type of values being expressed when the state acts in its expressive capacities and the type of values being expressed when the state protects the speech of citizens and groups within society. When the state bans murder in criminal law, it is clearly expressing the idea that murder violates the rules of a legitimate society. Antidiscrimination law functions similarly; it expresses disapproval of the inegalitarian treatment of citizens. But not all decisions about coercion are similar. If the state protects a Klansman's right not to be murdered, it does not express support for the Klan's values, nor is it neutral about the Klan's beliefs. On the contrary, the state that protects the Klansman from murder is acknowledging that citizens are entitled to rights by virtue of their being citizens, even when their viewpoints are deeply illiberal. Thus, it does not follow from the state's protection of the lives of Klan members that the state endorses the viewpoint of these speakers. Similarly, the state protects the Klan members' right to expression for reasons related to respect for the liberal principles of freedom, although these values are rejected in the content of the Klan members' speech.

Lawrence's critique, despite its inability to differentiate between the types of values expressed when the state acts in its two distinct capacities, is nevertheless helpful in forcing liberal theory to clarify its reasons for refusing to regulate illiberal expression. When the state refrains from regulating illiberal viewpoints, it is essential that it also use its expressive capacities to clarify that it is not expressing support for the viewpoints themselves. The state is instead guaranteeing an entitlement that stems from the need to respect all citizens as free and equal. In my account, the state can clarify the relationship between the rights and the reasons behind rights by clearly condemning hateful political viewpoints while protecting them from coercive law. Without this clarification, there is a significant

---

[51] *See* Lawrence, *supra* note 6, at 60–62, 85–87.

[52] *See, e.g.*, Mari J. Matsuda & Charles R. Lawrence III, *Epilogue: Burning Crosses and the* R.A.V. *Case*, *in* WORDS THAT WOUND, *supra* note 6, at 133 (critiquing the Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which invalidated an ordinance that criminalized cross burning).

[53] *See* MACKINNON, *supra* note 6, at 71–110.

risk that the real meaning of the protection of free expression will be inverted.

Consider in greater depth the Court's opinion in *Virginia v. Black*. In this case, the Court held that cross burning was protected during a rally in which no member of the targeted class was singled out.[54] Although the Court allowed for the possibility of an exception to the requirement of content neutrality in the instance of a threat to particular individuals,[55] it did not think that the rally constituted such a threat. The Court invoked its doctrine of content neutrality,[56] which includes but is not limited to the doctrine of viewpoint neutrality. The important point for our purposes is that the protected "speech" in this case—the burning of the cross—clearly opposes the normative reasons that underlie its legality in the first place. Liberal theories justify the right to free expression based on free and equal citizenship. Yet they should also emphasize why the act of cross burning is an affront to these ideals because the reasons for the right, which the state has the obligation to express, are at odds with the content of the speech protected by the right. *Virginia v. Black* thus presents a potential paradigm of how and why the meaning of rights to freedom of expression should be clarified to citizens. Without this clarification, there is a significant risk that the real meaning of the protection of free expression and the commonly understood meaning will be inverted.

Part of the Court's audience in the *Black* case is legislatures considering passing coercive laws that would ban hateful viewpoints short of direct threats. These state actors should be reminded of why such laws violate the ideal of free and equal citizenship. But a second audience for Court opinions is the Klan itself and other hate groups in the marketplace of ideas. To these citizens, the Court is saying that while their right to free expression is protected, the content of their hateful views conflicts with the reasons for those rights protections. In addressing these citizens, the Court acts as an exemplar of public reason in the first and second senses described previously—it is both protecting a right and promulgating the reasons for that right.

Value democracy argues that the reasons for rights are not just intended to be expressed publicly; they are also meant to be persuasive. The arguments offered as part of democratic persuasion are intended to challenge and change the minds of those who do not appreciate the importance of free and equal citizenship in a legitimate society. Of course, hate groups including the Klan might not listen to reason or be persuaded, but in those cases, it is important to convince third parties and the population at large of the values of free and equal citizenship. Part of the task here is clarifying that the state is not neutral in regard to groups like

[54] *See* Virginia v. Black, 538 U.S. 343, 347–48 (2003).

[55] *See id.* at 359–60.

[56] *See id.* at 360–63.

the Klan and that the state instead affirms the freedom and equality of all citizens. In short, the legitimate state should employ democratic persuasion to convince the citizenry as a whole that its reasons for protecting the rights of all citizens are good reasons.

As I have suggested, one example of democratic persuasion is Supreme Court opinions. However, these Court opinions on their own may not be effective in changing the minds of hate groups that oppose the ideal of equal citizenship. The early Klan membership of Justice Hugo Black aside, I assume that most members of hate groups are not thinking analytically about the nuances of First Amendment doctrine. Although they still have an important expressive purpose, we must acknowledge that Court opinions alone will not effectively persuade the citizenry at large of the reasons for rights. No single institution of government has an exclusive monopoly on the reasons that underlie rights. Other state actors in addition to the Court should also appeal to these reasons. These institutions should be concerned with the question of how to express the reasons for coercion and its limits.

When the state attempts to promulgate the reasons for rights without violating freedom of expression, it is essential that it observe two limits: means based and substance based. The first, means-based limit of democratic persuasion requires that the state not pursue the transformation of citizens' views through any method that violates fundamental rights like freedom of expression, conscience, and association. For example, the state cannot use criminal sanctions to prohibit Klan meetings on the grounds that Klan members reject the reasons for freedom of expression. However, it would be appropriate for the state and its public officials to articulate why the Klan's views are inconsistent with the reasons for freedom of expression. In my view, the state can avoid crossing the means-based limit by confining its method of communicating its message to its expressive rather than its coercive capacity. For example, public officials and citizens engaged in public discussion may make arguments that seek to transform hateful viewpoints. In addition, I will suggest in the next Part that there is a wide role for educators and the state more broadly to teach the importance of the ideal of equal citizenship. The challenge for value democracy, however, lies in simultaneously protecting rights to expression against coercive interference while criticizing inegalitarian beliefs protected by these rights.

As I suggested earlier, the criticism involved depends on the degree to which the beliefs oppose free and equal citizenship. Hate groups like the Klan should be condemned by the state as their very mission is to undermine democratic values like the equal protection of all citizens under law. However, in many instances, it is the specific discriminatory beliefs of citizens that the state should criticize, and in these cases, the state should make it clear that it is not condemning their entire belief set.

Since the notion of coercion is central to the means-based limit, it is worth elaborating on how I will use this term. Drawing on Robert Nozick's work on this subject, I define coercion as the state threat to impose a sanction or punishment on an individual or group of individuals with the aim of prohibiting a particular action, expression, or belief.[57] Coercion, by this definition, need not be carried out; indeed some people might resist the state's threats. But the mere fact that a state action is coercive does not imply, as some have inferred, that the action is unjustifiable.[58] On the contrary, there are certainly justifiable cases of state coercion. For example, it is justifiable for the state to employ coercive criminal law in an attempt to stop citizens from committing acts of violence like murder, rape, and assault. The means-based limit, however, suggests that the state should not use coercion to prohibit expression. Coercive threats would deny the ability of persons to decide for themselves what kinds of policy beliefs to express. This denial would fail to respect the entitlement of citizens to develop and exercise their moral powers. In particular, coercively banning viewpoints would impair the ability of citizens to determine autonomously which beliefs they wish to hold and defend.

