THE IRONY OF FREE SPEECH

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may have to act to further the robustness of public debate in circumstances where powers outside the state are stifling speech. It may have to allocate public resources—hand out megaphones—to those whose voices would not otherwise be heard in the public square. It may even have to silence the voices of some in order to hear the voices of the others. Sometimes there is simply no other way. The burden of this book is to explore when such exercises of the state's power to allocate and regulate are necessary, and how they might be reconciled with, indeed supported by, the First Amendment.

THE SILENCING EFFECT OF SPEECH

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The First Amendment—almost magisterial in its simplicity—is often taken as the apotheosis of the classical liberal demand that the powers of the state be limited. It provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The Supreme Court has read this provision not as an absolute bar to state regulation of speech but more in the nature of a mandate to draw a narrow boundary around the state's authority.

The precise location of this boundary has varied from age to age and from Court to Court, and even from Justice to Justice, but its position has always reflected a balance of two conflicting interests—the value of free expression versus the interests advanced by the state to support regulation (the so-called countervalues). Sometimes the accommodation of conflicting interests has been achieved through the promulgation of a number of categories of speech that may be subject to regulation. For example, the state has been allowed to regulate "fighting words" but not the "general advocacy of ideas." In other cases, the Court engaged in a more open and explicit

balancing process in weighing the state's interest against that of free speech. The rule that allows the state to suppress speech that poses a "clear and present danger" to a vital state interest might be the best example of this approach. In either instance, the Court has tried, sometimes more successfully than others, to attend to both value and countervalue and to seek an accommodation of the two.

In trying to guide the Court in this process, Harry Kalven, Jr.—in my eyes the leading First Amendment scholar of the modern period—pleaded with the Court to remember that freedom of speech is not "a luxury civil liberty."[1] In a more jocular mood, he expressed the same sentiment in saying, "Honor the countervalues."[2] Kalven was an ardent defender of liberal values, always in favor of limiting the state, yet he felt that in its resolve to protect speech, the Court should not in any way trivialize the interests of the state. At the end of the day, speech might well win, indeed, speech *should* win. But not, Kalven insisted, before the Court gave a sympathetic hearing to what the state was trying to accomplish. The Court must begin by attending to the state's interests and treating them as fully worthy of respect.

The 1960s was an extraordinary period of American law, a glorious reminder of all that it might accomplish. The decade was best known for progress made in racial equality and the reform of the criminal process, but it was also marked by a number of notable free speech victories. When, in his book *A Worthy Tradition,* Kalven celebrated the evolution of First Amendment doctrine over the course of the twentieth century as an example of the law working itself pure, he was referring above all to the free speech decisions of the Warren Court in the 1960s. Although I am sympathetic to this reading of the sixties, I cannot help but wonder whether the free speech decisions of that era represented a fair test of Kalven's faith that

speech would win even if the Court honored the countervalues.

Take the Court's repeated willingness to protect the protest activities of the Southern civil rights movement.[3] In those cases, the Southern states defended their actions in curbing free speech on the ground that they were attempting to preserve order. The Supreme Court listened to that defense with some measure of seriousness, but the plea on behalf of maintaining order was impeached by the racial policies the states were pursuing in the name of that value. Order did not just mean order, but order that preserves segregation. Then, in the years following the Watts riots in Los Angeles in 1965 and the emergence of the black power movement, the claims of order became somewhat distinct from the program of preserving segregation. In that context the countervalue, order, could be engaged more sympathetically, but at the risk that free speech would not prevail. For example, in *Walker v. City of Birmingham,* a majority of the Justices upheld a criminal contempt citation against Dr. Martin Luther King Jr. and his followers for parading in defiance of a restraining order, even though the state court had not given him an adequate opportunity to attack that order on free speech grounds.[4] The case arose in 1963, but the Justices spoke in the different circumstances of 1967 and were guided by the events that they saw before them then.

