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CASS R. SUNSTEIN

## Preferences and Politics

The drafting of the United States Constitution, it is often said, signaled a rejection of conceptions of politics founded on classical ideals in favor of a quite different modern view.<sup>1</sup> The precise terms of the alleged shift are not altogether clear, but it is possible to identify the most prominent strands. The classical conception assumes a relatively homogeneous people and prizes active participation by the polity's citizenry. In the classical conception, the polity is self-consciously concerned with the character of the citizens; it seeks to inculcate in them and to profit from a commitment to the public good. Plato said that politics is the "art whose business it is to care for souls";<sup>2</sup> and under the classical conception, civic virtue, not private interest, is the wellspring of political behavior. Whether or not the state imposes a "comprehensive view"<sup>3</sup> on the nation, it relies relatively little on private rights to constrain government. The

I am grateful to Jon Elster for many valuable discussions of these issues; to Elizabeth Anderson, Joshua Cohen, George Loewenstein, Jon Macey, Jane Mansbridge, Frederick Schauer, and Elisabeth Wood for helpful comments on an earlier draft; and, for their lively responses, to participants in the University of Toronto Legal Theory Workshop and the University of Chicago seminar led by Gary Becker and James Coleman on rational models in the social sciences. Some of this essay develops arguments set forth in chaps. 1 and 2 of my *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, Mass.: Harvard University Press, 1990).

1. See Gordon Wood, *The Creation of the American Republic, 1776-1787* (New York: W. W. Norton, 1972); Thomas Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (Chicago: University of Chicago Press, 1988); and Martin Diamond, "Ethics and Politics: The American Way," in *The Moral Foundations of the American Republic*, ed. Robert Horwitz (Charlottesville: University Press of Virginia, 1986), pp. 75-106.

2. *The Laws* 65ob.

3. See John Rawls, "The Idea of an Overlapping Consensus," *Oxford Journal of Legal Studies* 7 (1987): 1-25.

underlying vision of “republican” politics is one of frequent participation and deliberation in the service of decision, by the citizenry, about the sorts of values according to which the nation will operate.

In the modern account, by contrast, government is above all respectful of the divergent conceptions of the good held by its many constituents. People are taken as they are, not as they might be. Modern government has no concern with souls. Although electoral processes are ensured, no special premium is placed on citizen participation. Self-interest, not virtue, is understood to be the usual motivating force of political behavior. Politics is typically, if not always, an effort to aggregate private interests. It is surrounded by checks, in the form of rights, protecting private liberty and private property from public intrusion.

In this system, the goal of the polity is quite modest: the creation of the basic ground rules under which people can satisfy their desires and go about their private affairs. Much of this is famously captured in *The Federalist* No. 10, in which Madison redescribed the so-called republican problem of the corruption of virtue as the so-called liberal problem of the control of factions, which, as Madison had it, were inevitable if freedom was to be preserved.

In fact, the conventional division between the American founders and their classical predecessors is far too crude. The founders attempted to create a deliberative democracy, one in which the institutions of representation, checks and balances, and federalism would ensure a deliberative process among political equals rather than an aggregation of interests.<sup>4</sup> But respect for private preferences, rather than collective deliberation about public values or the good life, does seem to be a distinguishing feature of American constitutionalism. Indeed, the view that government should refuse to evaluate privately held beliefs about individual welfare, which are said to be irreducibly “subjective,” links a wide range of views about both governmental structure and individual rights.

In this article I want to explore the question whether a contemporary democracy might not sometimes override the private preferences and beliefs of its citizens, not in spite of its salutary liberalism but because of it.

4. Indeed, participants in the liberal tradition, in its classical forms, emphasized the need for deliberation in government and placed a high value on political virtue. Many liberals do not take private preferences as the basis for social choice, without regard to their sources and consequences, or to the reasons that might be offered in their support. See my “Beyond the Republican Revival,” *Yale Law Journal* 97 (1988): 1539–89.

It is one thing to affirm competing conceptions of the good; it is quite another to suggest that political outcomes must generally be justified by, or even should always respect, private preferences. A large part of my focus here is on the phenomenon of endogenous preferences. By this term I mean to indicate that preferences are not fixed and stable, but are instead adaptive to a wide range of factors—including the context in which the preference is expressed, the existing legal rules, past consumption choices, and culture in general. The phenomenon of endogenous preferences casts doubt on the notion that a democratic government ought to respect private desires and beliefs in all or almost all contexts.<sup>5</sup> It bears on a number of particular problems as well, including the rationale for and extent of the constitutional protection accorded to speech; proportional representation and checks and balances; and the reasons for and limits of governmental regulation of the arts, broadcasting, and the environment. I take up these issues at several points in this article.

The argument proceeds in several stages. In Section I, I set forth some fairly conventional ideas about welfare and autonomy, in conjunction with the endogeneity of desires, in order to argue against the idea that government ought never or rarely to override private preferences. In Section II, I contend that in three categories of cases, private preferences, as expressed in consumption choices, should be overridden. The first category involves what I call collective judgments, including considered beliefs, aspirations for social justice, and altruistic goals; the second involves preferences that have adapted to undue limitations in available opportunities or to unjust background conditions; the third points to in-

5. On the limits of preference-based theories, see Amartya Sen, "Rational Fools: A Critique of the Behavioral Foundations of Economic Theory," *Philosophy & Public Affairs* 6, no. 4 (Summer 1977): 317–44; Jon Elster, *Sour Grapes* (New York: Cambridge University Press, 1983); and John Roemer, "'Rational Choice' Marxism," in *Analytical Marxism*, ed. John Roemer (New York: Cambridge University Press, 1986), pp. 191–201. Of course, the satisfaction of private preferences in markets or elsewhere may create prisoners' dilemmas or collective action problems, and here governmental controls (or social norms) are a natural solution. I will not, however, deal with this narrower problem here.

It might well be that literature, in addition to economics and political theory, is a fruitful place to explore this subject. See Martha Nussbaum, *Love's Knowledge* (New York: Oxford University Press, 1990), and "Shame, Separateness, and Political Unity: Aristotle's Criticism of Plato," in *Essays on Aristotle's Ethics*, ed. Amelie Rorty (Berkeley: University of California Press, 1980), pp. 395–435. It is thus no accident that writers in politics and economics sometimes draw on literature. See, e.g., Elster, *Sour Grapes*.

trapersonal collective action problems that, over a lifetime, impair personal welfare. In all of these cases, I suggest, a democracy should be free and is perhaps obliged to override private preferences. In Section III, I make some remarks about the relevance of these claims to several current issues of constitutional controversy. These include proportional representation in politics and governmental regulation of the speech “market,” including rights of access to the media, democratic controls on the electoral process, hate speech, and pornography.

### I. AGAINST SUBJECTIVE WELFARISM

Should a constitutional democracy take preferences as the basis for political choice? In contemporary politics, law, and economics, the usual answer is affirmative. Modern economics, for example, is dominated by a conception of welfare based on the satisfaction of existing preferences, as measured by willingness to pay; in politics and law, something called “paternalism” is disfavored in both the public and private realms.<sup>6</sup> But

6. David Gauthier, *Morals by Agreement* (New York: Oxford University Press, 1986), contains arguments in this direction; for a representative example at the intersection of economics and law, see Richard Posner, *Economics of Justice* (Cambridge, Mass.: Harvard University Press, 1983), p. 53. There are, of course, criticisms within all of these fields. In economics, see Sen, “Rational Fools”; in politics, see Elster, *Sour Grapes*.

It is notable that the great expositors of liberalism in the nineteenth and twentieth centuries are emphatic in their rejection of the view that satisfaction of existing preferences is adequate for purposes of ethics or politics. See John Stuart Mill, *Considerations on Representative Government*, ed. C. V. Shields (1861; New York: Liberal Arts Press, 1958), and *The Subjection of Women*, ed. Susan Moller Okin (1869; Indianapolis: Hackett, 1988); and John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971). Mill’s rejection of that view is especially emphatic in his essay on Bentham, where he criticizes Bentham for the view that “[t]o say either that man should, or that he should not, take pleasure in one thing, displeasure in another, appeared to him as much an act of despotism in the moralist as in the political ruler.” Mill, by contrast, emphasized the need to explore the influences “on the regulation of . . . affections and desires,” and pointed to “the deficiencies of a system of ethics which does not pretend to aid individuals in the formation of their own character” (*Mill on Bentham and Coleridge*, ed. F. R. Leavis [London: Chatto & Windus, 1950], pp. 68, 71, 70). Of course, there is a difference between what a system of ethics and what a system of politics should say about that question, as Mill clearly believed.