It should be emphasized, however, that a state's attempt to change people's minds by expressing certain beliefs does not constitute coercion since the state does not seek to prohibit citizens from holding conflicting beliefs. To the contrary, it is central to the idea of expression and, more specifically, to the expression and defense of the core values of freedom and equality that citizens remain free to reject it. Although I argue that the state should seek to persuade citizens to endorse democratic values, it is essential to the values of freedom and equality that the state not attempt to force acceptance. On the contrary, citizens should be free to reject the state's defenses of the core values of free and equal citizenship. For similar reasons, the state should avoid manipulating citizens into accepting the values of free and equal citizenship by intentionally misleading them or by subliminally trying to change their minds. To respect autonomy, the means-based limit suggests that democratic persuasion must be transparent. But the requirement that democratic persuasion include explicit reasons does not mean that it must avoid emotion or rhetorical persuasiveness. Indeed, as Sharon Krause has pointed out, there is nothing about the appeal to emotion that need be inconsistent with reasoning.[59]

---

[57] *See* ROBERT NOZICK, SOCRATIC PUZZLES 15–44 (1997).

[58] I do not, therefore, rely on a moralized conception of coercion. In a moralized conception, an act counts as coercion only if it is not fully justified. For an explanation of the moralized conception, see ALAN WERTHEIMER, COERCION (1987). However, my definition differs from the moralized conception in that it acknowledges that certain acts can be morally justified and yet coercive. For example, imprisoning murderers is coercive in my definition but morally justified. My definition uses the nonmoral but normative criterion that acts count as coercion when they attempt to deny a choice. For discussion on this point, I thank Eric Beerbohm and Daniel Viehoff.

[59] *See* SHARON R. KRAUSE, CIVIL PASSIONS (2008).

In addition to being subject to a means-based limit, democratic persuasion is also subject to a second, substance-based limit. This substance-based limit restricts the kinds of beliefs that the state is obligated to seek to transform through its expressive capacity as well as the circumstances under which the state is justified in exercising that capacity. It is necessary for the state to use its expressive capacity to challenge only those beliefs that violate the ideal of free and equal citizenship. In particular, the state should not seek to transform all inegalitarian beliefs, but only those that challenge the ideal of free and equal citizenship.

It is essential to clarify here that equal citizenship constitutes a political ideal; it is not the equivalent to equality in every sense. For instance, if I always neglect to pay the check at dinner with my friend, I might violate the ideal of an equal friendship, but in doing so I do not violate the ideal of equal citizenship. In sum, the substance-based limit of democratic persuasion requires the state to criticize only views incompatible with the ideal of free and equal citizenship and not views that are incompatible with morality per se.

Of course, there will be easy and hard cases—it is not always obvious whether a belief is incompatible with the ideal of equal citizenship and therefore subject to criticism by the state. It is only views that are openly hostile to the ideal of equal citizenship or implausibly compatible with it that the state has an obligation to criticize, according to the substance-based limit. For example, the views of hate groups are paradigmatic of views that are openly hostile to democratic values or implausibly disguised in a language of equality.[60] However, groups or citizens who hold opinions that might be plausible interpretations of equal citizenship, although there may be controversy over them, should not be subject to disapproval by the state in its expressive capacities. For instance, while some may think an ideal of equality requires affirmative action, other citizens who disapprove of this policy are not expressing opinions that are necessarily hostile to or implausibly connected to the ideal of equal citizenship. They may oppose affirmative action on grounds that may be plausibly interpreted as consistent with equal citizenship, like an ideal of colorblindness in the college admissions process. The disagreement would be reasonable in that case and not subject to democratic persuasion. The substance-based limit therefore makes the state use of democratic persuasion more limited than the principle of public relevance.[61] The principle of public relevance identifies conflicts generally between free and equal citizenship and

[60] I am thinking, for instance, of the case of former Klan Grand Wizard David Duke. His National Association for the Advancement of White People masks clearly inegalitarian views in the language of equality. The Association makes the misleading claim on its website that it "campaigns merely for equal treatment of all races." *See* Thomas Jackson, *What Is Racism?*, DAVIDDUKE.COM (Oct. 23, 2004), http://www.davidduke.com/?p=32.

[61] For a discussion of the principle of public relevance, see BRETTSCHNEIDER, *supra* note †, ch. 2.

individual beliefs, and suggests the importance of making these beliefs consistent with democratic values. The substance-based limit, on the other hand, further narrows the instances when the state should engage in democratic persuasion. According to the substance-based limit, the state should use democratic persuasion only when individuals hold or advance ideas that clearly conflict or are implausibly claimed to be consistent with the ideal of free and equal citizenship.

The substance-based limit of democratic persuasion concerns the content of what the state is obligated to say on behalf of its own values. At times, the state articulates these values and their justifying reasons through state actors, and in these cases, the substance-based limit should then be followed. But this limit certainly does not entail that state actors cannot articulate opinions on controversial matters when speaking in their own capacities. Particular citizens, politicians, or state actors may have their own opinions on questions about which there is reasonable disagreement, including questions about conflicting interpretations of equal citizenship. Moreover, although my focus is on instances in which the state is obligated to promote the ideal of free and equal citizenship and to criticize viewpoints at odds with it, I hold open the possibility that other kinds of state speech might be neither obligatory nor prohibited. Pronouncements in favor of public health, like warnings about smoking or trans fat, do not violate an ideal of equal citizenship, but neither are they required to clarify the meaning of equal citizenship. Such pronouncements might be permissible on grounds that are distinct from the ones I explore.

