

## ARTICLE

# ‘Down Freedom’s Main Line’\*

Steven L. Winter

*‘It may be an easy thing to make a Republic; but it is a very laborious thing to make Republicans; and woe to the republic that rests upon no better foundations than ignorance, selfishness, and passion.’ – Horace Mann<sup>1</sup>*

Two principal trends define this post-Cold War, post-9/11 era of globalization. The first is the spread of market economies under the neoliberal aegis colloquially known as the Washington consensus. The second, more fitful development is the spread of democracy. This occurred in two spurts, separated by more than a decade. The first wave saw democracies emerge in the former communist countries of Central and Eastern Europe and in post-Apartheid South Africa. The second wave began only in 2010 with the successful uprisings in Tunisia, Egypt, and Libya that – together with foment in Yemen, Syria, and elsewhere in the Middle East – has come to be known collectively as the ‘Arab Spring.’ Similar popular protest is afoot in several established democracies: particularly the anti-corruption movement in India, but also the mass student protests in Chile known as the ‘Chilean Winter’ and the Occupy Wall Street movement which started in New York, spread across the United States, and then jumped to Western Europe. Seeds of protest are sprouting in Russia and in Wukan in China.

The two waves of democratization are in many ways distinct. Where the first was individualist and libertarian, the second is populist and egalitarian. Where the first wave focused on the formal institutions of the market and the liberal state, the second wave is participatory and rooted in collective action. More importantly, the two waves reflect very different conceptions of freedom and democracy.

After the collapse of the Soviet Union, the triumph of the Western conception of individual freedom was widely assumed. Many presumed that, because both democracy and free markets are forms of social ordering that facilitate individual

\* © 2011; all rights reserved. The paper’s title is taken from a song sung by the Freedom Riders during their courageous 1961 civil rights protest. See Raymond Arsenault, *Freedom Riders: 1961 and the Struggle for Racial Justice* (New York: Oxford University Press, 2011) (abridged edition), 61. I am grateful to Frank Michelman, Mark Johnson, Alessandro Ferrara, and Petra Gúmplová for comments, criticisms, and suggestions. For Julius Chambers: civil rights pioneer, great constitutional lawyer, true friend.

1 Horace Mann, ‘Twelfth Annual Report to the Secretary of the Massachusetts State Board of Education’ (1848), in *The Republic and the School: Horace Mann on the Education of Free Men*, ed. Lawrence A. Cremin (New York: Columbia University Press, 1957), 91-92.

choice, the emergence of one would necessarily lead to the other. This view has, in particular, been the mainstay of American policy toward China for more than two decades. But the results have been disappointing. Markets and consumerism in China coexist with state-capitalism and repression; in Russia and many of the former-Soviet republics, the introduction of democratic institutions was largely superseded by corruption, crony capitalism, and thinly-veiled autocracy. The financial collapse of 2008, ensuing recession, and continuing economic instability have left many – including, even, some at Davos<sup>2</sup> – wondering whether, as currently constituted, markets and representative democracy can produce fair and sustainable outcomes.

Underlying these various setbacks and breakdowns is a highly conventional, but false and fetishistic concept of individual freedom. Autonomous subjectivity – the idea of the individual human consciousness as source of value and self-directing agent – is both the great achievement of modernity and its undoing. Subjectivity descends into subjectivism; individualism progresses inevitably through atomism to alienation. The fragile collective enterprise of democratic self-governance becomes unworkable.

The second wave of democratization forcefully reminds us that the main path to freedom takes a different line. Democracy's moral appeal lies not in the promise of an impossible radical freedom, but in the commitment to equal participation in determining the terms and conditions of social life – what, even before the currency of the term 'democracy,' the ancient Greeks called *isonomia*.<sup>3</sup>

The disintegration of the ideas of the 'individual' and the 'state' left over from the last two centuries leave us the critical task of reconceiving such basic concepts as freedom, democracy, and self-governance. I take up that project here, proceeding in four steps. Section 1 considers the conventional account of democracy as grounded in liberal individualism and explains why that understanding is, for many of us, no longer tenable. Section 2 reconsiders the presumed correlation between markets and democracy. Although market economies and democracies share some conceptual commitments, they embrace others that are distinct from and, even, inconsistent with one another.

Section 3 examines the conventional notion of freedom as the absence or overcoming of constraint – what I call 'freedom as transcendence.' It considers the conceptual and historical provenance of this notion of freedom and shows why it is either impossible or empty. Absolute freedom, like absolute subjectivity, is not

- 2 Even Klaus Schwab, executive chairman of the World Economic Forum, has worried that: 'Capitalism, in its current form, no longer fits the world around us.' Jack Ewing, 'Across the World, Leaders Brace for Discontent and Upheaval,' *New York Times*, January 26, 2012, 12; see also Ed Miliband, 'At Davos, Debating Capitalism's Future,' *New York Times*, January 27, 2012, <[www.nytimes.com/2012/01/27/opinion/at-davos-debating-capitalisms-future.html?src=recg](http://www.nytimes.com/2012/01/27/opinion/at-davos-debating-capitalisms-future.html?src=recg)>.
- 3 Gregory Vlastos, 'Isonomia' in *Studies in Greek Philosophy – Volume I: The Presocratics*, ed. Daniel W. Graham (Princeton: Princeton University Press, 1995), 89 (originally published in *American Journal of Philology* 74 [1954]: 337). Subsequent page numbers are given in text.

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an option for social beings like us. The modern conception of individual freedom is pathological: conducing to atomism, alienation, and social fragmentation. Part 3 then turns to an alternative view of freedom as a necessarily shared, socially situated capacity. It inquires into the public nature of action and the conditions necessary for meaningful freedom. This investigation will take us through such paradigmatic sites of freedom as resistance in the torture chamber and the dramatic events in Tahrir Square during the January 25<sup>th</sup> movement. The paradoxical conclusion will be that freedom requires others – that is, dependence – and is made possible by communicative relations of equality, solidarity, and mutual recognition. This social conception of freedom, moreover, is better able to distinguish between free and unfree actions than the more familiar notion of freedom-as-transcendence, which cannot. Democracy, on this view, consists in the sharing of authority with others under conditions of mutual recognition and respect.

Section 4 revisits freedom, democracy, and self-governance from a social point of view – i.e., one that takes into account the social conditions that make human agency possible. Freedom cannot mean that each of us is sovereign. But, we can nevertheless speak meaningfully of freedom and self-governance as participatory processes in which we act collectively to take initiative with respect to our fate. To vote is not to work together; the social imaginary of democracy remains today, as it was two and a half millennia ago, humans engaged together on terms of equality in effective collective action.

## 1 The Subject of Democracy

What is democracy? The concept is both obscure – an essentially contested concept<sup>4</sup> – and, at the same time, something about which we have robust, often confident intuitions.

To start, consider that democracy comes in many different forms: democracies can be direct or representative; deliberative, republican, or pluralist; limited and constitutional or purely majoritarian. Representative democracy can be proportional or carved up geographically into single-member, winner-take-all districts. Beyond that, there is liberal democracy, social democracy, and – as we see in emergent democracies in the Middle East – illiberal democracy. We could, no doubt, add yet other variations.

To complicate matters, we make different kinds of judgments about these various democratic arrangements. We judge some better, others more democratic. These two judgments, moreover, need not converge. Thus, one person might think proportional representation better on the ground that it is more democratic – i.e., that it more accurately reflects voters' policy and political preferences than single-member, winner-take-all districts (which necessarily submerge losers' preferen-

4 Walter B. Gallie, 'Essentially Contested Concepts,' *Proceedings of the Aristotelian Society* 56 (1955-56): 167.

ces, forcing those who defend the practice to indulge in some notion of 'virtual representation').<sup>5</sup> A person of a more Madisonian bent might prefer representative rather than direct democracy or large rather than small districts precisely because such arrangements are *less* democratic.<sup>6</sup> On this view, such institutional arrangements are pragmatically better because they provide mechanisms (the independent, reflective judgment of the elected officials or the greater difficulties of mobilization faced by factions in a large district) for tempering the potential 'excesses' of democracy that threaten social order (most notably, the presumed antipathy of popular democracies to the accumulation of private property). Alternatively, it can be argued that such arrangements are morally superior to more democratic forms of governance because their tempering mechanisms better protect individual autonomy by, for example, safeguarding the disparities of wealth that such autonomy inevitably produces.<sup>7</sup>

But, as these examples are intended to suggest, the many points of divergence and potential disagreement do not obscure some core intuitions about what counts as democracy. At a minimum, democracy signifies popular sovereignty and majority rule. Robert Post argues, however, that one cannot define democracy in these descriptive terms because it is perfectly possible for 'the People' to opt for a tyrannical form of government or a majority of the electorate to vote for particular anti-democratic measures.<sup>8</sup> Thus, he concludes, democracy must be defined normatively in terms of autonomy understood in the Kantian sense of being governed only by those rules one gives oneself. A self-governing, democratic society, then, is one that in which the people live under only those rules they accept 'as their own.'<sup>9</sup>

5 See *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion) ('[T]he power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually *deemed* to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district.') (emphasis added).

6 See The Federalist Papers, No. 10.

7 The inevitable inequality that follows from protecting the right of property is not some radical Marxist insight; it was forthrightly acknowledged both by Madison in The Federalist No. 10 and by the United States Supreme Court during its infamous substantive due process era. *Coppage v. Kansas*, 236 U.S. 1, 17 (1915) ('since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.')

8 Robert Post, 'Democracy and Equality,' *Law, Culture & Humanities* 1 (2005): 142-43.

9 *Ibid.*, 144. To be precise, Post maintains that democratic self-governance 'requires that a people have the *warranted conviction* that they are engaged in the process of governing themselves' (*ibid.*; emphasis added). The point of this formulation is to distinguish between actual participation in democratic decision-making, which may be lacking in any given case, and the acceptance of particular democratic decisions 'as one's own.'

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This understanding of democracy, however, creates the profound problem that Frank Michelman labels 'the institutional difficulty.'<sup>10</sup> How can we square the ideal of collective autonomy with modern conditions of pluralism and the practical reality of disagreement? Absent unanimity,<sup>11</sup> the dissenting minority will almost necessarily experience the majority's rule as something other than 'self' governance. To accept the majority's rule is to submit to a rule other than the one the dissenters would give to themselves. As Hannah Arendt explains: 'Within the conceptual framework of traditional philosophy, it is indeed very difficult to understand how freedom and non-sovereignty can exist together or, to put it another way, how freedom could actually have been given to men under conditions of non-sovereignty.'<sup>12</sup>

The typical strategy for bridging this gap between self-sovereignty and majority rule is to posit conditions of participation sufficiently fair and inclusive to persuade the minority nevertheless to identify with the result as their own. In its strongest form, this would occur when the terms of democratic discourse are sufficient not just to obtain consensus, but also to enable those initially in the minority to experience their conversion as fully voluntary and uncoerced.<sup>13</sup> In a weaker form, Post advocates a view of 'responsive democracy'<sup>14</sup> in which the conditions of discourse are such that the dissenters could maintain 'a warranted sense of autonomous and effective contribution, through public discourse, to the process of creating the social order in which they live.'<sup>15</sup>

Although there are other reasons dissenters might accept an otherwise disagreeable rule as their own, the important point at this stage of the argument is that neither version of discursive legitimation is plausible. The strong version would require unanimity for, in the face of imperfect agreement, all attempts at collective self-governance must conclude in prescription under the threat of coercion.<sup>16</sup>

- 10 Frank I. Michelman, *Brennan and Democracy* (Princeton: Princeton University Press, 1999), 15. Subsequent page numbers are given in the text.
- 11 There have been communities that insisted on unanimity in certain critical contexts. See Irving A. Agus, *Urban Civilization in Pre-Crusade Europe: A Study of Organized Town-Life in Northwestern Europe During the Tenth and Eleventh Centuries Based on the Responsa Literature*, vol. 1 (New York: Yeshiva University Press, 1965).
- 12 Hannah Arendt, *Between Past and Future* (New York: Penguin Books, 1968), 164. See also Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 2d ed. 1958), 234 ('If it were true that sovereignty and freedom are the same, then indeed no man could be free, because sovereignty, the ideal of uncompromising self-sufficiency and mastership, is contradictory to the very condition of plurality.').
- 13 Frank I. Michelman, 'Law's Republic,' *Yale Law Journal* 97 (1988): 1526-27.
- 14 See Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge: Harvard University Press, 1995), 273, 278, 283-84
- 15 Post, 'Democracy and Equality,' 144. Post's notion of 'autonomous contribution' is, in several ways, quite different than my argument for participatory democracy as 'shared authority.' It is formalized, distanced and, in its emphasis on autonomy, anti-egalitarian. For the complete version of the argument, see my 'Reclaiming Equality' (ms.) available at: <[http://works.bepress.com/steven\\_winter/1/](http://works.bepress.com/steven_winter/1/)>.
- 16 See Steven L. Winter, 'Contingency and Community in Normative Practice,' *University of Pennsylvania Law Review* 139 (1991): 970-71.

