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PROPTER HONORIS RESPECTUM

DISCOURSE AND ITS DISCONTENTS

*Frederick Schauer**

Discourse is in the air. From a host of perspectives, and employing diverse methodologies, numerous political, legal, moral, and social theorists have been, for a decade or more, advocating and celebrating the virtues of citizen discourse. These theorists have stressed the role of discourse in forging social consensus, in locating and defining political and moral truth, and in fostering respect for those whose cultures and world views are different from our own. Discourse, it appears, may help us to cure a multitude of social ills.

Yet if discourse, or its virtual synonyms *deliberation* and *dialogue*, is such a transcendent human good, then why has its importance only recently been discovered? More to the point, if discourse is so plainly desirable, why has it been so necessary for theorists to argue for its adoption?¹ One possible answer to these questions, of course, is that the personal interests of those with social power have led them to impede the fostering of institutions of public discourse. If discourse is a vehicle for an egalitarian consensus, for example, then we should not

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1 It is worth asking—perhaps with a touch of irony—whether the recent discourse *about* discourse has produced the effects that might have been anticipated on the basis of the underlying substantive claims that have been made about discourse.

be surprised when those in the upper reaches of an inegalitarian hierarchy attempt to hold back the progress of egalitarianism.

Another possibility, however, has received considerably less attention. This is the possibility that discourse may be less of an unalloyed virtue than most of its proponents suppose. It is this possibility that I wish to explore here, particularly in the context of considering various discourse-dependent accounts of the underlying philosophical foundations for the principle of freedom of speech. The key to my critique of some strands of contemporary discourse theory will be the banal point that discourse is centrally about *talking*. At one level the claim that discourse is about talking is a vacuous truism. Yet at another level the point that discourse is *talk* is often obscured by more grandiloquent terms like "discourse," "dialogue," and "deliberation," for often these terms keep us from recognizing that "talking about it" is only one among numerous different ways of making a decision and coming to a conclusion. If we take talking to be one among many contingent devices of institutional design, we can then compare talking to other decisionmaking devices, and we can at least consider the possibility that more talk is not always better than less talk (or more of something else) in promoting better decisionmaking. If this is so, then decisionmaking by public discourse may not always be preferable to decisionmaking without discourse, a conclusion that the existence of the institution of the secret ballot may usefully underscore. Talk can, at times, be the vehicle of dissensus as well as of consensus, and talk can be an instrument of domination as well as an instrument for resisting it.

When we sort out what the claims of discourse are all about, we may find ourselves with a more skeptical attitude towards it, but promoting an extremely skeptical view of discourse is not my aim here. Still, insofar as one of the conclusions of this Article is that the practice of discourse is more continuous with life in general than its proponents often acknowledge, the conclusion will appear skeptical to many, and more skeptical than justified to some. But my goal here is not to argue that discourse is always or even usually to be avoided. Nor is it to claim that less discourse is typically preferable to more. My goal is, however, to maintain that discourse is part and parcel of all that is good and bad about social existence, for all its messiness, and that it therefore may involve more disadvantages and fewer advantages than many of discourse's most enthusiastic proponents appear to believe. I will thus argue that discourse, for all its virtues, may embody rather than transcend all that is good—and bad—about the world we inhabit, and is thus less self-evidently the key to a better world than might sometimes appear to be the case. And if discourse is better

seen as embodying rather than transcending the range of virtues and pathologies of our collective existence, then we may have lost the purchase necessary to support the claim that the promotion and protection of discourse—another way of characterizing the goal of a theory of free speech—is a value of supra-political significance.

I

I will continue to speak primarily of “discourse” and not of “deliberation,” despite the fact that the latter term is more prevalent than the former in contemporary political and legal theory.² Although a *group* of people can deliberate, as when a jury deliberates prior to delivering a verdict, when a family deliberates about where to spend its next vacation, and when a faculty deliberates about whom to appoint to its ranks, it is no linguistic error to refer to the non-communicative deliberations of a single individual, as when a person deliberates to herself before choosing the best course of action from among several available to her. There is a sense of the word “deliberate” in which the best synonym is “consider” or “contemplate” or even “judge.”³ Because of this linguistic ambiguity between inter-personal and intra-personal deliberation, therefore, and because the proponents of a deliberative view about political organization and political value formation typically appear to have something particularly collective, collaborative, and communicative in mind, I will use the word “discourse” to encompass what some theorists do call “discourse,”⁴ others call “deliberation,” and still others call “dialogue.”⁵

2 See, e.g., JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION* (1991); Jane J. Mansbridge, *A Deliberative Theory of Interest Representation*, in *THE POLITICS OF INTERESTS* 32 (Mark P. Petracca ed., 1992); GEORGE F. WILL, *RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY* (1992); David M. Estlund, *Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 *TEX. L. REV.* 1437 (1993).

3 Indeed, although the Oxford English Dictionary does include within the definitions of the verb “deliberate” the idea of a “body of persons . . . tak[ing] counsel together” in “considering and examining the reasons for and against a proposal or course of action,” the first listed definition of the verb is “[t]o weigh in the mind; to consider carefully with a view to decision; to think over.” 4 *OXFORD ENGLISH DICTIONARY* 413–14 (2d ed. 1989).

4 See, e.g., Jürgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification*, in *THE COMMUNICATIVE ETHICS CONTROVERSY* 60 (Seyla Benhabib & Fred Dallmayr eds., 1990).

5 See, e.g., JAMES FISHKIN, *THE DIALOGUE OF JUSTICE* (1992); Bruce Ackerman, *Why Dialogue?*, 86 *J. PHIL.* 5 (1989); Robert Post, *Managing Deliberation: The Quandary of Democratic Dialogue*, 103 *ETHICS* 654 (1993).

I am concerned here neither with Arrow's Theorem⁶ nor with any of the related issues about the extent to which multiple decisionmakers with multiple goals can be said to have (or not to have) some collective view about a policy or a decision.⁷ Rather, I am concerned with the process by which communication among multiple decisionmakers is treated as being antecedent to an outcome or a decision in the process of institutional design. The final outcome or decision might come from a vote taken after communication, or might emerge less formally as the product of the process of give-and-take, modification, and compromise that we typically call a *consensus*. For simplicity I will preliminarily define discourse as a decisionmaking process in which communication among decisionmakers is a necessary component and a temporal antecedent to a decision, and in which at least a majority of the relevant decisionmakers as a result of their interactive communication come to some agreement about what is the case (whether of fact or of value) or about what to *do*.⁸

An interactive communicative process that culminates in a collective decision, however, is merely one among a multiplicity of plausible decision procedures. Indeed, as a way of highlighting the contingency of a discursive view about decisionmaking, it might be useful to distinguish (at least) five different public decision procedures. One, the most open form of deliberative and democratic decisionmaking, is best represented by the deliberations of a jury and by the New Eng-

6 See KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

7 I bracket Arrow's Theorem and related matters (on which, *see, e.g.*, MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1960)) not because I believe Arrow's Theorem wrong or irrelevant, and not because I believe collective action difficulties are unrelated to discourse theory, but because I do not possess the competence to delve into the issue with any degree of sophistication. My instinct is to believe that Arrow's Theorem has more to do with discourse theory than much of the existing literature supposes, although it is an open and difficult question whether Arrow's Theorem and related difficulties of collective choice would undercut the alleged virtues of discourse, or whether, instead, discourse is a way of transcending those very difficulties. *See* David Miller, *Deliberative Democracy and Social Choice*, 40 POL. STUD. 54 (1992) (spec. issue). Less directly, *see* also Joshua Cohen, *An Epistemic Conception of Democracy*, 97 ETHICS 26 (1986); Jules Coleman & John Ferejohn, *Democracy and Social Choice*, 97 ETHICS 6 (1986).

