1993

Autonomy and Distrust

Geoffrey R. Stone

AUTONOMY AND DISTRUST

GEOFFREY R. STONE*

Robert Post offers us two competing conceptions of the First Amendment—the "autonomy" model and the "collectivist" model. According to Post, it is the autonomy model that has dominated the Supreme Court's First Amendment jurisprudence. The collectivist model, now in vogue among academics, has played only a minor role. Although I agree with the latter observation, I do not agree with the former, at least not without some important qualification.

Post's primary evidence for the claim that the Court has favored the autonomy over the collectivist model is that the Court historically has rejected government efforts to regulate speech in order to improve the quality of public debate. Post is correct in concluding that this shows that the Court is skeptical of collectivism. But the reason the Court has rejected such efforts is not because it has embraced what he describes as the autonomy model. It is, rather, because it has adopted a third model—a variation on the pure autonomy model—that combines the concern with autonomy with a deep distrust of government efforts to regulate public debate.

Like the autonomy and collectivist models, this third model, which for lack of anything better I shall call the "autonomy/distrust" model, also derives out of our concern with self-government. But unlike the pure autonomy model, which places its distinctive emphasis on the protection of individual liberty in order to promote public debate, and unlike the collectivist model, which places its distinctive emphasis on the authority of government to regulate expression in order to promote "sound" public deliberation, the autonomy/distrust model places its distinctive emphasis on a combination of individual autonomy with a deep-seated distrust of government efforts to regulate public debate.

As already noted, according to both Post and the collectivists, the autonomy model has dominated the Supreme Court's First Amendment jurisprudence and has shaped what Owen Fiss has

* Harry Kalven, Jr. Professor of Law and Dean, The University of Chicago Law School. I would like to thank my colleagues David Strauss and Cass Sunstein for their always sage advice.

called our "Free Speech Tradition." Fiss describes the situation as follows: Under our Free Speech Tradition, "the freedom of speech guaranteed by the First Amendment amounts to a protection of autonomy—it is a shield around the speaker."[1] Under this view, "autonomy is protected, not because of its intrinsic value, . . . but . . . as a means . . . of collective self-determination."[2] "The Free Speech Tradition assumes that by leaving individuals alone . . . a full and fair consideration of all the issues will emerge." "The premise is that autonomy will lead to rich public debate."[3]

This may be an accurate statement of what someone means by the autonomy model, but it is an inaccurate and inadequate understanding of our First Amendment jurisprudence. If we were to ask ourselves what First Amendment doctrine would have to look like if the Court actually had embraced the pure autonomy model, we would predict that the central issue in every case would be whether the challenged law unduly limits the opportunities of individuals for free expression.[4]

This is not, however, our actual First Amendment doctrine. To the contrary, current First Amendment doctrine is much richer and more complex than the autonomy model would suggest. Consider, for example, the content-based/content-neutral distinction, which plays a central role in the Court's First Amendment jurisprudence and which, as I shall explain, has nothing to do with autonomy.

In general, and to vastly oversimplify, the Court gives its highest scrutiny to viewpoint-based restrictions of speech, such as a law providing that "no person may criticize the war"; it gives something akin to intermediate scrutiny to subject-matter restrictions, such as a law providing that "no one may make political speeches on a military base"; and, it employs a form of ad hoc balancing to content-neutral restrictions, such as a law that restricts leafleting in public buildings.[5]

---

1. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409-10 (1986).

2. *Id.*

3. *Id.*

4. Indeed, those commentators who expressly favor a pure autonomy-based theory of the First Amendment have made precisely this suggestion, arguing, for example, that First Amendment doctrine, properly understood as premised on individual autonomy, should focus exclusively on the extent to which the challenged law "reduces the sum total of information or opinion disseminated." Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 128 (1981).

5. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

Although the Court's analysis of content-neutral restrictions focuses largely on the protection of autonomy,[6] its analysis of content-based restrictions derives in large part from the Court's quite distinct concerns with impermissible government motivation and distortion of public debate.

As the Court has long recognized, it is a central precept of our First Amendment jurisprudence that government may not restrict the expression of an idea merely because it disapproves of the idea and fears that citizens may unwisely adopt it in the course of political debate. This precept drives much of our free speech doctrine and lies at the very heart of the content-based/content-neutral distinction.

This is so because even when government offers an explanation for restricting speech other than its mere disapproval of the idea expressed, for example—"listeners may be persuaded to act unlawfully if they hear the speech"—there is always the risk that this explanation is a mere pretext and that the government's real motivation is to suppress the offending point of view. The content-based/content-neutral distinction tracks this concern, for viewpoint-based restrictions are most likely to be the product of such motivations, content-neutral restrictions are least likely to be the product of such motivations, and subject-matter restrictions fall somewhere in between.