The weak version presents formidable empirical problems: under conditions of modern mass society, very few people can even credibly – let alone, justifiably – believe that they have an effective voice in creating the social order in which they live. The most that could plausibly be claimed is that in liberal democracies everyone has a formally guaranteed right to contribute to the public discourse that shapes the social order.

If democracy turns on autonomy as conventionally understood, then it is – as Michelman (8) says – a 'necessarily compromised' ideal that presents itself to us as 'necessarily damaged goods.' But the problem is deeper still: Michelman struggles with the problem of the institutional arrangements under which autonomous self-governance can meaningfully be collective. He takes for granted, however, that autonomy can meaningfully be *individual*. In fact, as we shall see in a moment, it can fairly be said that Michelman takes for granted that there are 'selves' out there capable of autonomous self-governance.

The conventional understanding of democracy, in other words, depends upon a conceptual vocabulary of self, agency, and autonomy that has been undermined by disciplines as disparate as psychoanalysis, poststructuralism, and contemporary cognitive science. As Michelman (66) concedes, we are 'socially situated beings, enmeshed in institutions, cultures, vocabularies, relationships and groups, dependent on them for identity.' But, when the 'self' is understood as socially constructed, what does it mean to talk about autonomy? Indeed, what can autonomy mean once we recognize our 'choosing' selves as the products of unconscious processes, historical traditions, ongoing social practices, and other such heteronomous factors? When the ego, in Freud's famous phrase, is not even master in its own house,<sup>17</sup> it is hard to know when, how, and if my conscious choices are 'authentic' let alone autonomous.

In his discussion of liberal constitutional rights, Michelman attempts to finesse the problem that social construction poses to the conventional understanding of autonomy. Liberals, he says, can acknowledge the social construction of the self; they can even admit the contingency of the commitments 'that a person never chose but simply *has*, from birth or from accident.' All that is necessary is 'the view that a person's life will be massively lacking in value if it does not acquire *enough* of its shape and direction ... from aims, attitudes, commitments, and pursuits that the person willingly and consciously adopts as her own.' (66-67)

Michelman's gambit seems to work because it resonates with all of us who are, after all, constituted as liberal individual subjects. But the ploy of confession and avoidance is all the more revealing for that: it invokes our common sense – that is, our situated, historically contingent common sense – that what gives our lives value is the capacity to take conscious responsibility for or ownership of its socially situated shape. Here, Michelman assumes each of the principal points in

17 Sigmund Freud, *Introductory Lectures on Psycho-Analysis*, ed. James Strachey (New York & London: W.W. Norton, 1996), 353.



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contention: (1) that it is the operative moment of choice – rather than, say, duty or sacrifice or the value of one's contribution<sup>18</sup> – that gives human life value and nobility; (2) that choice is uncomplicated and meaningfully possible; and, relatedly, (3) that the subjective experience of choice is genuine and not an act of rationalization, neurotic self-delusion, or Sartrean 'bad faith.'<sup>19</sup> In the final analysis, Michelman does not respond to the challenge from social contingency so much as assume it away.

It is easy to understand, however, how this elision could occur. To recognize that we are socially situated beings is to appreciate that history, culture, vocabulary, and institutions are, for us, constitutive: 'Society for man is not an accident he suffers but a dimension of his being. He is not in society as an object is in a box; rather, he assumes it by what is innermost in him.'<sup>20</sup> This means that the relation between our cultural, historical heritage and our deepest intuitions is a circular one.<sup>21</sup> When we as products of the modern Western, liberal tradition reflect on the question of what makes life valuable, we cannot help but reflect those values and beliefs that make us who we are. Thus, when Michelman singles out the self-validation of the conscious choosing subject as that which gives a life value, he is identifying precisely what our particular historical situation makes salient *for us*.<sup>22</sup> I will say more on how and why that is so in Section 3. At this point, it is enough to see that the apparent persuasiveness of Michelman's argument is itself the contingent product of our particular liberal culture.

Beyond this revealing paradox, Michelman's response also betrays an instructive contradiction: although he acknowledges the contingent, socially situated nature

- 18 There are communities, both historical and contemporary, in which a person's life is considered massively lacking in value if it does *not* acquire its shape and direction from aims, attitudes, commitments, and pursuits given from elsewhere – God, tradition, filial or patriotic obligation – and assumed as a matter of duty. Within such worldviews, the surrender to higher authority is often understood as the very definition of both autonomy and authenticity. In contrast, the idea that one gets to *choose* whether to accept the authority of God, tradition, etc. is likely to be seen as a sign of hubris. Which is not to say that such worldviews lack a concept of free will. Rather, they assume the truth of both authority and duty. The faculty of choice is exercised with respect to obedience or transgression.
- 19 Jean-Paul Sartre, *Being and Nothingness: An Essay in Phenomenological Ontology*, trans. Hazel E. Barnes (New York: Philosophical Library, 1955), 47-70.
- 20 Maurice Merleau-Ponty, *Sense and Non-Sense*, trans. Hubert L. Dreyfus and Patricia Allen Dreyfus (Evanston, IL: Northwestern University Press, 1964), 128-29. This is how – as Michelman elsewhere says, 'Law's Republic,' 1513 – the past can be 'constitutively present in and for every self as language, culture, worldview, and political memory.'
- 21 Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Harvard University Press, 1989), 92-93, 306-7. Cf. Mark Johnson, *Moral Imagination: Implications of Cognitive Science for Ethics* (Chicago: University of Chicago Press, 1993), 64 ('Philosophical theories are, for the most part, attempts to develop internally consistent systematic accounts of various folk theories that exist within a culture.... This is what makes it possible for philosophically sophisticated theories to sometimes seem intuitively correct to ordinary people.')
- 22 See Hannah Arendt, *Between Past and Future*, 160 ('In other words, will, will-power, and will-to-power are for us almost identical notions; the seat of power is to us the faculty of the will as known and experienced by man in his intercourse with himself.')

of the self and its commitments, he nonetheless treats that self in abstraction from that context. He even says so: doubts about subjectivity and agency 'do not stop liberals from making precisely such attributions, virtually automatically, at the times when they focus thought on matter of political arrangement.' (66-67) On Michelman's account, the self is constituted by institutions, cultures, vocabularies, relationships, and groups; it is, he says, 'dependent on them for identity.' Yet, he has that self somehow stepping outside itself to view the aims, attitudes, and commitments that are constitutive of its identity and decide whether to affirm them.<sup>23</sup> Who is this 'self' emptied of all content that stands outside itself to decide whether to adopt itself as its 'true' self? The 'self' that steps outside itself would have to be the very same situated self – that is, the one constituted by the very aims, values, and commitments that it is deciding whether to jettison or keep.

We can better see the circularity here by replacing the inapt, though deeply conventional spatial metaphor with the equally conventional one of reflection. Just as I eye myself in the mirror with all the subjectivity of my already extant self-image – which depending on who I am may be unrealistically self-flattering or witheringly self-critical – the process of self-reflection cannot be innocent, untainted, or (in the Kantian sense) autonomous.

It is a commonplace, for example, that Americans tend to prefer lower taxes, a minimal social safety net, and unencumbered choice in health care while Western Europeans are inclined toward a more robust social welfare system including some form of universal health care.<sup>24</sup> These different policy preferences are not the result of careful consideration of the relevant empirical data or of the practical consequences of the respective policy options. (If they were, we presumably would have reached similar conclusions.) Yet, no one is surprised by such cultural differences; at the macro level, we take it for granted that different histories and traditions produce different perspectives and predispositions. But the same is true at the micro level: we are socially situated beings who exist in time, in culture, and in language. We are each of us the products of particular forms of life and possessed of and by particular perspectives. When, as a citizen, I adopt a pol-

23 Michelman acknowledges the contradiction: 'However scientifically challengeable may be these attributions to persons of individualized self-possession and subjectivity, they are rampant in deontological-liberal political thought ...' Frank I. Michelman, 'How Can the People Ever Make the Laws: A Critique of Deliberative Democracy,' in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg (Cambridge: MIT Press, 1997), 153. At the same time, he seeks to defend a chastened version of the deontological subject by noting that, however socially dependent we might be, each life 'is conceptually distinct from the lives of other subjects' in the sense that 'we take them one by one.' Frank I. Michelman, 'The Subject of Liberalism,' *Stanford Law Review* 46 (1994): 1812. I do not quarrel with the normative claim of individual dignity: One can be persuaded that people are socially constructed and still be committed to treat each and every one of them with equal dignity and respect. (Indeed, I shall argue in Section 3 that the former understanding can actually *lead* to that commitment.) But, I do not see how this normative claim responds in any way to the psychological, epistemological, or 'scientific' critique of 'individualized self-possession.'

24 See text accompanying n. 97 below.



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icy position on some important issue of the day, I come to that decision already constituted by the social practices and conditions, historical traditions, and cultural understandings that make me who I am.

To be clear, I am not arguing the past is a prison house that reproduces itself in a static or deterministic way.<sup>25</sup> Nor am I denying that we can distinguish between more or less autonomous modes of being. I am arguing, rather, that reflection and self-governance are not metaphysical capacities that individuals just 'have.' They are higher order processes that can be developed or destroyed in the process of coming to maturity. So, too, they can be nurtured or suffocated by the social practices available to the self as it elaborates its life in the relationships, groups, and activities through which it comes to understand and define itself. Reflection and self-governance, in other words, are socially constructed, socially situated capacities that we cannot take for granted.

When it comes time, as Michelman puts it, 'to focus thought on matters of political arrangement,' we cannot afford to eschew everything we know about what makes us who we are. To talk about democracy in the Romantic vocabulary of self, agency and autonomy is to bring to bear precisely the wrong conceptual tools. It would be like roasting a lovely goose for a dinner party only to find that all the guests are vegetarians. To consider the democratic project in light of the insight about social construction, we need a different idiom.

## 2 Fast Food and False Friends

How close is the connection between markets and democracy? We will examine that question under two alternative assumptions: first, that individuals are autonomous, preference-maximizing agents; and, second, that they are socially constructed.<sup>26</sup> The perhaps surprising conclusion will be that, on the conventional assumption of autonomous subjectivity, markets and democracies work on different principles with different social implications. When the question is viewed from the more realistic social perspective, the picture becomes more complex but the conclusion is comparable. Because, on the one hand, both are shaped by the same historical, social, and economic forces, market economies and democratic polities exhibit striking commonalities in structure, operation, and susceptibility to manipulation. On the other hand, these commonalities organize a system that is at variance in important ways with the basic idea of democratic self-governance. What remains constant on both views is that markets and democracy thrive on different values and assumptions. As real world democracies operate more like markets, they also become dysfunctional.

25 As I have argued elsewhere, once we understand the cognitive mechanisms of social reproduction it becomes clear that social reproduction is necessarily dynamic, imaginative, and adaptive. Social reproduction, therefore, is never really static even in the most rigid of traditions. Winter, 'Contingency and Community in Normative Practice,' 995-99.

26 I assume that socially constructed agents are also preference maximizing, but that both their preferences and their rational processes are socially shaped and influenced.

The presumed similarity between markets and democracy lies in the conventional understanding that both are forms of social ordering that facilitate individual choice. Markets aggregate individual preferences through price: the more people value a particular item, the more they are willing to pay relative to other goods; the greater the demand (supply, at any given moment, being limited), the more the price will rise; the higher the price, the greater the incentive either for suppliers to produce more goods of the same sort or for new producers to enter the market. If people's tastes are diverse – many prefer fast food, but some favor haute cuisine – and (especially) if there are economies of scale, then the market will produce a lot of fast food at low prices and those with more esoteric tastes will pay higher prices to feed their fancy preferences. In a well-functioning market – that is, when information and transaction costs are relatively low – the market will, in theory, produce what people want in the amounts that they desire as evidenced by their willingness to pay.

