MEIKLEJOHN'S MISTAKE: INDIVIDUAL AUTONOMY AND THE REFORM OF PUBLIC DISCOURSE

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Some of our best and most influential constitutional scholars have recently revived the view that the essential objective of the First Amendment is to promote a rich and valuable public debate. Their claim is that First Amendment issues ought to be decided not by "reference to . . . personal autonomy, or the right of self-expression," but rather by reference to the Amendment's "positive purpose of creating an informed public capable of self-government."[1] Because this understanding of the First Amendment subordinates individual rights of expression to collective processes of public deliberation,[2] I shall call it the "collectivist" theory of the First Amendment.

Moved by the disreputable state of contemporary democratic dialogue in America, proponents of the collectivist theory of the First Amendment have used the theory to advance a powerful reform agenda, ranging from statutes designed to correct the corrosive effects of private wealth on elections, to legislation calculated to free the marketplace of ideas from the distorting effects of large media oligopolies. The Supreme Court has been largely hostile to this agenda, objecting to its tendency to achieve its purposes through the suppression of individual speech. Thus in *Buckley v. Valeo* the Court struck down limitations on independent campaign expenditures, stating that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First

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1. Stephen Holmes, *Liberal Constraints on Private Power? Reflections on the Origins and Rationale of Access Regulation*, *in* DEMOCRACY AND THE MASS MEDIA: A COLLECTION OF ESSAYS 21, 32-33, 47 (Judith Lichtenberg ed., 1990).

2. *See* Daniel D. Polsby, Buckley v. Valeo: *The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 5-14.

Amendment . . . ."[3] And in *Miami Herald Publishing Co. v. Tornillo* the Court sought to protect a private and independent sphere of editorial autonomy by striking down a Florida statute providing candidates a right of reply when attacked by the press.[4]

Advocates of the collectivist theory of the First Amendment view these decisions as misguided, because they invoke private speech rights to circumscribe government efforts to enhance public debate. The touchstone of constitutional analysis should rather be, as Cass Sunstein has written, what "will best promote democratic deliberation."[5] Instead of fetishizing private rights, the Court should engage in a nuanced, contextualized, and pragmatic inquiry.

Professor Owen Fiss has offered the most uncompromising contemporary version of the collectivist theory. According to Fiss, the Supreme Court has been enthralled by a "Free Speech Tradition" that is wrongly focused on "the protection of autonomy."[6] It has thus failed to "see that the key to fulfilling the ultimate purposes of the first amendment is not autonomy . . . but rather the actual effect" of speech:

> On the whole does it enrich public debate? Speech is protected when (and only when) it does, and precisely because it does, not because it is an exercise of autonomy. In fact autonomy adds nothing, and if need be, might have to be sacrificed, to make certain that public debate is sufficiently rich to permit true collective self-determination. What the phrase "the freedom of speech" in the first amendment refers to is a social state of affairs, not the action of an individual or institution.[7]

This is a characteristically clear and succinct statement of the central premise of the collectivist theory. The criterion for constitutional analysis ought to be whether public debate is "sufficiently rich" to enable "true collective self-determination," and this criterion is analytically independent of the value of autonomy.[8] Once

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3. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976). *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790-92 (1978); Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 295 (1981). *But see* Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

4. 418 U.S. 241 (1974). *See* L.A. Powe, Jr., *Tornillo*, 1987 SUP. CT. REV. 345, 380-85. *But see* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

5. Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 28 (1991).

6. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408-11 (1986).

7. *Id.* at 1411. For a survey of literature making similar arguments in the context of campaign financing, see Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1068-74 (1985).

8. Fiss writes:

this premise is granted, the collectivist theory of speech presents a cogent and powerful argument for revising traditional First Amendment jurisprudence.

The question I wish to explore in this paper is whether, and if so under what conditions, this premise can be rendered constitutionally coherent.

I.

The most influential exposition of the collectivist theory of the First Amendment is by the American philosopher Alexander Meiklejohn; his work continues to inspire and guide the theory's contemporary advocates.[9] Because of its candid and unflinching exploration of the theory's assumptions and implications, Meiklejohn's work offers an especially clear revelation of the theory's essential constitutional structure.

A.

Meiklejohn anchors the First Amendment firmly to the value of self-government:

> The primary purpose of the First Amendment is . . . that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them. Under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves.[10]

Meiklejohn locates the essence of self-government, and therefore also "the final aim" of First Amendment freedom, in democracy's

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> We should learn to recognize the state not only as an enemy, but also as a friend of speech; like any social actor, it has the potential to act in both capacities, and, using the enrichment of public debate as the touchstone, we must begin to discriminate between them. . . . [T]he approach I am advocating is not concerned with the speaker's autonomy, real or effective, but with the quality of public debate. It is listener oriented.

Id. at 1416-17.

9. For an argument that Meiklejohn's great predecessor, Zechariah Chafee, also expounded a version of the collectivist theory, see MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 144-47 (1991).

10. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 75 (1960).

effort to ensure "the voting of wise decisions."[11] He sharply distinguishes this purpose from that of individual autonomy.

The First Amendment, Meiklejohn writes, "has no concern about the 'needs of many men to express their opinions'"; it provides instead for "the common needs of all the members of the body politic."[12] This orientation toward the needs of the collectivity, rather than the individual, underlies one of Meiklejohn's most quoted aphorisms: "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[13] In Meiklejohn's view, the ultimate purpose of the First Amendment is to guard against "the mutilation" of "the thinking process of the community,"[14] not to protect the rights of persons to self-expression.

Meiklejohn's account of the First Amendment requires a standard by which the quality of the thinking process of the community can be assessed. How otherwise could it be known whether public discourse is actually meeting "the common needs of all the members of the body politic"? How else could it be determined if "everything worth saying" has been said, or if some particular regulation of speech "mutilates," rather than advances, democratic deliberation?

Meiklejohn does not flinch from the responsibility of providing such a standard. He proposes "the traditional American town meeting" as "a model" for the measurement of the quality of public debate.[15] Meiklejohn argues that the town meeting "is not a Hyde Park"; it is not a scene of "unregulated talkativeness."[16] It is rather "a group of free and equal men, cooperating in a common enterprise, and using for that enterprise responsible and regulated discussion."[17] The objective of the enterprise is "to act

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11. *Id.* at 26. *Compare with* Stephen Holmes:

> Competition among would-be policymakers . . . is justified by the education of speakers and listeners in the practice of democratic government and by the expectation that public learning will occur so that collective decisions will be *better* (more intelligent, better informed) than decisions made without benefit of debate.

Holmes, *supra* note 1, at 32.

12. MEIKLEJOHN, *supra* note 10, at 55. Meiklejohn thus attacks Zechariah Chafee, Jr. for having been "misled by his inclusion of an individual interest within the scope of the First Amendment," and he faults Oliver Wendell Holmes for his "excessive individualism." *Id.* at 57, 61.

13. *Id.* at 26.

14. *Id.* at 27.

15. *Id.* at 24.

16. *Id.* at 25, 26.