In sum, democratic persuasion is an attempt by the legitimate state to express the reasons and values that underlie rights. In some instances, democratic persuasion requires challenging viewpoints that are protected by rights, especially when the viewpoints are hateful. But the point of democratic persuasion is not merely to express the values of equal citizenship as a philosophical exercise. It is ideally an attempt to change the minds both of the members of hate groups and of citizens more generally, and to keep the hate group's influence from spreading. Given the choice between expressing the values of freedom and equality in a nonpersuasive or a persuasive manner, all else being equal, the state should opt for forms of persuasion that are more convincing. If the reasons and values that underlie rights are central to the legitimacy of the state, it follows that the state has a role in defending them, especially when they are under attack. Part of defending democratic values is making persuasive arguments on their behalf.[62]

[62] Democratic persuasion allows for certain forms of rhetoric to further the democratic values that underlie rights, provided that the rhetoric is truthful and combined with the promulgation of reasons. My aim, however, is not to provide a roadmap detailing how such rhetoric might be employed but to justify and describe the state's role as it engages in democratic persuasion. A model for the rhetoric of democratic persuasion might be found in what Simone Chambers and others have called a "deliberative

I have argued so far that an account of free expression should both defend the free speech rights of individuals against state coercion and allow the state to promote the values that underlie these rights. I have also maintained that the state must respect both the substance-based and means-based limits of democratic persuasion when it promotes the ideal of free and equal citizenship through its expressive capacity. I now turn to explore how the state might fulfill these duties. The contemporary state can "speak" in favor of its own values—and against those who deny the freedom and equality of citizens—in a variety of ways, ranging from the direct statements of politicians to the establishment of monuments and public holidays. Martin Luther King Day and Black History Month exemplify official endorsement of the civil rights movement's struggle for equality. Public officials do not shy away from political viewpoints when they celebrate and commemorate these official holidays. Rather, they articulate the ideal of equal status and celebrate those citizens who have promoted it. Far from being viewpoint neutral about southern segregation or groups like the Klan, the state promotes a particular viewpoint in defense of equal protection. Of course, citizens have the right to dissent from such expression. But here the state and its citizens should stand together to express disapproval of those who defend segregation in our society or who, more subtly, lament the end of "states' rights" that would protect segregation.

Another way to frame state expression in defense of these values is through the state's action as an educator. When state standards require that the history of civil rights and the struggle against groups like the Klan be taught in schools, for instance, these matters are not taught in a viewpoint-neutral way. The movement and its victories are rightly taught as part of the American effort to live up to our proclaimed values of equality. The hope of public educators in teaching the lessons of Martin Luther King Day and Black History Month is that, regardless of what they are taught at home, students will learn the value of equal status for all citizens.

III. DOCTRINAL IMPLICATIONS OF DEMOCRATIC PERSUASION

I now want to turn to the question, important in applying value democracy to First Amendment free speech jurisprudence, of whether the state might or might not use its spending power to promote the value of equal citizenship. In a line of cases that explores whether the government can condition its spending power on certain expressive goals, the Supreme

rhetoric," in which effective communication is tied together with public reasoning, as opposed to a "plebiscitary rhetoric," which tries to change people's minds without explaining the underlying reasons or principles. An account of deliberative rhetoric can help to show that democratic persuasion can effectively promote the ideal of free and equal citizenship. *See* Simone Chambers, *Rhetoric and the Public Sphere: Has Deliberative Democracy Abandoned Mass Democracy?*, 37 POL. THEORY 323 (2009).

Court has alternated between two categorical frames. In the first category of cases, the Court has found that when the state creates or designates a "limited public forum" for "private speech," it cannot choose to give or withhold subsidies to groups based on their viewpoints, although it can potentially use content-based criteria such as obscenity, especially when this criteria is related to the purpose of the forum.[63] In this category, the Court has ruled that viewpoint neutrality in the limited public forum is required in order to avoid an unconstitutional limit on free speech. In a second category of cases, the Court has said that when spending is used to directly express a government-sponsored message, the state can place restrictions on the content of speech regardless of the nature of that speech.[64] On my view, both categories have a distinct but equally flawed conception of neutrality at their core. The first wrongly assumes that state subsidies of private speech should be viewpoint neutral. The second of the Court's categories seems to wrongly allow the state to say anything, even if the speech is directly at odds with the ideal of free and equal citizenship. In this Part I suggest why the ideal of democratic persuasion requires rethinking these doctrines.

The Court applied the limited public forum doctrine in the case of *Rosenberger v. Rectors and Visitors of University of Virginia*, concerning whether a public university could decide to withdraw subsidies from a student group that produced a religious publication.[65] The Court decided this case on First Amendment grounds regarding freedom of speech, invoking a standard of viewpoint neutrality. It ruled that when a public university creates a public forum to allow a variety of ideas to be heard, access to that forum, including funding, cannot be based on a group's viewpoint.[66] In the Court's terms, the University established a limited public forum, which in turn triggered a requirement of viewpoint neutrality in access to the forum.

The idea of a limited public forum is meant to evoke an analogy with the kind of broad free speech protections that individuals enjoy in a "traditional" public forum such as a park. In these public spaces, the government cannot limit what is said based on the viewpoint of a person or group.[67] The traditional public forum is a zone of free speech. Similarly, the Court has suggested that when the government creates a limited public

---

[63] *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–32 (1995). As the Court puts it, the state can regulate based on content (e.g., no sexually explicit speech) if it "preserves the purposes of [the] limited [public] forum." *See id.* at 829–30.

[64] *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 585–88 (1998); Rust v. Sullivan, 500 U.S. 173, 192–94 (1991); *cf. Rosenberger*, 515 U.S.at 834 ("A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.").

[65] *See* 515 U.S. at 829.

[66] *See id.* at 830–32.

[67] *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 268 (1988).

forum, all people's views are entitled to free speech. While all views are entitled to free speech in a traditional public forum, the limited public forum adds that all views are entitled to be funded if any view receives funding.[68] While I agree with the Court that all views are entitled to free speech, I argue that it is a mistake to hold that all views are equally entitled to state funding or grants.

I do not wish to dispute the specific outcome of the *Rosenberger* case on the grounds I have defended in this Essay. The group in question did not oppose the values of free and equal citizenship. But I do believe it a mistake to suggest that any time a student group receives a subsidy from a state university, freedom of expression requires viewpoint neutrality in funding. Taking this approach would mean that a public subsidy could be demanded by student groups, even if they espouse values that fundamentally seek to undermine the ideal of free and equal citizenship.[69] Consider the question of whether a state university would have to fund an organization that opposed the admission of women and racial minorities to the school. Members of this group should have a right to speak on campus, publish in the student newspaper, or espouse their views in the classroom, but this does not imply a right to be subsidized by the school. Both public universities and private universities that seek to advance public purposes have an interest in seeing that some democratic views succeed while others do not. To act on that legitimate interest, universities must be free to condition their subsidies on respect for free and equal citizenship. Universities should not be forced to give funds in a viewpoint-neutral way to all groups, including those that are hateful or discriminatory.

Imagine a case in which discriminatory viewpoints were spreading on a university campus. The university would have an important obligation to challenge these views, and it could use its spending power to do so. The university should use its subsidy power, funding student groups that respect democratic values and withdrawing state support from groups that advance discriminatory views. Nothing in this funding policy would limit the free speech rights of students to associate or organize. Rather, the public university would be acting on its duties to criticize racist or discriminatory views and to promote the ideal of free and equal citizenship. Groups that do not receive financial support from the university could still exercise their rights to free speech and association since they could continue to organize and raise private funds.

---

[68] *See, e.g.*, *Rosenberger*, 515 U.S. at 832–37.