Similarly, democracy aggregates people's policy preferences through voting. If some people prefer lower taxes while others favor a robust social welfare system, then they will vote for representatives who will pass laws to effectuate those respective preferences. (I put aside, for the moment, the possibility that people might prefer lower taxes *and* a robust social welfare system.) So, too, if some people support a woman's control over her reproductive capacity and others consider abortion murder, they will each vote for representatives who agree with their respective views. In a system of proportional representation, both sets of policy preferences will be represented in the legislature. In a system of single-member, winner-take-all districts, however, the minority's preference may not even gain a voice (except to the degree that there are other districts with the opposite mix of opinions). In either event, the minority's preference will be frustrated at the legislative level where the majority's preference will prevail. Practical politics, in other words, can be a zero-sum game in a way that (for reasons we will explore further below) markets are not: enactment of the majority's preference for a social safety net or reproductive rights will frustrate the minority's desire for lower taxes or its moral opposition to abortion (and vice versa).<sup>27</sup>

A democratic society, however, cannot long afford to alienate a significant minority of its citizens without risking protest, unrest, disruption, or dissolution.<sup>28</sup> Real-world democracies, therefore, employ various mechanisms for mitigating the dangers of minority discontent. The first can be variously characterized as practical, legal, or moral: every conception of democracy includes some notion of

27 This is Michelman's institutional difficulty. At this stage of the argument, it may appear that markets are superior to democratic systems in effectuating individual choice. But, as we shall see, that conclusion is premature.

28 For the argument that 'that all power is social power and, therefore, that it can be activated by people at very different positions within the social system,' see my article, 'The "Power" Thing,' *University of Virginia Law Review* 82 (1996): 721-834. With respect to dissolution, consider Lincoln's famous line in his pre-Civil War, 'House Divided' speech (July 17, 1858): 'I believe this government cannot endure, permanently half slave and half free.' *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler et al. (East Brunswick, NJ: Rutgers University Press, 1953), 2:513.

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minority rights – at a minimum, rights of participation, political expression, and tolerance – that must be respected. Because even the thinnest conception of democracy involves self-governance in conjunction with other self-directing citizens, other-regarding values such as fairness and equality are integral parts of a functioning democratic order.

The second mechanism is the familiar feature of liberal democracy that carves out certain areas of autonomy or privacy within which people may pursue their values or preferences free from majoritarian interference. The paradigmatic case is freedom of conscience and religion – though, as a practical matter, it works best when differences concern only matters of belief and not ritual observance.<sup>29</sup> Third, healthy democracies maintain a range of institutions and practices that encourage compromise, cooperation, or consensus. These include the practice of forming coalition governments in parliamentary systems or, in representative systems, the ad hoc alliances or legislative bargains necessary to fashion majorities on particular subjects. Others include super-majority requirements, a two-party system as in the United States, checks and balances (including bicameralism, an executive veto, and judicial review), and various legislative practices such as the filibuster or senatorial privilege. Perhaps most interesting are civic institutions such as the public school which, for its nineteenth-century American originators, was intended to fashion citizens of enlarged sentiment capable both of living together in equality and of making common purpose together.<sup>30</sup>

The question is not how well these mechanisms work,<sup>31</sup> but how democracy could work without them. Consider a polity split between those who favor lower taxes and those who prefer a robust social safety net. Earlier, I presented this dispute as a kind of zero-sum game. But, it will no doubt have occurred to the reader that an issue of this sort is amenable to compromise. As long as the opponents are committed to working together, they can negotiate until they reach the point at which the trade-off between higher taxes and fewer social welfare programs is acceptable to both sides. The alternatives are to fight it out in an endless stalemate or wait until one side persuades additional voters and gains the upper hand.

29 See *Employment Division v. Smith*, 494 U.S. 872, 882 (1990) ('Respondents urge ... that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.').

30 Mann, 'Twelfth Annual Report'; Charles O. Hoyt & R. Clyde Ford, *John D. Pierce, Founder of the Michigan School System: A Study of Education in the Northwest* (Ypsilanti, MI: The Scharf Tag, Label & Box, 1905), 88-100 ('Our safety is not in constitutions and forms of government, for no constitution within the power of man to devise can provide such security, but in the establishment of a right system of general education ...').

31 In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court left the decision to abort a fetus during the first trimester to the woman and her physician, free of any interference from the State. This by no means ended the intensely divisive controversy over abortion. When the Court revisited *Roe* nearly twenty years later in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), it warned that 'the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.' *Ibid.*, 866-67 (plurality opinion). Needless to say, the controversy continues.

Both these latter states of affairs represent breakdowns in the democratic process – as is currently on view in the United States, where polarization and extreme partisanship are responsible for Washington's much-decried gridlock.<sup>32</sup>

Consider how the market might handle a similar zero-sum conflict. Some people prefer Good X and others prefer incompatible Good Y (say, fast food versus lower health care costs or more fossil fuels versus cleaner air). In a well-functioning market, those who put a higher value on their preference – say, those who prefer Good Y – can bargain with their counterparts and pay them to forgo Good X.<sup>33</sup> Suppose a corporation's employees have a penchant for fast food and that, as a result, the corporation's health care premiums have skyrocketed. The corporation can pay the employees to forgo fast food in favor of more fruits and vegetables or to exercise, lose weight, or maintain a healthy blood pressure.<sup>34</sup> As long as it costs less to provide such incentives than to pay the higher premiums, both sides will be better off: the corporation will save money and the employees, who will have forgone this particular preference, will have additional money to spend on things they value even more highly than fast food (not to mention better health). Where high transaction and mobilization costs make such bargains impossible, as in the clean air example, the price mechanism makes it possible to achieve an efficient equilibrium. If those who prefer Good X had to pay the real costs of their preference – that is, the loss to those who favor Good Y – they would use less of X and there would be more of Y for everyone else.<sup>35</sup> Thus, if the price for fossil fuels reflected its real costs in environmental degradation (either through a liability rule or a tax), people would switch from the now-more-expensive fossil fuels to alternative forms of energy (or transportation) and there would be cleaner air and a reduction in the rate of global climate change.

The important point is that, although the conventional account of markets and democracy start with the same premise of a sovereign, preference-maximizing individual, they elaborate that value through very different mechanisms with very different social implications. Because most transactions in modern markets are monetized, differences can be adjusted easily through arms-length bargains or, even, autonomously through multiple anonymous transactions influenced by price: we can disagree about fast food and fossil fuels, but we don't have to agree

32 Cf. Maurice Merleau-Ponty, *The Phenomenology of Perception*, trans. Colin Smith (London: Routledge & Kegan Paul Press, 1962), 56 ('Human society is not a community of reasonable minds, and only in fortunate countries where a biological and economic balance has locally and temporarily been struck has such a conception of it been possible.'). Subsequent page numbers are given in the text.

33 Ronald H. Coase, 'The Problem of Social Cost,' *Journal of Law & Economics* 3 (1960): 1.

34 Alternatively, if the employees value their fast food more highly, they can bargain with the corporation and agree to pay more individually for their health care costs. Of course, the employees (whether collectively or individually) must have the wherewithal to absorb these additional costs or they will pay with both poorer health and inadequate health care. Which is another way of saying that, in markets, the participants' resources matter.

35 Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts,' *Yale Law Journal* 70 (1961): 499.

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on who is correct in order to mediate our difference of opinion and reach a more efficient allocation. In a democracy, in contrast, we must either 'agree to disagree' or – when that is not possible – sit down together and iron out our differences.<sup>36</sup> Markets, in other words, can function perfectly well with atomized, self-interested individuals who coordinate through impersonal interactions. Democracy, on the other hand, requires very different interpersonal values and interactions – including tolerance, pragmatism, cooperation, negotiation, and compromise.

The difference in mechanisms also entails a fundamental difference with respect to participation. Market behavior is very much affected by resources. Those with greater wherewithal are in a substantially better position not only to maximize their preferences,<sup>37</sup> but also to influence allocation decisions through their purchases. Democracy, on the other hand, signifies equality: to democratize a practice or resource is to make it more fully available on terms of equality without regard to status or wealth. Democracy – from the Greek *dēmokratia* (*dēmos* + *kratos*) – translates as power of the common people. The idea of democracy as the rule of the people has always entailed strong leveling notions – most dramatically in the French Revolution, but also in the civil rights and feminist movements of our own time. In a market, every dollar counts equally; in a democracy, it is every person's vote that must be treated the same. 'Democracy,' in other words, 'has an internal morality grounded on the dignity and equality of all human beings.'<sup>38</sup> In sum, democracies and market economies thrive on different operating principles with different corresponding values.

So far, we have considered the relationship between markets and democracy on idealized assumptions. What happens if we examine the question from a more realistic perspective that takes social context and construction into account?

- 36 Consider how those who disagree about abortion might attempt a Coasean bargain. Pro-choice activists might offer to bargain with pro-life adherents to forgo their opposition to abortion. But any such suggestion would likely be rejected on moral grounds. Alternatively, pro-life adherents might offer to bargain with pro-choice supporters to accept social welfare programs to cover the costs of child-rearing, day care, etc. if women would forgo their right to terminate unwanted pregnancies. In the real world, however, this hypothetical bargain would run into two obstacles: first, most pro-life adherents also favor low taxes and limited government; and, second, many pro-choice activists view the issue of a woman's control over her reproductive capacity as fundamentally a question of equality and full citizenship and, therefore, every bit as much a moral issue that resists monetization.
- 37 See n. 34 above; see also Sheldon S. Wolin, 'Transgression, Equality, and Voice,' in *Dēmokratia: A Conversation on Democracies Ancient and Modern*, ed. Josiah Ober & Charles Hedrick (Princeton: Princeton University Press, 1996), 86 ('For whatever else one may want to say about free market capitalism, it is definitely not an arrangement for producing equality. Its principal motor force comes from the differentials in rewards, status, and power that it makes available. In the United States evidence is substantial that various inequalities are increasing ...'). Which is not to say that markets are devoid of any notion of equality, just that the only equality they can recognize is the formal one of equality of opportunity. See n. 7 above.
- 38 Aharon Barak, 'Foreword – A Judge on Judging: The Role of a Supreme Court in a Democracy,' *Harvard Law Review* 116 (2002): 39. For the longer version of the argument, see my 'Reclaiming Equality.'

Even without the intervention of sophisticated social theory, we know that people's market preferences are not truly endogenous. They are influenced by advertising, branding, peer behavior, fads, and other social trends. In modern, mass-media societies with consumer-oriented economies, the processes of opinion formation are pervasive. It would be a mistake, however, to think of these processes as manipulating individual consumers to buy particular products. That, to paraphrase Foucault, would be to assume something on the order of the autonomous subject.<sup>39</sup> Rather, these processes are part of a *system* of social formation whose import is to create a certain kind of modern subject.<sup>40</sup> As Jean Baudrillard observes, 'needs are not produced one by one, in relation to specific objects, but are produced as *consumption power*, as an overall propensity within the more general framework.'<sup>41</sup>

Although we may experience consumer culture and its incidents as matters of individual 'lifestyle' choice, they are in fact products of pervasive social processes that began in the mid-eighteenth century.<sup>42</sup> We remain largely oblivious to these processes precisely because they constitute the everyday practices that form the taken-for-granted landscape of our lives. Yet, they have profoundly transformed how we live, who we are, and how we relate to each other. As Baudrillard observes:

'Self-evidently, most of the time, the content conceals from us the real function of the medium. It presents itself as a message, whereas the real message, [compared to which the manifest discourse is perhaps only a connotation], is the profound structural change (of scale, of model, of habitus) wrought in human relations.'<sup>43</sup>

- 39 Cf. Michel Foucault, 'Truth and Power,' in *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, ed. Colin Gordon (New York: Pantheon Books, 1980), 118 ('[T]he concept of ideology refers, I think necessarily, to something of the order of a subject.'). As Foucault famously explains: 'The individual is not to be conceived as a sort of elementary nucleus, a primitive atom, ... on which power comes to fasten.... The individual is an effect of power, and at the same time, or precisely to the extent to which it is that effect, it is the element of its articulation.' Foucault, 'Two Lectures,' in *ibid.*, 98.
- 40 Charles Taylor, 'Foucault on Freedom and Truth,' in *Foucault: A Critical Reader*, ed. David Couzens Hoy (London: Wiley-Blackwell, 1986), 75-76 ('[T]he new kind of power is productive. It brings about a new kind of subject and new kinds of desire and behaviour.... It is concerned to form us as modern individuals.').
- 41 Jean Baudrillard, *The Consumer Society: Myth and Structures*, trans. Chris Turner (London: Sage Publications, 1998), 74-75 (originally published as *La société de consommation* [Paris: Denoël, 1970]).
- 42 See Steven L. Winter, 'What Makes Modernity Late?' *International Journal of Law in Context* 1 (2005): 61.
- 43 *The Consumer Society*, 123. A somewhat more elegant translation of these passages can be found in Jean Baudrillard, *Revenge of the Crystal: Selected Writings on the Modern Object and Its Destiny, 1968-1983*, ed. and trans. Paul Foss & Julien Pefanis (London: Pluto Press, 1990), 75-76. Unless otherwise noted, quotations are from *The Consumer Society*; bracketed material represents interpolations from *Revenge of the Crystal* that improved the sense of the translation.