17. *Id.* at 25.

upon matters of public interest,"[18] and speech is routinely and necessarily regulated so as to attain that objective:

> For example, it is usually agreed that no one shall speak unless "recognized by the chair." Also, debaters must confine their remarks to "the question before the house." If one man "has the floor," no one else may interrupt him except as provided by the rules. The meeting has assembled, not primarily to talk, but primarily by means of talking to get business done. And the talking must be regulated and abridged as the doing of the business under actual conditions may require. If a speaker wanders from the point at issue, if he is abusive or in other ways threatens to defeat the purpose of the meeting, he may be and should be declared "out of order." He must then stop speaking, at least in that way. And if he persists in breaking the rules, he may be "denied the floor" or, in the last resort, "thrown out" of the meeting. The town meeting, as it seeks for freedom of public discussion of public problems, would be wholly ineffectual unless speech were thus abridged.[19]

Meiklejohn explicitly describes the town meeting as having a structure of authority that I have elsewhere characterized as "managerial."[20] The meeting is regarded as an instrumental organization designed to achieve important and specific social ends, and its rules and regulations are deemed constitutionally justified insofar as they are necessary for the attainment of these ends. For Meiklejohn, the purpose of the meeting is "to act upon matters of public interest," and all facets of the meeting, including the speech of its participants, can be legally arranged so as to realize that objective. Meiklejohn is quite clear that "the talking must be regulated and abridged as the doing of the business under actual conditions may require."[21] The quality of public debate, therefore, is to be measured by its capacity to facilitate public decisionmaking.

This criterion makes sense within the context of a town meeting. Participants in the meeting share "a common enterprise" and hence a common derivative understanding of the purpose and function of the regulatory standards by which the enterprise will be advanced. There is general agreement about such fundamental questions as the methods for setting the meeting's agenda, the procedures for governing debate within the meeting, the criteria

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18. *Id.* at 24.

19. *Id.* at 24-25.

20. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

21. MEIKLEJOHN, *supra* note 10, at 24.

for distinguishing relevant from irrelevant speech, and so forth. In this antecedent agreement lies the source of the moderator's constitutional authority to enforce rules of procedure by controlling speech within the "structured situation" of the meeting,[22] even to the extent of "denying the floor" to those who persistently refuse to accept the moderator's authority.

Meiklejohn does not theorize this agreement; he assumes it. Or, to be more precise, he assumes the institutional structure of the town meeting in which it lies embedded. In fact the very form of a town meeting derives from shared assumptions of function and procedure; they give the meeting its shape and order, and they distinguish it from the "unregulated talkativeness" of "a Hyde Park." These assumptions thus stand in a position analytically distinct from, and prior to, any substantive decisions the town meeting might reach. The meeting is free to resolve as it wishes items properly presented for decision, but it is not free to abandon the shared assumptions of function and procedure that constitute it as a town meeting.

Meiklejohn views the town meeting as a model for public discourse because he conceptualizes democratic dialogue as serving the function of facilitating "the voting of wise decisions." He sees the exercise of democracy as analogous to an enormous town-meeting. He thus imports into his conception of democracy a dichotomy between the substance of public decisions and the shared understandings of function and procedure that are analytically distinct from, and prior to, the content of specific public decisions. The consequence of this dichotomy is that for Meiklejohn the content of government decisions remains open for the determination of citizens, but the framework of democratic decisionmaking remains fixed and beyond the reach of citizen self-government. It is precisely on this point, on the range and meaning of self-government, that traditional First Amendment jurisprudence differs significantly from Meiklejohn.

B.

Every interpretation of traditional First Amendment doctrine is, of course, contestable, but there is little dispute that one of the most important themes of that doctrine is the Amendment's func-

22. White v. City of Norwalk, 900 F.2d 1421, 1425 (9th Cir. 1990). *White* reaches the correct but seemingly paradoxical conclusion that a town meeting is not a "public forum" for First Amendment purposes. *See* Post, *supra* note 20, at 1799-1800.

tion "as the guardian of our democracy."[23] The Amendment, of course, serves to limit majoritarian enactments, so, of course, "democracy" cannot in this context be equated with simple majoritarianism.[24] In fact, majoritarianism, from the perspective of traditional First Amendment doctrine,[25] is merely a mechanism for decisionmaking that we adopt to reflect the deeper value of self-government, which in turn rests on the distinction between autonomy and heteronomy:

> "democratic forms of government are those in which the laws are made by the same people to whom they apply (and for that reason they are autonomous norms), while in autocratic forms of government the law-makers are different from those to whom the laws are addressed (and are therefore heteronomous norms)."[26]

What it means for laws to be "made" by the "same people to whom they apply" is not easy to understand. If, with Rousseau, we postulate a determinate fusion of individual and collective will, the difficulty dissolves.[27] But the postulate is unconvincing under modern conditions of heterogeneity.

Traditional First Amendment doctrine, and a broad spectrum of modern political theories, meet this difficulty by locating the normative essence of democracy in the opportunity to participate in the formation of the "will of the community" through "a running discussion between majority and minority."[28] On this account democracy attempts to reconcile individual autonomy with collective self-determination by subordinating governmental decisionmaking to communicative processes sufficient to instill in citizens a sense of participation, legitimacy, and identification.[29]

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23. Brown v. Hartlage, 456 U.S. 45, 60 (1982). *See also* Schneider v. New Jersey, 308 U.S. 147, 161 (1939); Stromberg v. California, 283 U.S. 359 (1931).

24. *See* STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 56-58 (1990).

25. And, I might add, from the perspective of constitutional law generally. *See* Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, *in* DEMOCRATIC COMMUNITY, XXXV NOMOS 163-90 (1993).

26. NORBERTO BOBBIO, DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER 137 (Peter Kennealy trans., 1989).

27. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Maurice Cranston trans., 1968).

28. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 284-88 (Anders Wedberg trans., 1949). *See, e.g.*, BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 136 (1984); JAMES T. FARRELL ET AL., DIALOGUE ON JOHN DEWEY 58 (Corliss Lamont ed., 1959); JURGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 186 (Thomas McCarthy trans., 1979); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1526-27 (1988).

29. The discussion of the relationship between self-government and traditional First

Although citizens may not agree with all legislative enactments, although there may be no determinate fusion of individual and collective will, citizens can nevertheless embrace the government as rightfully "their own" because of their engagement in these communicative processes. Following Supreme Court precedent, I shall use the term "public discourse" to refer to these communicative processes.[30]

Conceiving public discourse in this way has two important implications. First, censorship of public discourse must be understood as excluding those affected from access to the medium of collective self-determination. Censorship cuts off its victims from participation in the enterprise of autonomous self-government, and the fundamental democratic project of replacing the "unilateral respect of authority by the mutual respect of autonomous wills"[31] is *pro tanto* circumscribed.

Second, public discourse must be conceptualized as an arena within which citizens are free continuously to reconcile their differences and to (re)construct a distinctive and ever-changing national identity. Building on the work of Charles Taylor, we might define a "national identity" in this context as an orientation in "moral space," a framework within which we "can try to determine from case to case what is good, or valuable, or what ought to be done."[32] We commonly ground government regulation of behavior on specific visions of national identity. But if the state attempts to use such visions to censor public discourse, if the state excludes communicative contributions on the grounds of a specific sense of what is good or valuable, the state then stands in contradiction to the central project of collective self-determination. It displaces that project for the sake of heteronomously imposed norms. The internal logic of self-government thus implies that with regard to the censorship of speech the state must act as though the meaning of collective identity were perpetually indeterminate within the medium of public discourse, where the "debate as to

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Amendment doctrine in this and the following paragraph is developed at length in Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 279-88 (1991).

30. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 54 (1988).

31. JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD 366 (Marjorie Gabain trans., 1948).

32. CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 27-28 (1989).

what is legitimate and what is illegitimate" must "necessarily" remain "without any guarantor and without any end."[33]

Meiklejohn's model of the town meeting, however, precisely violates this necessary indeterminacy of public discourse. While acknowledging that "the voting of wise decisions" must be kept free from government interference, it nevertheless authorizes the censorship of public discourse on the basis of assumptions about function and procedure. Meiklejohn cannot appeal to a neutral distinction between substance and procedure to justify this contraction of the scope of democratic self-government, for the procedural assumptions he wishes to enforce, no less than substantive ones, are ultimately grounded upon a distinctive and controversial conception of collective identity. His paradigm of the town meeting specifically presupposes that the function of American democracy is to achieve an orderly, efficient, and rational dispatch of common business, and it consequently implies that aspects of public discourse incompatible with that function are constitutionally expendable. To the extent public discourse is thus truncated, a particular concept of national identity is placed beyond the reach of the communicative processes of self-determination.

The difficulty with Meiklejohn's analysis, therefore, is that it reflects an insufficiently radical conception of the reach of self-determination, which encompasses not merely the substance of collective decisions, but also the larger framework of function within which such collective decisionmaking is necessarily conceived as taking place. It is precisely because he is certain about the nature of that framework that Meiklejohn can, for example, unproblematically appeal to the authority of a moderator. But Kenneth Karst noted long ago that in fact the "state lacks 'moderators' who can be trusted to know when 'everything worth saying' has been said."[34] The state lacks such moderators because the very standards necessary to distinguish "relevant" from "irrelevant"

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33. CLAUDE LEFORT, DEMOCRACY AND POLITICAL THEORY 39 (David Macey trans., 1988).

34. Kenneth Karst, *Equality and the First Amendment*, 43 U. CHI. L. REV. 20, 40 (1975). Karst writes that "even the repetition of speech conveys the distinctive message that an opinion is widely shared," which is of "great importance in an 'other-directed' society where opinion polls are self-fulfilling prophecies." *Id. Compare* MEIKLEJOHN, *supra* note 10, at 26 (citations omitted):

> If, for example, at a town meeting, twenty like-minded citizens have become a "party," and if one of them has read to the meeting an argument which they have all approved, it would be ludicrously out of order for each of the others to insist on reading it again. No competent moderator would tolerate that wasting of the time available for free discussion.

speech (or "original" from "repetitious" speech, or "orderly" from "disorderly" speech, or even "rational" from "irrational" speech) are themselves matters of potential dispute.[35] We can settle disputes about the nature of these standards only by appealing to particular conceptions of the larger framework of function that gives collective decisionmaking its telos. Conflicts about the nature of these standards ought therefore to be a matter for debate within public discourse. To use a particular version of these standards to censor public discourse would be, *pro tanto*, heteronomously to foreclose the open-ended search for collective self-definition.

The same point can be made with respect to the agenda-setting mechanisms of a town meeting. Public control over the presentation and characterization of issues within a town meeting seems unproblematic because of a shared agreement concerning efficient institutional function and procedure. But within democratic life generally such agreement cannot be assumed without concomitantly diminishing the arena for self-determination. This is because "[p]olitical conflict is not like an intercollegiate debate in which the opponents agree in advance on the definition of the issues":

> As a matter of fact, *the definition of the alternatives is the supreme instrument of power*. . . . He who determines what politics is about runs the country, because the definition of the alternatives is the choice of conflicts, and the choice of conflicts allocates power.[36]

The state ought not to be empowered to control the agenda of public discourse,[37] or the presentation and characterization of issues within public discourse, because such control would necessarily circumscribe the potential for collective self-determination.

These elementary examples can be given general theoretical formulation. Managerial structures necessarily presuppose objectives that are unproblematic and hence that can be used instrumentally to regulate domains of social life. The enterprise of public

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35. *See, e.g.*, Kenneth Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95; Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 308-10 (1988); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601 (1990) [hereinafter *Public Discourse*].

36. ELMER E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 66 (2d ed. 1975).

37. *See, e.g.*, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 538 (1980) ("To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.").

discourse, by contrast, rests on the value of autonomy, which requires that all possible objectives, all possible versions of national identity, be rendered problematic and open to inquiry. No particular objective can justify the coercive censorship of public discourse without simultaneously contradicting the very enterprise of self-determination. As a consequence public discourse always appears intolerably formless and incoherent to those who care about the instrumental accomplishment of particular purposes, whether they be the voting of wise decisions or the maintenance of rational debate. Public discourse seems to them to consist merely of "a Hyde Park" filled with "unregulated talkativeness."

Justice Harlan captured this aspect of public discourse in *Cohen v. California*.[38] He observed that democratic dialogue "may often appear to be only verbal tumult, discord, and even offensive utterance."[39] But Harlan understood that this disorder, this "verbal cacophony," is merely a "necessary side effect[]" of the fact that, "in a society as diverse and populous as ours," public discourse is organized not to accomplish anything in particular, but instead to serve as a medium within which heterogeneous versions of collective identity can be free continuously to collide and reconcile.[40]

Self-determination, we might say, is something that *happens* within public discourse; there is no external Archimedean point from which it can be compelled or its outcome anticipated. We can decide, within public discourse, to form and set in motion specific organizations of order and instrumental rationality, like town meetings. But it would be a grave mistake to confuse these discrete institutions with the sea of tumult and discord that is public discourse itself.

II.

Meiklejohn's work displays a structure of analysis that is common to all versions of the collectivist theory of the First Amendment. The theory postulates a specific "objective" for public discourse, and it concludes that public debate should be regulated instrumentally to achieve this objective. The objective thus stands distinct from, and prior to, any process of self-determination that happens within public discourse. The collectivist theory, there-

38. 403 U.S. 15 (1971).
39. *Id.* at 24-25.
40. *Id.*

fore, stands for the subordination of public discourse to a framework of managerial authority.