In truth, most of the Warren Court's First Amendment docket involved cases in which the countervalue advanced by the state was neither particularly alluring nor compelling, and for that reason the Court's decisions in favor of free speech generated widespread support. Examples are such landmarks as *New York Times v. Sullivan* (1964), *Brandenburg v. Ohio* (1969), and even, if it can be included within the reaches of the Warren Court, the *Pentagon Papers* case (1971). Like the

early civil rights protest cases, these decisions are indeed important free speech victories, in that an opposite result would have been a profound setback for the cause of freedom. But at the same time we should recognize that these cases were not a true test of Kalven's faith that free speech would prevail.

In *New York Times v. Sullivan,* the Court curbed the state's capacity to protect reputation, but in fact the reputational interest in jeopardy was that of public officials, who, in the Court's view, necessarily assumed certain risks to their reputation when they entered the political fray.[5] In *Brandenburg v. Ohio,* the Court protected the advocacy of illegal conduct and tightened up the "clear and present danger" test, but it did so in a context devoid of any true danger;[6] the case involved a sparsely attended Klan rally in an isolated farm in Ohio. In the *Pentagon Papers* case the Court refused to give the Attorney General the injunction he sought against the publication of a Department of Defense document that was said to threaten national security.[7] Kalven marveled at the fact that this decision was handed down even when the nation was at war.[8] But there was less to the countervailing claim of national security advanced by the Attorney General than first met the eye. Although the document in question was based on classified documents and was itself classified as "Top Secret," in truth it consisted of nothing more than a historical study of our involvement in Vietnam up until 1968. Moreover, the war was unpopular in many quarters; most of the study was in the public domain by the time the Court spoke; and though the Court did in fact deny the government an injunction against further publication, a majority of the Justices made clear that the government could protect a legitimate interest in secrecy by use of the criminal law.

The situation is, however, entirely different with three of the free speech issues that dominate public discussion today—

hate speech, pornography, and campaign finance. They strain, indeed shatter, the liberal consensus because the countervalues offered by the state have an unusually compelling quality. These contemporary issues are a truer test of Kalven's faith in the ability of free speech to prevail over the countervalues.

IN A MOST decisive manner, the American constitutional order and its governing political philosophy were reshaped by *Brown v. Board of Education*[9] and the transformations that followed. Whereas the liberalism of the nineteenth century was defined by the claims of individual liberty and resulted in an unequivocal demand for limited government, the liberalism of today embraces the value of equality as well as liberty. Furthermore, contemporary liberalism acknowledges the role the state might play in securing equality and sometimes even liberty. Admittedly, *Roe v. Wade*[10] and its condemnation of the criminalization of abortion have given new vitality to the claims of individual liberty, but never, I would insist, to the exclusion of equality. Indeed, as most commentators and a number of the Justices now recognize, *Roe v. Wade* is not fully explicable as a matter of constitutional theory unless some account is taken of equality and the consequences that criminalizing abortion would have upon the social status of women.[11]

This transformation of the constitutional order and of liberalism itself was not the work of the Supreme Court alone. In the 1960s all branches of government coordinated their efforts and produced such singular measures as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968.[12] In the ensuing decades, as the Court and the presidency moved to the right, the leadership role fell to Congress.[13] The momentum toward equal treatment continued even during the Reagan and Bush years and resulted in the

Voting Rights Act of 1982, the Americans with Disabilities Act of 1990, and the Civil Rights Act of 1991.[14]

As a result of these developments, more and more spheres of human activity—voting, education, housing, employment, transportation—have come to be covered by antidiscrimination law, so that today there is virtually no public activity of any significance that is beyond its reach. Moreover, the protection of the law has been extended to a wide array of disadvantaged groups—racial, religious and ethnic minorities, women, the disabled. Soon it is likely to be extended to groups defined by their sexual orientation. Over the last forty or fifty years, civil rights laws have become essential to the American legal order.

The welfare policies of the modern state fall short of the lofty ambitions proclaimed by those who launched the War on Poverty in the 1960s. Today we are more tolerant of economic inequalities. But norms protecting the poor against discrimination still have their force in certain special domains, such as the criminal and electoral processes.[15] Moreover, despite repeated assaults over the last twenty-five years, contemporary liberalism remains committed to satisfying the minimum needs of the economically downtrodden, providing them, though sometimes inadequately, with access to food, housing, and medical care. Like the civil rights measures, these welfare policies are actively embraced by contemporary liberalism.