[69] A related issue is present in the case of *Bob Jones University v. United States*, 461 U.S. 574 (1983). There the Internal Revenue Service denied 501(c)(3) tax status to the University on the grounds that its policy banning interracial dating was at odds with the public purpose of educational institutions. *Id.* at 605. On my view, the IRS made the right decision, given Bob Jones's explicit opposition to rights to interracial marriage. Opposition to rights of interracial marriage constitutes a viewpoint that is at odds with the ideal of equal citizenship.

The Court, in its recent decision *Christian Legal Society v. Martinez*, reached the right conclusion when it ruled that a state university did not violate the right to free speech when it refused to subsidize a discriminatory student group.[70] But the Court's reasoning in the case was flawed because it focused on whether the university respected the viewpoint-neutrality requirement in funding.[71] After describing the case, I will argue that the state need not be completely viewpoint neutral in funding student groups in that it can and should refuse to fund hateful or discriminatory viewpoints. Constitutional doctrine should be shaped to acknowledge this obligation.

In the case, a student group called the Christian Legal Society (CLS) sued the University of California, Hastings College of the Law. The CLS claimed that its First Amendment rights to free speech, free association, and free exercise were violated when Hastings refused to recognize the group as an official student organization. According to Hastings policy, only official student organizations were entitled to receive school funding. The CLS argued that the school's policy of recognizing and funding only nondiscriminatory student groups violated the First Amendment guarantee of viewpoint neutrality as applied to the Christian Legal Society. The CLS claimed that the school's policy violated viewpoint neutrality by discriminating against the group's viewpoint that homosexuality is immoral. The group claimed that the First Amendment right to free expression protected its refusal to admit gays as members. In the CLS's view, its discrimination against gays expressed the group's fundamental belief that homosexuality is immoral and contrary to Christian teachings. The group not only practiced discrimination against gays, it also saw that discrimination as fundamental to its expressive purpose. Hastings replied that the university's commitment to nondiscrimination required all student organizations, as a condition of receiving funding, to abide by an "all-comers" membership policy that does not exclude anyone based on sexual orientation, race, or gender. Hastings defended its all-comers policy on the grounds that it was a viewpoint-neutral condition for funding. When the CLS refused to abide by this policy, its subsidy and its recognition as an official student group at the law school were discontinued. However, the CLS retained the right to meet and speak on campus.

While I agree with the Court's result, which sided with Hastings, its reasoning for that decision wrongly placed viewpoint neutrality as central to the holding in this case. Specifically, I think the Court erred in its belief that the denial of funds to the CLS was consistent with the requirement of viewpoint neutrality in the limited public forum doctrine.[72] On my view,

---

[70] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971 (2010).

[71] *See id.* at 2993–95.

[72] *See id.* at 2993. Justice Ginsburg wrote:

> We next consider whether Hastings' all-comers policy is viewpoint neutral.

Hastings's all-comers policy was not viewpoint neutral, and rightly so. However, I disagree with the Christian Legal Society's claim that because the policy was not viewpoint neutral, it was invalid. I suggest instead that Hastings should have argued—and that the Court should have held—that discontinuing funding was constitutionally permissible state speech.

To see why nondiscrimination policies are not viewpoint neutral and thus why the case should have been argued and decided through the lens of the state speech doctrine,[73] it is helpful to consider the Court's decisions regarding "compelled association." Michael McConnell, who argued the case before the Supreme Court, cited these cases in his brief for the CLS.[74] As he points out, the Court has recognized that in certain circumstances, the state would violate the right to free expression and association if it compelled association by requiring a group to admit all applicants for membership.[75] For example, discrimination is central to the Klan's expressed purpose for existing. Forcing it to admit black and Jewish members would undermine its ability to express its hateful viewpoint about minorities. For instance, if the Klan were required to allow blacks and Jews to join its marches, it would force upon the Klan a message of inclusion when the Klan's preferred message is one of exclusion. Compelled association in that case would not be viewpoint neutral because it would interfere with the Klan's expression of its discriminatory viewpoint. Similarly, the Court upheld the right of an Irish veterans group to exclude gays from a march on the grounds that exclusion was central to the group's expressed disapproval of homosexuality.[76] In sum, free expression and association rights require the protection of a group's right to discriminate when that discrimination is tied to the expressive purpose of that group. Requiring inclusion is therefore not a viewpoint-neutral policy.

Compelling association in such cases would arguably infringe on these groups' interest in free expression. But there are differences between the *Christian Legal Society* case and the jurisprudence on compelled association. Most saliently, cases of compelled association concern whether groups can be coerced into accepting members, whereas the *Christian Legal Society* case is about whether a public university can noncoercively

---

> Although this aspect of limited-public-forum analysis has been the constitutional sticking point in our prior decisions, as earlier recounted, we need not dwell on it here. It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers. In contrast to *Healy*, *Widmar*, and *Rosenberger*, in which universities singled out organizations for disfavored treatment because of their points of view, Hastings' all-comers requirement draws no distinction between groups based on their message or perspective. An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral.

Id. (citation omitted).

[73] *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991).

[74] *See* Petition for Writ of Certiorari at 23–27, *Christian Legal Soc'y*, 130 S. Ct. 2971 (No. 08-1371), 2009 WL 1265294, at *23–27.

[75] *See id.* at 25.

[76] *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).

grant or discontinue state subsidies to groups. But while I will suggest that the difference between coercion and state subsidy is an important one, it should not be confused with the question of whether an all-comers policy is viewpoint neutral. An all-comers policy would not be viewpoint neutral towards the Klan or as applied to the CLS because it would be critical of those groups' discriminatory viewpoints as expressed by their membership policies.

The fact that Hastings's nondiscrimination policy is non-neutral, however, does not imply that it violates freedom of expression. Whether it is consistent with the right of free expression depends on the method used to promote nondiscrimination. It would violate the right to free expression and association to force the CLS, the Klan, or the participants in the Irish parade to change their membership policies. Doing so would be a coercive case of compelled association. But it would be compatible with the right to free expression and association if a public university noncoercively discontinued its subsidy to the CLS. The CLS would still retain its right to free expression since it could continue to congregate on campus, express its views, and follow its chosen membership policy. There would be no compelled association. Instead, Hastings would be taking the noncoercive step of refusing to grant a state subsidy to the group.

On my view, the Court should have decided this case as an instance of Hastings exercising state speech through the use of its funds and its recognition of official student groups. Hastings's use of funds should have been seen as an example of state speech that rightly pursued the goal of promoting nondiscrimination and the ideal of free and equal citizenship. In my account of value democracy, it would have been not only constitutionally permissible for Hastings to use its expressive capacities to promote a message of nondiscrimination; it also would have had a duty to do so as a matter of political morality. It is essential that we craft our constitutional jurisprudence regarding the First Amendment to allow the state to pursue its duty of democratic persuasion. The state speech doctrine leaves this pursuit constitutionally permissible.[77]

If the state were to continue to fund the CLS, it would raise the problem of complicity. The state's financial support for the CLS would make it complicit in the group's message of discrimination. This would be an illegitimate policy since it would undermine the freedom and equality of gay citizens. It would also violate the public law school's mission of promoting a legal profession that does not discriminate based on sexual orientation, race, or gender. Hastings should be allowed to respect the ideal of free and equal citizenship—and indeed, it has a moral obligation to respect that ideal—by refusing to subsidize a discriminatory group. I believe that such an approach would be more honest about Hastings's

[77] *See, e.g.*, *Rust*, 500 U.S. at 193 ("[T]he Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.").

policy, but it would require abandoning the limited public forum requirement of viewpoint neutrality.