Dewey spoke in similar terms, invoking the need for critical reflection on the “conditions under which objects are enjoyed” and “the consequences of esteeming and liking them,” and arguing that “judgments about values are judgments about that which should regulate the formation of our desires, affections and enjoyments” (John Dewey, *The Quest for Certainty: A Study of the Relation of Knowledge and Action* [New York: Putnam, 1960], pp. 259, 265, 272–73; emphasis in original).

the idea that government ought to take preferences as the basis for political decisions is a quite modern one. This is not to say that the idea is without foundations. Partly a function of the perceived (though greatly overstated) difficulty of making interpersonal comparisons of utility, the idea is also a product of the epistemological difficulties of assessing preferences in terms of their true connection with individual welfare, and, perhaps most of all, the genuine political dangers of allowing government to engage in such inquiries.

The constellation of ideas that emerges from these considerations has been exceptionally influential. It embodies a conception of political justification that might be described as “subjective welfarism.”<sup>7</sup> On this view, the government, even or perhaps especially in a democracy, should attend exclusively to conceptions of welfare as subjectively held by its citizens. A wide range of prominent approaches to politics turn out to be versions of subjective welfarism. These include, for example, certain forms of utilitarianism; the view that some version of Paretian efficiency ought to be treated as the foundational norm for political life; opposition to paternalism in public and private life; approaches to politics modeled on bargaining theory (rational or otherwise); and conceptions of politics that see the democratic process as an effort to aggregate individual preferences.

It is important to understand that subjective welfarism, thus defined, may or may not be accompanied by a broader notion that ethical and moral questions should generally be treated in welfarist or subjectivist terms. It is as a political conception, rather than an ethical one, that subjective welfarism underlies a wide range of approaches to public life, including ideas about institutional arrangements and individual or collec-

7. I am grateful to Joshua Cohen for this formulation. I will not explore the complexities of the notion of “preference” here. I mean to refer simply to choices, mostly as these are observed in market behavior. This understanding of course captures the economic notion of “revealed preference” and also is a foundational part of subjective welfarism as I understand it. For a recent and interestingly offhand example, see Ingemar Hansson and Charles Stuart, “Malthusian Selection of Preferences,” *American Economic Review* 90 (1990): 529, 542: “We use natural selection to explain behavior, or equivalently, preferences.” I do not explore the view, much broader than the claims defended here, that the existence of even widely held preferences, thus defined, furnishes no argument at all for governmental action.

If the notion of preference is intended to refer to an internal psychological force, or to a supposed wellspring of action, difficulties of course abound: people have first-, second-, and *n*th-order preferences, and their desires can be organized into many different categories, ranging from whimsy to considered judgments.

tive rights. What I want to argue here is that subjective welfarism, even as a political conception, is unsupportable by reference to principles of autonomy or welfare, the very ideas that are said to give rise to it.

The initial objection to the view that government should take preferences “as they are,” or as the basis for political choice, is one of impossibility. Whether people have a preference for a commodity, a right, or anything else is in part a function of whether the government has allocated it to them in the first instance. There is no way to avoid the task of initially allocating an entitlement, and the decision to grant an entitlement to one person frequently makes that person value that entitlement more than if the right had been allocated to someone else. (It also makes other people value it less than they would otherwise.) Government must not only allocate rights to one person or another; it must also decide whether or not to make the right alienable through markets or otherwise. The initial allocation serves to reflect, to legitimate, and to reinforce social understandings about presumptive rights of ownership, and that allocation has an important causal connection to individual perceptions of the good or right in question.

For example, a decision to give employees a right to organize, farmers a right to be free from water pollution, or women a right not to be subjected to sexual harassment will have an impact on social attitudes toward labor organization, clean water, and sexual harassment. The allocation therefore has an effect on social attitudes toward the relevant rights and on their valuation by both current owners and would-be purchasers. And when preferences are a function of legal rules, the rules cannot be justified by reference to the preferences.<sup>8</sup> Moreover, the initial

8. See Elster, *Sour Grapes*, and Rawls, *A Theory of Justice*. The problem here is not the simple fact of endogeneity, but that social rules and practices cannot be justified by reference to preferences that they have produced.

The point in the text receives empirical confirmation in the “endowment effect” frequently observed in social psychology and economics. See, e.g., David Brookshire and Don Coursey, “Measuring the Value of a Public Good: An Empirical Comparison of Elicitation Procedures,” *American Economic Review* 77 (1987): 554–65; David Harless, “More Laboratory Evidence on the Disparity Between Willingness to Pay and Compensation Demanded,” *Journal of Economic Behavior & Organization* 11 (1989): 359–70; Richard Thaler, “Toward a Positive Theory of Consumer Choice,” *Journal of Economic Behavior & Organization* 1 (1980): 39–60; and Jack Knetsch and J. A. Sinden, “Willingness to Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value,” *Quarterly Journal of Economics* 99 (1984): 507–21. The endowment effect is the consequence, for preferences and willingness to pay, of the initial allocation of an entitlement. Cf. Martha Nussbaum, “Shame, Separateness, and Political Unity,” and

assignment creates the basic “reference state” from which values and judgments of fairness are subsequently made, and those judgments affect preferences and private willingness to pay.<sup>9</sup> Of course, a decision to make an entitlement alienable or inalienable (consider the right to vote or reproductive capacities) will have preference-shaping effects. Because of the preference-shaping effects of the rules of allocation, it is difficult to see how a government might even attempt to take preferences “as given” or as the basis for decisions in any global sense.

To some degree this concern might be put to one side. Surely there is a difference between a government that concerns itself self-consciously and on an ongoing basis with private preferences and a government that sets up the basic rules of property, contract, and tort, and then lets things turn out however they may. If this distinction can be sustained, disagreements about the relationship between politics and preferences turn on competing notions of autonomy or freedom on the one hand and welfare on the other. Subjective welfarism is founded on the claim that an approach that treats preferences as sovereign is most likely to promote both individual freedom, rightly conceived, and individual or social welfare.

It will be useful to begin with welfare. Even if one accepted a purely welfarist view, one might think that the process of promoting welfare should take place not by satisfying current preferences but by promoting those preferences and satisfying them to such an extent as is consonant with the best or highest conception of human happiness. This view is connected with older (and some current) forms of utilitarianism; it also

“Aristotelian Social Democracy,” in *Liberalism and the Good*, ed. R. Bruce Douglas, Gerald Mara, and Henry Richardson (New York: Routledge, 1990), pp. 203–52. A similar problem occurs when preferences are produced through an effort to counter the status quo, as in the “grass is always greener” phenomenon, in which people prefer things simply because they are unavailable. There is much less, however, in the way of empirical confirmation of this phenomenon.

9. See Daniel Kahneman, Jack Knetsch, and Richard Thaler, “Fairness and the Assumptions of Economics,” in *Rational Choice: The Contrast Between Economics and Psychology*, ed. Robin Hogarth and Melvin Reder (Chicago: University of Chicago Press, 1987), pp. 101–16, esp. pp. 113–14. A related phenomenon is “loss aversion,” which refers to the fact that a negative change from the status quo is usually seen as more harmful than a positive change is seen as beneficial. See Daniel Kahneman and Amos Tversky, “Prospect Theory: An Analysis of Decision Under Risk,” *Econometrica* 47 (1979): 263, 286–88. Loss aversion, together with the “reference state” phenomenon, may help to explain the endowment effect described in note 8 above.

has roots in Aristotle.<sup>10</sup> Here one does not take existing preferences as given, and one does not put all preferences on the same plane. A criterion of welfare remains the ultimate one, but the system is not focused solely on preference satisfaction, since it insists that welfare and preference satisfaction are entirely different things.<sup>11</sup>

A central point here is that preferences are shifting and endogenous rather than exogenous, and as a result are a function of current information, consumption patterns, legal rules, and general social pressures. An effort to identify welfare with preference satisfaction would be easier to understand if preferences were rigidly fixed at some early age, or if learning were impossible; if this were so, democratic efforts to reflect on, change, or select preferences would breed only frustration. But because preferences are shifting and endogenous, and because the satisfaction of existing preferences might lead to unhappy or deprived lives, a democracy that treats all preferences as fixed will lose important opportunities for welfare gains.