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The profound social consequences include atomization, social fragmentation, a decline in empathy for others with whom we no longer share bonds of community, and a citizenry acculturated to the pull of media and marketing techniques.<sup>44</sup>

The most important practices that drive this system, however, are not cognitive (as in advertising) or professional (as in marketing), but social, psychological, and industrial. For present purposes, I discuss only three: (1) the expression of status through purchase; (2) the fetishization of the object;<sup>45</sup> and (3) the consumer paradox.

(1) What largely distinguishes consumers from simple purchasers is that they are motivated by concerns that go beyond – or entirely dispense with – the practical utility of the goods they purchase. The most important of these motivations is status.<sup>46</sup> Consumer goods, Baudrillard explains, serve ‘a *sociological function*’ by means of their distinctiveness. ‘At any moment, and for any condition of the social structure, this function makes it possible for a given social group to distinguish itself and to designate its status through a particular category of objects or signs.’<sup>47</sup> We are all familiar with this phenomenon of consumer-item-as-status-marker: viz., successive fads for designer labels, Rolex watches, car phones, sport utility vehicles (SUVs), iPhones, and iPads. In a society characterized by upward mobility, the process takes on something of the character of a perpetual motion machine: ‘broad swathes of the population are moving up the social ladder, reaching a higher status and, at the same time, acceding to [a] cultural demand, which is simply the need to manifest that status [through] signs.’<sup>48</sup>

Baudrillard suggests that we can ‘define the object of consumption by the relative disappearance of its objective function.’<sup>49</sup> In a famous passage, he describes the meaning of the tailfin that was a notable feature of classic cars of the 1950s and early 1960s. Designed to mimic the tail assemblies of fighter jets and rocket ships, the tailfin is nothing but an allegory of speed: ‘When ... the object itself is overwhelmed by a formal detail, the true function is no longer anything but a pretext.... Speed so apprehended is ... the final, passive state of an energy completely degraded to the level of a pure sign.’<sup>50</sup> Thus, the perfect consumer item is the kitsch object: the pet rock, chia pet, or contemporary plastic wristband (in a vari-

44 Winter, ‘What Makes Modernity Late,’ 72-74.

45 The fetishization of consumer goods takes two forms. The first involves the projection of oneself into and, thus, the animation of or attribution of magical potency to the object. The second mimics the psycho-neurotic phenomenon of obsession and arousal. I mostly discuss the first dimension in what follows. On the second dimension, see nn. 52 and 93 below.

46 Thorstein Veblen, *The Theory of the Leisure Class* (New York: The Modern Library, 2001); Baudrillard, *The Consumer Society*, 100-21.

47 *Revenge of the Crystal*, 89 (*The Consumer Society*, 111).

48 *The Consumer Society*, 110.

49 *Ibid.*, 112.

50 Jean Baudrillard, *The System of Objects*, trans. James Benedict (London: Verso, 1996), 60 (first published as *Le système des objets* [Paris: Editions Gallimard, 1968]). Subsequent page numbers are given in the text.

ety of colors for a variety of causes) which has no value other than its signification.

(2) Consumers also buy to express their sense of self or in an often vain attempt to sustain their psychological well-being. Consumers, in other words, are people who relate to their possessions narcissistically. They 'recognize themselves in their commodities; they find their soul in their automobile, hi-fi set, split-level home, kitchen equipment.'<sup>51</sup> This narcissistic identification is psychologically and emotionally regressive. In contrast to humans who are complex, conflictual, inconstant, and – above all else – *mortal*, the consumer object reassures. As Baudrillard (89-90) explains:

'The object is in fact the finest of domestic animals – the only "being" whose qualities exalt rather than limit my person. In the plural, objects are the only entities in existence that can genuinely coexist, because the differences between them do not set them against one another, as happens in the case of living beings: instead they all converge submissively upon me and accumulate with the greatest of ease in my consciousness. Nothing can be both "personalized" and quantified so easily as objects.... The object is thus in the strict sense of the word a mirror, ... precisely because it sends back not real images but desired ones. In a word, it is a dog of which nothing remains but faithfulness.'

Possessions, in other words, provide the regressive comfort of the child's security blanket or toy. The capacity of these intimate objects to serve as the repository of one's projected neuroses, tensions, and mourning is – as Baudrillard (90) observes – 'what gives them a "soul", and what makes them "ours".'<sup>52</sup>

In this, consumerism is inextricably linked with modern celebrity culture. Both involve the psychological processes of projection, identification, and narcissistic

51 Herbert Marcuse, *One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society* (Boston, MA: Beacon Press, 1964), 9. Subsequent page numbers are given in the text.

52 The New York Times review of the movie *Toy Story 3* observed (A. O. Scott, 'Voyage to the Bottom of the Day Care Center,' *New York Times*, June 18, 2010, C13):

'Therein lies its genius, and its uncanny authenticity. A tale that captured the romance and pathos of the consumer economy, the sorrows and pleasures that dwell at the heart of our materialist way of life, could only be told from the standpoint of the commodities themselves, those accretions of synthetic substance and alienated labor we somehow endow with souls.

Cars, appliances, laptops, iPads: we love them, and we profess that love daily. Its purest, most innocent expression – but also its most vulnerable and perishable – is the attachment formed between children and the toys we buy them.'

We can see the narcissistic dimension of this consumerist attachment in *bas relief* by contrasting it to the psychological role of the transitional object which serves – precisely – as a transition or 'hinge' to individuation and other-regarding relations. Donald Woods Winnicott, *Playing and Reality* (New York: Routledge, 2d ed. 2005). For the consumer, in contrast, the object does not provide a transition to relations with other human beings, but – as Baudrillard says – either to oneself or to other consumer goods.

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obsession with a fantasy object in which one's sense of self, status, and identity become deeply invested.

The sheer technological wizardry of today's consumer goods – smartphones, for example – provide reassurance in a dangerous and unstable world. They serve, as Baudrillard (116) says, 'to reinforce the belief that every practical (and even psychological) problem may be foreseen, forestalled, resolved in advance by means of a technical object that is rational and adapted.' Or, as the novelist Jonathan Franzen recently noted: 'the ultimate goal of technology, the telos of techne, is to replace a natural world that's indifferent to our wishes – a world of hurricanes and hardships and breakable hearts, a world of resistance – with a world so responsive to our wishes as to be, effectively, a mere extension of the self.'<sup>53</sup> Here, too, consumerism is regressive in that it provides the same psychological compensation associated with play: as Johan Huizinga observes in his classic study, play 'creates order, is order. Into an imperfect world and into the confusion of life it brings a temporary, a limited perfection.'<sup>54</sup> For consumers, the goods with which we surround ourselves offer a private enclave of comfort and stability in a chaotic, unpredictable, perilous world.<sup>55</sup>

(3) Although the latent social meaning of consumerism is a regressive narcissism, its manifest content is choice: we opt for an iPhone or an Android phone, a laptop or a desktop, an SUV or a hybrid, a Sony or a Panasonic, McDonald's or Burger King. In advanced consumer economies, however, options proliferate while real choices actually decline. The 'choice' we experience is increasingly illusory.

Baudrillard (188) observes that, in an earlier world of craft production 'objects reflected the contingency, the uniqueness of needs.' If I required a bookcase, I went to the carpenter and engaged him to construct one for me. It would be designed to fit the shape and dimensions of my room and to accommodate the size of my library. Now, I go to the furniture store and choose between the available models. Not only are they regularized in size and shape, but they are mostly designed to hold electronic equipment and nicknacks. (When we moved from New York to Miami in 1986, we left behind an apartment in an 1850s brownstone with built-in bookcases. We searched furniture stores throughout Miami-Dade in vain: 'Bookcases?' we would inquire. To which we invariably received the puzzled response: 'Bookcases? Bookcases? Oh, you mean wall units!')

53 Jonathan Franzen, 'Liking Is for Cowards. Go for What Hurts,' *New York Times*, May 29, 2011, WK10 (adapted from a commencement speech delivered at Kenyon College, May 21, 2011).

54 Johan Huizinga, *Homo Ludens: A Study of the Play Element in Culture* (Boston: Beacon Press, 1950), 10 (original Dutch publication in 1938).

55 This is what drives the mass media's concentration on crime, car accidents, and other tragedies: 'the tranquility of the private sphere has to appear as a value *preserved only with great difficulty*, constantly under threat and beset by the dangers of a catastrophic destiny.... The consumer society sees itself as an encircled Jerusalem, rich and threatened.' Baudrillard, *The Consumer Society*, 35-36.

In that earlier world, the finished product reflected the quality and unique workmanship of the craftsperson. For example, when pottery-making was an artisanal industry – in which one craftsperson was responsible for all stages of production from conception to sale – every pot was unique. Although, by the 1750s, pottery-making had become a manufacturing industry in which the work was divided among as many as seven different crafts, it was still the case that each product would vary depending on such factors as the heat of the kiln or the way in which the craftsperson applied the glaze or molded ornaments to the pot.<sup>56</sup> By the late 1760s, however, Josiah Wedgwood had introduced two innovations that dramatically changed the world of porcelain production (and still dominate our tables today). First, he developed a cream colored glaze – which he called 'creamware' – that yielded consistent results. Second, he adopted the more elegant neoclassical style whose simpler shapes provide large smooth surfaces that can be decorated in any number of different patterns applied through enamel-printed transfers.<sup>57</sup> The result was a more uniform product with vastly fewer shapes but with a wide variety of interchangeable enameled decorations. By adopting what, today, we refer to as a modular design and method of production, Wedgwood was able simultaneously to reduce the range of available products (thus, minimizing costs) and still satisfy consumer demand for novelty. This effect was exponentially multiplied by his success, as more and more of his competitors further reduced consumer choice by switching over to creamware.<sup>58</sup>

What was true in Wedgwood's time is no less true in ours. Mass production requires standardized products made of interchangeable or modular parts. Today, we personalize our consumer goods by customizing the wallpaper on our computer or buying a snap-on case or 'skin' for our phone that announces our favorite color, college, sports team, or love for Jesus. Our products may be more advanced, but our 'choices' are as superficial as those of the early consumers who distinguished their china by selecting one of Wedgwood's stenciled patterns.<sup>59</sup> Even when we pick between competing products, market forces will ensure that the alternatives are amazingly alike. What manufacturer would risk the mass market by failing to include features offered by a competitor? When the iPhone adds a new feature, you can be confident that the next Android upgrade will find a way to mimic it (and, too, that patent litigation will ensue). We have the illusion of choice; in fact, we merely select from an already determined array of remarkably similar products. As Baudrillard (152) says: 'Since "specific differences" are produced on an industrial scale, any choice he can make is ossified from the outset.'

56 Adrian Forty, *Objects of Desire: Design and Society Since 1750* (London/New York: Thames & Hudson, 1986), 32-34.

57 *Ibid.*, 31-32, 40-41. For his more expensive wares, the designs would be hand-painted in enamel.

58 Wolf Mankowitz, *Wedgwood*, (London: B.T. Batsford, 1953), 43-53.

59 As Baudrillard (*The System of Objects*, 142) notes: 'The fact is that at the level of the industrial object and its technological coherence the demand for personalization can be met only in insensentials.'