Part of what often triggers a neutralist analysis by the Court is the intent by the school to distribute funds in a neutral way. Hastings mistakenly argued in this case that it intended to create a public forum, and it then claimed that its all-comers policy was viewpoint neutral. Within existing case law, democratic persuasion could likely be pursued by universities and colleges if they declared that their intention was not to create a public forum but rather to promote a message of respect for the freedom and equality of all citizens. In this way, universities could avoid the viewpoint-neutrality requirement that the Court applies to the limited public forum. But I would argue that the Court should reject the viewpoint-neutrality requirement itself concerning discriminatory viewpoints when it comes to state funding. This would allow the state and public universities to promote a message of respect for free and equal citizenship when deciding to grant subsidies. While viewpoint neutrality has a place in ensuring that no viewpoint is coercively banned, it would be inappropriate to apply a requirement of viewpoint neutrality to state subsidies for discriminatory groups.[78]

A funding policy of limiting or discontinuing state subsidies to discriminatory or hateful groups would be compatible with the rights of these groups to free speech or association. While it would violate the rights of student groups to coercively ban them, the use of subsidies is significantly different because it is a noncoercive means for the state to promote equality. It allows groups and individuals to retain their right to express themselves without fear of imprisonment or the use of force. They can continue to meet and speak in public.[79] However, they do not have a

[78] For a defense of the Court's neutralist approach, which prefigures its *Hastings* opinion, see Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919 (2006). Although I agree with Volokh that Hastings College of the Law has an entitlement to deny subsidy to a discriminatory student group, I disagree with him and the Court when he contends that Hastings's all-comers policy is viewpoint neutral. *See, e.g.*, Eugene Volokh, *Why No-Discrimination-Based-on-Religion Conditions for Government Benefits Aren't Viewpoint-Discriminatory*, VOLOKH CONSPIRACY (Dec. 11, 2009, 1:09 AM), http://www.volokh.com/2009/12/11/why-no-discrimination-based-on-religion-conditions-for-government-benefits-arent-viewpoint-discriminatory/. On my view, Hastings's policy was not viewpoint neutral. However, I argue that viewpoint neutrality is the wrong standard for determining state subsidies. Instead, the state should use a non-neutral standard, based on respect for free and equal citizenship, in its decisions to grant funds. The state or a public university should not grant funds to groups that are discriminatory or otherwise fail to respect free and equal citizenship.

[79] Although I believe this case should have been seen as a state speech case, it is worth considering an argument in the alternative that also would have left room for democratic persuasion. If Ginsburg insisted on seeing this case as a limited public forum case, she might have acknowledged that the policy was not viewpoint neutral as applied to the Christian Legal Society but asserted that the state had a compelling interest that was narrowly tailored in promoting a message of nondiscrimination. This would have followed the logic of the Court in *Roberts v. United States Jaycees*, 468 U.S. 609, 622–29 (1984), upholding a Minnesota law banning discrimination against women in a private club, but would

right to be subsidized by the state in promoting a message of discrimination.[80]

While my account of value democracy disagrees with the Court's viewpoint neutrality in the limited public forum doctrine, there are other parts of the Court's jurisprudence that are closer to the aims of democratic persuasion. In these cases, the Court often acknowledges that the government should be allowed to promote its own message using state funds. For instance, in *National Endowment for the Arts v. Finley*, four artists who had failed to win National Endowment for the Arts (NEA) grants challenged the NEA's policy of using "content-based" criteria in distributing funds.[81] In particular, the NEA had been instructed by Congress to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[82] The Court, ruling against the artists, held that the NEA could award grants based on its own standards of artistic merit. The NEA did not need to be neutral about the content of the art it was funding, so long as "content" refers to artistic or cultural significance or a concern about decency.[83]

A harder case would have arisen if the NEA had used not only content-based criteria that discriminated among artistic work by merit and decency, but also viewpoint-based criteria, either generally or as applied to a particular artist. Viewpoint-based criteria refer to political beliefs, like democratic values or hateful viewpoints, as opposed to more general and nonpolitical content-based criteria, like artistic skill and originality.[84] In Justice O'Connor's majority opinion, the Court allowed the NEA to use content-based criteria in awarding grants, but it cautioned that it might have

---

have run into conflict with its holding in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The Court might have distinguished *Dale* (upholding the Boy Scouts' right to exclude gays from membership on grounds of free association), however, on the grounds that *Christian Legal Society* concerned matters of subsidy, not coercion, and thus the state had a compelling interest in using the funds to promote its own message.

Although I do not think *Christian Legal Society* should have been decided as a limited public forum case, my arguments here do suggest a general way of conceiving of First Amendment viewpoint neutrality when the Court invokes this doctrine. The First Amendment in limited public forum cases might ultimately protect viewpoint neutrality only within the boundaries of respect for free and equal citizenship. This version of viewpoint neutrality might ultimately be justified as constitutional doctrine by recognizing a compelling government interest in promoting the ideal of equality that, even in state subsidy cases that trigger limited public forum analysis, overrides the general interest in viewpoint neutrality.

[80] In another place, I consider circumstances where the line between subsidy and coercion is more difficult to draw, particularly in cases involving individuals with no other access to resources. For a discussion, see BRETTSCHNEIDER, *supra* note †, ch. 4. However, I do not believe these circumstances apply in this case.

[81] 524 U.S. 569 (1998).

[82] *Id.* at 572 (quoting 20 U.S.C. § 954(d)(1) (2006)).

[83] *See id.* at 585.

[84] *See, e.g.*, *id.* at 581–86 (discussing the differences between content- and viewpoint-based decisionmaking).

reached a different outcome if the NEA's policy had been viewpoint based. For example, the NEA might not have been allowed to sponsor viewpoint-based art that celebrated the civil rights movement and criticized racism. Such a policy would have discriminated against racist viewpoints in the grant competition.[85]

Although this policy for distributing NEA funds would not be viewpoint neutral, I believe that it would be constitutionally permissible and the right kind of public policy. As I have argued, the state has an obligation not only to protect viewpoints from coercion, but also to promote the democratic values that justify rights. One goal of state funding should be to express the democratic values of free and equal citizenship. For example, the state could fund an art program or documentary film that seeks to explore the importance of the values of the civil rights movement. But I would oppose funding hate groups, even if their expression were artistically "meritorious." Although D.W. Griffith's *Birth of a Nation* and Leni Riefenstahl's Nazi propaganda film *Triumph of the Will* are often cited for their original and influential cinematography, they express viewpoints that the state should not be complicit in or subsidize. Decisions about state funding should therefore not be viewpoint neutral. Instead, there should be a role for democratic persuasion in funding art that furthers the democratic values of free and equal citizenship as opposed to subsidizing hateful viewpoints.