With respect to welfare, then, the problem posed by the endogeneity of preferences is not the origin of desires but their malleability. At least if the relevant cases can be confidently identified in advance, and if collective action can be justified by reference to particular good reasons, the argument for democratic interference will be quite powerful. Respect for preferences that have resulted from unjust background conditions and that will lead to human deprivation or misery hardly appears the proper course for a liberal democracy.<sup>12</sup>

10. For a modern utilitarian account along these lines, see Richard Brandt, *A Theory of the Good and the Right* (New York: Oxford University Press, 1979). For Aristotelian accounts, see Nussbaum, "Aristotelian Social Democracy," and Amartya Sen, "Well-Being, Agency, and Freedom," *Journal of Philosophy* 82 (1985): 169–221.

11. See Amartya Sen, *The Standard of Living*, The Tanner Lectures on Human Values, ed. Geoffrey Hawthorne (Cambridge: Cambridge University Press, 1987). On various conceptions of welfare, see James Griffin, *Well-Being: Its Meaning, Measurement and Moral Significance* (Oxford: Clarendon Press, 1986).

12. The objection here is not solely that preferences are endogenous to state action of some sort. As discussed in more detail below, the fact of endogeneity is not in itself an argument for democratic control of preferences. The argument is instead that misery that is a product of unjust background conditions calls for collective change. A subjectively satisfactory status quo produced by unjust background conditions will also call for change in some settings, for reasons taken up below. I do not deal with the possibility that subjective unhappiness that is a product of just background conditions also calls for governmental action, except insofar as an intrapersonal collective action problem is involved.

Moreover, to say that a preference is endogenous is not to say that it is a mere whim or

For example, legal rules prohibiting or discouraging addictive behavior may have significant advantages in terms of welfare. Regulation of heroin or cigarettes (at least if the regulation can be made effective) might well increase aggregate social welfare, by decreasing harmful behavior, removing the secondary effects of those harms, and producing more healthful and satisfying lives. Similarly, governmental action relating to the environment, broadcasting, or culture—encouraging or requiring, for example, protection of beautiful areas, broadcasting about public issues, high-quality programs, or public support of artistic achievement—may in the end generate (or, better, prevent obstacles to the generation of) new preferences, providing increased satisfaction and in the end producing considerable welfare gains. The same may well be true of anti-discrimination measures, which affect the desires and attitudes of discriminators and victims alike. A system that takes existing private preferences as the basis for political choice will sacrifice important opportunities for social improvement on welfarist criteria. This point was a crucial one in the early stages of utilitarian thought; it has been lost more recently with the shift from older forms of welfarism to the idea of “revealed preferences.”

Moreover, the satisfaction of private preferences, whatever their content and origins, does not respond to a persuasive conception of liberty or autonomy. The notion of autonomy should refer instead to decisions reached with a full and vivid awareness of available opportunities, with reference to all relevant information, and without illegitimate or excessive constraints on the process of preference formation. When these conditions are not met, decisions should be described as unfree or nonautonomous; for this reason it is most difficult to identify autonomy with preference satisfaction. If preferences are a product of available information, existing consumption patterns, social pressures, and governmental rules, it seems odd to suggest that individual freedom lies exclusively or by definition in preference satisfaction, or that current preferences should, on grounds of autonomy, be treated as the basis for

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fancy, or highly malleable. Some preferences are in fact relatively stable, even if they are a function of legal rules, social pressures, or existing institutions. A high degree of stability, and great resistance to change, will counsel against efforts at changing preferences, certainly on welfare grounds, and perhaps on grounds of autonomy as well (though even stable preferences may be nonautonomous, as in the case of rigid adaptations to an unjust status quo). In the face of extremely stable preferences, democratic efforts at change will merely breed resentment and frustration on the part of the objects of those efforts.

settling political issues. It seems even odder to suggest that all preferences should be treated equally, independently of their basis and consequences, or of the reasons offered in their support.

For purposes of autonomy, then, governmental interference with existing desires may be justified because of problems in the origins of those desires. Welfare-based arguments that invoke endogeneity tend to emphasize the malleability of preferences after they are formed; arguments based on autonomy stress what happens before the preferences have been created, that is, the conditions that gave rise to them. Because of this difference, the two arguments will operate along different tracks; and in some cases autonomy-based arguments will lead to conclusions different from those that would emerge from arguments based on welfare. In many cases, however, considerations of autonomy will argue powerfully against taking preferences as the basis for social choice.

Consider, for example, a decision to purchase dangerous foods, consumer products, or cigarettes by someone unaware of the (serious) health risks; an employer's decision not to hire blacks because of a background of public and private segregation or racial hostility in his community; a person who disparages or has no interest in art and literature because the culture in which he has been reared centers mainly around television; a decision of a woman to adopt a traditional gender role because of the social stigma attached to refusing to do so; a decision not to purchase cars equipped with seat belts or not to wear a motorcycle helmet produced by the social pressures imposed by one's peer group; a lack of interest in environmental diversity resulting from limitation of one's personal experiences to industrialized urban areas; a decision not to employ blacks at a restaurant because of fear of violence from whites.

These examples are different from one another. The source of the problem varies in each. But in all of them, the interest in liberty or autonomy does not call for governmental inaction, even if that were an intelligible category. Indeed, in many or perhaps all of these cases, regulation removes a kind of coercion.

One goal of a democracy, in short, is to ensure autonomy not merely in the satisfaction of preferences, but also, and more fundamentally, in the processes of preference formation. John Stuart Mill himself was emphatic on this point, going so far as to suggest that government itself should be evaluated in large measure by its effects on the character of

the citizenry.<sup>13</sup> The view that freedom requires an opportunity to choose among alternatives finds a natural supplement in the view that people should not face unjustifiable constraints on the free development of their preferences and beliefs. It is not altogether clear what such a view would require—a point to which I will return. At the very least, however, it would see a failure of autonomy, and a reason for collective response, in beliefs and preferences based on insufficient information or opportunities.

Governmental action might also be justified on grounds of autonomy when the public seeks to implement, through democratic processes culminating in law, widely held social aspirations or collective desires. Individual consumption choices often diverge from collective considered judgments: people may seek, through law, to implement a democratic decision about what courses to pursue. If so, it is ordinarily no violation of autonomy to allow those considered judgments to be vindicated by governmental action. Collective aspirations or considered judgments, produced by a process of deliberation on which competing perspectives are brought to bear, reflect a conception of political freedom having deep roots in the American constitutional tradition. On this view, political autonomy can be found in collective self-determination, as citizens decide, not what they “want,” but instead who they are, what their values are, and what those values require. What they “want” must be supported by reasons.

To summarize: On the thinnest version of the account offered thus far, the mere fact that preferences are what they are is at least sometimes and perhaps generally an insufficient justification for political action. Government decisions need not be and in some cases should not be justified by reference to preferences alone. More broadly, a democratic government should sometimes take private preferences as an object of regulation and control—an inevitable task in light of the need to define initial entitlements—and precisely in the interest of welfare and autonomy. Of course, there are serious risks of overreaching here, and there must be some constraints (usually denominated “rights”) on this process. Checks laid down in advance are an indispensable part of constitutional government. Those checks will include, at a minimum, basic

13. See Mill, *Considerations on Representative Government*.

guarantees of political liberty and personal security, and such guarantees may not be comprised by processes of collective self-determination. I return to this point below.