Against this background, it is no surprise that in confronting the regulation of hate speech, pornography, and campaign finance today, many liberals find it difficult to choose freedom of speech over the countervalues being threatened. The liberals' commitment to speech remains strong, as evidenced by their staunch support for the flag-burning decisions,[16] but in all three of these areas that commitment is being tested by exercises of state power on behalf of another of liberalism's defining goals—equality.

Hate speech is regulated by the state on the theory that such expression denigrates the value and worth of its victims and the groups to which they belong.[17] Equality can also be found at work in the new assault on pornography by some feminists, who object to pornography not for religious or moral reasons but on the ground that it reduces women to sexual objects and eroticizes their domination.[18] In their view pornography leads to violence against women, including rape and domestic abuse, and beyond that to a pervasive pattern of social disadvantage, both in matters most intimate and in the public sphere. As with hate speech and pornography, the regulation of expenditures in electoral campaigns is also impelled by egalitarian considerations.[19] Some defend such regulation as a device to prevent corruption, but it can be understood in more generous terms—as a way of enhancing the power of the poor, putting them on a more nearly equal political footing with the rich, thus giving them a fair chance to advance their interests and enact measures that will improve their economic position.

Each generation tends to emphasize its uniqueness, and so one must be careful not to overstate the significance of the present moment. Regulations like the ones that so concern us today have been considered by the courts in earlier times. Yet I believe an important difference can be found in the depth of the legal system's commitment to equality today. Even in the 1960s, equality was but an aspiration, capable of moving the nation but still fighting to establish itself in the constitutional arena. Today, equality has another place altogether—it is one of the center beams of the legal order. It is architectonic.

When obscenity regulations were debated during the 1960s, consideration was of course given to the alleged power of sexually explicit films and magazines to arouse sexual drives and lead to rape. Little attention was given, however, to the effect that their perceived risk of rape might have on the day-to-day behavior of women, and to the impact pornography

might have on the way women are viewed in society. In this formative period of obscenity doctrine, the egalitarian revolution in the law brought about by *Brown* had begun to move from blacks to the poor but had not yet reached women, not even at the level of ideology. True, a ban on gender discrimination was placed in the fair employment section of the Civil Rights Act of 1964, but as all the world knew, that addition was intended to sink the measure rather than to extend it.[20] Until the 1970s, the Civil Rights Act ban against employment discrimination based on sex was systematically slighted by the enforcement agencies, though in the last twenty years great efforts have been made to catch up. Today, gender equality has as strong a claim to the law's attention as does racial equality.

Many participants in the current debates readily acknowledge the pull of equality but refuse to capitulate to it. They honor the countervalue, yet resolve the conflict between liberty and equality in favor of liberty. The First Amendment should be first, they argue.[21] Such a position makes claim to the more classical conception of liberalism, and perhaps for that very reason has achieved a privileged position in current debates. It nevertheless seems vulnerable to me, because no reason is given for preferring liberty over equality—for preferring the First Amendment over the Fourteenth. The firstness of the First Amendment appears to be little more than an assertion or slogan. Those favoring liberty often refer to the role that free speech played in securing equality during the 1960s, suggesting that free and open debate is a precondition for achieving a true and substantive equality. But certainly the converse may also be true: that a truly democratic politics will not be achieved until conditions of equality have been fully satisfied.

In saying this, my intention is not to favor equality over liberty, to prefer the Fourteenth Amendment over the First Amendment, but only to acknowledge the difficulty, perhaps

the impossibility, of discovering a method of choosing between these two values. The regulation of hate speech, pornography, and political expenditures forces the legal system to choose between transcendent commitments—liberty and equality—and yet the Constitution provides no guidance as to how that choice should be made. I therefore cannot agree with those partisans, including Catharine MacKinnon, who defend such regulations by simply asserting the priority of equality. They seem to be mirroring the error of the libertarians who assert the priority of speech.