The state speech doctrine as it currently exists, however, has a more subtle but equally problematic conception of neutrality at its core. During the first Bush Administration, clinics that received federal funds were banned by the Department of Health and Human Services (HHS) from telling patients about their right to have an abortion. This ban later became known as the "gag rule."[86] Pro-choice and free speech advocates brought suit against the Department, challenging the gag rule as a violation of First Amendment free speech protections. The Court ruled in *Rust v. Sullivan* that the HHS gag rule violated no rights because the state was using its spending power to directly express its own viewpoint in a manner similar to when it orders its own employees to express a message.[87] The Court avoided the viewpoint-neutral requirement of the public forum doctrine by arguing that the clinics and doctors were speaking on behalf of the state.

[85] *See id.* at 587 ("If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case.").

[86] *See* Editorial, *Obama's Turn on Gag Rule*, REGISTER-GUARD (Eugene, OR), Jan. 26, 2009, at A8. The rule gave rise to *Rust v. Sullivan*, 500 U.S. 173, 179 (1991), although the term "gag rule" is not used in the opinion.

[87] *See Rust*, 500 U.S. at 192–94.

The Court concluded in this case that the state can condition its use of funds on a non-viewpoint-neutral requirement, including the gag rule.[88]

My own framework, with its means-based and substance-based limits on democratic persuasion, serves as an alternative to the Court's jurisprudence. Specifically, although I agree with the Court's contention in *Rust* that the state need not be viewpoint neutral because it is speaking, in this case, I take issue with its conclusion on substantive grounds related to the content of democratic persuasion. Democratic persuasion concerns the state's obligation to promote the values of free and equal citizenship. But in the case of the gag rule, the state expressed itself in a way inconsistent with the most basic democratic values of a legitimate society, violating the substance-based limit. The problem with the gag rule is that it sought to deny information to citizens, not only about their medical options, but also about their legal rights. In a democracy, hindering access to information about legal rights keeps citizens both from being treated as equals and from being treated as free individuals capable of making their own decisions. Withholding such information suggests that some citizens are inferior since they are treated as incapable, unlike the elites in the "know," of making decisions about how to exercise their rights. It is important to emphasize here that my concern has to do with the policy of denying information *about* a right of free citizens. I do not mean to suggest in upholding this right to information that the state should take a position in its expressive capacity in order to persuade citizens of one position or another on abortion.

Value democracy allows the state to take a non-viewpoint-neutral approach to state expression and funding. But for instances of state expression and funding to qualify as democratic persuasion, they cannot promote just any value. Rather, state expression and funding must be consistent with a respect for free and equal citizenship, as required by the substance-based limit. The gag rule violated the substance-based limit and would fail to qualify as democratic persuasion. Since it denied access to information about legal rights and did not treat citizens as free and equal, the gag rule in *Rust* was an improper use of the state's expressive and funding powers. Just as the state would violate its mandate as a speaker if it were to advocate for an ideal of inequality under law, so too, by denying

---

[88] The Court doesn't discuss public forum doctrine in *Rust*, but it later distinguishes expenditure cases from public forum cases in *Rosenberger*. The distinction is as follows:

> [In *Rust*], the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) (citation omitted) (citing *Rust*, 500 U.S. at 194, 196–200); *see also* Garcetti v. Ceballos, 547 U.S. 410, 437 (2006) (holding that the First Amendment does not forbid the government from disciplining its employees' speech).

access to information about legal rights in *Rust*, the state failed to promote the right values. The gag rule example demonstrates that rights against coercion are not the only limits on government action. Importantly, the substance-based limit on democratic persuasion also requires that the content of the state's expression not itself conflict with the ideal of free and equal citizenship. Democratic persuasion thus provides a normative standard, in the form of the democratic values of free and equal citizenship, to limit and to evaluate the content of state expression and funding.

My claim that there should be substance-based and means-based limits on democratic persuasion is both a normative principle and a constitutional one. The state should be constitutionally permitted to speak in favor of the ideal of free and equal citizenship, but the Court should also restrict state speech to its proper scope. State speech that is racist or that otherwise clearly opposes the ideal of free and equal citizenship should be constitutionally limited. I therefore agree with Michael Dorf's argument that some state speech is sometimes constitutionally prohibited. According to Dorf, these constitutional limits on state speech might derive from a variety of constitutional provisions, including the Establishment, Due Process, and Equal Protection Clauses.[89] For instance, drawing on Dorf and the arguments in my book, *When the State Speaks, What Should It Say?*, we might see wrongful forms of state speech as failing the rational basis review triggered by an equal protection claim. Rational review requires the state to pursue "a legitimate interest." This burden is not met when the state speaks in a way that is directly at odds with the core values of free and equal citizenship. For example, racist state speech might be found to constitute "animus" and therefore might fail the requirement that the government pursue a legitimate government interest.[90]

A doctrine of unconstitutional state speech, however, should be restrained by appeal to the substance-based limit on democratic persuasion. I introduced this limit earlier in the context of the state's obligation to pursue democratic persuasion. I argued that the state did not have an obligation to criticize views that could plausibly be consistent with the ideal of free and equal citizenship, even if there were some evidence that they were ultimately inconsistent with that ideal. Similarly, the substance-based limit suggests restraint on Court decisions about the constitutionality of state speech. On my view, state speech must clearly be at odds with the ideal of free and equal citizenship to be found unconstitutional.

Democratic persuasion might seem to abandon important features of the Court's current limited public forum doctrine. One distinction between

---

[89] Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1286–98 (2011). See too my discussion of the "Lukumi principle" in BRETTSCHNEIDER, *supra* note †, ch. 5, at 144–57.

[90] *See* Dorf, *supra* note 89, at 1277. See, for instance, Dorf's excellent discussion of the "Confederate battle flag." *Id*. at 1316–23.

state speech decisions like *Rust* and limited public forum decisions like *Christian Legal Society* might be thought to lie in the nature of the subsidies at issue. It might be thought that unlike state speech cases, limited public forum cases involve the state distributing funds to private actors. The Court's distinction rests on an apparent difference in the subject who is speaking. If it is the state speaking, it has more leeway to depart from viewpoint neutrality than when it is distributing funds to private actors who are the speakers.

But both state expression in *Rust* and the state subsidizing private speech in *Christian Legal Society* concern whether the government can use its spending power to promote or criticize particular non-neutral values and viewpoints. Indeed, it is quite difficult to discern the difference between the public forum cases and public expression cases solely in terms of the structure of funding. The doctors in *Rust* and the artists in *Finley* were private actors just like the students in *Christian Legal Society*. On the view I have sketched, the state would be free to promote a message of nondiscrimination regardless of how its funding were structured.