## II. DEMOCRATIC REJECTION OF REVEALED PREFERENCES: A CATALOGUE

In this section I attempt to particularize the claims made thus far by cataloguing cases in which considerations of autonomy and welfare justify governmental action that subjective welfarism would condemn. In all of these cases, I claim that participants in a liberal government ought to be concerned with whether its citizens are experiencing satisfying lives and that the salutary liberal commitment to divergent conceptions of the good ought not to be taken to disable government from expressing that concern through law. The cases fall into three basic categories.

### *A. Collective Judgments and Aspirations*

Citizens in a democratic polity might act to embody in law not the preferences that they hold as private consumers, but instead what might be described as collective judgments, including aspirations or considered reflections. Measures of this sort are a product of deliberative processes on the part of citizens and representatives. In that process, people do not simply determine what they "want." The resulting measures cannot be understood as an attempt to aggregate or trade off private preferences.

*1. Politics, Markets, and the Dependence of Preferences on Context.* Frequently political choices cannot easily be understood as a process of aggregating prepolitical desires. Some people may, for example, support nonentertainment broadcasting on television, even though their own consumption patterns favor situation comedies; they may seek stringent laws protecting the environment or endangered species, even though they do not use the public parks or derive material benefits from protection of such species; they may approve of laws calling for social security and welfare even though they do not save or give to the poor; they may support antidiscrimination laws even though their own behavior is hardly race- or gender-neutral. The choices people make as political participants are different from those they make as consumers. Democracy thus calls for an intrusion on markets.

The widespread disjunction between political and consumption

choices presents something of a puzzle. Indeed, it sometimes leads to the view that market ordering is undemocratic and that choices made through the political process are a preferable basis for social ordering.

A generalization of this sort is far too broad in light of the multiple breakdowns of the political process and the advantages of market ordering in many arenas. Respect for private markets is an important way of respecting divergent conceptions of the good and is thus properly associated with individual liberty. Respect for markets is also an engine of economic productivity, an important individual and collective goal. But it would be a mistake to suggest, as some do, that markets always reflect individual choice more reliably than politics; or that democratic choices differ from consumption outcomes only because of confusion, as voters fail to realize that they must ultimately bear the costs of the programs they favor; or that voting patterns merely reflect a willingness to seek certain goods so long as other people are footing the bill.

Undoubtedly, consumer behavior is sometimes a better or more realistic reflection of actual preferences than is political behavior. But in light of the fact that preferences depend on context, the very notion of a “better reflection” of “actual” preferences is a confusing one; there is no such thing as an “actual” (in the sense of unitary or acontextual) preference in these settings. Moreover, the difference might be explained by the fact that political behavior reflects a variety of influences that are distinctive to the context of politics, and that justify according additional weight to what emerges through the political setting.

These influences include four closely related phenomena. First, citizens may seek to implement individual and collective aspirations in political behavior but not in private consumption. As citizens, people may seek the aid of the law to bring about a social state that they consider to be in some sense higher than what emerges from market ordering. Second, people may, in their capacity as political actors, attempt to satisfy altruistic or other-regarding desires, which diverge from the self-interested preferences sometimes characteristic of markets.<sup>14</sup> Third, political decisions might vindicate what might be called metapreferences or second-order preferences. People have wishes about their wishes, and some-

14. See Howard Margolis, *Selfishness, Altruism, and Rationality: A Theory of Social Choice* (New York: Cambridge University Press, 1982). Of course the work by Kenneth Arrow and his followers in social choice theory creates serious problems for all preference-based theories of politics.

times they try to vindicate those second-order wishes, including considered judgments about what is best, through law. Fourth, people may precommit themselves, in democratic processes, to a course of action that they consider to be in the general interest. The adoption of a constitution is itself an example of a precommitment strategy.

Three qualifications are necessary here. First, some of these objections might be translated into the terms of subjective welfarism. Some preferences, after all, are most effectively expressed in democratic arenas, and that expression can be supported precisely on the grounds that they are subjectively held and connected to a certain form of individual and collective welfare. My broader point, however, is that political choices will reflect a kind of deliberation and reasoning, transforming values and perceptions of interests, that is often inadequately captured in the marketplace. It is this point that amounts to a rejection or at least a renovation of subjective welfarism as a political conception. It is here that democracy becomes something other than an aggregative mechanism, that politics is seen to be irreducible to bargaining, and that prepolitical "preferences" are not taken as the bedrock of political justification.

Second, to point to these various possibilities is not at all to deny that market or private behavior frequently reflects considered judgments, altruism, aspirations, or far more complex attitudes toward diverse goods than are captured in conventional accounts of preference structures. There are countless counterexamples to any such claim. All I mean to suggest is that divergences between market and political behavior will sometimes be attributable to phenomena of the sort I have described.

Third, a democratic system must be built on various safeguards to ensure that its decisions are in fact a reflection of deliberative processes of the sort described here. Often, of course, such processes are distorted by the fact that some groups are more organized than others, by disparities in wealth and influence, and by public and private coercion of various kinds. I am assuming here that these problems have been sufficiently overcome to allow for a favorable characterization of the process.

*2. Explanations.* Thus far I have suggested that people may seek, through law, to implement collective desires that diverge from market choices. Is it possible to come up with concrete explanations for the differences? There are a number of possibilities.

First, the collective character of politics, which permits a response to

collective action problems, is critical here. People may not want to implement their considered judgments, or to be altruistic, unless there is assurance that others will be bound to do so as well. More simply, people may prefer not to contribute to a collective benefit if donations are made individually, with no guarantee that others will participate; but their most favored system, obtainable only or best through democratic forms, might be one in which they contribute if (but only if) there is assurance that others will do so as well. Perhaps people feel ashamed if others are contributing and they are not. Perhaps they feel victimized if they are contributing and others are not. In any case, the satisfaction of aspirations or altruistic goals will sometimes have the characteristics of the provision of public goods or the solution of a prisoner's dilemma.

Second, the collective character of politics might overcome the problem, discussed below, of preferences and beliefs that have adapted, at least to some extent, to an unjust status quo or to limits in available opportunities.<sup>15</sup> Without the possibility of collective action, the status quo may seem intractable, and private behavior, and even desires, will adapt accordingly. But if people can act in concert, preferences might take on a quite different form. Consider social movements involving the environment, labor, and race and sex discrimination. The collective action problem thus interacts with aspirations, altruistic desires, second-order preferences, and precommitment strategies. All of these are most likely to be enacted into law if an apparatus such as democratic rule is available to overcome collective action problems.

Third, social and cultural norms might incline people to express aspirational or altruistic goals more often in political behavior than in markets. Such norms may press people, in their capacity as citizens, in the direction of a concern for others or for the public interest.

Fourth, the deliberative aspects of politics, bringing additional information and perspectives to bear, may affect preferences as expressed through governmental processes. A principal function of a democratic system is to ensure that through representative or participatory processes, new or submerged voices, or novel depictions of where interests lie and what they in fact are, are heard and understood. If representatives or citizens are able to participate in a collective discussion of (for exam-

15. Cf. Mill's discussion of the ability of regimes to create active or passive characters, in *Considerations on Representative Government*.

ple) broadcasting or levels of risk in the workplace, they might well generate a far fuller and richer picture of diverse social goods, and of how they might be served, than can be provided through individual decisions as registered in the market. It should hardly be surprising if preferences, values, and perceptions of both individual and collective welfare are changed as a result of that process.

Fifth, and finally, consumption decisions are a product of the criterion of private willingness to pay, which creates distortions of its own. Willingness to pay is a function of ability to pay, and it is an extremely crude proxy for utility or welfare. Political behavior removes this distortion—which is not to say that it does not introduce distortions of new kinds.

3. *Qualifications.* Arguments from collective desires are irresistible if the measure at issue is adopted unanimously. But more serious difficulties are produced if (as is usual) the law imposes on a minority what it regards as a burden rather than a benefit. Suppose, for example, that a majority wants to require high-quality television and to ban violent and dehumanizing shows, but that a significant minority wants to see the latter. (I put the First Amendment questions to one side.) It might be thought that those who perceive a need to bind themselves, or to express an aspiration, should not be permitted to do so if the consequence is to deprive others of an opportunity to satisfy their preferences.