This structure of analysis is plainly visible in the work of Professor Owen Fiss, a profound and influential modern exponent of the collectivist theory. Fiss writes that "the larger political purposes" of the First Amendment are to establish a "rich public debate."[41] He accordingly views the "protection of autonomy" as "instrumental" for enhancing "the quality of public discourse."[42] "Autonomy may be protected, but only when it enriches public debate."[43] If autonomy does not fulfill this function, then "we as a people will never truly be free" until the state is constitutionally empowered to "restrict the speech of some elements of our society in order to enhance the relative voice of others."[44]

Thus Fiss, like Meiklejohn, would use governmental power to censor speakers whose expression is deemed incompatible with the achievement of a rich and informative public dialogue. He is willing to deny these speakers access to the processes of democratic self-government because he desires to fashion a public dialogue capable of empowering "people to vote intelligently and freely, aware of all the options and in possession of all the relevant information."[45] Fiss wants this goal to be managerially imposed upon public discourse by the state. He believes that objections to such managerial authority flow from a misplaced concern with individual autonomy, from a misguided effort to erect "a zone of noninterference . . . around" the speech of "each individual."[46]

What Fiss apparently does not recognize, however, is that the value of individual autonomy is inseparable from the very aspiration for self-government that propels his own proposed revision of First Amendment doctrine. Fiss plainly sees that First Amendment jurisprudence must provide for "the essential preconditions for an effective democracy," and that "[d]emocracy promises collective self-determination."[47] Yet his analysis extends the logic of self-determination only to the content of democratic decisions, and it withholds that logic from the procedural framework of democratic decisionmaking. Like Meiklejohn, Fiss conceptualizes this framework as exogenous to public discourse and hence as

41. Owen M. Fiss, *Why the State?* 100 HARV. L. REV. 781, 785 (1987).
42. *Id.* at 785-86.
43. *Id.* at 786.
44. Fiss, *supra* note 6, at 1425.
45. *Id.* at 1410.
46. Fiss, *supra* note 41, at 785.
47. Fiss, *supra* note 6, at 1407. Thus, Fiss writes: "The duty of the state is to

subject to majoritarian control. Fiss is therefore vulnerable to the same critique that we have already applied to Meiklejohn.

"[C]ollective identity is created by and perpetuated through public discourse,"[48] and different conceptions of collective identity will imply different standards for measuring the quality of public debate. Fiss believes that public discourse is subject to a "distorting influence" when it is controlled by the ambient structure of the capitalist market.[49] But Fiss believes this because he has a particular orientation in "moral space," a framework within which he can distinguish the "distorted" from the normal.[50] To use the coercive power of the state to suppress public discourse on the basis of Fiss's particular vision of national identity would be to decide in advance the very issue of collective identity that public discourse is meant to be the means of resolving.

What follows from this analysis is not that public discourse can never be regulated, but that it ought not to be managed in ways that contradict its democratic purpose. This purpose need not preclude "time, place and manner regulations" that function as "rules of the road" to co-ordinate and facilitate expression within public discourse. Nor need it rule out government action designed to supplement or augment communications within public discourse, as for example by establishing state supported forums to enhance public debate.[51] But the democratic function of public discourse is inconsistent with government regulations that suppress speech within public discourse for the sake of imposing a specific version of national identity.

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preserve the integrity of public debate . . . to safeguard the conditions for true and free collective self-determination." *Id.* at 1416. *See also* Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2087-88 (1991) ("The principle of freedom that the First Amendment embodies is derived from the democratic nature of our society and reflects the belief that robust public debate is an essential precondition for collective self-determination.").

48. SHELDON S. WOLIN, THE PRESENCE OF THE PAST: ESSAYS ON THE STATE AND THE CONSTITUTION 9 (1989).

49. Fiss, *supra* note 41, at 790. *See also id.* at 788 ("To be a consumer, even a sovereign one, is not to be a citizen.").

50. Thus Fiss would have the state regulate speech by means of decisions that "are analogous to the judgments made by the great teachers of the universities of this nation every day of the week." Fiss, *supra* note 47, at 2101. But it is deeply inconsistent with democratic legitimacy to conceive citizens as the pupils of their government, in no small part because the student/teacher relationship is inherently managerial. *See* Post, *supra* note 29, at 317-25. A great educator defines her educational mission in terms of what she conceives to be best for her students. But democracy conceives its citizens not as pupils to be guided by a beneficent state, but as free and independent persons capable and determined to decide their own destiny.

51. It is true that such government action may influence national identity, and it is

Traditional First Amendment jurisprudence uses the ideal of autonomy to insulate the processes of collective self-determination from such preemption. The protection of individual autonomy prevents the state from violating the central democratic aspiration to create a communicative structure dedicated to "the mutual respect of autonomous wills." And this structure, which Professor Fiss can explain only as a vestigial remnant of an earlier era of "Jeffersonian democracy,"[52] in turn ensures that government will respect public discourse as pervasively indeterminate.[53] Traditional First Amendment doctrine guarantees that democratic dialogue will remain continuously available to the potential contributions of its individual participants. Autonomy, properly understood, signifies that within the sphere of public discourse and with regard to the suppression of speech the state must always regard collective identity as necessarily open-ended.[54]

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also true that at some point such action may become so pervasive or inescapable as to amount to governmental imposition of a state-authorized version of national identity. At that point, and for that reason, traditional First Amendment jurisprudence would be relevant to the assessment of such government action.

52. Fiss, *supra* note 41 at 786.

53. Thus, for example, the many First Amendment decisions prohibiting restrictions on public discourse because speech is "offensive," Cohen v. California, 403 U.S. 15, 16 (1971), or "outrageous," Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988), or because it affronts "dignity" or is "insulting" or causes "public odium" or "public disrepute," Boos v. Barry, 485 U.S. 312, 315 (1988), both protect the individual autonomy of the speaker and simultaneously preclude the state from subordinating public discourse to the civility rules which embody particular community understandings of public life. For a full discussion, see *Public Discourse*, *supra* note 35.

54. The preceding two sentences in the text frame an important question regarding the status of corporate speech during elections—the subject of a fascinating and unsteady line of Supreme Court decisions. *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990); Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978). Meir Dan-Cohen has demonstrated rather convincingly that most corporations cannot claim original autonomy rights to expression. Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229 (1991). But even in the absence of any concern for the autonomous participation of corporations within democratic life, constitutional scrutiny must also be applied to the justifications for state regulation of corporate electoral speech.

In Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), the Court upheld a Michigan prohibition on independent expenditures from corporate treasury funds in support of, or in opposition to, any candidate for state office. In an opaque and difficult opinion, Justice Marshall stated that the statute was meant to redress "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. On Marshall's account the Michigan statute seems to be an effort to enforce a particular image of collective identity, from which vantage the

The ideal of autonomy essentially distinguishes First Amendment jurisprudence from other areas of constitutional law, which are most often associated with specific visions of collective identity. For example in the domain of Equal Protection, with which Professor Fiss is most famously associated, the federal government has for the past 40 years aggressively sought to inculcate particular national values of equality. But legal imposition of these values acquires democratic legitimacy precisely because the First Amendment has already established an arena of public discourse within which they can be freely embraced or rejected. So far from vestigial, then, the ideal of autonomy is instead foundational for the democratic project.[55]

III.

Many who practice empirical political science would no doubt object to the identification of democracy with the value of autonomous self-government.[56] But within the world of constitutional law this identification stands virtually unchallenged, perhaps because of the absence of serious alternative normative accounts of

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influence of corporate wealth can be excised as "corrosive and distorting."

But this raises the question of whether such an effort does not contradict the First Amendment principle that the state must always regard collective identity as necessarily open-ended within the sphere of public discourse. The question is a vexing one. On the one hand, the strength of this principle does not seem to depend upon the denial of the autonomy of particular speakers, as may perhaps be glimpsed in the constitutional fate that ought to await any statute that attempted to prohibit independent corporate expenditures in support of democrats, but that allowed such expenditures for republicans. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2543 n.4 (1992). But on the other hand, government actions affect collective identity all the time in ways that are properly viewed as constitutionally unproblematic, as for example by subsidies to private speakers. *See supra* note 51. These actions seem to be constitutionally permissible precisely because they do not suppress the autonomy of speakers.