8 My concern here is with talk as a device of institutional design in general, and free speech as a principle of institutional design in general, and not only with talking and the special protection of talk as a part of the form of political organization we call "democracy." For a valuable skeptical view about the role of deliberation in democracy, and one to which I am much indebted, *see* James A. Gardner, *Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk*, 63 TENN. L. REV. 421 (1996).

land town meeting as celebrated by Alexander Meiklejohn.⁹ Under this model, proposals are made by members of the decisionmaking group, openly debated (the discourse) by that group, and are then voted upon in a non-secret ballot, or, as in many committee meetings, discussed until a point of consensus is reached. The key features are inclusiveness, openness in discussion, and openness in the "end game" of actually coming to a decision.

In contrast to this model is a second and different process that employs discourse prior to the moment of decision, but which employs a non-open final decisionmaking process. More concretely, this is the process of deliberative democracy without open voting—deliberative democracy with a secret ballot. This decision procedure, which captures the mode ordinarily used in most democracies and which is sometimes employed in jury deliberations, allows (or encourages) face-to-face or more impersonal (such as through the mass media) communication, but then actually makes its decisions by secret ballot.¹⁰ When the discussion ends, therefore, the actual decision is individual rather than collective.

To be contrasted with both of these models is a third model that we might call non-deliberative democracy, where decisions are not only made by secret ballot, but also where the secret ballot is not preceded by discourse or discussion.¹¹ Voting, therefore, is used under this procedure as a measure of the antecedent, pre-deliberative preferences of the relevant constituency. Many forms of formal and informal opinion polling might fit this model, for although the

9 E.g., ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965); Alexander Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CAL. L. REV. 4 (1961); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245. For the moment I am referring to Meiklejohn's archetype, and not the divergence between the archetype and what in fact happens at New England town meetings. On the latter, see JANE MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1980).

10 The secret ballot has traditionally been viewed as a device to facilitate "the free expression of the public will." E.C. EVANS, *A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES* 72 (1917). For a much more skeptical view of the advantages that a secret ballot is commonly thought to bring, see Geoffrey Brennan & Philip Pettit, *Unveiling the Vote*, 20 BRIT. J. POL. SCI. 311 (1990).

11 Some would insist that this procedure is not deserving of the name "democracy" at all and would take discourse as a necessary criterion for proper use of the word "democracy." See Post, *supra* note 5; Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993). For my purposes, however, such a definition of "democracy" is question-begging, and I will follow Jon Elster and others in defining "democracy" as "simple majority rule, based on the principle 'One person one vote.'" Jon Elster, *Introduction*, in *CONSTITUTIONALISM AND DEMOCRACY* 1, 1 (Jon Elster & Rune Slagstad eds., 1988).

preferences sampled in a poll may be the product of some form of previous deliberation, the typical sampling does not deem it necessary to ensure that there has been discussion among the members of the sampled population. Moreover, many traditional discussions of utilitarianism implicitly assume this model since those discussions focus on the preferences of the population in a way that rarely takes account of the fluidity of the preferences and the sensitivity of those preferences to policy, rather than the other way around.¹²

Not all decisionmaking procedures are democratic, of course, and so a fourth model would simply be one of non-deliberative and non-democratic decisionmaking, a model under which some decisionmaker simply consults her own judgment and resources to make the decision she believes best. It may seem odd to include such individual (authoritarian?/autocratic?/totalitarian?) forms of decisionmaking within this discussion, but I do so for two reasons. First, if deliberation is seen as a way of *locating* rather than of *defining* (political) truth,¹³ then from the perspective of an institutional designer who may believe she has some ability to identify truth, it is an open question whether she should put in place a mechanism she believes will be less effective than her own best judgment. Second, identifying the possibility of non-discursive decisionmaking helps us to identify a fifth model, a decisionmaking method that is deliberative but non-democratic. Here we have decisionmaking that is preceded by discourse of some form, but in which the speakers are not part of the final decisionmaking process. Although the standard picture of deliberation supposes that the deliberators are also the decisionmakers, the two functions need not necessarily be conjoined. Most courts fit this model, for there is an opportunity for discussion and argument, but those deliberating and arguing have no vote in the process. Less benignly, perhaps, monarchies with well-entrenched free speech and free press ideals would also appear to fit this model, for again we have a decisionmaker who is willing to listen to speech, and possibly even to engage in discourse with the speakers, but is not willing to relinquish the prerogative of making the final decision, a decision that will be binding on the speakers even if it is inconsistent with the views they have expressed in their speech.

12 This theme is at the center of many of the contributions to *FOUNDATIONS OF SOCIAL CHOICE THEORY* (Jon Elster & Aanund Hylland eds., 1986) and *INTERPERSONAL COMPARISONS OF WELL-BEING* (Jon Elster & John E. Roemer eds., 1991). See also CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 162-94 (1993).

13 On this distinction, and on its implications for free speech theory, see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 19-22 (1982).

The widespread presence of secret ballot procedures, as well as respectable exemplars of all of the other decision procedures I have just listed, suggests that modern democratic institutions have inherited a range of procedures, not all of them self-evidently pernicious, and not all of them necessarily incorporating the maximal amount of openness and discourse in their methods. Such discourse-averse procedures may be for that reason deficient. But recognizing their existence shows that the debate about discourse (the discourse about discourse, if you will) is not a debate between discourse and Hitlerian tyranny, or a debate between democracy and authoritarianism. Rather, it is a debate about the extent to which *talk* as a decisionmaking device should be more or less incorporated into decisionmaking, including, but not limited to, democratic decisionmaking, with a host of historical examples suggesting that there is a genuine debate to be had.