I am also troubled by the attempt by Professor MacKinnon and others to work their way out of this conflict in ultimate values by defining liberty (in the form of free speech) out of the equation. MacKinnon argues that pornography is not speech at all but rather action, thus denying it the privileged status accorded to speech as an especially protected liberty.[22] In making this argument, she draws on a mode of analysis that was advanced in academic circles by Thomas Emerson at Yale[23] and that was once expounded by Justice Hugo Black.[24] I myself have doubts as to the usefulness of the speech/action distinction as a general First Amendment methodology because it masks all the hard judgments that the First Amendment requires. But even putting those more general concerns to one side, it seems to me that the distinction between action and speech is misplaced in this context.

Some forms of pornography—for example, movies and photographic magazines—may use women in the very process by which they are produced; the women who participate in such a productive process may well be engaged in action. Similarly, pornography may be one of the many causes or triggers of human action, including masturbation and violence against women. For that reason, pornography may be properly considered, as Catharine MacKinnon once said, as a mechanism

of transmitting action from one domain to another. Still, I would insist, pornography itself is not reducible to either the action that produced it or the action that it causes but is a form of speech. Pornography is an expression of the creators and producers of the work and is most certainly part of the discourse by which the public understands itself and the world it confronts. A similar point can be made about hate speech, even when the speech in question might be characterized as "fighting words," "intimidation," or "harassment." Like pornography or for that matter much of art and literature, hate speech may appeal to our affective sentiments and be both the cause and the product of human action, but nonetheless is speech.

The effort to define the speech element out of hate speech and pornography defies common understanding of what is speech. An analogous argument was advanced in the context of campaign finance by Judge Skelly Wright in the 1970s, but in this case the argument has ordinary usage on its side.[25] His purpose was to justify regulating political expenditures against the argument that it violated the speech rights of the person making these expenditures. To put the regulations beyond the reach of the First Amendment, Judge Wright insisted that money is not speech. Once again, my inclination is to resist the easy way out and to claim, in defiance of common usage, that money is speech, or more accurately, that the act of spending money is as expressive an activity as parading and as important a method of advancing one's political values as selling a book.

People sometimes give money to candidates or spend money on behalf of a cause as a way of communicating something about themselves or their beliefs. But even when political expenditures are purely instrumental and lack any expressive elements, they can still make claim to the First Amendment. The instruments needed to make a speaker's message effective and

to bring the ideas to the public are protected by the First Amendment, though perhaps not as intensely as the speech itself. Account must be taken of the fact that the First Amendment protects not only the writing of books but also the facilities and institutions necessary to distribute books to the public.

IT MAY THUS seem that we have arrived at an impasse. We cannot avoid the problem posed by state regulation of hate speech, pornography, and campaign finance by simply defining speech out of the equation, and we have no principled way of resolving the conflict between liberty and equality. As a result, liberals have been divided, almost at war with themselves, some favoring liberty, some equality. We may have to live with this sorry state of affairs; but there may be another way of framing the issue that moves beyond this battle between transcendent values. Perhaps the regulations in question can be seen as themselves furthering, rather than limiting, freedom of speech

This understanding of what the state is seeking to accomplish would transform what at first seemed to be a conflict between liberty and equality into a conflict between liberty and liberty. This formulation would not make all disagreements go away, nor would it obviate the need for hard choices, but it would place those choices within a common matrix. It would make the controversy over regulation less a battle over ultimate values, a fruitless inquiry into whether the Fourteenth or the First Amendment comes first, and more a disagreement among strong-minded people working to achieve a common purpose: free speech.

In the history of free speech, the state has sometimes defended the regulation of speech in the name of liberty. For example, during the height of the Cold War, suppression of the

Communist Party and its leadership was often justified in terms of saving America from Stalinism.[26] The fear was that communist propaganda would, in time, be persuasive and would lead to the overthrow of the government or even the establishment of a totalitarian dictatorship. Characteristically, liberals responded that the remedy was more speech, not state regulation.

With pornography, hate speech, and campaign regulation, however, the alleged threat to freedom coming from speech is more direct and immediate. The claim is not that the speech will persuade listeners to act in a certain fashion—for instance, creating a new form of dictatorship or subjugating various disadvantaged groups in society. Rather, the fear is that the speech will make it impossible for these disadvantaged groups even to participate in the discussion. In this context, the classic remedy of more speech rings hollow. Those who are supposed to respond cannot.