The concern over distortion of public debate works in much the same manner. That is, one factor the Court considers in evaluating the constitutionality of particular restrictions on speech is the extent to which the restriction not only limits the opportunities for free expression, but does so in a content-differential manner so as to alter what would be the distribution of views without the restriction.

I want to emphasize that the Court's concern here is not with preserving some ideal distribution of views that perfectly captures what we might think to be "quality" public debate. Rather, the baseline that is sought to be preserved is the actual distribution of views that exists in the real world, and that is not the product of intentional government intervention. The reason for this concern is not a naive belief that this actual distribution is necessarily ideal but, rather, a distrust of government efforts that have the purpose or effect of altering that distribution.[7]

---

6. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

7. The concern, in other words, is that whatever problems may exist in the distri-

Like the concern with impermissible government motivation, the concern with distortion of public debate helps drive the Court's content-based/content-neutral distinction, for viewpoint-based restrictions are most likely to distort public debate in this manner, content-neutral restrictions are least likely to distort public debate in this manner, and subject matter restrictions fall somewhere in between.[8]

Now, the key point in all of this is that none of it is responsive to the pure autonomy model of the First Amendment. It is the Court's concern, both implicitly and explicitly, with impermissible motivation and distortion of public debate that belies the claim that we can sensibly understand our Free Speech Tradition in terms of the pure autonomy model; for whatever doctrines such an approach would yield, they surely would look nothing like our contemporary First Amendment jurisprudence.

Why does any of this matter? Well, suppose our Free Speech Tradition really was premised on the pure autonomy model. We know, of course, that under that Tradition the right of the individual to speak is not absolute. To the contrary, individual autonomy may be restricted in order to further a broad range of competing government interests. In appropriate circumstances, for example, speech may be limited because it is too noisy, or too disruptive, or too dangerous.

Under a pure autonomy model, one would simply weigh the extent to which any particular restriction of speech limits the opportunities for free expression against such competing government interests. Against such a background, the collectivist claim might seem quite sensible. After all, if we can legitimately restrict speech to promote quiet and order, surely we can restrict it to promote quality public debate as well.

What this masks, however, is the direct conflict between the collectivist agenda and the Court's traditional—and in my view healthy—distrust of government efforts to regulate public debate. Even though collectivism may seem to be merely one more reason for regulating speech when we understand First Amendment doctrine entirely in terms of autonomy, it looks quite different when we see it through the lens of distrust. It is for this reason that we

---

bution of views in public debate structured without intentional government intervention, the situation is only likely to be made worse by such intervention because of the incentives and motives that are likely to distort government action in this realm.

8. *See generally* Stone, *supra* note 3, for a more comprehensive discussion of this issue.

must understand the central role that distrust, as well as autonomy, plays in our Free Speech Tradition.

All of this, of course, is quite abstract. I will therefore trace through a few simple, but concrete hypotheticals to illustrate the interaction of autonomy and distrust in existing doctrine and to show how that doctrine responds to at least a few of the collectivist proposals.

The first thing we should note about the autonomy/distrust model is that it does not reject as necessarily illegitimate all governmental efforts to improve pubic debate. Consider, for example, a law requiring all shopping center owners to permit individuals to distribute leaflets on the premises of the shopping center. The purpose of the law is to expand the opportunities for free expression and, thus, to enhance the quality of public deliberation. Under the prevailing autonomy/distrust model, this would be seen as a perfectly legitimate governmental interest and, as we know from the Court's decision in *PruneYard Shopping Center v. Robins*,[9] such a law would be sustained. Similarly, a law granting every taxpayer a $1,000 tax credit, to be used by the taxpayer to support political candidates of her choice, also would be upheld. These laws are acceptable because they are content-neutral, thus reducing the concerns with impermissible motivation and distortion, and because they are subsidies that do not directly limit any individual's autonomy.

At the other extreme, consider a state law that prohibits Democrats from spending more than $1 million in their campaigns for Congress, but does not place a similar limit on Republicans, because, in the view of the state legislature, there already are "too many Democrats in Congress." Or, to take an even more extreme example, consider a law prohibiting anyone to advocate the repeal of the federal antidiscrimination laws because such repeal would be a "terrible" idea and public debate would be "better" without it. Both of these laws clearly would be invalid under existing doctrine, for they significantly restrict autonomy in an explicitly viewpoint-based manner.

Between these extremes is a vast gray area. Consider, for example, a law granting $20 million to the Democratic Party because it was outspent by that amount in the last election by the Republicans, or a policy of the National Endowment for the Arts that refuses to support art that promotes feminism. Although

9. 447 U.S. 74 (1980).

neither of these laws involves a direct restriction on anyone's autonomy, both clearly would be invalid under existing doctrine, because they are explicitly viewpoint-based.