Despite the respectability of discourse-averse decision procedures, it is not my purpose to argue against discourse or dialogue as a decision procedure. It is my purpose, however, to argue that treating discourse as presumptively superior is questionable, as is the entrenchment of principles (such as almost all versions of a free speech principle) that would assume acontextually that discourse and its promotion are, *ceteris paribus*, worthy of active promotion and special protection. Thus, the attitude I propose with respect to discourse is one of agnosticism rather than hostility, and I will argue that there is no more reason to suppose that discourse is acontextually undesirable than that it is acontextually desirable. But if we deflate some of the grandest claims that have been made on behalf of discourse, we may be better situated to evaluate when discourse will be a desirable decision procedure, and when it will not be.

My concern with discourse is partly a function of an interest in the use of discourse as a device of institutional design, especially in light of the frequency with which political and constitutional ideas and ideals find their way down to micro-level questions of decision-making procedure.¹⁴ My concern is also related to an interest in the way in which discourse theory occupies an increasingly large segment

14 Consider, for example, the extent to which the norms of criminal procedure—presumption of innocence, proof beyond a reasonable doubt, right to counsel, etc.—have, largely with the assistance of television, often over-informed the design of non-governmental institutions concerned with the determination of what has happened. On this, see Frederick Schauer & Richard Zeckhauser, *On the Degree of Confidence for Adverse Decisions*, 25 J. LEGAL STUD. 27 (1996).

of moral, political, legal, and social theory.¹⁵ But my primary concern here is with the relation between discourse theory and free speech theory, for, with the exception of theories protecting speech specially because of its self-expressive aspects,¹⁶ a quite large portion of free speech theory turns out to be dependent on theories of discourse closely related to those now being celebrated.¹⁷ Some of this free speech theory is expressly related to modern discourse theory,¹⁸ but it

15 For many, the sacred texts are by Habermas. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (1996); Jürgen Habermas, *Discourse Ethics*, in MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION (Christian Lenhardt & Shierry Weber Nicholsen trans., 1993); Jürgen Habermas, *Human Rights and Popular Sovereignty: The Liberal and Republican Versions*, 7 *RATIO JURIS* 1 (1994); Jürgen Habermas, *Reconciliation Through the Use of Public Reason: Remarks on John Rawls' Political Liberalism*, 92 *J. PHIL.* 109 (1995); Jürgen Habermas, *Three Normative Models of Democracy*, 1 *CONSTELLATIONS* 1 (1994). A broader sample of contemporary discourse theory would include strands of contemporary feminist theory (see, e.g., CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990)), empirical political science (see, e.g., JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1980)), liberal political and democratic theory (see, e.g., FISHKIN, *supra* note 2; AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE* 17 (Alan P. Hamlin & Philip Pettit eds., 1989); David Ingram, *The Limits and Possibilities of Communicative Ethics for Democratic Theory*, 21 *POL. THEORY* 294 (1993)), republican legal or political theory (see, e.g., SUNSTEIN, *supra* note 12; Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 *HARV. L. REV.* 4 (1986)), and more traditional jurisprudence (see, e.g., ROBERT ALEXY, *A THEORY OF LEGAL ARGUMENTATION* (Neil MacCormick & Ruth Adler trans., 1989)).

16 See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* (1984); DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964 (1978); Martin H. Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591 (1982). I do not believe that such arguments can maintain a distinct principle of freedom of speech, but I will not repeat arguments I have made elsewhere. See SCHAUER *supra* note 13, at ch. 4; Frederick Schauer, *Must Speech Be Special?*, 78 *Nw. U. L. REV.* 1284 (1983); cf. Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 *ETHICS* 635 (1993) [hereinafter Schauer, *The Phenomenology of Speech and Harm*].

17 Even theories of toleration, see LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986), may have a discourse-dependent conception of why tolerating harmful behavior is a good thing. See David A. Strauss, *Why Be Tolerant?*, 53 *U. CHI. L. REV.* 1485 (1986). And even theories of autonomy, see Thomas Scanlon, *A Theory of Freedom of Expression*, 1 *PHIL. & PUB. AFF.* 204 (1972), are dependent on a certain conception of how the process of persuasion works. See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 *COLUM. L. REV.* 334 (1991).

18 See, e.g., Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, 103 *HARV. L. REV.* 601 (1990); Cass R. Sunstein, *Free Speech Now*, 59 *U. CHI. L. REV.* 255 (1992).

turns out that almost all of the justifications for a free speech principle are premised on a similar vision of the communicative process,¹⁹ and it is that vision that I want to explore here. For whether it be the classical argument from truth—associated in different versions with John Milton,²⁰ John Stuart Mill,²¹ Walter Bagehot,²² Karl Popper,²³ Learned Hand,²⁴ and many others²⁵—that posits that truth will best emerge from an unregulated marketplace of ideas,²⁶ or the argument from democracy (of which many contemporary arguments from discourse are a variant) that sees unregulated public communication about values and goals as an essential component of democracy,²⁷ the basic idea is that restrictions on the (negative) liberty to communicate will produce, in the aggregate, worse outcomes than would be produced by the unregulated communicative or discursive domain. The identification of truth and the exposure of error, the central goals of classical marketplace theory, can best be seen as a subset of the larger set of desirable outcomes potentially produced by some decision procedure, and what joins the marketplace of ideas theory of free speech with the democratic decisionmaking theory of free speech is that both are committed to the proposition that discursive openness in decisionmaking, and the use of dialogue in decisionmaking, will, in the aggre-

19 See *supra* note 18.

20 John Milton, *Areopagitica*, in MILTON'S PROSE 297 (J.M. Patrick ed., 1968).

21 JOHN STUART MILL, ON LIBERTY ch. 2 (John Gray & G.W. Smith eds., 1991) (1859).

22 Walter Bagehot, *The Metaphysical Basis of Toleration*, in LITERARY STUDIES 422 (R.H. Hutton ed., 1884).

23 KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES (5th ed. 1966).

24 See, e.g., *International Bhd. of Elec. Workers v. NLRB*, 181 F.2d 34 (2d Cir. 1950); see also *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

25 On the relationship between discourse theory and marketplace of ideas or search for truth theory, I am indebted to Thomas Christiano, *Deliberative Equality and Democratic Order*, in XXXVIII NOMOS (POLITICAL ORDER) 251, 268–75 (Ian Shapiro & Russell Hardin eds., 1996), even though my conclusions diverge considerably from Christiano's.

26 See William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995).

27 In addition to the contributions of Alexander Meiklejohn, see *supra* note 10, see also CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191; Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451 (1988); William Marshall, *Free Speech and the "Problem" of Democracy*, 89 NW. U. L. REV. 191 (1994) (book review).

gate, produce better outcomes than will the avoidance of such methods.