Another key difference between neutralist public forum cases, such as *Christian Legal Society*, and non-neutralist state expression cases, such as *Finley*, might be found in the intent or purpose of the funding. But as I have suggested in my discussion of *Christian Legal Society*, if that is the sole criterion, it is not difficult for an institution to avoid the requirements of viewpoint neutrality. If the state could avoid the viewpoint-neutrality requirement merely by stipulating that one of its purposes in distributing funds is to promote free and equal citizenship, it would be easy to overcome by careful wording of the Law School's intent in its rules for distributing funds. It would be a mistake, however, to claim that the limited public forum doctrine and the viewpoint-neutrality requirement are required to always protect private speech from public influence. Such a doctrine would be at odds with the obligation of the state to pursue democratic persuasion, and it would mistakenly place the neutralist understanding of free speech in the way of the state promoting democratic values. Democratic persuasion suggests that the state should use its subsidy power to promote the values of free and equal citizenship.

Some defenders of the neutralist approach to free speech and government subsidy might claim that I am proposing an unconstitutional condition on private speech.[91] This criticism might be interpreted to require that state conditions for funds should not be tied to a group's acceptance of a particular viewpoint. To the extent that this doctrine would require viewpoint-neutral distribution of state funds, I believe it is a mistake. On my view, there is no such thing as private speech that should be protected from any influence by the state. Free speech entails the right to be protected

[91] *See, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

from coercion, but it does not entail the right of any individual to be free from the promotion of the core values of free and equal citizenship central to the state's legitimacy.[92] The right of free speech does not create an entitlement of any individual or group to be free from criticism in advancing beliefs or ideologies inimical to core democratic values.[93]

Throughout this Essay, I have argued for the importance of democratic persuasion to promote the ideal of free and equal citizenship. I have argued that when the state declines to fund organizations like the Christian Legal Society, the Court should apply its state speech doctrine and avoid the viewpoint-neutrality requirement of limited public forum analysis in allowing the state to express a particular viewpoint. Although I have not argued against the limited public forum doctrine as a whole, and I have recognized that the government might sometimes fund speech apart from government-sponsored messages, the doctrine must be crafted to allow for democratic persuasion. Government should be entitled to refuse to fund viewpoints that are at odds with the core values of a liberal democratic state. But if the Court were to reject my suggested doctrinal course, and instead continued to expand the neutralist analysis of the limited public forum doctrine to cases where the state engages in democratic persuasion, there is a danger that the Court might ultimately find itself at odds with the fundamental holding in *Bob Jones University v. United States*.[94] In that case, the Court largely dealt with issues of free exercise and statutory interpretation when it upheld the IRS's decision to deny tax exemption to Bob Jones University, an organization that prohibited interracial dating and the advocacy of interracial marriage on its campus. An expansion of the limited public forum doctrine, however, might place in jeopardy the Court's holding in that case that there was no free speech violation in the IRS's denial of nonprofit status to the university.[95]

Imagine that Bob Jones University made the argument that the distribution of the subsidies associated with nonprofit status constituted a limited public forum and therefore no group that was otherwise eligible for

[92] It is worth bearing in mind that democratic persuasion, with its substance- and means-based limits, requires the promotion only of the values of free and equal citizenship. It does not require the state promotion of particular partisan politics or sectarian views.

[93] The state has an obligation to be transparent about its own reasons. I take this concern to be at the heart of the obligation to clarify its own reasons for the inverted rights that protect hateful viewpoints from coercion. The same principle supports the notion that the state should be clear when it is expressing its own viewpoint and not attribute its views to private actors. For discussion on this point, see Abner S. Greene, *(Mis)Attribution*, 87 DENV. U. L. REV. 833 (2010). Greene rightly defends this concern and also prominently defends the need of the state to promote its own values. *See* Abner S. Greene, *Speech Platforms*, 61 CASE W. RES. L. REV. 1253 (2011). I have emphasized the importance of the state criticizing views at odds with the ideal of free and equal citizenship, for instance by denying subsidies. The conflict that defines this criticism often makes it clear that there is a difference between the views of private actors, which they are entitled to hold, and the state's own viewpoint.

[94] 461 U.S. 574 (1983).

[95] *See id.* at 602–04.

such funds could be denied them on the grounds that it held a disfavored viewpoint.[96] Bob Jones could argue that its discriminatory policies were tied to its fundamental expressive message that there should be no intimate mixing among different races. Under this argument, the Court would have to reverse its decision in *Bob Jones University* because the IRS policy of not granting tax exemption to discriminatory groups was based on a non-viewpoint-neutral standard, in violation of the limited public forum doctrine.

My own analysis suggests a straightforward understanding of why there was no free speech violation in the *Bob Jones University* decision. On my account, the IRS in its interpretation of nonprofit law should be allowed to promote an ideal of nondiscrimination by denying tax-exempt, nonprofit status to an organization that opposes the basic ideal of equality before the law. The IRS in this case can be seen as engaging in democratic persuasion and the promotion of the state's viewpoint about nondiscrimination. But if the distribution of tax-exempt, nonprofit status were to be viewed instead through the lens of the limited public forum doctrine, this would require viewpoint neutrality in deciding which groups would receive nonprofit status. Such a viewpoint-neutral analysis would have made it impossible for the state to assign nonprofit status based on its vision of the public good. The denial of nonprofit status to Bob Jones University, because it was based on a criticism of its viewpoint, might have been unconstitutional under the limited public forum doctrine.

Indeed, advocates such as Michael McConnell, who successfully convinced the Court to apply the limited public forum doctrine in the *Christian Legal Society* case,[97] might ultimately concede that their approach would lead to a reversal of *Bob Jones University*. I have argued at length in this Essay, however, why such a reversal of *Bob Jones University* would cut off the possibility of the state defending the values of free and equal citizenship and of answering the paradox of rights. Indeed, the IRS's action in *Bob Jones University*, as well as the Court's holding in that case, stands as a bulwark against misplaced uses of the important constitutional ideal of viewpoint neutrality in rights against coercion.

In sum, I have sought to argue that state funding should be used to promote the core values of free and equal citizenship and to criticize viewpoints that challenge those values. The power to spend is one of the means for the state to effectively promulgate the reasons that underlie rights. In this respect, the state is not a neutral umpire among competing views, especially when it comes to those views that challenge the very reasons and values that justify rights. Nor are beliefs that are incompatible

---

[96] *Cf., e.g.*, Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971 (2010). CLS made this same argument, but the Court held that the school's policy was viewpoint neutral. *See id.* at 2994–95.

[97] *See supra* text accompanying notes 74–75.

with the ideal of equal citizenship "private" in the sense that the state has no role in seeking to change them. On the contrary, the state should seek to protect the freedom of expression from coercion while persuading those who hold viewpoints at odds with the states own core values to change their minds. Particularly when it comes to the promotion of the ideal of equal citizenship, the state should express the very values that underlie the freedom of speech in the first place. Moreover, I have also suggested that the state should also be constitutionally restricted in its own speech, when it promotes a message inconsistent with the ideal of free and equal citizenship.