The foreclosure of the preferences of the minority is unfortunate, but in general it is difficult to see what argument there might be for an across-the-board rule against collective action of this sort. If the majority is prohibited from vindicating its considered judgments through legislation, an important arena for democratic self-government will be eliminated. The choice is between the considered judgments of the majority and the preferences (and perhaps judgments as well) of the minority. On the other hand, the foreclosure of the minority should probably be permitted only when less restrictive alternatives, including private arrangements, are unavailable to serve the same end.

Of course, the argument for democratic outcomes embodying collective judgments is not always decisive. It is easy to imagine cases in which that argument is weak. Consider a law forbidding atheism or agnosticism, or barring the expression of unpatriotic political displays. And while I cannot provide in this space a full discussion of the contexts in which the case for democratic outcomes is overcome, it might be useful

to describe, in a preliminary way, three categories of cases in which constraints on collective judgments seem especially appropriate.

First, if the particular choice foreclosed has some special character, and especially if it is a part of deliberative democracy itself, it is appropriately considered a right, and the majority has no authority to intervene. Political expression and participation are prime examples. The equal political rights of members of the minority, as citizens, should be respected even if a general aspiration, held by the majority, argues for selective exclusions. So, too, other rights fundamental to autonomy or welfare—consider consensual sexual activity—ought generally to be off-limits to government.

Second, some collective desires might be objectionable or a product of unjust background conditions. A collective judgment that racial intermarriage is intolerable could not plausibly be justified even if it is said to reflect a collective social aspiration. To explain why, it is of course necessary to offer an argument challenging that judgment and invoking principles of justice. Such an argument might itself involve notions of autonomy or welfare. However that may be, the example suggests that the collective judgment must not be objectionable on moral grounds.

Third, some collective desires might reflect a special weakness on the part of the majority: consider a curfew law, or perhaps prohibition. In such circumstances, a legal remedy might remove desirable incentives for private self-control, have unintended side effects resulting from the “bottling-up” of desires, or prove unnecessary in light of the existence of alternative remedies. When any one of these three concerns arises, the case for protection of collective judgments is implausible. But in many contexts, these concerns are absent, and democratic controls initiated on these grounds are justified.

#### *B. Excessive Limitations in Opportunities or Unjust Background Conditions*

Citizens in a democracy might override existing preferences in order to foster and promote diverse experiences, with a view to providing broad opportunities for the formation of preferences and beliefs and for distance on and critical scrutiny of current desires. This goal usually supports private ordering and freedom of contract as well. But it calls for collective safeguards when those forces push toward homogeneity and

uniformity, as they often do in industrialized nations. Here the argument for governmental controls finds a perhaps ironic origin in Mill. Such controls are necessary to cultivate divergent conceptions of the good and to ensure a degree of reflection on those conceptions.

A system that took this goal seriously could start from a range of different foundations. It might find its roots in the principles that underlie a deliberative democracy itself.<sup>16</sup> Here the notions of autonomy and welfare would be defined by reference to the idea of free and equal persons acting as citizens in setting up the terms of democratic life. That idea will impose constraints on the sorts of preferences and beliefs that a political system would be permitted to inculcate. Perhaps more controversially, the system could be regarded as embodying a mild form of liberal perfectionism. Such a system would see the inculcation of critical and disparate attitudes toward prevailing conceptions of the good as part of the framework of a liberal democracy. Liberal education is of course the principal locus of this concern, but the principles embodied in liberal education need not be confined to the school system. Still another foundation would be Aristotelian. Here the governing goal would be to ensure that individual capacities and capabilities are promoted and not thwarted by governmental arrangements.<sup>17</sup> And this set of ideas, a different kind of perfectionism, is not so dramatically different from Mill's version of utilitarianism.

If government can properly respond to preferences that are based on limitations in available opportunities, it might well undertake aggressive initiatives with respect to the arts and broadcasting: subsidizing public broadcasting, ensuring a range of disparate programming, or calling for high-quality programming not sufficiently provided by the marketplace. Indeed, the need to provide diverse opportunities for preference formation suggests reasons to be quite skeptical of unrestricted markets in

16. See Joshua Cohen, "Deliberation and Democratic Legitimacy," in *The Good Polity: Normative Analysis of the State*, ed. Alan Hamlin and Philip Pettit (Oxford: Basil Blackwell, 1989), pp. 17–34.

17. See Nussbaum, "Aristotelian Social Democracy." Here, as above, I do not attempt to choose among foundations but instead suggest that those adopting a wide range of starting points should reject subjective welfarism. To say this is not of course to deny the need to rely ultimately on some conception of the good. For these purposes a wide variety of possibilities should do, including a form of liberal perfectionism, or a thin but relatively precise conception, as in Rawls's *A Theory of Justice*, or a thick but vague one, as in "Aristotelian Social Democracy."

communication and broadcasting. There is a firm theoretical justification for governmental regulation here, including the much-criticized, and now largely abandoned, "fairness doctrine," which required broadcasters to cover controversial issues and to give equal time to competing views. In view of the inevitable effects of programming on character, beliefs, and even conduct, it is hardly clear that governmental "inaction" is always appropriate in a constitutional democracy. Indeed, the contrary seems true. I take up this issue in more detail below.

Market behavior is sometimes based on an effort to reduce cognitive dissonance by adjusting to undue limitations in current practices and opportunities. When this is so, respect for preferences seems unjustified on grounds of autonomy and under certain conditions welfare as well. Preferences might be regarded as nonautonomous insofar as they are reflexively adaptive to unjust background conditions, and collective responses to such preferences might yield welfare gains.<sup>18</sup> The point has significant implications. For example, workers appear to underestimate the risks of hazardous activity partly in order to reduce the dissonance that would be produced by an accurate understanding of the dangers of the workplace.<sup>19</sup> Democratic controls might produce gains in terms of both welfare and autonomy.

Similar ideas help account for principles of antidiscrimination. In general, the beliefs of both beneficiaries and victims of existing injustice are affected by dissonance-reducing strategies.<sup>20</sup> The phenomenon of blam-

18. There is a difference between self-conscious adaptation to an intractable status quo and the sorts of processes I am describing. If a person without musical talent decides to counteract and revise a desire to be a world-famous pianist, it would be odd to find that (healthy) decision to be inconsistent with personal autonomy. The cases under discussion involve a reflexive process based on a socially produced absence of sufficient opportunities. Of course, the notion of sufficient opportunities itself requires a baseline; every system contains limited opportunities.

19. See George Akerlof and William Dickens, "The Economic Consequences of Cognitive Dissonance," *American Economic Review* 72 (1982): 307-18.

20. On cognitive dissonance, see Leon Festinger, *A Theory of Cognitive Dissonance* (Stanford, Calif.: Stanford University Press, 1957); on some of its implications for social theory, welfare, and autonomy, see Elster, *Sour Grapes*. See also the discussion of endowment effects and reference states in notes 9 and 10 (above) and the accompanying text.

Consider also Mary Wollstonecraft, *A Vindication of the Rights of Women*, ed. Carol Poston (1792; New York: W. W. Norton, 1975), which can be seen as an extended discussion of the social formation of preferences and the phenomenon of the adaptation of preferences, beliefs, and desires to an unjust status quo. Thus Wollstonecraft writes, "I will venture to affirm, that a girl, whose spirits have not been damped by inactivity, or innocence

ing the victim has distinct cognitive and motivational foundations: the strategy of blaming the victim, or assuming that an injury or an inequality was deserved or inevitable, permits nonvictims or members of advantaged groups to reduce dissonance by enabling them to maintain that the world is just—a pervasively, insistently, and sometimes irrationally held belief.<sup>21</sup> The reduction of cognitive dissonance is a powerful motivational force, and it operates as a significant obstacle to the recognition of social injustice or irrationality.

Victims also participate in dissonance-reducing strategies, including the lowering of their own self-esteem to accommodate both the fact of victimization and the belief that the world is essentially just. Sometimes it is easier to assume that one's suffering is warranted than that it has been imposed cruelly or by chance. Consider here the astonishing fact that after a draft lottery, participants decided that the results of the purely random process, whether favorable or not, were deserved.<sup>22</sup> The phenomenon of blaming the victim also reflects the "hindsight effect," through which people unjustifiably perceive events as having been more predictable than they in fact were, and therefore suggest that victims or disadvantaged groups should have been able to prevent the negative outcome. All of these phenomena make reliance on existing or revealed preferences highly problematic in certain contexts.