Underlying this proposition, I want to maintain, is at least one and possibly more among several assumptions about the role of private power in the communicative process, and each of these assumptions deserves closer scrutiny. In scrutinizing the traditional assumptions about the comparative non-importance of disparities of non-governmental communicative competence and power, I will, as I have said, collapse some of the important distinctions between classical marketplace of ideas theory—truth will be most likely to emerge from an unregulated exchange of ideas²⁸—and more contemporary emphases on discourse, dialogue, and public deliberation.²⁹ I do this because, for all their differences, the two seemingly different approaches share the same vision of the communicative process. Whether the consensus consequent upon public discourse is seen as constitutive of truth, or public values, as the earlier Habermas and the later Holmes would have it, or whether public deliberation is seen, more plausibly, as merely a necessary but not a sufficient condition for the identification of public truth,³⁰ the persistent vision is of a process of engaged public communication more likely than any alternative to produce sound results, where there is, in theory, a measure of the soundness of the result logically independent of its success in the discursive arena. In this respect, the question both for modern discourse theory and for classical marketplace of ideas theory is whether the governmentally-unimpeded process that both revere contains those properties providing some basis for at least comparative confidence in its output. So although I will focus more on the epistemological version of the argument from communicative freedom, the argument that the lack of governmental regulation can be predicted to produce in the long run better results (more truths located, and fewer falsehoods accepted) than its alternative, much that I say is equally applica-

28 See especially *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market"). For a critique, see Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

29 For a similar conjunction, see David O. Brink, *Mill's Deliberative Utilitarianism*, 21 PHIL. & PUB. AFF. 67 (1992).

30 See Janna Thompson, *A Defense of Communicative Ethics*, 1 J. POL. PHIL. 262 (1993); Janna Thompson, *A Defense of Discourse Ethics* (1993) (unpublished manuscript, on file with author). Some may believe that I am too dismissive of views holding that discourse is in some way constitutive of truth. The topic does deserve a more extensive discussion, but it might be worthwhile noting here that if discourse is constitutive of political truth, then it is not clear where the participants in that discourse get the purchase for what they say.

ble to the argument that an entrenched principle of governmentally-unimpeded public deliberation is entitled to special solicitude in the design of public institutions.

II

To repeat, I do not intend to argue that discussion, deliberation, discourse, and the exchange of ideas are bad. I do intend, however, to suggest that there may be good reasons, as a matter of institutional design, to question an *ex ante* assumption of superiority for a discursive decisionmaking procedure over a non-discursive one. I also want to argue that treating discursive processes as entitled to special immunity from official intervention (a way of recasting the Free Speech Principle so that its relevance to a wider range of questions of institutional design is more apparent) rests on at least one of several assumptions, some seemingly highly questionable, about just what a communicative environment—or a public deliberation—looks like when the government or any other putative controller or regulator remains uninvolved. I thus use the window of free speech theory as a way of thinking more broadly about the nature of discursive decisionmaking.

Let me then turn to the assumptions implicit, and at times explicit, in the view that discourse—speech of a certain kind—is, just because of its speechness, entitled to a special immunity from otherwise applicable principles of state intervention. One possible assumption is what we might call the assumption of equality. Not entirely unrelated to the Habermasian ideal-speech situation, the assumption of equality assumes that, in the absence of governmental intervention, all of the participants in an exchange of views are of roughly similar ability to speak and roughly similar ability to understand, that neither the making nor the understanding of communications are distorted by bias, and that all of the participants in the deliberation will evaluate with care and sympathy the utterances of all others. In this context, we might assume truth, and certainly political truth, would indeed be most likely to emerge. Without this assumption, however, it seems initially that the instrumental optimism surrounding the standard arguments for open discussion is in need of explanation that is not to be found in the existing literature.

One of the most obvious things to notice about the assumption of equality, of course, is that it is false.³¹ As the current debates about

31 For a sampling of the numerous slants on the same basic idea, see RONALD K.L. COLLINS & DAVID SKOVER, *THE DEATH OF DISCOURSE* (1996); ROBERT ENTMAN, *DEMOCRACY WITHOUT CITIZENS: MEDIA AND THE DECAY OF AMERICAN POLITICS* (1989); OWEN

the role of money in political campaigning and political advertising make stunningly clear,³² resources matter, and more resources matter more.³³ Indeed, the current debates about tobacco and alcohol advertising make it increasingly difficult to discount the importance of resources in preference formation. Moreover, not all speakers are equally articulate or persuasive, and not all listeners are equally understanding. We have recognized that issues of race, gender, class and many others can hardly be thought of as irrelevant in a communicative environment, and hardly irrelevant in determining who talks, who listens, and who gets listened to.³⁴ In terms of who actually speaks, and of who actually listens, and of what a listener actually takes away from the speaker's speech, therefore, there seems little reason to believe that all of the inequalities of society in general are not replicated in the context of deliberation. Indeed, even when such inequalities are lessened, the dynamics of the communicative process itself may engender more pessimism than optimism about the possibility that the process will focus on a correct outcome.³⁵ And if this is so, then it seems as a first cut strange to believe this process is any more likely to ameliorate than to exacerbate the existing inequalities in a society, and equally strange to believe that this process is one deserving of special or antecedent solicitude (as compared, for example, to more controlled communicative environments) in the search for moral, political, or factual truth.

FISS, THE IRONY OF FREE SPEECH (1996); CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975 (1993); Owen Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987); Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935 (1993).

32 See BENJAMIN PAGE, WHO DELIBERATES? (1996); Symposium, *Campaign Finance Reform*, 94 COLUM. L. REV. 1018 (1994); see also Cotton M. Lindsay & Michael T. Maloney, *Party Politics and the Price of Payola*, 26 ECON. INQUIRY 203 (1988); Al Wilhite & John Theilmann, *Campaign Contributions by Political Parties: Ideology vs. Winning*, ATLANTIC ECON. J., June 1989, at 11.

33 For examples of some of the literature, see DORIS GRABER, MASS MEDIA AND AMERICAN POLITICS (4th ed. 1993); W. RUSSELL NEUMAN, THE PARADOX OF MASS POLITICS (1986); JOHN ZALLER, THE NATURE AND ORIGINS OF MASS OPINION (1992); Scott Althaus, *Opinion Polls, Information Effects, and Political Equality: Exploring Ideological Biases in Collective Opinion*, 13 POL. COMMENTARY 3 (1996); Robert S. Erikson, *The Influence of Newspaper Endorsements in Presidential Elections*, 20 AM. J. POL. SCI. 207 (1976).

34 See the survey in Chingching Chang & Jacqueline Hitchon, *Mass Media Impact on Voter Response to Women Candidates: Theoretical Development*, 7 COMM. THEORY 29 (1997).