It is asserted that hate speech tends to diminish the victims' sense of worth, thus impeding their full participation in many of the activities of civil society, including public debate. Even when these victims speak, their words lack authority; it is as though they said nothing. This silencing dynamic has also been attributed to pornography.[27] In this view, pornography reduces women to sexual objects, subordinating and silencing them. It impairs their credibility and makes them feel as though they have nothing to contribute to public discussion. In an even clearer case, unlimited political expenditures not only perpetuate the unequal distribution of wealth and put the poor at a disadvantage in the political arena but also may have the effect of silencing the poor. The rich may, for example, so dominate advertising space in the media and other public domains that the public will, in effect, hear only their message. As a result, the voice of the less affluent may simply be drowned out.[28]

In each of these cases the agency threatening speech values is not the state itself. Nor need it be. The call for state intervention is based not on the theory that the activity to be regulated is inherently a violation of the First Amendment (a claim that would require, as a purely technical matter, a showing of state action) but only on the theory that fostering full and open debate—making certain that the public hears all that it should—is a permissible end for the state. Even if the silencing dynamic is wrought solely by private hands—for example, by the person who hurls racial epithets or publishes pornography or uses superior economic resources to dominate political campaigns—there is ample basis for intervention. The state is merely exercising its police power to further a worthy public end, as it does when it enacts gun control or speed limit laws. In this case, the end happens to be a conception of democracy which requires that the speech of the powerful not drown out or impair the speech of the less powerful.

While the promotion of democratic values is a worthy—indeed, a compelling—public purpose, a question can be raised about the method by which that goal is pursued, specifically, whether it is consistent with the First Amendment. State regulation of the type we are considering might promote, under the best of assumptions, the speech rights of women, minorities, and the poor, but it necessarily diminishes the speech rights of racists, pornographers, and the rich. What gives the state the right to choose the speech rights of one group over the other? The answer to this question depends in large part on how we conceive the speech interests at stake, which in turn falls back on the distinction between libertarian and democratic conceptions of freedom.

If nothing more were involved than the self-expressive interests of each group, say the desire of the racist and the interest of the would-be victim each to speak his or her mind, then

there would indeed be something arbitrary about the state's choosing one group over the other. I believe that something more is involved, however. The state is not trying to arbitrate between the self-expressive interests of the various groups but rather trying to establish essential preconditions for collective self-governance by making certain that all sides are presented to the public. If this could be accomplished by simply empowering the disadvantaged groups, the state's aim would be achieved. But our experience with affirmative action programs and the like has taught us that the matter is not so simple. Sometimes we must lower the voices of some in order to hear the voices of others.

In conceiving of state regulation of hate speech, pornography, and campaign finance in this manner, equality once again makes an appearance. But now the value is rooted in the First Amendment, not the Fourteenth Amendment. The concern is not simply with the social standing of the groups that might be injured by the speech whose regulation is contemplated. Rather, the concern is with the claims of those groups to a full and equal opportunity to participate in public debate—the claims of these groups to their right to free speech, as opposed to their right to equal protection. The state, moreover, is honoring those claims not because of their intrinsic value or to further their self-expressive interests but only as a way of furthering the democratic process. The state is trying to protect the interest of the audience—the citizenry at large—in hearing a full and open debate on issues of public importance.

RECONCEPTUALIZING the problems presented by hate speech, pornography, and campaign finance in this way might seem to accord easily with the traditional framework. It turns out that the countervalue we take seriously is not the bland public

order, nor even the more alluring value of equality, but democracy itself. Indeed, one way of describing the situation is simply to say that now speech appears on both sides of the equation, as a value threatened by the regulation and as the countervalue furthered by it. But even this way of putting the matter radically understates the depth of the challenge we confront. Whereas the traditional framework rests upon the old liberal idea that the state is the natural enemy of freedom, now we are being asked to imagine the state as the friend of freedom.