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Not that choice among commodities is bad: our lives are, no doubt, better as a result of the broad spectrum of products available to us at affordable prices. But, material prosperity is not the same as freedom. As Marcuse (7) cautions: "The range of choice open to the individual is not the decisive factor in determining the degree of human freedom, but *what* can be chosen and what *is* chosen by the individual.' To put it differently, the range of available goods may vastly exceed what was available to our forebears. We are, in that sense, richer. It does not follow, however, that we are more free. For freedom, at the very least, must be measured in the degree of control one has over one's life-decisions.<sup>60</sup> Consumers, however, are passive and reactive in the sense that they 'choose' from what is on offer on the basis of what, at any given moment, is trendy. (Hence, the worst thing one can say about a friend's purchase is "That's *so* last year.')

At any given time, only certain commodities will be socially recognized as markers of status. Everyone who is anyone must have one, and pretty soon everyone does. Which, of course, makes the possessor of the previously coveted item just like everyone else. Something further is now needed to reconfirm one's status and sense of well-being. Acquisition to display status is self-defeating and, for that very reason, self-perpetuating. Far from manifesting freedom, consumption is as Baudrillard (153) says 'undoubtedly a trap.'

At some level, consumers know that. No matter how much they identify with their consumer goods, consumers understand – if only vaguely – that they are participants in a heteronomous system. This is evident in the welter of rationalizations that they employ to justify their purchases. When cellular car phones first became available in the 1980s, one of my more thoughtful friends said: 'I tell myself that it's a safety thing in case of a breakdown on the road. But the truth is it's really an indulgence.' So, too, the SUV has prompted an interesting array of needs-based justifications. Many SUV owners insist they need a four-wheel drive vehicle for winter road conditions, though two of the biggest markets for SUVs are Miami and Los Angeles.<sup>61</sup> The most common justification for the SUV is safety; yet, SUVs in fact have higher rates of collision loss, injuries, and fatalities than standard cars.<sup>62</sup>

Perhaps the most pernicious aspect of this social system is that, for the vast majority of us, the narcissistic charge of choice in a consumer market is experienced *as* freedom. Only in such a society – in which the fast food of freedom is the freedom to choose fast food – could one even imagine a statement such as Fox

60 See Ellen Meiksins Wood, 'Demos Versus "We the People": Freedom and Democracy Ancient and Modern,' in *Dēmokratia*, 129 ('while, as Wolin points out, "free market capitalism" is undeniably "not an arrangement for producing equality," neither is it unambiguously an arrangement for producing freedom, as it displaces so many spheres of life to an economic sphere beyond the reach of democratic accountability, subjecting them to the imperatives of competition, profit-maximization, and the rule of capital.')

61 Keith Bradsher, *High and Mighty: SUVs – The World's Most Dangerous Vehicles and How They Got to Be that Way* (New York: PublicAffairs, 2002), 113.

62 Gregg Easterbrook, *The Progress Paradox: How Life Gets Better While People Feel Worse* (New York: Random House, 2003), 93.

News commentator Brian Kilmeade's inane: 'Nothing spells Freedom like a Hooters meal.'<sup>63</sup> The misidentification of consumer choice with freedom serves, moreover, as a diversion of choice from the political to the private sphere.<sup>64</sup> This was precisely the line taken in response to the September 11<sup>th</sup> attacks, when both Mayor Giuliani and President Bush urged that Americans should 'take a stand against terrorism' by shopping.<sup>65</sup>

Consumers, in other words, are acculturated to experience conformity and passivity as individuality and freedom. This distorted form of subjectivity is, in turn, reflected in our politics. From the phantom WMDs that helped pave the way for the 2003 invasion of Iraq<sup>66</sup> through the so-called 'swift-boaters' who believed that John Kerry had not really earned his medals during the Vietnam War to the 'birthers' who denied that President Obama was born in the United States, American political operatives have skillfully exploited the superficiality of contemporary consumer subjectivity to manipulate public opinion. Today, commentators refer unabashedly to the Republican or Obama brand,<sup>67</sup> and even thoughtful academics describe electoral campaigns 'primarily' as a device 'to match buyers with appropriate sellers in a political marketplace.'<sup>68</sup> The extension of sophisticated marketing and advertising practices into the political sphere, though hardly a recent phenomenon,<sup>69</sup> increasingly means that politics is dominated by sound-bites and non

63 <[www.thedailyshow.com/watch/wed-june-9-2010/moment-of-zen---let-freedom-wing-day](http://www.thedailyshow.com/watch/wed-june-9-2010/moment-of-zen---let-freedom-wing-day)>.

64 As Baudrillard (*The System of Objects*, 141) notes: 'Increasing the number of objects makes it easier for society to divert the faculty of choice onto them, so neutralizing the threat that the personal demand for choice always represents for it.'

65 Serge Schmemmann, 'The Mayor; Giuliani Is Blunt in Rare U.N. Talk,' *New York Times*, October 2, 2001, A1; idem, 'A Nation Challenged; Excerpts From the President's Remarks on the War on Terrorism,' *New York Times*, October 12, 2001, B12. President Bush's precise words were: 'We cannot let the terrorists achieve the objective of frightening our nation to the point where we don't conduct business, where people don't shop.'

66 As National Security Advisor Condoleezza Rice infamously proclaimed on CNN's 'Late Edition With Wolf Blitzer' on Sunday September 8, 2003: 'We don't want the smoking gun to be a mushroom cloud,' <[http://articles.cnn.com/2002-09-08/politics/iraq.debate\\_1\\_nuclear-weapons-top-nuclear-scientists-aluminum-tubes?\\_s=PM:ALLPOLITICS](http://articles.cnn.com/2002-09-08/politics/iraq.debate_1_nuclear-weapons-top-nuclear-scientists-aluminum-tubes?_s=PM:ALLPOLITICS)>.

67 Adam Nagourney, 'The Art of the Comeback,' *New York Times*, July 12, 2009, WK1; Matt Bai, 'Democrat in Chief?' *New York Times Magazine*, June 13, 2010, 10.

68 James A. Gardner, *What are Campaigns For? The Role of Persuasion in Electoral Law and Politics* (Oxford: Oxford University Press, 2009), 177. Compare the tag line of a recent campaign by Democracy for America (a pro-Obama political action committee): 'Democracy is not an eBay item.'

69 Already in 1958, Aldous Huxley complained that: 'The methods now being used to merchandise the political candidate as though he were a deodorant positively guarantee the electorate against ever hearing the truth about anything.' Aldous Huxley, *Brave New World Revisited* (New York: First Perennial Classics, 2000), 57 (originally published New York: Harper & Row, 1958).



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sequiturs, a focus on appearance,<sup>70</sup> celebrity, the mobilization of ‘values voters,’<sup>71</sup> and the celebration of other such glittering abstractions entirely divorced from the substance or actual policy of governance.

It is unsurprising, then, that a social system of this sort would produce voters who insist on lower taxes *and* social welfare programs. In fact, for nearly three decades, the calculated policy of the Republican Party has been to pursue a ‘Two Santa Claus Theory.’ This highly successful electoral strategy is premised on the simple idea that, if the Democrats are the party of social programs such as Social Security and Medicare, the Republicans cannot compete by playing the Grinch and slashing spending. Instead, as the theory’s originator Jude Wanniski proposed in 1976, ‘the Republicans should become the Santa Claus of Tax Reduction.’<sup>72</sup>

The emergence of the Tea Party movement in the wake of the financial crisis of 2008 and subsequent recession is particularly instructive. Only in a society where one is defined by what one accumulates could the most vocal and unruly of the disaffected be not those left unemployed and dispossessed by the latest recession, but the better-educated, wealthier citizens who actually comprise the bulk of that movement.<sup>73</sup> We can see the full force and perversity of the cultural logic of consumerism in the summer of 2009’s well-publicized incident at a South Carolina town hall meeting during which a constituent berated his representative: ‘Keep your government hands off of my Medicare!’<sup>74</sup> One could write this off to simple ignorance. (And many have.) But the sentiment – which first surfaced in the 1990s health care debate – has proven largely immune from factual correction. The South Carolina representative, in fact, politely tried to explain that Medicare is government program. ‘But he wasn’t having any of it.’<sup>75</sup> In the cultural logic of self-definition through possession, an entitlement like Medicare is simply another element of the material accumulation that becomes part of the subject’s

70 As one Iowa Republican observed with respect to Mitt Romney’s candidacy: “Personality does matter,” said Michael Dee, a lawyer in West Des Moines. “Because this person is going to be on TV all the time as president.” Michael Barbaro & Ashley Parker, ‘Voters Examining Candidates, Often to a Fault,’ *New York Times*, December 29, 2011, A1. Note how similar in feel this comment is to the kind of rationalizations consumers offer for their purchases. See text accompanying nn. 61-62 above.

71 There is, naturally, both a website and a conference: <[www.valuevotersusa.com](http://www.valuevotersusa.com)> and <[www.valuesvotersummit.org](http://www.valuesvotersummit.org)>. What the rest of us ‘valueless’ voters are supposed to do is unclear.

72 The original essay published in the *National Observer*, March 6, 1976, under the title “Taxes and a Two-Santa Theory,” can be found online at <<http://capitalgainsandgames.com/blog/bruce-bartlett/1701/jude-wanniski-taxes-and-two-santa-theory>>.

73 Kate Zernike, ‘Doing Fine, but Angry Nonetheless,’ *New York Times*, April 18, 2010, A1.

74 The incident was widely discussed in the media, but seems to have been first reported in the *Washington Post* and then quickly picked up by Paul Krugman in the *New York Times*. Phillip Rucker, ‘S.C. Senator Is a Voice of Reform Opposition,’ *Washington Post*, July 28, 2009, A1; Paul Krugman, ‘Health Care Realities,’ *New York Times*, July 31, 2009, 23.

75 *Ibid.*

identity. Indeed, in American constitutional law, statutory entitlements of this sort *are* property protected from arbitrary governmental interference.<sup>76</sup>

Given this cultural context, there is nothing surprising about the state of contemporary democratic politics in the United States. Polarization, incivility, the uncompromising refusal to negotiate, the fact that the left and right live in completely different factual and policy universes – these are all symptoms of a society whose members are disconnected not just from each other, but also from the everyday meaning of their own, most pervasive practices and routines. For such subjects, democracy is merely a means of expressing one's preferences. Judge Posner, for example, observes that 'in political as in economic markets, not much turns on which brand one buys – or even on whether one decides to buy at all.'<sup>77</sup> Democracy, on this view, is not a matter of collective self-governance. It is merely a Schumpeterian system in which policy elites compete for the support of the masses no less than Wedgwood competed for the patronage of the emerging bourgeoisie in the mid-eighteenth century.<sup>78</sup>

I have worked hard over the last several pages to trouble our complacent self-image as freely choosing subjects. Under contemporary conditions, neither markets nor democracy are particularly good at effectuating the values of individual or collective autonomy. But, it is not my contention that, as social institutions, markets and democracy are ineffective. To the contrary, the market and the liberal state are the two most powerful and successful cultural developments of the last two centuries. Nor is it my contention that modern subjectivity lacks moral value. The distinctively modern, normative claim of equal dignity and respect for all persons is – as I argue in the next two sections – the critical component of a theory of freedom and democracy. My point, rather, is that what contemporary markets and liberal democracies realize is not the self-directing freedom which we believe our birthright. What, in fact, they realize is the formation of modern subjectivity as we know and experience it.

### 3 Freedom's Social Aspect

In a recent book,<sup>79</sup> Robert Pippin (279) attempts to harmonize Hegel's insistence that all reasons are situated reasons – specifically, that '[p]ractical reasons are ... institution- and time-bound considerations demanded and offered within a social

76 See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985).

77 Richard A. Posner, *Law, Pragmatism, and Democracy* (Cambridge: Harvard University Press, 2003), 169. Compare Martin Ostwald, 'Shares and Rights: Citizenship Greek Style and American Style,' in *Dēmokratia*, 56 ('[M]y "right" to vote makes me only a potential and passive citizen; while I do not lose my citizenship by failing to exercise it, I am not an active participant in the political process if I fail to vote.')

78 Posner, *Law, Pragmatism, and Democracy*, 143-212; Gardner, *What are Campaigns For?*, 61-64.

79 Robert B. Pippin, *Hegel's Practical Philosophy: Rational Agency as Ethical Life* (Cambridge: Cambridge University Press, 2008). Subsequent page numbers are given in the text.