Another variation, presenting somewhat different issues, would be a law prohibiting any person to spend more than $1,000 per year in support of any candidate for President. Although the collectivists probably would uphold this, we know from *Buckley v. Valeo* [10] that such a law is invalid under the prevailing autonomy/distrust model. The reason for this conclusion is not, however, obvious.

Because the law is content-neutral, it does not appear to trigger core First Amendment concerns about impermissible motivation or distortion of public debate. On the other hand, if one sees this as a severely restrictive limitation on individual autonomy, because it sharply limits an important opportunity for participation in public debate, a high standard of justification might make sense under the Court's ad hoc balancing approach to content-neutral restrictions, thus justifying the decision to invalidate the law.

In *Buckley* itself, however, the Court did not rely exclusively on this reasoning. Rather, the Court announced that "the concept that government may restrict the speech of some [in] order to enhance the relative voice of others is wholly foreign to the First Amendment."[11] It is unclear precisely why the Court thought this an "impermissible" government purpose. The Court's concern presumably derives from the view that we simply cannot trust government to control public debate for such reasons, even if the law is technically content-neutral.

To complicate matters further, consider a law granting a tax credit of up to $1,000 each year to each taxpayer, to be used exclusively to support political candidates of the taxpayer's choice, where the amount of the credit decreases as the income of the taxpayer goes up. The idea, again, is to equalize the opportunities for effective political participation and, thus, to enhance the quality of public debate. The collectivists would no doubt look kindly on such a law.

It is more complex, however, under the prevailing approach. From the standpoint of distrust, it is hard to see why this law is any more acceptable than the one I just discussed. On the other hand, because this can easily be seen as a subsidy rather than a

10. 424 U.S. 1 (1976).
11. *Id.* at 48-49.

restriction, the Court might conclude that this law does not undermine individual autonomy. Indeed, it is noteworthy that the Court in *Buckley* said that it is impermissible for the government to "*restrict* the speech of some [in] order to enhance the relative voice of others." Is the purpose of "equalization" therefore permissible if the government subsidizes rather than "restricts" speech in order to achieve its goal? If so, existing law leaves significant room to achieve at least some of the collectivist objectives, although the route to get there may be a good deal less direct.

I would like to conclude with two very brief observations. First, one of the interesting puzzles posed at least implicitly in Robert Post's paper is whether it is possible to reconcile Meiklejohn's Town Meeting, with all of its managerial regulation of speech, with the relatively unregulated public debate called for in the autonomy/distrust model. If we allow rigid regulation in a Town Meeting, why not in public debate as well?

Consider, for example, a law that prohibits any person to spend more than $1,000 in support of any candidate for President. This may be seen as roughly analogous to a rule in a Town Meeting that prohibits any person to speak for more than ten minutes. The Town Meeting rule is permissible; the expenditure limitation is not.

Interestingly, the explanation cannot be found in considerations of either autonomy or distrust, for the effects on individual autonomy in the two cases are quite similar, and there is no more reason to distrust the members of Congress than there is to distrust the managers of the Town Meeting insofar as they seek to promote quality public debate. Thus, if managerial regulation is permissible in Meiklejohn's Town Meeting, why shouldn't it be permissible in public debate as well?

The answer, I think, lies in the issue of scarcity. In a Town Meeting there is a need for rules to govern the order or number of speakers on each issue and the time each person may speak because of the constraints of time and space. One simply could not have a Town Meeting in which every person is permitted to say whatever she wants for however long she wants if the meeting is to last only a reasonable time. In public debate, however, there are no similar constraints. As a practical matter, time is essentially unlimited and there is no need for analogous regulation that would limit each side, for example, to ten minutes—or $1,000—each.

On this view, the regulation that exists in the Town Meeting is not an ideal or an aspiration. It is, rather, a necessary evil. And

for this reason, Meiklejohn's Town Meeting may be a dangerous, rather than a helpful, analogy for public debate. Indeed, it is interesting, and perhaps even revealing, that the one decision in which the Court has expressly embraced the collectivist view is *Red Lion Broadcasting Co. v. FCC*,[12] and it did so, of course, precisely on the ground of scarcity.[13]

My final point concerns Post's own, reconceived theory of autonomy in response to the collectivist challenge. Post's innovative approach is theoretically interesting and perhaps even conceptually sound. In the end, however, I find it—as a practical matter—unhelpful. It is simply too abstract and too theoretical to withstand the assault of the collectivists. We will do better to reaffirm our traditional distrust of government regulation of public debate as the bedrock on which we rest our response.

---

12. 395 U.S. 367 (1969).

13. This suggests that if government is ever to regulate public debate by analogy to the Town Meeting, there must be a showing of "necessity" similar to that which exists in the context of the Town Meeting. Of course, there are such circumstances. This is so, for example, in the judicial process, in legislative proceedings, and so on. Such circumstances do not generally exist, however, in ordinary public debate.