Resistance to this reversal of the traditional dialectic of freedom is considerable. In part it is founded on an absolutist reading of the First Amendment as a bar to any state regulation of speech whatsoever.[29] This view of the First Amendment proclaims that "no law" means "no law," which is certainly true, but as Alexander Meiklejohn emphasized, what the First Amendment prohibits is laws abridging "the freedom of speech," not a freedom to speak.[30] The phrase "the freedom of speech" implies an organized and structured understanding of freedom, one that recognizes certain limits as to what should be included and excluded. This is the theory upon which speech regulation that aims to protect national security or public order is sometimes allowed; it should be equally available when the state is trying to preserve the fullness of debate. Indeed, the First Amendment should be more embracing of such regulation, since that regulation seeks to further the democratic values that underlie the First Amendment itself.

Although the Supreme Court has never taken kindly to absolutism in its reading of the First Amendment, over the course of the last twenty-five years it has increasingly fallen back on a principle that would seriously impair—though perhaps not altogether bar—the state's capacity to protect freedom. This is the principle of content neutrality, which prohibits the state from regulating speech on the basis of what is being said.

Starting with *Buckley v. Valeo,*[31] the Court has adamantly resisted mandatory limitations on political expenditures, even on the premise that these limitations prevent distortions of public debate. Time and again, the Court has declared that the First Amendment prohibits the state from restricting the voice of some so as to enhance the voice of others.[32] No justification was offered for this stance when it was initially proclaimed, but it seems to make appeal to the principle of content neutrality. In later cases, the Court explicitly linked the *Buckley* manifesto to that principle.[33]

On the issue of hate speech, the Court has not been so coy. In the 1992 decision in *R.A.V.* v. *St. Paul*—the so-called cross-burning case—the Court struck down the City of St. Paul's hate speech ordinance on the ground that it was not content neutral.[34] The Court assumed the ordinance proscribed only "fighting words," a category of expression that was within the power of the state to regulate or even suppress. Nonetheless, the Court invalidated the ordinance on the ground that it was partial. The "fighting words" of racists or sexists were prohibited but not those of individuals fighting racism or sexism. The state was favoring the tolerant over the intolerant. As Justice Scalia, writing for the majority, put it, "St. Paul has no authority to license one side to fight free style, while requiring the other to follow Marquis of Queensbury Rules."[35]

The Supreme Court has allowed the regulation of obscenity, provided that it stays within the bounds provided by the so-called *Miller* test,[36] but it has not yet had occasion to hear a case involving a regulation specifically structured to respond to feminist concerns regarding pornography. Its decision in the hate speech case, however, is indicative of how it might rule. Indeed, in justifying his conclusion in *R.A.V.,* Justice Scalia took as his first premise the view that a partial regulation of obscenity—a law that proscribed only obscenity that

was critical of the city government—would be unconstitutional because it transgressed the rule requiring content neutrality.[37] Several years earlier a similar line of reasoning was used by Judge Frank Easterbrook in the Seventh Circuit Court of Appeals to strike down an Indianapolis ordinance that was aimed specifically at sexually explicit material that subordinated women.[38]

The principle of content neutrality bars the state from trying to control the people's choice among competing viewpoints by favoring or disfavoring one side in a debate. So understood, the principle has powerful appeal and can be profitably applied in many contexts. The abortion protests of the modern day provide one. It would violate democratic principles for the state to adopt a rule protecting parades and demonstrations by those who favor the right to abortion while clamping down on "pro-life" forces. On the other hand, content neutrality is not an end in itself and should not be reified. The principle responds to some underlying concern that the state might use its power to skew debate in order to advance particular outcomes, and this purpose should always be kept in mind. Accordingly, the principle should not be extended to situations like hate speech, pornography, and political expenditures, in which private parties are skewing debate and the state regulation promotes free and open debate. In those cases, the state may be disfavoring certain speakers—the cross-burner, the pornographer, or the big spender—and make judgments based on content, but arguably only to make certain that all sides are heard. The state is simply acting as a fair-minded parliamentarian, devoted to having all views presented.