CONCLUSION

In this Essay, I have defended a theory of free speech that embraces viewpoint neutrality in rights against state coercion. On my account, the right of free speech should protect all viewpoints from coercive punishment. Viewpoint neutrality is necessary for the state to respect citizens as free and equal, meaning that citizens have the equal autonomy to hear and make all arguments, including those that reject liberal democracy itself. This equal autonomy must be respected for all citizens to be able to make democratic decisions.

While defending viewpoint neutrality in rights against coercion, I have argued that the state should not be neutral in its own expression regarding the values of free and equal citizenship. For instance, it is appropriate for the state to designate Martin Luther King Day as an official holiday and to build public monuments to King while not setting aside a holiday or monument to the segregationist George Wallace. Public officials should be free to argue for the views of the civil rights movement and to criticize the views of the Ku Klux Klan. In making this point, I have drawn on Justice O'Connor's history of the Klan in *Virginia v. Black*. Writing for a majority of the Court, O'Connor upheld the Klan's right to burn a cross but detailed a history that showed the Klan to be opposed to the ideal of free and equal citizenship, and in particular, equality under law. Building on this dictum, I have made the further claim that the state should criticize hateful and discriminatory viewpoints in its expressive capacities. While the state must be viewpoint neutral in regards to coercion, on my account it should not be viewpoint neutral in defending the values of free and equal citizenship. The state should engage in democratic persuasion, speaking in favor of the reasons for rights, which are based on respect for the equal autonomy of all citizens.

My contention is broadly consistent with the Supreme Court doctrine of state speech, which allows constitutionally permissible departures from

viewpoint neutrality when the state is using its expressive capacities.[98] But I have argued that the doctrine of state speech should be reinterpreted in two ways. First, I go beyond the claim that state speech is permissible. I contend instead that First Amendment law should be crafted to allow a certain type of state speech, what I call democratic persuasion, which defends free and equal citizenship and criticizes hateful or discriminatory viewpoints. Democratic persuasion should be seen as morally obligatory for the state and not merely permissible.

Democratic persuasion requires the state to use the substantive standard of not supporting hateful or discriminatory viewpoints when funding groups or giving grants. For example, in the *Christian Legal Society* case, the Court rightly allowed the Hastings College of the Law not to fund a discriminatory student group. But the Court wrongly based its ruling on the limited public forum doctrine, which requires showing that the criterion for funding is viewpoint neutral. Instead, the Hastings College of the Law, as an institution of the state, should be allowed to use its spending power to advocate the reasons for rights. Rather than applying the limited public forum doctrine to this case, the Court should have decided it on the grounds that Hastings was engaged in state speech promoting the value of nondiscrimination. This distinction is important because the state speech doctrine does not require viewpoint neutrality, unlike the limited public forum doctrine.[99] Nondiscrimination is not a viewpoint-neutral idea, as evidenced by the many groups that are ideologically opposed to it. Thus, Justice Ginsburg's attempt to apply the limited public forum doctrine was inconsistent with the conclusion she wanted to reach since she was using a viewpoint-neutral standard to support a non-neutral policy. Similarly, I have suggested, in my comments on *NEA v. Finley*, why viewpoint neutrality should not apply to government grants in the arts. The state should be free to promote the values of free and equal citizenship, even if it means criticizing discriminatory viewpoints. For instance, the state would be well within its rights not to fund a film like *Triumph of the Will* given its racist viewpoint.[100]

A second modification to the doctrine of state speech is that there should be constitutionally recognized limits on what it is permissible for the state to say. The state should not be allowed to express hateful or discriminatory viewpoints itself, or to deny access to information about basic rights to its citizens. I have thus criticized the Court's holding in *Rust*

---

[98] *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587–88 (1998); Rust v. Sullivan, 500 U.S. 173, 192–93 (1991).

[99] *Compare Rust*, 500 U.S. at 193 ("The Government can . . . selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."), *with Christian Legal Soc'y*, 130 S. Ct. at 2984 ("Any access barrier must be reasonable and viewpoint neutral . . . .").

[100] *See* Roger Ebert, *Silencing of the Lambs: Decades Later, the Nazi Propaganda Vehicle Casts a Horrifying Shadow*, CHI. SUN-TIMES, June 27, 2008, at D2.

v. Sullivan for allowing the state to deny access to information about basic rights. I have explained that democratic persuasion should be subject to both means-based and substance-based limits. The substance-based limit on democratic persuasion is that the state should only promote the values of free and equal citizenship, and the means-based limit is that it should not use coercive means, such as punishments or prohibitions on speech. *Rust v. Sullivan* stands as an example of violating the substance-based limit on democratic persuasion since the state attempted to limit the transfer of information about a basic constitutional right. In short, although the state should speak in favor of the freedom and equality of all citizens, that obligation does not mean that it can say anything.

While respecting means-based and substance-based limits on democratic persuasion, the state should engage in criticism of discriminatory and hateful viewpoints because of two important concerns. First, thinkers like Jeremy Waldron and Catherine MacKinnon express the concern that the spread of hateful views might undermine the standing of citizens as free and equal.[101] I have proposed democratic persuasion to check the spread of hateful viewpoints throughout a society without resorting to banning them. Second, there is a danger that when the state protects hateful viewpoints, it will be seen as being neutral towards or complicit with them. This impression might arise because free speech rights have an "inverted" character: they protect viewpoints that seek to undermine the very basis of rights in the values of free and equal citizenship. To avoid complicity with hateful viewpoints, the state should clarify its stance towards them and defend the values of autonomy and equal respect for all citizens through democratic persuasion.

My account of free expression stands in contrast to two other dominant ways of understanding free speech. It endorses viewpoint neutrality in free expression rights and thus differs from the prohibitionist approach of banning hate speech that has been adopted by many other democracies and is advocated by Waldron and MacKinnon. The prohibitionist approach does not adequately respect the equal autonomy of citizens. However, my view also differs from neutralists, such as Martin Redish, who interpret free speech as grounded in humility about the Constitution's own values. I have instead offered a substantive value-based justification for the doctrine of viewpoint neutrality in rights against coercion. The underlying values of the First Amendment, the reasons for rights, are based on the non-neutral values of free and equal citizenship. Although I have defended viewpoint neutrality in rights against coercion, I have rejected viewpoint neutrality in state speech. The state should promote the values of freedom and equality for all citizens in its expressive capacities as a speaker, educator, and spender. My approach accepts the notion that the Court should be humble when it comes to imposing

[101] *See, e.g.*, MACKINNON, *supra* note 6; WALDRON, *supra* note 5.

constitutional values through coercion but adds that the Court should also recognize the importance of an active role for the state in advancing the values of free and equal citizenship when it employs democratic persuasion.