There is suggestive evidence to this effect in the psychological literature in this area. Some work here reveals that people who engage in cruel behavior begin to devalue the objects of their cruelty; observers tend to do the same.<sup>23</sup> Such evidence bears on antidiscrimination law in

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tainted by false shame, will always be a romp, and the doll will never excite attention unless confinement allows her no alternative" (p. 43). Similar points are made in Mill, *The Subjection of Women*, as against the claim that the existing desires of women are a product of consent.

Consider finally the discussion of women's illiteracy in Bangladesh in Nussbaum, "Aristotelian Social Democracy." Drawing on Martha Chen, *A Quiet Revolution: Women in Transition in Rural Bangladesh* (Cambridge, Mass.: Schenkman, 1983), Nussbaum explores the fact that many women in Bangladesh did not demand or even want greater education or literacy, and indeed expressed satisfaction with their current educational status. Of course, desires of this sort were a product of a lack of available opportunities and of social and cultural pressures.

21. See Melvin Lerner, *The Belief in a Just World: A Fundamental Delusion* (New York: Plenum Press, 1980).

22. Zick Rubin and Anne Peplau, "Belief in a Just World and Reaction to Another's Lot," *Journal of Social Issues* 29 (1973): 73–93.

23. See Lerner, *The Belief in a Just World*.

general. Certain aspects of American labor and race discrimination law can be understood as a response to the basic problem of distorted beliefs and preferences. For example, the Supreme Court has emphatically rejected freedom-of-choice plans as a remedy for school segregation.<sup>24</sup> Such plans would simply permit whites and blacks to send their children to whichever school they wished. The Court's rejection of such plans might well be puzzling to proponents of subjective welfarism, but the outcome becomes more reasonable if it is seen as based in part on the fact that, in this area, preferences and beliefs have conspicuously grown up around and adapted to the segregative status quo. Under these circumstances, freedom of choice is no solution at all; indeed, in view of the background and context the term seems an oxymoron.

In labor law as well, American law rejects freedom of contract and freedom of choice in order to protect collective bargaining. Some of this legislation must stand on a belief that private preferences have been adaptive to a status quo skewed against unionization. Special steps are therefore necessary in order to encourage collective bargaining, which also, of course, overcomes the prisoner's dilemma faced by individual workers, and therefore facilitates collective deliberation on the conditions of the workplace.

Poverty itself is perhaps the most severe obstacle to the free development of preferences and beliefs. Programs that attempt to respond to the deprivations faced by poor people—most obviously by eliminating poverty, but also through broad public education and regulatory efforts designed to make cultural resources generally available regardless of wealth—are fully justified in this light. They should hardly be seen as objectionable paternalism or as unsupportable redistribution. Indeed, antipoverty efforts are tightly linked with republican efforts to promote security and independence in the interest of creating the conditions for full and equal citizenship.

Sometimes, of course, preferences are only imperfectly adapted. At some level there is a perception of injury, but a fear of social sanctions or a belief that the cause is intractable prevents people from seeking redress. Here the collective character of politics, permitting the organization of numerous people, can be exceedingly helpful.

Standing by itself, the fact that preferences are shifting and endoge-

24. See *Green v. County School Bd.*, 391 U.S. 430 (1968), and Paul Gewirtz, "Choice in the Transition," *Columbia Law Review* 86 (1986): 728–98.

nous is hardly a sufficient reason for the imposition of democratic controls. All preferences are to some degree dependent on existing law and current opportunities, and that fact cannot be a reason for governmental action without creating a license for tyranny. The argument for democratic controls in the face of endogenous preferences must rely on a belief that welfare or autonomy will thereby be promoted. Usually governmental interference should be avoided. But far too often, the salutary belief in respect for divergent conceptions of the good is transformed into an unwillingness to protect people from either unjust background conditions or a sheer lack of options.

The actual content of democratic controls here will of course be controversial, and it probably should begin and usually end with efforts to provide information and to increase opportunities. Thus, for example, governmentally required disclosure of risks in the workplace is a highly laudable strategy. In a few cases, however, these milder initiatives are inadequate, and other measures are necessary. A moderately intrusive strategy could involve economic incentives, which might take the form of tax advantages or cash payments. For example, the government might give financial inducements to day-care centers as a way of relieving child-care burdens. Such a system might well be preferable to direct transfers of money to families, a policy that will predictably lead many more women to stay at home. In view of the sources and consequences of the differential distribution of child-care burdens, it is fully legitimate for the government to take steps in the direction of equalization. The most intrusive option, to be used rarely, is direct coercion, as in the case of governmentally mandated use of safety equipment.

The category of democratic responses to endogenous preferences of this sort overlaps with that of measures that attempt to protect collective aspirations. Frequently, aspirations form the basis for laws that attempt to influence processes of preference formation.

### *C. Intrapersonal Collective Action Problems*

There is also a case for democratic controls on existing preferences when such preferences are a function of past acts of consumption and when such acts alter desires or beliefs in such a way as to cause long-term harm. In such cases, the two key facts are that preferences are endogenous to past consumption decisions and that the effect of those decisions

on current preferences is pernicious. For government to act in this context, it is important that it be confident of its conclusions; in the face of uncertainty, freedom of choice is appropriate here. An absence of information on the part of the private actors is usually a necessary condition for collective controls.

Regulations of addictive substances, myopic behavior, and habits are familiar examples. In the case of an addiction, the problem is that the costs of nonconsumption increase dramatically over time as the benefits of consumption remain constant or fall sharply. The result is that the aggregate costs, over time or over a life, of consumption exceed the aggregate benefits, even though the initial consumption choice provides benefits that exceed costs. Individual behavior that is rational for each individual consumption choice ultimately leads people into severely inferior social states. In such cases, people, if fully informed, would in all likelihood not want to choose the good in the first place. Governmental action is a possible response.

Menahem Yaari offers the example of a group of traders attempting to induce alcoholism in an Indian tribe.<sup>25</sup> At the outset, alcoholic beverages are not extremely valuable to consumers. The consumers are willing to buy only for a low price, which the traders accept. But as a result of consumption, the value of the beverages to the consumers steadily increases to the point where they are willing to pay enormous sums to obtain them. Thus the traders are able “to manoeuvre the Indian into a position where rationality conflicts with Pareto-efficiency, i.e., into a position where to be efficient is to be irrational and to be rational is to be inefficient. . . . [T]he disadvantage, for an economic unit, of having endogenously changing tastes is that, even with perfect information and perfect foresight, the unit may find itself forced to follow an action which, by the unit’s own standards, is Pareto-dominated.”

Because of the effect over time of consumption on preferences, someone who is addicted to heroin is much worse off than he would have been had he never started, even though the original decision to consume was not irrational in terms of immediate costs and benefits. Statutes that regulate addictive substances respond to a social belief, grounded on this

25. Menahem Yaari, “Endogenous Changes in Tastes: A Philosophical Discussion,” in *Decision Theory and Social Ethics: Issues in Social Choice*, ed. Hans Gottinger and Werner Leinfellner (Boston: D. Reidel, 1978), pp. 59–98.

consideration, that the relevant preferences should not be formed in the first place.

We might describe this situation as involving an intrapersonal collective action problem, in which the costs and benefits, for a particular person, of engaging in an activity change dramatically over time.<sup>26</sup> A central point here is that consumption patterns induce a significant change in preferences, and in a way that makes people worse off in the long run.<sup>27</sup> In the case of addictions, there will also be interconnections between intrapersonal collective action problems and preferences and beliefs that are adaptive to unjust background conditions, at least as a general rule. (Yaari's own example, involving whites trading alcohol with native Americans, is a prime example.) The problem of drug addiction is hardly distributed evenly throughout the population, and the process of addiction is in large part a response to social institutions that severely limit and condition the range of options.