55. This, of course, implies that our national identity does have determinate content which includes a commitment to the value of autonomy. But the peculiar consequence of the value of autonomy is to require that a public communicative space be generated within which government is precluded from enforcing specific concepts of national identity. In that space, as Justice Brandeis observed, democracy "substitutes self-restraint for external restraint." Letter from Justice Louis Brandeis to Robert Walter Bruere (Feb. 25, 1922), *in* 5 LETTERS OF LOUIS D. BRANDEIS 46 (Melvin I. Urofsky & David M. Levy eds., 1978). I have argued elsewhere that democracy always presupposes an antecedent but unenforceable community commitment to the value self-determination. Post, *supra* note 25 at 175-83. I have also argued that the enterprise of constitutional interpretation, including the interpretation of the First Amendment, presupposes a similar structure of antecedent community commitments. *See* Robert Post, *Theories of Constitutional Interpretation*, *in* LAW AND THE ORDER OF CULTURE 13-41 (Robert Post ed., 1991).

56. *See, e.g.*, JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (3d ed. 1950).

democracy. Indeed, the principle "that the American people are politically free insomuch as they are governed by themselves collectively" is one "that no earnest, non-disruptive participant in American constitutional debate is quite free to reject."[57]

There are, of course, vast disparities between the dreary realities of American politics and the aspirational principle of self-determination. The extent to which our public discourse actually functions to instill participation, legitimacy and identification is highly debatable.[58] Participants in the American constitutional tradition are thus forced to choose. They can either abandon the principle of self-determination and proffer a new and more convincing normative account of democracy, or they can propose reforms that will enable the principle of self-determination to be more effectively realized in American society.

Proponents of the collectivist theory have uniformly chosen the latter option. Their reform agenda is explicitly designed to further the value of self-governance. Exemplary is the work of Cass Sunstein, who argues that "the First Amendment is fundamentally aimed at protecting democratic self-government,"[59] which he understands to be a structure of "deliberation" designed to place "governing authority in the people themselves."[60] But because Sunstein believes that the value of "private autonomy" is logically distinct from democratic self-government,[61] he also urges that public discourse be managed so as to improve its "quality and diversity."[62] Like all modern proponents of the collectivist theory, therefore, Sunstein is rendered vulnerable to the charge of failing to appreciate the full radical force of the aspiration toward democratic self-governance.

Although a complete survey of the literature is beyond the scope of this article, it can generally be said that proponents of the collectivist theory, in a sincere and admirable effort to rejuvenate democratic self-governance, argue that public discourse should be regulated so as to achieve some specific ideal associated with a particular view of national identity, ranging from "equality"[63]

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57. Michelman, *supra* note 28, at 1500.

58. Less debatable, perhaps, is the claim that, under conditions characteristic of the modern bureaucratic state, democratic self-governance would be impossible in the absence of a public discourse that is, in relevant respects, free and unfettered.

59. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 263 (1992).

60. *Id.* at 313-14.

61. *Id.* at 277, 303-04.

62. *Id.* at 277.

63. J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?* 82 COLUM. L. REV. 609, 625-26 (1982).

to "diversity"[64] to "fairness."[65] But to the extent that the managerial logic of the collectivist theory requires that these regulatory criteria be themselves exempt from the logic of self-determination, the theory stands in essential tension with fundamental premise of democratic self-governance.

To avoid this contradiction, proponents of the collectivist theory emphasize the circumstances in which public discourse cannot convincingly be said to realize the values of self-governance, and therefore in which the managerial logic of the collectivist theory does not contradict basic democratic premises. They properly focus our attention on three propositions: (1) Public discourse serves the value of self-governance only when there is a plausible public/private distinction; (2) public discourse serves the value of self-governance only when public debate can plausibly be regarded as an exchange among free and autonomous persons; and (3) public discourse serves the value of self-governance only when public debate engenders the sense of participation, legitimacy, and identification necessary to reconcile individual with collective autonomy.

Each of these propositions spotlights a vulnerable link between public discourse and the value of self-determination. Where any of these links are broken, the focus of traditional First Amendment jurisprudence on autonomy is rendered problematic, and the collectivist theory emerges as a powerful alternative account of freedom of speech.

A.

Traditional First Amendment doctrine presupposes some form of a public/private distinction. It locates the essence of democracy in self-determination, which inheres in the responsiveness of government to its citizens. The thrust of the doctrine is thus to protect from "public" regulation the communicative processes of "private" citizens deemed necessary for self-governance.[66] The doctrine

64. Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105, 111-16. *See* Judith Lichtenberg, *Foundations and Limits of Freedom of the Press*, *in* DEMOCRACY AND THE MASS MEDIA, *supra* note 1.

65. Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory, and the First Amendment*, 29 UCLA L. REV. 505, 515 (1982).

66. I enclose in quotation marks the adjectives "public" and "private" to avoid semantic confusion with the obviously very different meaning of the term "public" in the phrase "public discourse." The distinction between public discourse and nonpublic speech

has rather little to say, however, about government speech itself, which is not theorized as central to self-determination.[67] When, therefore, a speaker crosses the divide from private citizen to public functionary, she passes beyond the scope of traditional First Amendment doctrine. In such circumstances the collectivist theory offers an attractive alternative account of First Amendment standards for regulating the speech of public functionaries.

This can plainly be seen in the one decision of the Supreme Court that unambiguously relies on the collectivist theory, *Red Lion Broadcasting Co. v. FCC*.[68] At issue in *Red Lion* was the constitutionality of various FCC regulations of the broadcast media, including the fairness doctrine and subsidiary rules requiring that those personally attacked be given a right to reply. The Court held that because "broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government,"[69] and because those frequencies were "a public trust,"[70] a broadcast licensee could appropriately be regarded "as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[71]

Broadcast licensees, in other words, were not private parties whose views were to be shielded from government regulation out of respect for the indeterminacy of their contribution to the communicative process of self-determination. They were instead agents of a public objective. The Court appealed to a collectivist theory of speech to specify this objective, which it characterized as "the First Amendment goal of producing an informed public capable of conducting its own affairs."[72] The Court had no difficulty

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tracks the boundary between the speech of persons in their role as citizens and the speech of persons in other aspects of their lives. On the location and nature of that boundary, see *Public Discourse*, *supra* note 35, at 667-84. The public/private distinction at issue in the text, however, refers to the boundary between government and its citizens. These common but different usages of the terms "public" and "private" allow us to assert, without fear of anomaly, that "private" citizens can engage in "public" discourse. Needless to say, our vocabulary in this area deserves a good scrubbing.

67. *See generally* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983).

68. 395 U.S. 367 (1969).

69. *Id.* at 376.

70. *Id.* at 383.

71. *Id.* at 389. *See id.* at 394 ("It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern.").

72. *Id.* at 392.

finding that the fairness doctrine instrumentally served this goal.[73]

The Court's embrace of the collectivist theory was thus made possible by its characterization of broadcast licensees as public functionaries. This characterization could not plausibly have been driven by the logic of scarcity; even at the time of *Red Lion* there were, in most media markets, many more frequencies available than had actually been allocated for use by FCC regulation.[74] In any event, neither we nor the Court ordinarily regard the owners of scarce important communicative resources, like major metropolitan newspapers, for that reason alone to be public agents.[75] The Court's characterization must instead be understood as reflecting a political judgment about whether the broadcast media were sufficiently independent from the achievement of public purposes as to be regarded as private participants in the project of self-determination.[76] Unfortunately the Court never convincingly spelled out the rationale for its judgment, and our ability to assess the validity of such evaluations remains quite rudimentary.