35 See Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1 (1996).

Now it may seem odd to evaluate a philosophical position intended as ideal theory by reference to the non-ideality of the world we currently inhabit. Sophisticated discourse theorists recognize the pathologies and defects of our existing discursive environment, yet believe it important to retain the discursive idea as an aspiration that guides the formation of constitutional doctrine as well as political theory.³⁶ Yet if we are employing, even aspirationally, something analogous to an ideal-speech situation, to employ Habermas's term, even while recognizing that it does not currently exist, it seems peculiar to allow an aspirational assumption of ideality for non-governmental communicators and their relations with each other, while not allowing such an aspirational assumption for government itself. In an ideal world, the state would have no reason to interfere with the deliberations and communications of its equally idealized citizens, and if it did, it would do so only to achieve legitimate purposes, and no other. Thus, it is not clear that in an ideal setting there would ever be a need for a second-order principle of free speech premised on comparative governmental inability to regulate speech, and thus not clear why there would be a need for a principle that would preclude the state from doing what the ideal state would not attempt to do, or that would preclude the ideal state from doing what it would have, *ex hypothesi*, good first-order reasons for doing. Thus, the observation of non-ideality about the communicative settings that actually exist is not a too-easy cheap shot about the limitations of ideal theory, but rather one about the question-begging peculiarity of stipulating a counterfactual equality for speakers while not stipulating an equivalent counterfactual benignness of government. For by stipulating the former and not the latter, we take off the table the very questions that instrumental free speech theory must address—whether the interventions of admittedly non-ideal governments can systematically be expected to be more harmful to the truth-finding process than the distortions occasioned by the operation of equally non-ideal inequalities and other misuses of communicative power in the deliberative setting; and whether the promotion of discourse under non-ideal conditions will tend towards ideality, or instead merely exacerbate the conditions that made the conditions non-ideal in the first place.

One response to this argument could be that the distortions in communicative ability or in listener comprehension are of less consequence than the response to the assumption of equality would suppose. To put it differently, the stress on inequality of resources, and

36 See, e.g., Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991).

the stress on the manipulability of the listeners by sophisticated and well-resourced communicators, may understate human rationality, and understate human resistance to such distortions as long as a full array of ideas are available for popular consideration. We must, therefore, now consider what we can call the assumption of rationality. Prompted by the ideals of the Enlightenment, the assumption of rationality posits that true propositions (of fact or of value) possess some inherent properties such that for all or most human beings the superiority of true propositions to their negations will be apparent even in the face of disparities in communicative power.³⁷ That is, if it is the case that P is true and not-P false, then we might assume that human beings, by virtue of their rationality, will identify the truth of P and the falsity of not-P even if not-P is uttered with much greater frequency, even if not-P is uttered in an especially persuasive manner, even if not-P is more consistent with what people might have believed prior to hearing P, and even if not-P is more consistent with the hearers' antecedent interests, desires, biases, and prejudices, than P. Thus, this assumption of rationality admits the existence of inequality of resources and of speech in the marketplace of ideas, but discounts the importance or effect of those inequalities in the communicative environment, stressing the ability of true or sound propositions, but not false or unsound ones, to transcend the effects of the distortions and inequalities. More plausibly, the assumption of rationality places confidence in the ability of people—especially adult people in full control of their faculties—to transcend many of the distortions that might be caused by financial, social, or political inequalities in the deliberative environment.

Once the issue is framed in this way, however, it becomes clear that the question is more empirical than philosophical.³⁸ Despite the fact that the natural response to identifying an empirical question is (or at least ought to be) to attempt to provide an empirical answer,³⁹ or test an empirical hypothesis, this may not be the best setting in which to undertake that task. Nevertheless, it is still worth exposing the Enlightenment-inspired empirical assumptions upon which much

37 I am not squeamish about claims of *truth*, but those who are may substitute more sound and less sound, or even more useful and less useful, for truth and falsity. Nothing in the argument in the text is weakened by the substitution.

38 Indeed, freedom of speech is an excellent example of a political principle resting on testable but rarely tested empirical assumptions.

39 Unfortunately, this is not as common in the legal academy as it ought to be, including (or especially) in the free speech literature, as Scot Powe has powerfully pointed out. See L.A. Powe, Jr., *The Supreme Court, Social Change, and Legal Scholarship*, 44 STAN. L. REV. 1615 (1992).

of traditional free speech theory has relied, for that is a step towards understanding how to evaluate them. According to these assumptions, the truth (or soundness, or value, or whatever) of a proposition has more power in explaining why people accept some propositions and not others than do truth-independent properties such as the context in which the proposition is uttered, the frequency of its utterance, the manner in which the proposition is uttered,⁴⁰ the prestige of its utterer, and the rhetorical force of the actual way in which the proposition is uttered and supported. If we wanted to predict which propositions were likely to be accepted and which rejected, we could do worse, so this assumption would have it, than to look at the soundness of the propositions, for the sound propositions would be predicted to have, for that reason alone, a greater chance of acceptance than the unsound ones. But although this empirical conclusion about the inherent power of or visibility of truth might be true for selected groups, whether it is true for a population at large is far from self-evident. Again, therefore, although as a matter of ideal theory one can assume a communicative environment in which truth will out, as a matter of ideal theory one also has no reason to assume that the state will interfere unduly with the process of truth-finding. But if as a matter of non-ideal theory one assumes the possibility and indeed the likelihood of misguided governmental intervention, then as a matter of non-ideal theory it seems odd to assume, quite ideally, that the distortions of power and persuasiveness in the marketplace of ideas are not just as likely to produce a world in which unsound propositions replace sound ones just as often as sound ones replace unsound ones.⁴¹

40 This factor would include the full range of techniques that might be available to the most sophisticated molders of public opinion, whether they exist on Madison Avenue or anywhere else.

41 Consider the typical jury deliberation. The jury hears testimony and is presented with exhibits over a period of several hours, several days, or several weeks. At the close of the evidence, the jury begins deliberating, and then attempts, by a combination of voting and argument, to reach a (typically) unanimous consensus. But consider for the moment a case in which at the close of the evidence nine jurors believe (correctly) that the defendant committed an act which he denies, and that three jurors believe (incorrectly) the defendant did not commit the act. One possibility is a decision procedure that takes a vote immediately after the close of the evidence, and treats this pre-deliberative counting of preferences as conclusive. Assuming a majority-vote decision rule, the result here would be a verdict against the defendant. Another possibility is what in fact exists, the opportunity to discuss and debate—to engage in a discourse—prior to voting, followed by a relatively public (to the other jurors) vote. Consider the circumstances under which one of the three mistaken jurors would be able to persuade more than three of the nine non-mistaken jurors to change a correct vote to a mistaken one. And consider the circumstances under which one of the nine non-mistaken jurors would be able to persuade one or

Those who would argue that discourse is a necessary condition for the identification of truth, however (assuming again that there are criteria for truth other than deliberative consensus), must suppose that the holder of a true belief, by reason of the truth of that belief, is more resistant to belief-modification from argument than is the holder of a false belief. Perhaps this is so, but as the basis for the entrenchment of a second-order principle applicable to an entire polity, it rests on empirical assumptions about the intrinsic power of truth that are hardly self-evident.