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practice' – with a Kantian understanding of autonomy as self-legislation. In Pippin's own words (273-74), this reading of Hegel leaves us with a "‘Have Your Cake and Eat It Too’ skepticism' in which actual human reason is historicized within a structure of social relations that must be said, somehow, to manifest 'objective rationality' or 'the actuality of concrete freedom.' But, as Charles Taylor observes, 'no one actually believes' Hegel's 'central ontological thesis.'<sup>80</sup> Taylor, in fact, provides a thoughtfully historicized (which is to say, Hegelian) account of why Hegel's particular synthesis of rationalism and Romanticism no longer makes sense to us.<sup>81</sup>

There are those who chide us post-Hegelians for failing to recognize that Hegel distinguished between *subjectivity* (which he saw as the great achievement of the modern age) and *subjectivism* (which Hegel understood as leading to a false and fetishistic conception of freedom). Thus, my colleague Dana Villa observes that Hegel simultaneously critiqued the atomistic individual self of liberal theory and validated the norm of freedom and the modern form of subjectivity that is our particular historical legacy.<sup>82</sup> Indeed, he darkly hints that the failure to observe this distinction puts profound moral and political values at risk. In much the same vein, Pippin (281) concludes that anyone committed to 'the aspiration to lead a life of one's own in common with others, in the social and material conditions under which such equal dignity is actually possible' must reject both the wild exaggerations of modern subjectivity and the postmodern decentering of the subject.

I find neither claim persuasive. One can accept, with Villa, that modern subjectivity with all its trappings – the liberal Western conceptions of rights, justice, and personhood – are in Richard Rorty's words 'fragile, precious creations.'<sup>83</sup> But that appreciation neither diminishes nor refutes the force of the postmodern critique of subjectivity. Indeed, Villa suggests as much when he notes that the slide in Hegel and de Tocqueville 'from the critique of methodological individualism ("atomism") to that of moral or democratic individualism *tout court* is more or less built into their respective theories....'<sup>84</sup> Perhaps more to the point, the critique of atomistic individualism is borne out precisely in the phenomena of alienation, anomie, and the profoundly pathological forms of identification characteristic of contemporary consumer and celebrity culture that Villa himself invokes.<sup>85</sup>

Pippin's closing exhortation that we need to resume something like Hegel's project has its appeal. But, it cannot be done – as Pippin seems to want to do –

80 Charles Taylor, *Hegel* (Cambridge: Cambridge University Press, 1975), 538. Subsequent page numbers are given in the text.

81 Thus, Taylor, *Hegel* (544-46) notes that the 'orgies of grotesque inhumanity' of the twentieth century make it impossible to 'see history as the realization of reason and freedom.'

82 Dana Villa, *Public Freedom* (Princeton: Princeton University Press, 2008), 50-51, citing Robert Fine, *Political Investigations: Hegel, Marx, Arendt* (London & New York: Routledge, 2001), 34.

83 Richard Rorty, 'Thugs and Theorists: A Reply to Bernstein,' *Political Theory* 15 (1987): 579 n. 28.

84 Villa, *Public Freedom*, 51.

85 *Ibid.*, 82-83.

on anything like Hegel's own terms. All reasons cannot simultaneously be situated reasons and, as Pippin says (279), 'the historical experience of, the self-education of, spirit.' Modern subjectivity cannot be both wildly exaggerated and the normative precondition of our politics. We *cannot* have our cake and eat it too, no matter how much we might like to. One cannot resolve a dialectic by pretending that the antitheses are somehow compatible. A dialectic can be resolved only with an *Aufhebung* or some analogously radical change of field.

I will try to suggest such an understanding, one that makes it conceivable simultaneously to recognize the critique of modern subjectivity and, *on that very basis*, to aspire to lead one's life in common with others, in the social and material conditions under which equal dignity is possible. This will require a critique of the conventional conception of freedom that parallels our earlier discussion of democracy.

Conceptually, the conventional understanding of freedom as the absence of constraint is a psychological primitive. The embodied experience of physical motion gives rise to a metaphorical, conceptual mapping in which the experience of physical motion is mapped onto abstract social or intellectual actions.<sup>86</sup> The mapping is systematic, which means that each of the entailments from the domain of physical mobility – the experience of blockage, containment, and movement through space toward desired objects – is also carried over to the target domain of abstract social action.<sup>87</sup> This mapping thus yields a series of correlative metaphors, in which:

- ACTIONS ARE MOTIONS
- CONSTRAINTS ON ACTION ARE CONSTRAINTS ON MOTION
- PURPOSES ARE DESTINATIONS
- IMPEDIMENTS TO PURPOSES ARE OBSTACLES TO MOTION
- FREEDOM IS THE ABSENCE OF CONSTRAINT

These conceptual metaphors and their attendant metaphorical mappings motivate a tremendous range of common expressions. The most widespread and cross-cultural is the metaphorical conceptualization of life as a journey: life-choices are choices of direction as in the decision to follow a 'career path' or a 'road less traveled,' life's difficulties are 'obstacles' that must be 'overcome,' death is 'a final resting place,' etc.

These embodied metaphorical conceptions yield both the conventional understanding of freedom as the absence of constraint (we are, then, free to act) and the primacy of the liberal conception of freedom as negative liberty – that is, as freedom from interference by the State – which, in the technical terms of cognitive science, emerges as a prototype effect.<sup>88</sup>

86 Steven L. Winter, *A Clearing in the Forest: Law, Life, & Mind* (Chicago: University of Chicago Press, 2001), 1-32.

87 *Ibid.*, 12-18, 206-10; George Lakoff & Mark Johnson, *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought* (New York: Basic Books, 1999), 178-206.

88 On prototype effects, see *Clearing in the Forest*, 76-85.

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This underlying metaphorical conception is deeply entrenched and, therefore, ubiquitous. We thus see the same metaphorical mapping at work not only in the conventional understanding of freedom as absence of constraint, but also in substantively different conceptions of freedom. In his 1941 State of the Union address, for example, President Roosevelt listed among the ‘four essential human freedoms’ the positive liberties of ‘freedom from want’ and ‘freedom from fear.’ Here, the idea is that a person cannot be free when she is in the grip of want or fear and, therefore, that the social, economic, and political conditions must be such as both to provide for all and to protect against international physical aggression. Similarly, in his famous examination of freedom as a situated quality, Merleau-Ponty (438) explained that: ‘If freedom is to have room [*avoir du champ*] in which to move, if it is to be describable as freedom, there must be something to hold it away from its objectives, it must have a field.’ One might think that the Kantian conception of freedom as self-rule – in which, as Arendt notes, ‘the harbinger of freedom’ is paradoxically to be found in ‘the faculty of the will whose essential activity consists in dictate and command’<sup>89</sup> – surely must be different. But, in fact, the basic idea is the same: the subject is bound by no constraint it does accept as its own; it follows no rule except that which it lays down for itself (and notice, particularly, that – in an instantiation of the CONSTRAINTS ON ACTIONS ARE CONSTRAINTS ON MOTIONS metaphor – a rule is a path that is *laid down* and *followed*).<sup>90</sup>

Historically, the conventional understanding of freedom is rooted in the Enlightenment’s dualist schema of subject and object. By radically separating the subject from the objects of its inquiry, the dualist schema makes modern science possible. The objectification of nature is extended to human behavior and this produces, as Taylor (539) notes, ‘an associationist psychology, utilitarian ethics, atomistic politics of social engineering, and ultimately a mechanistic science of man.’ But this form of scientific explanation, with its abstraction from history and context and pretension to an Olympian point of view, separates the actual historical subject from the grounds of her own intelligibility. As Merleau-Ponty warns, such explanations ‘destroy the mixture we are made of and make us incomprehensible to ourselves.’<sup>91</sup>

The Enlightenment schema of subject and object not only isolates the subject from the objects of its inquiry, itself, and its history, it also isolates the subject from other subjects. Its focus is on the individual consciousness and its relation to the world. (One can scarcely imagine Descartes proclaiming: ‘We think, therefore we are.’) From the perspective of the Enlightenment schema, social context can only be understood as an external condition and – as such – it can only be seen as a source of constraint. Freedom, on this view, can only be conceptualized, as Taylor (563) says, in terms of ‘a set of limits to be overcome, or a mere occasion

89 Hannah Arendt, *Between Past and Future*, 145.

90 Winter, *Clearing in the Forest*, 206-09.

91 Maurice Merleau-Ponty, *Signs*, trans. Robert McCleary (Evanston, IL: Northwestern University Press, 1964), 241.

to carry out some freely chosen project, which is all that a situation can be within the conception of freedom as self-dependence.'

The modern understanding of freedom, then, is of a self-propelled agent released from the limits of the older feudal and religious orders who is now free to think, act, and choose according to reason alone. It expects – indeed, is expected – to rise above the social limits of origin and class to achieve according to merit and ambition. It acknowledges no constraints except those it recognizes for itself. Social context is not just something to be transcended; it is exactly what the Enlightenment has sloughed off in the name of freedom.

This view, however, leads to three paradoxes. First, modern subjectivity and its concomitant understanding of freedom are themselves particular, historical developments nurtured by an entire ensemble of social and political institutions that include not just the consumer market and liberal State, but also the modern novel, the popular media, and the educational system. It emerges from and is sustained by a form of life that validates the individual over the social, the chosen over the inherited, and what is exceptional and unique over what is common and shared. This view of freedom and individualism is constitutive of who we are; yet, and here is the paradox, it is not a philosophy or value-system that we ourselves have chosen. For us, it has the force of necessity.

Second, the 'freedom' of modern subjectivity is its own kind of prison: the slide from subjectivity to subjectivism progresses inevitably through atomism to alienation. Nowhere is this more evident than in the United States where taxes paid to sustain the common enterprise of democratic self-government are experienced as a kind of extortion and mandatory participation in an insurance pool run by private firms is excoriated as a form of socialism. More pointedly, the consumer and celebrity culture that dominate contemporary life in the West represent the pathological extremes of modern subjectivity. Consumerism, as we have seen, is defined by a regressive narcissism in which relations with one's commodities rival those with other humans. (When the iPhone4 was released in 2010, an ecstatic customer told a reporter: "This is better than losing your virginity."<sup>92</sup>) Celebrity culture sustains a similar narcissism. This is evident in the compulsion for 15-seconds-of-fame that drives reality television. But it is yet more disturbing in its more widespread, conventional form: the central dynamic of identification with favorite sports, music, or movie stars is to participate vicariously in their triumphs and adulation; fans 'live in imagination the sumptuous and full life' that they can never experience, but which the media 'dramatically describe[s] to them

92 Mitch Albom, 'iPhone Crazyies Need a Major Wake Up Call,' *Detroit Free Press*, June 27, 2010, 19A.



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daily.<sup>93</sup> Celebrity culture is, thus, an institutionalized form of alienation.<sup>94</sup> As Roger Caillois observes: ‘This superficial and vague, but permanent, tenacious, and universal identification constitutes one of the essential compensatory mechanisms of democratic society.’<sup>95</sup>

The common product of consumer and celebrity culture is a passive and disaffected citizenry who, to borrow from Arendt,<sup>96</sup> relinquish the burdens of self-government to the State and accept for themselves the role of ‘mere clients.’ As Villa elsewhere explains:

‘Arendt was convinced by her analysis of totalitarianism that many in the modern world were eager to abdicate their civic freedom and responsibility, thereby relieving themselves of the “burden” of independent action and judgment. The rise of totalitarian movements was the most spectacular expression of this tendency, but it could also be found in liberal democratic societies (such as the United States) and in the increasingly bureaucratic welfare states of Europe. If the majority of people in a particular polity thought of freedom as essentially the freedom *from* politics (as in America) or politics as the centralized administration of the needs of life (as in the European welfare state), then the public realm and its distinctive freedom were bound to be in jeopardy.’<sup>97</sup>

The conventional understanding of freedom as the mere absence of governmental constraint leads directly from estrangement through disaffection to democratic dysfunction.

Perhaps this descent into atomism and alienation is just an historical fortuity. But there is reason to think otherwise. The third paradox is that freedom-as-transcendence makes a promise that cannot be redeemed. At the pragmatic level, social context is not something that *can* be sloughed off; particular social structures can be transformed or replaced, but another social structure always takes its place: I may leave a family, a job, or a profession because I find it too stifling; but I inevitably start another relationship, take another job, or choose another calling

93 Roger Caillois, *Man, Play and Games*, trans. Meyer Barash (Urbana: University of Illinois Press, 1961), 125 (first published as *Les jeux et les hommes* [Paris: Librairie Gallimard, 1958]).