This has not prevented some modern proponents of the collectivist theory from attempting to generalize from *Red Lion*. They argue that the collectivist theory is justified because the public/private distinction can have little persuasive applicability to the modern world. Thus Fiss writes that not only can CBS "be said to perform a public function" (and therefore to be "a composite

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73. *Id.* at 390. *See id.* at 394 ("To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press.").

For a contrary view, see LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987). Powe concludes that "[t]he regulation of broadcasting has been characterized by the very abuses—favoritism, censorship, political influence—that the First Amendment was designed to prevent in the print media." L.A. Powe, Jr., *Scholarship and Markets*, 56 GEO. WASH. L. REV. 172, 185 (1987).

74. *See* 395 U.S. at 398 n.25. On the theoretical and empirical inadequacy of the scarcity rationale, see Daniel D. Polsby, *Candidate Access to the Air: The Uncertain Future of Broadcaster Discretion*, 1981 SUP. CT. REV. 223, 256-62.

75. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). *But see* Jerome A. Barron, *Law and the Free Society Lectures: Access—The Only Choice for the Media?* 48 TEX. L. REV. 766, 775 (1970).

76. Justice Brennan understood this quite clearly when, four years later, he concluded that the actions of broadcast licensees constituted "governmental action." Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 180 (1973) (Brennan, J., dissenting). He reached this conclusion "because the Government 'has so far insinuated itself into a position' of participation" in the policies of licensees "as to make the Government itself responsible for [their] effects." *Id.* at 181 n.12. The majority of the Court, however, refused to follow Brennan's lead, thus relegating *Red Lion's* holding to a confused fixation on physical scarcity.

of the public and private"), but also that the "same is true of the print media, as it is of all corporations, unions, universities, and political organizations."[77] In fact, Fiss concludes, "the social world is largely constituted by entities that partake of both the public and private."[78]

Fiss's argument illustrates the danger of confusing descriptive and political accounts of the public/private distinction. His characterization is no doubt descriptively accurate, but the public/private distinction turns instead on questions of moral and political ascription. What is politically at issue in characterizing a speaker as public or private is precisely the scope of self-government. To repudiate the private status of speakers in the wholesale manner proposed by Fiss would necessarily entail an equally sweeping rejection of the realm of democratic self-determination. And this would be inconsistent with the very value of self-governance that Fiss acknowledges to be at the root of the collectivist theory.

The point, therefore, is that while particular applications of the collectivist theory may be sustained through local adjustments of the boundary between private citizens and public functionaries, the collectivist theory cannot be *generically* justified by this method without profoundly revising contemporary notions of democratic legitimacy.[79]

B.

Public discourse merits unique constitutional protection because it is the process through which the democratic "self," the agent of self-government, is itself constituted through the reconciliation of individual and collective autonomy. Constitutional solicitude for public discourse, therefore, presupposes that those participating in public discourse are free and autonomous. Public discourse could not serve the project of self-determination if the opinions and attitudes of speakers were deemed to be merely the effects of external causes. Under such conditions, therefore, the

77. Fiss, *supra* note 6, at 1414.

78. *Id.* For arguments with a similar tendency, see Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986); Sunstein, *supra* note 59, at 277, 288; Eule, *supra* note 64, at 113-14.

79. Hence the theoretical force behind Lee Bollinger's acute insight that, having embarked upon the collectivist regulation of the broadcast media, the state was bound "to maintain a partial regulatory structure for its own sake." Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 36 (1976).

collectivist theory would no longer be inconsistent with democratic values.

Advocates of the collectivist theory commonly attempt to justify their position by stressing that public discourse cannot now plausibly be interpreted as an arena of free communicative exchange. Thus Julian Eule, using a metaphor popular among proponents of the collectivist theory, argues that limitations on campaign finance expenditures are necessary because the voices of the wealthy "drown out the voices of others."[80] The metaphor serves a double function. At one level it expresses the normative criterion—"ensuring that the public is exposed to a broad array of views"[81]—that Eule believes ought to be managerially used to regulate public discourse. At a deeper level the metaphor serves the additional function of justifying the creation of this managerial authority. Eule specifically tells us that "[t]he extent to which a well-financed corporate speaker can dominate the 'marketplace' has little to do with the persuasiveness of the speech."[82] Eule's point is that the perspectives of those engaged in public discourse are *physically caused* by may be based on such variables as the quantity of speech that money can buy,[83] and hence that such perspectives cannot be regarded as the freely adopted conclusions of rational agents. Managerial control is justified because the freedom necessary to link public discourse to self-determination has vanished.

This loss of freedom approach to collectivist theory is also explicit in the work of Owen Fiss, who writes that the market is

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80. Eule, *supra* note 64, at 115.

81. *Id.* at 112.

82. *Id.* at 113.

83. *See id.* at 129-30; *see also* Wright, *supra* note 63; Lowenstein, *supra* note 65 (both contain well-developed arguments along these lines). Several readers have objected to the harshness of the characterization in the text, but I believe it to be appropriate. The most plausible meaning of the metaphor, and the one most commonly invoked by proponents of the collectivist theory, is that there exists an empirically verifiable correlation between expenditures of money and electoral outcomes—a correlation that is relatively indifferent to the specific content of the relevant speech. Within the ambit of this correlation, the attitudes and votes of citizens are squarely conceptualized as the effects of measurable social causes. For the state to act on the basis of this correlation, therefore, would be to act on the basis of an effective denial of the autonomy of its citizens. In such circumstances, the value of self-governance could have no application.

Of course, the metaphor of "drowning out" could have other meanings, but these would not be particularly useful to proponents of the collectivist theory. The metaphor may merely express, for example, the "distortion" of public discourse when measured by a relevant normative criterion, in which case the metaphor would not function to justify

"a structure of constraint" and that regulation is necessary "to counteract the skew of public debate attributable to the market."[84] The denial of autonomy is most developed, however, in the arguments of Cass Sunstein. Sunstein sets rigorous standards for the ascription of autonomy: "The notion of autonomy should refer . . . to decisions reached with a full and vivid awareness of available opportunities, with reference to all relevant information, and without illegitimate or excessive constraints on preference formation. When these conditions are not met, decisions should be described as unfree or nonautonomous. . . ."[85] Sunstein finds it "most difficult" to deem "individual freedom" relevant when attitudes "are a product of available information, existing consumption patterns, social pressures, and governmental rules."[86] In fact individual attitudes should "be regarded as nonautonomous insofar as they are reflexively adaptive to unjust background conditions."[87] Government regulation to overcome such conditions "removes a kind of coercion."[88] Sunstein proposes far-reaching reforms to subordinate public discourse to managerial control,[89] and these reforms are ultimately justified by his equally far-reaching denial of the relevance of individual autonomy.