While addiction is the most obvious case, it is part of a far broader category. Consider, for example, myopic behavior, defined as a refusal, because the short-term costs exceed the short-term benefits, to engage in activity having long-term benefits that dwarf long-term costs. Another kind of intrapersonal collective action problem is produced by habits, in which people engage in behavior because of the subjectively high short-term costs of changing their behavior, regardless of the fact that the long-term benefits exceed the long-term costs. *Akrasia*, or weakness of the will, has a related structure, and some laws respond to its individual or collective forms.

For the most part, problems of this sort are best addressed at the individual level or through private associations, which minimize coercion; but social regulation is a possible response. Statutes that subsidize the arts or public broadcasting, or that discourage the formation of some habits and encourage the formation of others, are illustrations. There are similar arguments for compulsory recycling programs (the costs of par-

26. Thomas Schelling, "Economics, or the Art of Self-Management," *American Economic Review* 68 (1978): 290–94; Jon Elster, "Weakness of Will and the Free-Rider Problem," *Economics and Philosophy* 1 (1985): 231–65.

27. Of course, all consumption has an effect on preferences. For example, exposure to classical music usually increases appreciation. But the pattern under discussion is a rare one: it is that pattern, producing miserable lives, to which a democracy might respond. To be sure, in practice the response might make things worse rather than better.

ticipation in which decrease substantially over time, and often turn into benefits) and for democratic restrictions on smoking cigarettes.<sup>28</sup>

The problem with collective controls in this context is that they are unlikely to be fine-tuned. They will often sweep up so many people and circumstances as to create serious risks of abuse. In some settings, however, citizens will be able to say with confidence that the effect of consumption on preferences will lead to severe welfare or autonomy losses. In such cases democratic controls are justified.

### III. EXAMPLES

#### *A. The Frontiers of Free Speech Law: The Fairness Doctrine, Campaign Speech, Hate Speech, and Pornography*

The most important issues in the contemporary law of free expression have produced cleavages between groups and ideas that were previously closely allied. Thus the First Amendment has been invoked, with considerable vigor and passion, on behalf of cigarette companies seeking to advertise their products; corporations attempting to influence electoral outcomes; people engaged in racial hate speech; pornographers; and large networks objecting to a private right of access to broadcasting or to other efforts to promote quality and diversity in the media. The effort to invoke the First Amendment is increasingly resisted—often, ironically, on the theory that it runs counter to the goals of deliberative democracy and free expression itself—by individuals and groups formerly associated with an absolutist or near-absolutist position against governmental regulation of speech.

These debates raise exceedingly complex issues, and I can only touch on them briefly here. The complexities are increased by the fact that a system dedicated to freedom of expression ought to be highly sensitive to the idea that speech alters preferences and beliefs. It should also find that process to be one to which a democracy is generally quite receptive. As Justice Louis D. Brandeis wrote in what is probably the most distinguished judicial opinion in the entire history of free expression, “the fitting remedy for evil counsels is good ones. . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the

28. See Robert Goodin, *No Smoking: The Ethical Issues* (Chicago: University of Chicago Press, 1989).

processes of education, the remedy to be applied is more speech, not enforced silence.”<sup>29</sup>

Justice Brandeis’s statement notwithstanding, I want to suggest that attention to the endogenous character of preferences and to the considerations traced thus far provides some basis for receptivity to democratic controls in this context.

1. *The Fairness Doctrine.* There is a growing consensus that the government should not concern itself with the airwaves and that total reliance on private markets and consumer preferences is the appropriate strategy for government. On this view, broadcasting should be treated like soap, cereal, or any other commodity. Indeed, there is a growing consensus that this result is ordained by the First Amendment. But if the claims made here are persuasive, the consensus is misguided. The meaning of the First Amendment is a function of competing views about what sort of relation between government and markets will best promote democratic deliberation. Lawyers (and not a few nonlawyers) have an unfortunate habit of thinking that the meaning of the First Amendment precedes rather than postdates that inquiry.

The consequence of market-based strategies in broadcasting is a system in which most viewers see shows that rarely deal with serious problems; are frequently sensationalistic, prurient, dehumanizing, or banal; reflect and perpetuate a bland, watered-down version of the most conventional views about politics and morality; are influenced excessively by the concerns of advertisers; produce an accelerating “race to the bottom” in terms of the quality and quantity of attention that they require and encourage; and are often riddled with violence, sexism, and racism. It simply defies belief to suggest that such shows do not affect the preferences and even the character of the citizenry. Is it so clear that a constitutional democracy ought to consider itself unable to respond to this situation? Is it so clear that a First Amendment enacted in order to ensure democratic self-determination bars a democratic corrective here?

In my view, the considerations marshaled thus far suggest that citizens in a constitutional democracy ought to be conceded, and ought to exercise, the power to engage in a wide range of controls. If welfare and autonomy provide the governing criteria, large gains might be expected from such controls. All three of the categories I have described argue in

29. *Whitney v. California*, 274 U.S. 357, 377 (1927).

favor of some form of regulation. Democratic controls would probably reflect collective desires, which deserve respect. They would respond to the fact that in spite of the large number of channels, the current regulatory regime diminishes genuine options, to the detriment of both welfare and autonomy; they would also counteract a kind of intrapersonal collective action problem faced by many of those habituated to the broadcasting status quo.

Such controls might permit the government to regulate advertising on television, certainly for children, but for others as well; to require broadcasters to pay attention to public affairs, as in, for example, an hour of compulsory programming per night; to ban gratuitous or prurient violence on television, especially when it is sexualized; to require, as a condition for licensing, a subsidy to public television; and to impose a broad fairness doctrine, in the form not only of an obligation of attention to important issues but also a chance to speak for divergent sides. The evident dangers notwithstanding, there would be a wide range of collective and external benefits from such controls, which would thus carry forward a strand of the liberal tradition that calls for governmental action in such cases.<sup>30</sup>

At least in principle, rights of private access to the media for differing positions and associated kinds of controls ought to be considered congenial to the free speech guarantee. Surely this is so if that guarantee is understood as a protection of a deliberative process centered on public values rather than of a “marketplace.” The First Amendment need not be seen as an obstacle to such efforts. If anything, the existing system might be thought to raise serious constitutional questions. A system in which access to the media, with its inevitable consequences for the shaping of preferences and beliefs, is made dependent on private willingness to pay raises genuine problems for free expression.<sup>31</sup>

30. See, e.g., John Stuart Mill, *Principles of Political Economy*, ed. W. J. Ashley (1871; London and New York: Longmans, Green & Co., 1929). See also Owen Fiss, “Free Speech and Social Structure,” *Iowa Law Review* 71 (1986): 1405–25; this essay carries the argument considerably further than I do here.

31. The Supreme Court seemed to recognize this point in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), but the point has dropped out of the current debate. If this analysis is correct, moreover, it is by no means clear that the print media should be more immunized from regulation than broadcasting, especially now that the original scarcity rationale seems weak.

*2. Campaign Regulation.* It would not be difficult to argue that a variety of regulations on the electoral process are necessary both to promote a deliberative process among political equals and to ensure that the deliberative process is a genuine one. Properly conceived, such efforts would be highly congenial to the purposes of the free speech guarantee. Both restrictions on campaign contributions—to eliminate the distorting effects of wealth<sup>32</sup>—and qualitative measures to reduce the “soundbite” phenomenon and to promote more in the way of reflective discussion hold considerable promise.

Currently, however, there is a large if ironic obstacle to such efforts: the First Amendment. The Supreme Court has generally been unreceptive to governmental efforts to regulate electoral campaigns.<sup>33</sup> In the key passage in *Buckley v. Valeo*, the Court said that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the first amendment.”<sup>34</sup> It is crucial to note here that the Court did not say that the effort to promote deliberation among political equals was insufficiently weighty or inadequately promoted by the legislation at hand. Instead the Court said, far more broadly, that the effort was constitutionally illegitimate.

Under the approach suggested here, campaign regulation would be treated more hospitably. In view of the effects of wealth on the formation of political beliefs, and the corrosive consequences of some forms of electioneering, democratic controls on the process might be welcomed. The First Amendment might be understood not as a guarantor of unrestricted speech “markets,” and much less as a vehicle for the translation of economic inequalities into political ones, but instead as an effort to ensure a process of deliberation that would, under current conditions, be promoted rather than undermined through regulatory measures. This is so especially if citizens in a democratic polity support regulation of the electoral process in order to pursue their desire for a well-functioning deliberative process.