This naturally leads to the third possible assumption of both traditional and modern deliberative theories. Even if we assume non-equality of communicators, and even if we reject Enlightenment-inspired assumptions about the intrinsic power or visibility of sound ideas and true propositions, so the argument goes, then the risks of distortion caused by the intervention by non-ideal governments are necessarily and systematically greater than the risks of distortion caused by disparities of power, broadly speaking, in a governmentally-unregulated communicative environment. Briefly, this is the assumption undergirding the distinction between the public and the private, and the assumption that the dangers of excess public power are systematically greater than the dangers of private power, applied here to the specific question of freedom of speech.⁴²

Here we have what is probably the most plausible of the three assumptions I am considering—the assumption that the deeply flawed marketplace of ideas is still less dangerous than the even more deeply

more of the mistaken jurors as to the error of his conclusions. A great deal of discourse theory surrounds the empirical question of when it is more likely that non-mistaken jurors will be able to persuade mistaken jurors to change their votes (or first impressions) and when it is more likely that mistaken jurors will be able to persuade non-mistaken jurors to change their votes (or correct first impressions). In the context of juries, some of these issues have been the subject of empirical investigation. See, e.g., VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986); *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* (Reid Hastie ed., 1993); REID HASTIE ET AL., *INSIDE THE JURY* (1983). For an optimistic view of the lessons of jury research on deliberation theory, see GUTMANN & THOMPSON, *supra* note 15, at 132–34. For a less optimistic view, see Lynn Sanders, *Against Deliberation* (Dec. 1993) (unpublished manuscript). And for another less optimistic view of the power of deliberating jurors to reach sound results, see STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* (1994).

42 Compare Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986), with L.A. Powe, Jr., *Scholarship and Markets*, 56 GEO. WASH. L. REV. 172 (1987). Also relevant to this issue are: J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375; R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1 (1977); Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1 (1964).

flawed governmental intervention—but again the assumption appears both more empirical and more contingent than much of traditional free speech theory has supposed. There are undoubtedly good reasons to believe that when governments intervene they do so more often in the interests of the governors than in the public interest,⁴³ and equally good reasons to believe that even public-minded governmental action is frequently mistaken or misguided. But if we reject the highly unrealistic assumptions of equality and rationality, then there appear equally good reasons to believe that the distortions of the putatively unregulated communicative environment will be equally mistaken or misguided, and the consequences equally problematic.

But perhaps not. Perhaps, so the argument could run, government, by virtue of its resources, its monopoly on the legitimate use of force, its ability to imprison, its psychological authority, and its regulatory pervasiveness, has powers available to it that are unavailable to even the largest concentrations of private power, and thus has powers to distort the communicative and deliberative processes unavailable to even the most dominant communicators. But again this raises a necessarily empirical question, and one as to which the answer again seems hardly self-evident. When government is out of the picture, are those remaining forces of power invariably so ineffective that there is less limitation on communicative ability than would be the case were government to be involved? Or is it possible that at some times and in some places, and as to some issues, the risks of governmental intervention are no greater than the risks consequent to the imbalances of power that exist when government steps back? To put it differently, and starkly, when the State does not decide what is to be said, who does, and on what basis?⁴⁴

There are strong and weak forms of the argument I have just suggested. The strong form is an argument that attacks the core of the public-private distinction, and thus questions whether there is any reason to believe that the dangers of private concentrations of power are less than the dangers of the State. As such, this argument is quite possibly an argument against liberalism itself. If a recurring feature of free speech argumentation is a faith in the belief that the dangers of

43 See SCHAUER, *supra* note 13, ch. 6.

44 Thomas Scanlon reports that he heard Herbert Marcuse (Herbert Marcuse, *Repressive Tolerance*, in *A CRITIQUE OF PURE TOLERANCE* (Robert Paul Wolff et al. eds., 1969)) deliver a lecture at Princeton in the late 1960s in which Marcuse, after advocating some degree of governmental intervention against intolerant speech, was, expectedly, asked "Who decides?". "Who decides now?" Scanlon reports Marcuse as having responded.

government are necessarily or systematically greater than the dangers of non-governmental power, then the principle of free speech hinges on one of the central tenets of modern liberalism, and may remain vulnerable to a more broad-based attack on liberalism itself.

That an attack on free speech as a distinct principle may be an attack on liberalism itself is not a sufficient reason to reject the attack, but nevertheless a weaker form of the argument is sufficient for my purposes here. For even if we assume the comparatively greater dangers of governmental intervention than of non-governmental disparities of power in the unregulated communicative environment, there seems no persuasive reason to believe that this would be the case *more* with respect to communication than with respect to any other manifestation of the public-private distinction or the central tenets of libertarian liberalism. Thus one can believe that governmental power is systematically more dangerous than the concentrations and distortions of private power while still not believing that this phenomenon has a different incidence with respect to communication than with respect to other aspects of human action.

III

My focus here is thus on the relation between the ideal and the non-ideal, between the aspirational and the actual, in free speech theory. A slightly different way of putting the same basic point would be to think about the difference between full-compliance and partial-compliance theories,⁴⁵ and to think as well about the possibility and effect of different varieties of partial compliance theory.

So let us imagine a field of nongovernmental communicators, and a government with the putative power to control some of the communications of the nongovernmental communicators. And with this distinction in place, we can imagine first a full-compliance theory, one in which the nongovernmental communicators do not engage in any pathological behavior (such as some speakers drowning out others, or intimidating them from speaking, or having more communicative resources than other speakers, or using rhetorical tricks or flat-out lies to manipulate their audiences into believing things they ideally would not believe, or making decisions they would not otherwise make), and in which the government behaves similarly benignly by imposing no unnecessary restrictions on the communicative process. Only those restrictions that are essential (such as those coordination rules necessary to prevent several speakers from speaking

45 On the differences between the two, compare JOHN RAWLS, *A THEORY OF JUSTICE* (1971), with JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

simultaneously, or those substantive rules necessary to prevent serious communication-produced harm) would be imposed, and thus, by stipulation, there would be no worry about speaker pathologies interfering with the communication process, and no worry about regulator (government) pathologies being used unwisely or excessively.

Insofar as a principle of free speech is a second-order principle barring what we would otherwise have good first-order reasons to do,⁴⁶ it should be clear that such a principle is unnecessary in this variety of full-compliance theory. Where we are dealing in an ideal world, and where we are by stipulation unconcerned with the pathologies of communicators or their putative regulators, then we need be equally unconcerned with designing principles premised on the existence of the very pathologies we have stipulated away.

If we turn away from full-compliance theories to partial-compliance theories, however, we can see that these come in several varieties. Using the same framework of benign and non-benign communicators and regulators, one variety of partial-compliance theory would involve benign regulators but non-benign communicators. In that case there would be considerable need for regulation in order to control speaker pathologies in the marketplace of ideas, but there would be no need to worry about the pathologies of misplaced or excess governmental regulation, and so, as in the case of full-compliance theory, there would be no need for a second-order principle of freedom of speech whose sole purpose is to prevent the regulator pathologies that in this variant do not exist.