The denial of freedom poses a fundamental and complex challenge to traditional First Amendment jurisprudence. We know that human beings, like all natural objects, are subject to laws of cause and effect. As social science grows more sophisticated, we can expect better to understand, predict, and control the manifold ways in which cultural environment affects and determines social behavior, including speech and attitude formation. This knowledge, however, is deeply incompatible with the very premise of democratic self-government. Members of the polity, regarded only

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the imposition of managerial authority by denying autonomy. Or the metaphor may express the notion that the expenditures of the wealthy literally preclude voters from having any access at all to competing points of view, perhaps by monopolizing all available media of communication. The analogy would be to the trumpets of an orchestra "drowning out" the English horn, so that the latter simply could not be heard. Quite apart from the empirical implausibility of this interpretation of the metaphor, its implication would not be that public discourse ought to be regulated so as to correct some relative imbalance between the voices of the wealthy and others, but rather that the absolute exclusion of the latter be ended. This implication does not deny the premise of citizen autonomy.

84. Fiss, *supra* note 41, at 787-88.

85. Sunstein, *supra* note 5, at 11.

86. *Id.*

87. *Id.* at 21.

88. *Id.* at 12.

89. *Id.* at 27-32.

through the lens of social or natural science, cease to be citizens; they are visible only as effects of complex and multifarious causes. Citizenship thus presupposes the attribution of freedom. The ascription of autonomy is in this sense the transcendental precondition for the possibility of democratic self-determination.

I appreciate the paradoxical quality of this conclusion. We often speak of autonomy as a condition that needs to be attained through education, nurturance, the ameliorization of disabling circumstances, and so forth. This is the perspective from which Sunstein writes, and it implies that autonomy must be achieved rather than ascribed. But this perspective can be misleading when it comes to the design of structures of social authority, for the nature of such structures will depend upon whether they are intended to foster interactions among citizens who are autonomous, or instead among citizens who are not. From the point of view of the designer of the structure, therefore, the presence or absence of autonomy functions as an axiomatic and foundational principle.[90] Managerial structures locate citizens within the constraints of instrumental reason, assuming therefore that citizens are objects of regulation, subject to the laws of cause and effect. Structures of self-governance, in contrast, situate citizens within webs of hermeneutic interactions, assuming therefore that citizens are autonomous and self-determining.

In most circumstances we find ways of finessing this tension between management and democracy. The explosive expansion of the regulatory state during the 20th century, for example, has been fueled by acceptance and application of the insights of social science. Through sophisticated forms of social engineering we manipulate the conditions of our environment, including the persons who inhabit it. We do not regard these government controls as fundamentally incompatible with the premises of democratic freedom because we conceive them to have been freely adopted by the citizens of a democratic state. Analogous managerial controls over public discourse, however, cannot be conceptualized as democratically legitimate in the same way, for they *displace* the very proc-

90. John Stuart Mill understood this clearly when in *On Liberty* he refused to support limitations on "beer and spirit houses," despite disturbing evidence of their uncontrolled abuse among members of the working class. He wrote that such limitations would be "suited only to a state of society in which the laboring classes are avowedly treated as children or savages, and placed under an education of restraint, to fit them for future admission to the privileges of freedom. This is not a principle on which the laboring classes are professedly governed in any free country." JOHN S. MILL, ON LIBERTY 100 (Elizabeth Rapaport ed., 1978).

esses of collective self-determination. To conceive public discourse as a realm of causation, and to use this conception to justify regulating public discourse in ways incompatible with its democratic purpose, is directly and uncompromisingly to challenge the last redoubt of self-governance.

Like the public/private distinction, therefore, the concept of autonomy must function within public discourse as a moral ascription that marks the boundaries of our commitment to democratic self-government. For this reason the denial of freedom within public discourse cannot *generically* justify the collectivist theory of speech without contradicting the central premise of our democratic enterprise. At most autonomy can be negated in discrete and local ways where First Amendment presumptions of autonomy have come to seem merely "fictions"[91] masking particularly intolerable conditions of private power and domination. The maintenance of democratic legitimacy, however, requires that sufficient domains of public discourse remain governed by presumptions of freedom so as meaningfully to realize our commitment to self-government.

The consequence of this conclusion is apparent in the work of J. Skelly Wright, who yields to none in the vehemence of his denunciation of the "stifling influence of money"[92] that perverts "the minds of the people"[93] and thus has "a powerful impact"[94] on the outcome of electoral campaigns. Yet Wright's proposed remedy is discrete and limited:

> An election campaign is finite in time and focuses on specific ballot decisions regarding specific alternatives. Expenditure limits and other curbs on campaign finance practices are analogous to rules of order at a town meeting, enforced so that the deliberative process is not distorted. The first amendment does not permit curbs on general discussion of political, economic, or social controversies. But, like the loud mouth and long talker at the town meeting, untrammeled spending during an election campaign does not serve the values of self-government . . . .[95]

As Eule, Fiss, and Sunstein all plainly understand, wealth has equally powerful and stifling effects on the "general discussion of political, economic, or social controversies" as it does on election campaigns. But Wright recognizes that public discourse cannot be

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91. Eule, *supra* note 64, at 129-30.
92. Wright, *supra* note 63, at 636.
93. *Id.* at 625.
94. *Id.* at 622.
95. *Id.* at 639 (footnote omitted).

subject to generic managerial control without concomitantly sacrificing central First Amendment values. He therefore embraces a distinction that is, from an empirical point of view, merely arbitrary. But so long as the political function of the attribution of autonomy is kept clearly in mind, some such empirically arbitrary limitation will be necessary whenever autonomy is denied to justify employment of the collectivist theory of freedom of speech.

An important practical implication of this analysis is that the criteria we use to locate autonomy must be politically calibrated by their implications for the value of self-determination. Thus, for example, Sunstein's rigorous preconditions for autonomy are plainly unacceptable for use in the First Amendment context. They are far too stringent practically to apply to the rough and tumble world of actual politics. Applied literally, they would reserve self-government for philosopher-kings. Applied loosely, they would tie the qualification for self-government directly to political perspective, and hence constitute an open invitation to exclude the communicative contributions of those whose views are deemed "reflexively adaptive to unjust background conditions."[96] Similarly, Owen Fiss's attribution of coercion to the constraints of the capitalist social structure is too vague and indiscriminate to coexist peacefully with the value of collective self-determination.

To be frank, I am uncertain whether appropriate criteria of autonomy can ever be satisfactorily established, for the tension between democracy and the attempt to justify the collectivist theory by denying the autonomy of citizens is so very fundamental. One cannot but be struck by the sharp anomaly of regulating democratic elections on the premise that voters are not autonomous and free. It is hard to imagine what kind of an empirical showing could ever suffice to overcome the internal disequilibrium of such a position. And there will always be disturbing possibilities for manipulation and abuse in sanctioning the exclusion of categories of citizens from the polity because of their ascribed lack of freedom. Without denying in principle that such exclusions may be necessary or desirable, I would emphasize that a democratic state can tolerate them only in the most unusual and limited of circumstances.

C.

Both the repudiation of the public/private distinction and the denial of autonomy are arguments exogenous to traditional First

96. Thus, Sunstein concludes that First Amendment protection ought not to be extended to pornography or hate speech because they "have serious and corrosive effects on beliefs and desires." Sunstein, *supra* note 5, at 31-32.