Of course, there are great risks here, and any regulatory efforts must

32. See John Rawls, “The Basic Liberties and Their Priority,” in *The Tanner Lectures on Human Values*, ed. Sterling McMurrin (Salt Lake City: University of Utah Press, 1982), 3:76.

33. See *Buckley v. Valeo*, 424 U.S. 1 (1976), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

34. 424 U.S. at pp. 48–49.

be carefully monitored to ensure that they do not act as incumbent protection bills or as serious constraints on speech that should instead be encouraged. But the issue is far more complex, from the standpoint of the First Amendment itself, than existing law allows.

*3. Violent Pornography and Hate Speech.* Many Western democracies, including those firmly committed to freedom of speech, regulate speech that casts contempt on identifiable social groups (hate speech). Some such democracies also control sexually explicit speech, especially when it associates sex and violence. These controls have been justified on mixed grounds of human dignity, community morality, and sexual equality. In the United States, the precise status of such restrictions remains unclear. Probably the best account of current law is that hate speech is protected, as is most speech that associates sex and violence, even if that speech is not conceivably part of a serious exchange of ideas but instead qualifies as pornography.<sup>35</sup>

The cases of hate speech and pornography raise somewhat different problems. Hate speech is self-consciously directed toward an issue of public concern; it is conspicuously and intentionally political in nature. Violent pornography is of course political too, in the sense that it has political origins and consequences. But it cannot be thought to be a self-conscious contribution to democratic deliberation about public issues. In this way it differs from misogynist speech of a more straightforward sort, where the political content is explicit. In terms of its connection to the First Amendment, pornography should probably be thought to fall in the same category as commercial speech, libel of private persons, bribes, and conspiracies. The reason is that most pornography does not amount to an effort to contribute to deliberation on matters of public interest, even if that category is broadly conceived, as it should be. Expression that is not central to the free speech principle counts as speech, but it is entitled to a lesser degree of protection. It may be regulated, not on a whim, but on a basis of demonstration of harm that is weaker than that required for political speech.

Should the First Amendment be taken to disable government from regulating hate speech and pornography? The affirmative answer of current law may well be unsound. Both of these forms of speech have seri-

35. I collapse some complex issues here. See *Miller v. California*, 413 U.S. 15 (1973), and my "Pornography and the First Amendment," *Duke Law Journal* (September 1986): 589–627.

ous and corrosive effects on beliefs and desires. Both have the additional and unusual characteristic of denying victimized groups the right to participate in the community as free and equal persons. With respect to certain kinds of violent pornography, there are especially severe consequences in terms of how men and women perceive sexuality, how men perceive women, and how women perceive themselves. One need not believe that the regulation of violent pornography would eliminate sexual violence or even do a great deal to produce sexual equality in order to recognize that the pervasiveness of material that associates sex with violence has a variety of harmful social consequences.

The case for regulation of these forms of speech is strongest when the relevant speech is pervasive, when it causes tangible harm, and when it falls outside the category of speech that is guaranteed First Amendment protection unless there is a demonstration of unavoidable, imminent, and serious danger. The considerations marshaled here suggest that at least certain forms of violent pornography ought to be regulated, and that perhaps in certain restricted settings, hate speech may be an appropriate subject of democratic controls as well.

#### *B. Proportional Representation*

In recent years, there has been a revival of interest in systems of proportional or group representation, both for disadvantaged groups and perhaps generally as well. There is a solid constitutional pedigree for such systems, notwithstanding the constant and emphatic rejections, by the Supreme Court, of constitutionally based arguments for representation of members of racial minority groups. Despite the rigidity of the one person—one vote formula, with its majoritarian and individualistic overtones, group representation has always been a feature of American constitutionalism.<sup>36</sup>

Moreover, the basic constitutional institutions of federalism, bicameralism, and checks and balances share some of the appeal of proportional representation, and owe their origins in part to notions of group representation. These institutions proliferate the points of access to government, increasing the ability of diverse groups to influence policy, multi-

36. At the time of the framing, for example, geography was thought to define distinct communities with distinct interests; representation of the states as such seemed only natural. It would not be impossible to argue that racial and ethnic groups (among others) are the contemporary analogues to groups that were defined in geographical terms during the founding period.

plying perspectives in government, and improving deliberative capacities. In this respect, they ensure something in the way of group representation, at least when compared with unitary systems. Of course, both the separation of powers and bicameralism grew in part out of efforts to promote representation of diverse groups: bicameralism allowed representation of both the wealthy and the masses, while the notion of separation derived from (though it also repudiated) notions of mixed government, which was designed to ensure a measure of representation of groups defined in social and economic terms.

Proportional representation might be designed, as in its Western European forms, to ensure representation in the legislature of all those groups that are able to attain more than a minimal share of the vote. In another form, the system might be an effort to ensure that members of disadvantaged groups are given the power to exert influence on political outcomes. In America, the Voting Rights Act goes far in this direction for blacks.

There are serious problems with both of these efforts, and I do not mean to evaluate them in detail here. I do suggest that efforts to ensure proportional representation become much more acceptable if they are justified on grounds that do not take existing preferences as the basis for governmental decisions and if they emphasize the preference-shaping effects of discussion and disagreement in politics.<sup>37</sup> The argument here is that deliberative processes will be improved, not undermined, if mechanisms are instituted to ensure that multiple groups have access to the process and are actually present when decisions are made. Proportional or group representation, precisely by having this effect, would ensure that diverse views are expressed on an ongoing basis in the representative process, where they might otherwise be excluded.

In this respect, proportional or group representation could be regarded as a kind of second-best solution for the real-world failures of Madisonian deliberation. And the primary purpose of access is not to allow each group to have its “piece of the action”—though that is not entirely irrele-

37. In part this is Mill's defense of such efforts. See *Considerations on Representative Government*. For valuable discussions, see Charles Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton, N.J.: Princeton University Press, 1989), pp. 123–40; and Iris Young, “Polity and Group Difference: A Critique of the Ideal of Universal Citizenship,” *Ethics* 99 (1989): 250–84. Beitz's argument that proportional representation is not a requirement of political fairness is not inconsistent with the more prudential considerations invoked here; Young's claims about the need for discussion among the differently situated are highly compatible with my account.

event—but instead to ensure that the process of deliberation is not distorted by the mistaken appearance of a common set of interests on the part of all concerned. In this incarnation, proportional representation is designed to increase the likelihood that political outcomes will incorporate some understanding of all perspectives. That process should facilitate the healthy expression of collective values or aspirations and the scrutiny of preferences adaptive to unjust background conditions or limited opportunities.

For this reason, proportional representation may be the functional analogue of the institutions of checks and balances and federalism, recognizing the creative functions of disagreement and multiple perspectives for the governmental process. In this sense there is continuity between recent proposals for proportional representation and some of the attractive features of the original constitutional regime. Indeed, Hamilton himself emphasized that in a system of checks and balances, the “jarring of parties . . . will promote deliberation.”<sup>38</sup> If this is so, proportional representation is most understandable in a democracy that does not take existing preferences as the basis for social choice but instead sees the broadest form of deliberation, covering ends as well as means, as a central ingredient in democratic politics.

#### IV. CONCLUSION

A constitutional democracy should not be self-consciously concerned, in a general and comprehensive way, with the souls of its citizens. Under modern conditions, liberal constraints on the operation of the public sphere and a general respect for divergent conceptions of the good are indispensable. At the same time, it would be a grave mistake to characterize liberal democracy as a system that requires existing preferences to be taken as the basis for governmental decisions and that forbids citizens, operating through democratic channels, from enacting their considered judgments into law, or from counteracting, through the provision of opportunities and information, preferences and beliefs that have adjusted to an unjust status quo. Ironically, a system that forecloses these routes—and that claims to do so in the name of liberalism or democracy—will defeat many of the aspirations that gave both liberalism and democracy their original appeal, and that continue to fuel them in so many parts of the world.

38. *The Federalist* No. 70.