Under the next variety of partial compliance theory, however, there *would* be a need for a second-order principle of freedom of speech. If we now take up the situation in which there are no speaker pathologies, but in which there are regulator pathologies, the arguments for entrenching a second-order principle of freedom of speech are compelling, because now there is a genuine risk of misplaced or excess regulation, but, by stipulation, no need for any regulation at all except the minimal regulation required by the coordination function.

46 On second-order principles in this sense, see JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (1975). For my own elaborations on this theme, see FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991), and, as applied to free speech theory, Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989). The closest I will ever come to committing an act of intellectual autobiography is the observation that a principle of freedom of speech, which immunizes numerous harmful actions that a well-working principle of general and equal liberty would punish, strikes me as a central case of rule-based decisionmaking and rule-sensitive institutional design.

But because under this situation there are, by stipulation, no speaker pathologies, there is no need for regulation designed expressly to control them.

The stipulation of the existence of regulator pathologies but the non-existence of speaker pathologies, however, seems no more realistic than the opposite stipulation of the existence of speaker pathologies but the non-existence of regulator pathologies. More realistic than either of these implausible sets of stipulations, therefore, is the final variety of non-compliance theory, one that is premised on the quite realistic assumption that there are *both* speaker pathologies and regulator pathologies. In this scenario, there are, because of the speaker pathologies, frequent needs for regulation, but there are, because of the regulator pathologies, good reasons to suppose that many of those regulations will be misguided. Thus, although the speaker pathologies would seem to generate the need for regulation to deal with distortions in the discursive arena, there would be strong reason to suspect that attempts at regulation would be both under- and over-inclusiveness—there would be a failure to regulate when necessary, and there would be regulation when unnecessary.

Although there is good reason to suspect the wisdom of any given regulatory act given the distinct possibility of either under- or over-regulation, the existence of the speaker pathologies provides good reason to suspect as well the operation of the unregulated communicative environment. And thus, although this variety of partial-compliance theory is the only one with any claim to accurately reflect the world, recognizing the existence of full-compliance theory as well as the other varieties of partial compliance theory makes clear that the central question is one of determining whether the expected negative consequences of misguided regulation are less than the expected negative consequences of misguided but unregulated speaker pathologies. And as with any other form of regulatory strategy, there is little reason to believe that this determination can be totally divorced from inevitably shifting patterns of regulation and patterns of unregulated conduct. In other words, while there may be good reasons for believing that instrumental and strategic free speech principles will be salutary at specific times and places, and in specific institutional contexts, there are fewer reasons to believe that the necessity of such principles can be imagined to be an atemporal, ahistorical, and universal imperative.

IV

Much of the foregoing can be seen as a call for empirical investigation of issues whose empirical dimension has traditionally been ignored by political and legal theorists for whom empirical investigation is not their natural or comparative advantage. But even apart from this issue, my claims thus far cannot be taken, even if empirically supported, as an argument against a distinct principle of freedom of speech,⁴⁷ since they are, at best, only an argument against one argument for such a principle, and not an argument against all arguments for such a principle. But although all of the foregoing by itself thus does not constitute a complete argument against recognition of a distinct second-order principle of freedom of speech, it may, in conjunction with other arguments I do not address here, and in conjunction with yet-to-be-established empirical evidence, point in that direction. And that is not because pointing out the consequences of the disparities in communicative power detracts from the importance of communication. On the contrary, it is the upshot of much of what I say here to challenge the marginalization of communication that seems the unspoken assumption of much of free speech theory. Discourse, dialogue, discussion, deliberation, communication—these are not activities that take place apart from and alongside the rest of our existence. More plausibly, these activities are so intrinsic to and constitutive of our existence that trying to carve out a unique political realm for communicative action seems, when put that way, counter-intuitive.⁴⁸ So by focusing on governmentally unregulated communication as still containing all of the pathologies of (and virtues of) social life in general, I mean to question a distinct principle of freedom of speech, but by no means to question the value of speech itself. Still, it may be important to see what, and more vitally what does not, flow from even

47 The best existing explanation of what a satisfactory account of a free speech principle would have to look like is R. Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

48 See Schauer, *The Phenomenology of Speech and Harm*, *supra* note 16. As I understand it, this is one of the running themes in CATHARINE A. MACKINNON, *ONLY WORDS* (1993). MacKinnon's arguments about the communicative dimensions of physical actions and the physical dimensions of communicative actions are aimed at undercutting the speech-action distinction that is a necessary component of any free speech principle. See also Susan J. Brison, *Speech, Harm, and the Mind-Body Problem in First Amendment Jurisprudence*, Address at the Annual Meeting of the American Philosophical Association (Dec. 1996) (unpublished manuscript, on file with author).

the seemingly extreme conclusion that there may not be any defensible second-order principle of freedom of speech at all.⁴⁹

Even if we cannot now justify a distinct free speech principle, perhaps it is the case that a second-order principle of free speech endures for special historical and political reasons rather than because of its philosophical soundness. Whatever the philosophical soundness of a free speech argument, a free speech argument has great political and social force in many societies, especially this one.⁵⁰ And given this fact, the free speech principle may persist, and even in a second-order way be justifiable, just because it serves important and morally defensible current purposes in a decidedly non-ideal world. Suppose I believe (which I do) that capital punishment is unjust in all circumstances. And suppose I live in a society that for arcane, mystic reasons believes, erroneously, that people with green eyes have special powers and should therefore be entitled to special privileges. The question then might arise whether green-eyed people should be exempt from capital punishment in this society that has, let us assume, explicitly refused to eliminate capital punishment. If this proposal were to be made, it is quite possible that I would support a principle that draws a dubious distinction between the green-eyed and everyone else just because that principle, but no other at the moment, will reduce the incidence of the practice of capital punishment that I find

49 I put aside here questions related to interpretation of a written constitution. It is possible (and, to me, desirable, see Frederick Schauer, *Constitutional Invocations*, 65 *FORDHAM L. REV.* 1295 (1997); Frederick Schauer, *An Essay on Constitutional Language*, 29 *UCLA L. REV.* 797 (1982); Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509 (1988)) that the interpretive constraints of the role of interpreter would produce different conclusions in the interpretation of the language of the First Amendment, which, after all, does contain a free speech clause, than in the case of a decision of political theory or public policy not involving interpretation of the concrete words "the freedom of speech." The more ephemeral point, but one I believe correct for reasons I cannot yet work out satisfactorily, is that it is easier to work out a theory of free speech, if free speech is presupposed to exist as a distinct principle, than it is to justify a free speech principle in a world without that presupposition.