Amendment jurisprudence. They attempt to clear a space for the application of the collectivist theory by negating axiomatic foundations for the application of established First Amendment doctrine. There is yet a third argument for the collectivist theory, however, which adopts a stance that is internal to the received First Amendment tradition.

This argument begins from the premise that public discourse serves the value of self-government because it engenders the sense of participation, identification, and legitimacy necessary to reconcile individual with collective autonomy. Even if public discourse is formally free, it cannot fulfill this function if the actual practices of public debate cause citizens to experience alienation or disaffection. A democratic state must combat these effects if public discourse is to sustain the value of self-determination. This effort may even require the subordination of specific aspects of public discourse to managerial control.

The internal argument for the collectivist theory is visible in the work of J. Skelly Wright, who observes that election campaigns, even if formally free, cannot fulfill their democratic function if they are experienced by citizens as distant, unresponsive, and dominated by wealth. Wright astutely cautions "that it is hazardous to discourage civic spirit, hope, and participation; that disillusionment breeds alienation; that alienation breeds apathy; that apathy menaces the democratic idea."[97] He therefore defends campaign expenditure limitations as a means of fulfilling the very concerns that lie at the core of the received First Amendment tradition.

Because the internal argument for the collectivist theory remains firmly anchored in the values of participation and self-determination, it does not imply that the collectivist theory ought generally to displace traditional interpretations of the First Amendment. It instead forces us to confront the possibility that the achievement of democratic values may, in discrete circumstances, require carefully bounded structures of managerial control.[98] The narrow objective of such structures must be the correction of conditions which cause disabling citizen disaffection.

So, for example, Wright believes that civic alienation from electoral campaigns has been caused by flagrant violations of "the

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97. Wright, *supra* note 63, at 638.

98. In this sense, the internal argument displays a structure of analysis similar to what I have elsewhere identified as the "paradox of public discourse." *See Public Discourse*, *supra* note 35.

ideal of equality,"[99] and he argues that campaign speech ought to be managed so as to instantiate that ideal. Wright understands, however, that even such a beneficent purpose does not alter the fact that citizens subject to managerial control become the heteronomous objects of regulation. His use of the internal argument thus leads Wright to cede priority of place to democratic values, thereby checking the slippage, so apparent in the recent work of Fiss and Sunstein, toward a disturbing loss of serious engagement with the ideal of collective self-government. Wright clearly sees that the organized structure of an election campaign, like the analogous structure of a town meeting, must remain a narrowly bounded island within a more general and uncensored sea of "discussion of political, economic, or social controversies."[100]

It seems to me better to use a spatial metaphor to express such a limited suspension of autonomous self-determination than to use the more common temporal image that may, for example, be found in the often retold parable of Ulysses and the Sirens.[101] Well-known dynamics of power suggest that in actual practice managerial displacements of self-governance are unlikely to be temporary. And certainly the total partition of public discourse from the value of self-determination, however limited in duration, would be unacceptable in a democratic state. In this sense the spatial metaphor properly focuses attention on the relationship between discrete areas of managerial control and the general health of ongoing and free processes of communication. The spatial metaphor emphasizes the necessarily ancillary and subordinate character of the managerial regulation of communicative processes.

According to the internal argument for the collectivist theory, managerial control of discrete domains of public discourse can be justified only by the most pressing necessity, which the internal argument comprehends in terms of circumstances rendering the formal conditions of freedom inimical to the achievement of actual democratic legitimacy. Only a democracy mesmerized by formal freedom could fail to be alarmed by such circumstances. But the internal argument also demands that we face unflinchingly the paradox entailed by establishing structures of managerial control

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99. Wright, *supra* note 63, at 609.

100. *Id.* at 639.

101. *See, e.g.*, JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (1979); Sunstein, *supra* note 78. For a critique of the political use of the metaphor, see Jonathan Schonsheck, *Deconstructing Community Self-Paternalism*, 10 LAW & PHIL. 29 (1991).

that violate formal conditions of freedom in order to recuperate democratic values. Such structures necessarily lose what they hope to achieve. They may thus be acceptable for acts of local rehabilitation, but, if generally imposed, would frustrate the very *raison d'etre* of the democratic enterprise.

We are thus thrown into a world of inconsistency and compromise, the unhappy home of both politics and constitutional adjudication. Our main hope is to keep clearly in view the values that ought to guide our judgment, including and especially the painful conflicts among them. Because its principled application will enforce this divided awareness, the internal argument for the collectivist theory of the First Amendment seems to me the theory's most attractive constitutional justification.

IV.

Contemporary advocates of the collectivist theory, by contrast, tend enthusiastically and uncritically to endorse the theory as a beneficent extension of the progressive, regulatory state. Resistance to the theory is attributed to Lochnerism,[102] to a nostalgic fixation on long-lost Jeffersonian independence.[103] The modern world, we are told, demands a sterner realism, an acknowledgement of pervasive and complex configurations of constraint and heteronomy that can only be mastered through active state intervention.

State intervention, however, implies managerial control, and we ought not to be quite so quick to embrace a world of "undeviating organization" (as members of the Frankfurt school would characterize it).[104] The nightmare vision of Michel Foucault demonstrates clearly enough the true nature of such a world. Structures of control acquire their own life, turn, and bite the progressive hand that establishes them. If we create organizations of heteronomy, we shall all, sooner or later, be condemned to inhabit them. We shall become the subjects of a power not our own.

I do not mean to imply that government regulation does not have its necessary uses. There is no "natural" social order, and government management is indispensable to achieve our desired purposes and ends. Indeed, a public discourse that did not ulti-

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102. *See* David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699 (1991); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 883-84 (1987).

103. Fiss, *supra* note 6, at 1412.

104. MAX HORKHEIMER & THEODOR W. ADORNO, DIALECTIC OF ENLIGHTENMENT 87 (John Cumming trans., 1972).

mately establish managerial organizations designed to attain publicly decided objectives would be merely impotent.[105] But more is at stake in the regulation of public discourse than the simple question of *laissez faire*. Quite beyond values of individual human liberty[106] and personal self-realization[107] lies the significance of the *collective* virtue of self-government. Traditional First Amendment doctrine, with its quaint focus on autonomy and the indeterminacy of national identity, is one of the last remaining areas of constitutional law seriously to engage the project of self-determination. If we discard that project as childish myth, so do we also discard our commitment to democracy, at least as our constitutional tradition has so far understood democracy.

Perhaps that understanding is now ripe for revision. If some are indeed prepared to abandon the Enlightenment framework that has so far governed our appreciation of democratic legitimacy, the debate should be joined directly, and not crabwise, through the unconscious evisceration of the very values in whose name we still purport to act. Certainly in the absence of a convincing alternative normative account of democracy, we ought not willingly and cheerfully abandon our last vestigial commitments to the project of collective independence and freedom, even for the most beguiling visions of progressive reform.

The collectivist theory of freedom of speech, therefore, while useful in subordinate and limited ways, ought not yet to displace traditional First Amendment jurisprudence. We should reserve the theory for those discrete and hopefully rare moments when its use will be necessary to sustain the enterprise of self-governance that continues at least nominally to claim our allegiance.

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105. *See Public Discourse*, *supra* note 35, at 684-85.

106. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989).

107. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).