94 Alienation is a charged concept with many contested meanings. Probably the best contemporary theoretical account can be found in Rahel Jaeggi’s *Entfremdung: Zur Aktualität eines sozialphilosophischen Problems* (Frankfurt: Campus Verlag, 2005), forthcoming in English (Columbia University Press), which defines alienation as ‘a relation of relationlessness’ (*eine Beziehung der Beziehungslosigkeit*).

95 Caillois, *Man, Play and Games*, 122.

96 Hannah Arendt, *The Origins of Totalitarianism* (San Diego, CA: Harvest Books, 1968), 141-42 (‘By assigning his political rights to the state the individual also delegates his social responsibility to it: he asks the state to relieve him of the burden of caring for the poor precisely as he asks for protection from criminals’) (discussing the political theory of Hobbes, whom Arendt describes as ‘the only great philosopher’ of the bourgeoisie).

97 Dana R. Villa, ‘Introduction: The development of Arendt’s political thought’ in *The Cambridge Companion to Hannah Arendt*, ed. Dana Villa (Cambridge: Cambridge University Press, 2000), 8.

that brings with it some new set of constraints. As Merleau-Ponty (452) says, we 'may defy all accepted form, and spurn everything,' but we 'do not withdraw into freedom, [we] commit ourselves elsewhere.' At the theoretical level, freedom-as-transcendence is either impossible or empty. It is impossible, Taylor (561) explains, because

'it is defined in such a way that complete freedom would mean the abolition of all situation.... The only kind of situation which this view can recognize is one defined by the obstacles to untrammelled action which have to be conquered or set aside – external oppression, inauthentic aspirations imposed by society, alienation, natural limits.'

And it is empty because a 'free' self that had transcended all the traditions, institutions, relationships, groups, values, and social expectations that defined it would, as Taylor (561) says, be 'characterless' and 'without defined purpose.'<sup>98</sup> How would it choose? What could it strive for? On what terms would it even think? 'Absolute subjectivity,' Merleau-Ponty (448) observes, 'is nothing but an abstract notion of myself.'

There seem, to me, but two ways out of these paradoxes. Each in its own way requires that we overcome the dualism of subject and context and – rather than trying to arrest the slide from subjectivity to subjectivism with a distinction – focus instead on intersubjectivity. Axel Honneth has argued that the intersubjective processes of recognition are necessary to the development of subjects capable of autonomy.<sup>99</sup> This seems both correct and essential. Pippin (256-57) responds that this insight cannot be translated into a rights claim that a liberal polity could enforce,<sup>100</sup> though Anne Daley's work shows how acknowledgment of a right to what, following Winnocott, she refers to as 'a good-enough caregiving relationship' could better inform existing constitutional law regarding the family.<sup>101</sup> My point, however, is that although Honneth's claim provides a good starting point, we need to push further to a more fundamental conception of freedom as utterly and unavoidably social.

98 In an earlier passage, Taylor (373) explains: 'The dilemma of radical freedom can be restated succinctly as follows: if freedom is to renounce all heteronomy, any determination of the will by particular desires, traditional principle or external authority, then freedom seems incompatible with any rational action whatsoever. There do not seem to be any grounds of action left, which are not wholly vacuous, that is which would actually rule some actions in and others out, and which are not also heteronomous.'

Or, as Stanley Fish puts it, if we were to transcend all constraint and achieve freedom, the result would be 'not free actions, but *no* actions' because 'action is only conceivable against a background of alternative paths.' Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989), 459.

99 Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, trans. Joel Anderson (Cambridge: MIT Press, 1996).

100 Pippin's argument here is not that there is no ethical claim to recognition, but that such claims could not function as 'independent justifications for some social order' as manifesting 'objective rationality.' Pippin, *Hegel's Practical Philosophy*, 255.

101 Anne C. Daley, 'Developing Citizens,' *Iowa Law Review* 91 (2006): 431.

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The first way out of these paradoxes requires a reconceptualization of the relation between the individual and the social. As historically situated beings, social contingency is for us obligatory and constitutive. If 'history is the context in which we know,'<sup>102</sup> then the institution- and time-bound understandings in which we find ourselves are, also, our very conditions of possibility. The fact that 'I am a psychological and historical structure,' Merleau-Ponty (455) points out, 'does not limit my access to the world, but on the contrary is my means of entering into communication with it.' Culture and community are not external constraints that the individual must rise above, but indispensable aspects of being. We are, to use Merleau-Ponty's (xiii) lovely formulation, 'through and through compounded of relationships with the world.'

To see subjectivity as constituted in *relationships* is not to reduce the subject to its social determinants, but rather to emphasize its dynamic qualities. Where modern subjectivity conduces to subjectivism, this understanding of subjectivity is, in a word, *reflexive*. Though it necessarily reflects the social circumstances and history through which it is constituted, subjectivity is simultaneously that which expresses, enacts, and thereby changes that context. To be a 'human subject,' is to be one 'who, by means of a continual dialectic, thinks in terms of his situation, forms his categories in contact with his experience, and modifies this situation and this experience by the meaning he discovers in them.'<sup>103</sup> On this view, freedom is necessarily a function of context; it inheres in our situated capacity to transform – rather than transcend – the conditions in which we live.<sup>104</sup>

To reconceptualize freedom as an emergent condition of a social situation is profoundly to change our sense of self and place in the world. It is not just that our agency is dependent on the social practices and historical conditions through which we are constituted, but also that the hubris of the self-legislating subject who acts freely in the world through reason – even situated reason – cannot be sustained.<sup>105</sup>

We can advance this point beyond postmodern cliché by considering what Pippin (232-34) identifies as Hegel's 'logic of action.' For Hegel, the paradigm 'of an acting subject so stubbornly insistent on the decisive role of his subjectively formulated intention, so insistent on the individual authority to determine what was done and what the scope of such action should include' is a kind of 'violation' or

102 Fish, *Doing What Comes Naturally*, 324.

103 Merleau-Ponty, *Sense and Non-Sense*, 133-34.

104 'Man is a being with a natural and social situation but one who is also open, active, and able to establish his autonomy on the very ground of his dependence.... [T]he bond which attaches man to the world is at the same time his way to freedom; ... man, in contact with nature, projects the instruments of his liberation around himself not by destroying necessity but, on the contrary, by utilizing it....' *Ibid.*, 130.

105 On the distortions, hegemony, and anti-humanism of this hubris – particularly its destructive role in the financial crisis of 2008 – see Steven L. Winter, 'Law, Culture, and Humility' in *Law and Humanities: An Introduction*, ed. Austin Sarat, Mathew D. Anderson, & Catherine O. Frank (Cambridge: Cambridge University Press, 2010), 98.

'pathology.' This is so because the meaning of action – both what was done and what was intended – is itself a social product:

'[A] subject's *ex ante* formulated intention[s] ... cannot ... be temporarily isolated from their expression in action ...; such subjective formulations and reasons change in the course of the deed, and ... it is quite possible that persons can be wrong about their actual intentions and motivation, that only as expressed in the deed in this public, social space, is it clear what they are committed to and sometimes clear why.... It means that a subject can sometimes only "learn from the deed," as Hegel says, ... and it implies a deep dependence on the reception of the deed in society.... In Hegel's view, [then,] ... actually to *have* an intention *is* to struggle to express that intention in a public and publically contestable deed, subject to ... appropriations and interpretations by others that can greatly alter one's own sense of what one is about.'

It follows that the freedom to act is itself a shared, social freedom because the meaning and intent of that act is necessarily a social phenomenon. As Pippin (233) says, action for Hegel 'must be understood as a self-negation in this sense, a negation of the subject's pretension to complete ownership of the nature and import of the deed, and therewith the sharing of such authority with others.' One's very status as an individual – who one is, what one does, even what one intends – is dependent on the understanding and recognition of others. Intersubjectivity here connotes something anterior to and more profound than communicative interaction for it is constitutive of both subject and meaning.<sup>106</sup>

This account of the meaning of action as, necessarily, outside one's own control raises an obvious problem. How do I recognize a deed as my own when it is subject to the appropriations and interpretations of others? To put it differently, if the meaning of my action is dependent on the interpretations of others, I stand in constant danger of alienation. I may act in a manner I think brilliant or virtuous and yet find that I am merely banal or, even, vile. To guarantee against this possibility, I would need reason to be confident that others recognize the deed, its description, and my motivation in the same manner that I do myself. This will be true and my act will be free, Pippin (221) says, if we all participate in 'a certain historical form of ethical life, in which such relations of recognition can be genuinely mutual, which means that the recognizers are themselves actually free, where the intersubjective recognitional relation is sustained in a reciprocal way.' Such social institutions would, he (262-63) says, manifest 'objective rationality' and, hence, freedom. But what is that form of life, how can we achieve it, and what if we do not get there? A teleological or strong ontological account would really help here; but that is exactly what we no longer find credible.

106 Thus, Pippin (*Hegel's Practical Philosophy*, 238) concludes that Hegel's claim is that 'there is a far deeper level of human dependence than would be claimed by mutual commitment to an ideal communicative exchange.... The content of one's status as an individual and not just the linguistic form of its expression also is taken to reflect such recognitional dependence.'

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Failing that, we could adopt a more particularized approach in which we identify and thematize specific contexts that we understand as meaningful realizations of freedom. Merleau-Ponty (453-55) employs such a strategy, which he explicitly offers as expressing what is true about the synthesis of *in itself* and *for itself* that would constitute Hegelian freedom. His two paradigmatic cases are the refusal to submit under torture and self-transformation in psychoanalysis. Of the former, he says:

‘Let us suppose that a man is tortured to make him talk. If he refuses to give the names and addresses which it is desired to extract from him, this does not arise from a solitary and unsupported decision: the man still feels himself to be with his comrades, and, being still involved in the common struggle, he is as it were incapable of talking.... What withstands pain is not, in short, a bare consciousness, but the prisoner with his comrades or with those he loves and under whose gaze he lives.... And probably the individual in his prison daily re-awakens these phantoms, which give back to him the strength he gave to them. But conversely, in so far as he has committed himself to this action, formed a bond with his comrades or adopted this morality, it is because the historical situation, the comrades, the world around him seemed to him to expect that conduct from him.’

Notice that, here, Merleau’s earlier point about the internalization of the social as constitutive of the subject is made concrete: it is the common understanding of what the situation requires, the shared commitment, and the imagined recognition of one’s comrades that provide the conditions of possibility for the heroic act of freedom under these most extreme circumstances.

With respect to psychoanalysis, Merleau emphasizes how freedom goes beyond a situation only by taking up a new one. Thus, he rejects the idea that one could resolve deep-seated psychological issues merely through introspection and intellectual insight:

‘Psychoanalytical treatment does not bring about its cure by producing direct awareness of the past, but in the first place by binding the subject to his doctor through new existential relationships. It is not a matter of giving scientific assent to the psychoanalytic interpretation, and discovering a notional significance for the past; it is a matter of reliving this or that as significant, and this the patient succeeds in doing only by seeing his past in the perspective of his co-existence with the doctor.... The same applies in all cases of coming to awareness: they are real only if they are sustained by a new commitment.’

The key here is that the emergence of freedom – i.e., the power to alter the import of one’s past – is a function of an ongoing intersubjective relation. ‘By taking up a present, I draw together and transform my past, altering its significance, freeing and detaching myself from it. But I do so only by committing myself

somewhere else.' Once again, this requires not any relation but a relation characterized by recognition, solidarity, and care.

One might reasonably ask whether these examples are generalizable. Both are cast at an intensely molecular scale: the prisoner in the torture chamber sustained by the bond with his comrades; the analysand in the intimacy of the therapeutic relationship. Even if these exemplars do capture something important about freedom, what could they possibly mean on a social scale?