In an earlier period, a number of First Amendment theorists, including Meiklejohn and Kalven—the architects of the liberal position—acknowledged that the state might sometimes have to act as a parliamentarian. But they assumed that the state

could discharge that function simply by following Robert's Rules of Order: a predetermined method of proceeding based not on what was transpiring in debate but rather on some universal abstract principle like temporal priority.[39] Today, that conception is not sufficient. A parliamentarian must be sensitive to the limitations that resources—such as time and money—place on debate and might well have to say, "We have heard a lot from this side already. Perhaps others should get a chance to speak before we vote." A fair parliamentarian wants vigorous expression of views but is also sensitive to the excesses of advocacy and the impact of such excesses on the quality of debate. A fair parliamentarian might sometimes have to interrupt and say, "Can't you restrain yourself? You have been so abusive in the way you have put your point that many have withdrawn from the debate altogether."

Of course, any regulation of debate is likely to have an impact upon the public's final decision on a policy issue; any regulation of process is likely to affect outcome. Hearing two sides of a debate may well produce a decision different from that arrived at if only one side is heard. In that sense, the use of the principle of content neutrality to bar the regulation of hate speech, pornography, and campaign finance might seem similar to its use in the case of abortion protests, where state regulation would have the effect of favoring one side of the debate over the other. But there is a crucial difference.

When the state acts as a parliamentarian, its purpose is not to determine outcome, nor even to preserve public order (as it might be in the abortion protest case) but rather to ensure the robustness of public debate. Such a goal changes the analysis altogether. It is not that the enrichment of public debate is a more worthy goal than, say, the maintenance of public order, and thus more capable of excusing the impact that regulation has upon process and thus upon outcome. It may be that; but I am making a more fundamental point, namely, that the skewing of outcome by the enhancement of debate is no cause for concern. There is no wrong. What democracy exalts is not simply public choice but rather public choice made with full information and under suitable conditions of reflection. From democracy's perspective, we should not complain but rather applaud the fact that outcome was affected (and presumably improved) by full and open debate.

In speaking of the state as parliamentarian, Meiklejohn and Kalven treated society as though it were one gigantic town meeting. Recently, Professor Robert Post has insisted that such a view ultimately rests on antidemocratic premises, and he has criticized this way of understanding society.[40] According to Post, while actual town meetings take place against a background in which the participants agree to an agenda—sometimes implicitly or informally—no such assumptions can be made about civil society. In the constant conversation that is civil society, no one is ever out of order and no idea is ever beyond consideration. Civil society, he argued, can be thought of as a town meeting only if it too has an agenda, but the setting of an agenda would require a certain measure of dictatorial action by the state, what Post would regard as an exercise of its managerial powers, thus flouting the radical democratic—almost anarchic—possibilities that might be realized. Genuine democratic principles, according to Post, require that citizens set the public agenda and always be free to reset it.

The notion of a town meeting does indeed presuppose an agenda—there must be some standard of relevance—but agendas, either of actual town meetings or of the more metaphoric type, need not be set by the deliberate action of the participants nor imposed by an external force, such as the state. They can evolve more organically. In democratic societies there is always an agenda structuring public discussion—one week nuclear proliferation, the next health care—even though that agenda is not set by a particular agent or authority.

Society is more than a town meeting, and the state is significantly more than a parliamentarian. The state is also the embodiment of distinctive substantive policies, and those in control of its power have a vested interest in how debates are resolved. Sly politicians may say that they are regulating content in order to enrich public debate and to make certain that the public hears from all sides, but their purpose may, in fact, be to determine outcome or to further certain policies. This danger strikes me as particularly acute in the area of campaign finance, where incumbents may limit expenditures as a way of insulating themselves from the challenges of newcomers.

This danger must be confronted and dealt with directly. Those in charge of designing institutions should place the power to regulate content—to act as a parliamentarian—in agencies that are removed from the political fray. It is never a good idea to choose to chair a meeting someone who is keenly invested in one outcome. In addition, a heavy burden of scrutinizing the state's action should fall to the judiciary, especially because it stands apart from the political fray. In discharging this task, the judiciary should not look at the motive—stated or otherwise—for the action but must carefully determine what the overall effect of the state regulation is upon public debate. The court must ask itself: Will the regulation actually enhance the quality of debate, or will it have the opposite effect?