50 And this is why public advocates seek to couch their claims in free speech terms, since a free speech argument can so easily in the United States claim the rhetorical high ground. The rhetorical beauty of the argument from silencing, see MacKinnon, *supra* note 31; Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 *TENN. L. REV.* 291 (1989), is that it makes the case for control in the language of free speech, and thus commands greater political attention in the world in which we live, than making the case for control in the language of equality. See also Frederick Schauer, *The Ontology of Censorship*, in *CENSORSHIP AND SILENCING* (Robert C. Post ed., forthcoming 1998).

abhorrent.⁵¹ As with the question whether it would be a better world than the one we have now if there were no poverty for people whose names begin with "Q," arbitrary principles may at times produce better results in non-ideal settings than any of the available alternatives.

So too, perhaps, with freedom of speech. Even if it is the case that communication is less distinguishable from other exercises of human liberty than is often supposed, the discourse of free speech may still, like the special immunity for green-eyed people from capital punishment, serve to minimize the restrictions on liberty that in a better world would be eliminated directly and without recourse to the language of free speech *qua* free speech. But short of that better world, principles with strong historical provenance and equally strong current emotional political appeal may produce desirable results just because the general protection of liberty remains so suboptimal. Moreover, if, as is the case under existing American constitutional doctrine, general and unjustified restrictions on personal liberty are immune from judicial invalidation,⁵² then a distinct principle of freedom of speech might once again, as in the flag-burning cases,⁵³ provide the pragmatically necessary way to eliminate a restriction that ideally could be eliminated just by seeing it as an unjustified restriction on liberty *simpliciter*.

And thus it is a mistake to equate skepticism about the philosophical soundness of a distinct second-order principle of freedom of speech with a desire to restrict speech. One could believe there to be no sound and distinct principle of freedom of speech while still believing that, for example, death warrants against Salman Rushdie and criminal prohibitions on the distribution of erotica⁵⁴ and imprisonment for burning the American flag, were deontologically unjust or consequentially undesirable restrictions on liberty. But as long as the principle of liberty *simpliciter* carries a less impressive historical provenance than the principle of free speech, or as long as the generalized enforcement by the courts of a principle of liberty creates separate

51 Those who find the example excessively counterfactual can substitute astrology as an example of a widely held but no less spurious method of distinguishing people and events.

52 See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Kelley v. Johnson*, 425 U.S. 238 (1976); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). The claim in the text may be less strong than it was in even the recent past, or at least that may be a plausible inference from some of the language, even if not the holding, in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

53 *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

54 I use the term "erotica" to refer to sexually explicit written or printed material not involving violence or coercion, either in its production or in its imagery.

problems of the scope of judicial power, it may be that the use of a distinct (and narrower) second-order principle of freedom of speech will remain as a pragmatically useful way of achieving greater liberty as long as a simpler principle of liberty is destined to remain underenforced.

This pragmatic gain, however, does not come without cost. For if it is the case that a categorical protection of free speech protects certain communicative activities that would not be protected by a simple principle of liberty,⁵⁵ then the over-protection of speech to help guard against the under-protection of liberty can only be calibrated with reference to the consequences not only of the under-protection of liberty, but also of the over-protection of speech. And it is only by considering the relationship between free speech and private power, and only by considering speech as both a manifestation of power and a process that is influenced by its distribution, can we fully consider all of the consequences involved.

Yet although critical thinking about discourse may bear fruit for the enterprise of theorizing about (negative) rights to freedom of speech and freedom of the press, such critical thinking may be even more valuable in considering the extent to which discourse should be built into a given decision procedure, and the extent to which discourse should actively be encouraged. To encourage discourse as part of public decisionmaking, and especially to devote scarce financial and other resources to that encouragement, is to presuppose particular advantages that more public discourse will bring. That public discourse will often bring advantages is undeniable, but that public discourse brings disadvantages that will sometimes outweigh its advantages is a problem that is too rarely confronted.

It is a plausible interpretation of all that I have said here, however, that I am not the one to confront these issues. A strong inference from my argument is that the question of the benefits of discourse for human decisionmaking is, to repeat, more an empirical than a theoretical question (assuming that the two are different, or that at least they represent different approaches).⁵⁶ Although some existing research in social psychology addresses some of these ques-

55 I am thinking here primarily of speech that is intentionally (*see* *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978); *Village of Skokie v. National Socialist Party of Am.*, 373 N.E.2d 21 (Ill. 1978)) or recklessly (*see* *Rice v. Paladin Enters., Inc.*, No. 96-2412 (4th Cir., decision pending, 1997); *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802 (S.D. Tex. 1983), *motion to dismiss denied*, 583 F. Supp. 1566 (S.D. Tex. 1984), *rev'd*, 814 F.2d 1017 (5th Cir. 1987)) harm-producing.

56 In correspondence with me, Gary King has put the point more strongly: "The literature [on freedom of speech and on deliberation] is entirely *theoretical* but the

tions,⁵⁷ one can imagine an experiment focused more on the existing empirical hypotheses of free speech theory and doctrine, or an experiment designed to test more crisply the advantages and disadvantages of each of the five decision procedures I have described in reaching a correct result. We could, for example, randomly assign people to five different treatment groups tracking the five methods I describe, and then measure such dependent variables as (1) how quickly is a decision reached; (2) how creative is the solution; (3) how satisfied are the participants with the outcome; and (4) is the outcome correct, for those outcomes in which there is an identifiably correct answer. Other variables are easily imaginable.⁵⁸ Such a course of research (although possibly with a different research design) might enable us to determine better than empirical assertions masquerading as theory just what is the relationship between discourse and the ability to identify truth. A great deal of free speech theory and a great deal of discourse theory is marked by an admirable epistemological optimism, but whether that epistemological optimism is well-founded is in the final analysis an empirical question, as to which the resources of contemporary social science research might help to locate an answer.

Even were we to determine that discourse might not be a very good way of determining the truth of some proposition of fact or value, it might still be the case that discourse serves truth-independent values such as equality and participation. My strong sense is that these values, more than values of moral, political, or factual epistemology, are at the heart of much of the contemporary celebration of discourse. And there is, in itself, nothing wrong with this. A decision-making procedure that is more participatory, more inclusive, and more egalitarian may serve politically and morally desirable purposes even if it produces worse outcomes with respect to particular decisions, and it may turn out that the cost of the worse array of outcomes is less than the benefit of greater equality and greater participation of people in the decisions that affect their lives. But if this is the case, then it may turn out that the adoption of discourse as a decisionmaking mechanism is not the easy one involving many benefits and no

question about the benefits of discourse for human decisionmaking is an *empirical* question."

57 See, e.g., John W. Payne et al., *Behavioral Decision Research: A Constructive Processing Perspective*, 43 ANN. REV. PSYCHOL. 87 (1992); Eldar Shafir et al., *Reason-based Choice*, 49 COGNITION 11 (1993); Douglas H. Wedell, *Distinguishing Among Models of Contextually Induced Preference Reversals*, 17 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 767 (1991).

58 One can imagine similar research designed to measure the related question of the desirability of the adversary system as a way of determining factual truth.

costs, but the harder one of whether the benefits of discourse outweigh its costs, a question unlikely to have a universal or acontextual answer.

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