An inquiry into the impact of state intervention on the quality of debate is a difficult, somewhat tortuous exercise, and it is hard to know how it might come out in the three problems under consideration. I have grouped hate speech, pornography, and campaign finance together because of my theoretical interests—because I perceive them as presenting a similar challenge to received First Amendment doctrine—and not because I believe they all need to be resolved the same way. Although it is clear to me that, in grappling with these issues, the courts

have erred in relying on a reified version of the principle of content neutrality, it is possible that even within a framework that conceives of the state as a parliamentarian and allows it sometimes to make content judgments, the courts might in fact conclude that the action of the state narrows debate and thus, in result alone, still come out the way they did.

That said, I do not believe that *Buckley v. Valeo,* invalidating the limitations on political expenditures, could be defended in these terms. The law in question in that case was enacted in the wake of Watergate and rested on a sober congressional judgment, amply supported by the evidence, about the distorting effect that unlimited political expenditures have on politics. But hate speech and pornography present more difficult issues. The silencing effect attributed to these two forms of speech depend on a more subtle psychological dynamic—one that disables or discredits a would-be speaker. In the specific case that comes before the court, the dynamic might not be present, or the chosen correctives might be clumsy, causing more distortions in public debate than they cure. The traditional remedy—more speech—might be far better. It is hard to be certain about these matters, especially when operating at this level of abstraction. Two points can be made about hate speech and pornography, however.

First, a failure of theory can lead to a failure of inquiry. Unable to appreciate or even acknowledge the possibility that they were confronted with a situation in which speech was both the threatened value and the countervalue, the courts in the St. Paul and Indianapolis cases invalidated the laws in question without even giving the state an opportunity to show how these forms of speech actually distort public debate or that the regulatory measures in question were appropriate correctives. The courts declared the laws invalid on their face.

Second, in arriving at their judgments, the courts in these

cases failed to give any weight to the Fourteenth Amendment version of the equality value, and this failure strikes me as an error. From the perspective of the First Amendment, we must attend to the silencing effect of hate speech and pornography on disadvantaged groups—how certain forms of speech violate the equal right to free speech of those groups; but this attention should not blind us to the impact that speech has upon the broader social status of those groups, that is, to the Fourteenth Amendment ramifications of those two forms of speech.

Even if the Fourteenth Amendment does not take priority over the First, that does not mean that the Fourteenth Amendment should be accorded no weight at all in the judicial calculus. Denying the priority of the Fourteenth Amendment does not obliterate it. It may have been hard to sustain the St. Paul hate speech ordinance and the Indianapolis pornography ordinance simply as speech-enhancing measures, but it may have been possible to compensate for the deficit of the First Amendment analysis and to tip the scale in favor of the state by broadening the focus of inquiry and taking into consideration the further cause of equality. All the countervalues should be honored.

A more powerful state creates dangers, there is no denying that; but the risk of these dangers materializing and an estimate of the harm that they will bring into being has to be weighed against the good that might be accomplished. We should never forget the potential of the state for oppression, never, but at the same time, we must contemplate the possibility that the state will use its considerable powers to promote goals that lie at the core of a democratic society—equality and perhaps free speech itself.

ART AND THE ACTIVIST STATE

2

In the history of political philosophy, the state has taken many forms. In the most familiar, the state acts in what might be called a regulatory manner, issuing commands and prohibitions and using the power at its disposal to enforce those directives. This is how the state typically acts in the criminal law—the state as policeman—and also in civil proceedings when it assesses damages and issues injunctions, and in a great deal of the administrative process when it issues cease-and-desist orders.

There is, however, another sphere of state activity of growing importance in the twentieth century, in which the state acts not as a regulator but as an allocator.[1] In this guise it awards licenses, builds and rents apartments, hires and fires people, buys books for libraries, funds and manages universities, and provides money for the arts. Some of these activities have no discernible connection to freedom of speech, but many do, either because subsidies are provided to speakers or because the award of benefits, such as jobs or passports, is tied to certain conditions affecting speech.