The stirring events in Tahrir Square during last year's January 25<sup>th</sup> movement offer an extraordinary Petri dish in which to observe the role that relations of mutual recognition and solidarity play, in fact, in the constitution of an emancipatory politics. Peter Gabel's classic critique of rights article provides an astute theoretical account with which to unpack these events.<sup>107</sup>

Gabel begins with the Sartrean observation that our day-to-day interactions are characterized by the performance of scripted social roles that simultaneously connect us to and protect us from the Other, thereby frustrating our desire for recognition.<sup>108</sup> Gabel (1967-68) gives the example of

'a bank teller who affects a cheerful mood and who suggests in all her words and gestures that she is glad to see me. Yet I detect in all these words and gestures an artificiality – her words are somehow “processed”; her gestures, ever so slightly delayed.... [S]he is playing the role of being a bank teller, while acting as if her performance is real. As I move toward her from my place in line, I feel myself becoming a “customer” ..., and she sees in me the same artificiality and delay-time she experiences in herself.... We each sense in the other the desire to recognize each other precisely through the amount of vigilant tension required to prevent this recognition from occurring. We may in fact make some minimal contact in “asides,” in the interstices of our public performances, asides that we intentionally marginalize as private moments. But on the whole we deny ourselves access to each other out of obedience to the demand implicit in the other's façade.'

The repetition and concatenation of such performances means that our everyday world is one, according to Gabel (1966), in which 'alienation envelops us in a qualitative milieu of blocked connection.' Alienation is, as noted earlier, a charged concept with many meanings; for Gabel (1963), it is the 'paradoxical form of reciprocity between two beings who desire authentic contact with each other and yet at the same time *deny* this very desire in the way that they act toward one another.'<sup>109</sup>

107 Peter Gabel, 'The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves,' *Texas Law Review* 63 (1984): 1563. Subsequent page numbers are given in the text.

108 Cf. Sartre, *Being and Nothingness*, 59-60 (the example of the waiter in a café 'playing at *being* a waiter in a café').

109 The term 'authentic' raises much the same theoretical problems as 'alienation.' But Gabel's definition remains intact if we substitute 'recognition from' for 'authentic contact with.'



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Gabel (1532) explains that, in a society characterized by hierarchy, oppression, and rampant powerlessness, a rising social movement must challenge the boundaries that constitute its qualitative milieu and ‘dissolve the fabric of performances that normally enclose the public world.’ Thus, the kind of event that sparks an uprising is typically one that rips away the façade of ‘normal’ social performances to expose their inhumanity; in the case of the Arab Spring, it was literally the self-immolation of Mohamed Bouazizi, a destitute twenty-six year-old college graduate provoked to fatal protest when the police would not even allow him to sell fruits and vegetables on the street.<sup>110</sup> The act of self-immolation, as Banu Bargu explains, ‘makes visible the invisible violence of the State.’<sup>111</sup>

What happens next is uncertain. It is not enough that many people experience the same concrete needs or grievances. They must also be ready to put themselves at risk, for in releasing their desire for recognition they expose themselves to humiliation or worse. They will do so only when they can reasonably anticipate that others will reciprocate. As Gabel (1587) puts it, ‘they can acquire the ontological capacity to “gather steam” only through reciprocal recognition of a universal need.’ Typically, this takes one of two forms: either through solidarity on the basis of shared deprivation or through a more-thoroughgoing redefinition of social identity. As Gabel (1588) explains:

‘For the movement to succeed in driving its energy into public space, which it must do in order to sustain itself as a movement in the face of the anxiety and resistance that it provokes in the anonymous “public” and even within its own members, it must engage in a struggle with the existing ... “belief-system” over the very meaning of who “we” are and how we are really constituted as social beings.’

When the movement succeeds, Gabel (1586-88) observes, it enables ‘the unique release of connection that constitutes the movement itself’ and ‘produces a disalienating energy that wants to challenge everything’ that stands in its way.

Gabel’s theoretical account is amply borne out in the details of the Tahrir Square uprising. The one unprecedented aspect was the role of social media in coordinating participants in advance; more than 100,000 people pledged online to join the protests, significantly reducing the problem of failed reciprocation.<sup>112</sup> At first, the public mocked the Facebook protesters. Before long, however, everyone joined in. As the Egyptian writer, Mansoura Ez-Eldin, reported:

110 David D. Kirkpatrick, ‘Amid Rioting, Tunisia Closes Universities And Schools,’ *New York Times*, January 11, 2011, A4.

111 Banu Bargu, ‘Theorizing Self-Immolations in the Middle East’ (paper delivered at the Conference on Philosophy and the Social Sciences, Villa Lanna, Prague, CZ, May 13, 2011).

112 David D. Kirkpatrick & David E. Sanger, ‘A Tunisian-Egyptian Link That Shook Arab History,’ *New York Times*, February 14, 2011, A1. In the words of Wael Ghonim, the 31 year-old Google executive who set up the Facebook page, ‘I have never seen a revolution that was preannounced before.’

'Shopkeepers handed out bottles of mineral water to the protesters, and civilians distributed food periodically. Women and children leaned from windows and balconies, chanting with the dissidents. I will never forget the sight of an aristocratic woman driving through the narrow side streets in her luxurious car, urging the protesters to keep up their spirits, telling them that they would soon be joined by tens of thousands of other citizens arriving from different parts of the city.'<sup>113</sup>

In the square, volunteers distributed free tea, cake, and wafers.<sup>114</sup> One shouted: 'This is the people's water' as he filled protestors' water bottles. Others swept the streets or organized neighborhood defense committees. The people who joined the protestors in the square formed 'a vast tapestry of diversity' that 'cut across Egypt's entrenched lines of class and religious devotion,' representing almost every element of Egyptian society – the secular young, the dispossessed, wealthy businessmen from the suburbs, turbaned clerics and veiled women, doctors and other medical professionals, engineers and peasants. As the days progressed, they set up clinics, soundstages, a detention center and security teams to man the barricades guarding the entrances to the square.

The watchword of the uprising was 'the people and the army are one hand' – serving simultaneously as a strategic plea that the army stay neutral and as a rallying cry for the protesters. 'This is the Egyptian people. We used to be one hand.' In the euphoria of the uprising, people – especially women – expressed a newfound sense of collective identity: 'For the first time, people feel like they belong to this place.' 'We feel this is our country now.' 'You feel like this is the society you want to live in.' One sign read, simply: 'Egypt is mine.'

These feelings of unity and belonging unleashed a sense of energy, empowerment, and rebirth. As she broke up bricks to be used as weapons, one demonstrator said: 'I'm fighting for my freedom.... For my right to express myself. For an end to oppression. For an end to injustice.' 'The words of people,' another protester said, 'are stronger than guns.' Many in the square said they woke up smil-

113 Mansoura Ez-Eldin, 'Date With a Revolution,' *New York Times*, January 31, 2011, A19.

114 The account and quotes that follow come from the reporting of Anthony Shahid and David D. Kirkpatrick during the uprising in Tahrir Square. Anthony Shahid, 'In the Euphoria of the Crowd, No Party or Leader Unifies the Opposition,' *New York Times*, February 1, 2011, A11; Anthony Shahid, 'Seizing Control of Their Lives and Wondering What's Next,' *New York Times*, January 30, 2011, A1; Anthony Shahid, 'Mubarak Won't Run Again, But Stays; Obama Urges a Faster Shift of Power,' *New York Times*, February 2, 2011, A1; Anthony Shahid & David D. Kirkpatrick, 'In Egypt, Opposition Unifies Around Government Critic,' *New York Times*, January 31, 2011, A1; Anthony Shahid, 'Street Battle Over the Arab Future,' *New York Times*, February 3, 2011, A1; David D. Kirkpatrick, 'Mubarak Out,' *New York Times*, February 12, 2011, A1; David D. Kirkpatrick & Kar-eem Fahim, 'Mubarak's Backers Storm Protesters as U.S. Condemns Egypt's Violent Turn,' *New York Times*, February 3, 2011, A.1; Anthony Shahid, 'At Night in Tahrir Square, Cairo Protest Gives Way to Poetry and Performances,' *New York Times*, February 7, 2011, A9; and Anthony Shahid, 'Egypt's Leaders Seek to Project an Air of Normalcy,' *New York Times*, February 8, 2011, A1.

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ing ‘for the first time.’ One shopkeeper who did not himself participate said: ‘If someone asked me when I was born, I would say Jan. 25.’

Perhaps the most striking aspect of the protests was the transformation in gender relations amidst this effluence of solidarity. During the uprising, the endemic sexual harassment characteristic of Egyptian life was temporarily put on hold. Members of the Muslim Brotherhood were surprised to find that, in Tahrir Square, they did not need to protect female members from the widespread groping. Nazly Hussein, a 27 year-old psychologist, recounted her experience on the way to the square the first day of the protests. People, she said, would bump into her and excuse themselves. ‘I’m thinking: “Excuse me”? Where was that yesterday? And the year before? And the year before?’ Once she reached the square, she found that ‘for the first time people would come up and talk to me like a human being and not like a woman; it was great!’<sup>115</sup> Young women, who made up about 25% of the demonstrators, found encouragement rather than harassment: ‘The same men they were afraid to talk to in the streets were saying, “Bravo, the girls’ revolution.”’<sup>116</sup>

This sudden opening in gender relations was short-lived. The very night of Mubarak’s ouster, Tahrir Square was the scene of an horrific sexual assault on CBS reporter Lara Logan and an almost immediate resumption of the groping and harassment of Egyptian women. Subsequent developments have signaled a disheartening return to the status quo ante. But, this is not surprising. As Gabel (1590) explains, the phenomenological architecture of a social movement carries with it the seeds of its own undoing.

‘[W]hile a rights-victory can both strengthen the movement’s confidence and awaken a feeling of possibility among a great many people, it can for these very reasons work to contain the movement and ultimately contribute to subduing its transformative potential. For the possibility that is either strengthened or awakened by such public victories ... is the possibility that “we” will actually have to change, and in a way that would require us both to open ourselves to each other in a new way.... The very success of the movement, therefore, evokes in a somewhat heightened way the fear of loss that the movement intends to surpass, and it does so not only in those who are most opposed to the movement, but also in those who constitute it.’

The experience of freedom in relations of mutual recognition, respect, and social solidarity is fragile because it challenges not just entrenched patterns of social interaction, but the very fabric both of the culture and of the individual’s social being. The contrast with freedom-as-transcendence is nevertheless instructive. The freedom released in relations of mutual recognition may be evanescent, but

115 Glen Johnson, ‘The Other Side of Tahrir Square,’ *International Herald Tribune*, March 10, 2011, <[www.nytimes.com/2011/03/10/opinion/10iht-edjohnson10.html](http://www.nytimes.com/2011/03/10/opinion/10iht-edjohnson10.html)>.

116 Sharon Otterman, ‘Women Fight to Maintain Their Role in the Building of a New Egypt,’ *New York Times*, March 6, 2011, A12.

freedom-as-transcendence is empty and impossible. The freedom released in relations of mutual recognition, in contrast, can be both intoxicating and – in a practical political way – remarkably powerful.

Our examination of these three paradigmatic examples of freedom provide the framework of a reconceptualized notion of freedom and democracy. Our first, theoretical pass provided an account of freedom as a function of social context. Our second, more pragmatic pass both confirmed this claim in real-world contexts and yielded the normative claim that freedom requires and depends on relations of commitment, solidarity, and mutual recognition. If we connect these insights to the Hegelian 'logic of action' explored earlier – and here is the payoff – we get a conception of democracy as the sharing of authority with others under conditions of mutual recognition and respect.

#### 4 Freedom, Democracy, Self-Governance

Arendt says that, for the ancient Greeks, freedom was understood as 'a form of political organization in which the citizens lived together under conditions of no-rule.'<sup>117</sup> For Arendt, it is significant that the term for this was *isonomy* (in Greek, *isonomia*); she stresses that the Greek suffixes 'archy' (from *arkein*, 'to rule') and 'cracy' (from *kratos* 'power') are entirely absent from this linguistic expression. But the import of 'no-rule' in this context is opaque. *Isonomia* – a compound of *isos*, meaning 'equal,' and *nomos*, meaning 'law'<sup>118</sup> – is, after all, not anarchy (from *an arkhos*, 'without leader'). Aristotle renders the concept more accurately as 'to rule and be ruled in turn,' a reference to the use of lot and rotation in the selection of offices.<sup>119</sup>

Arendt, in fact, is wrong. *Isonomia* was only the most prominent of a trio of cognate terms for democracy and its institutions that included *isēgoria*, the equal right to address the assembly, and *isokratia*, equality of power.<sup>120</sup> *Isonomia*, Vlas-

117 Hannah Arendt, *On Revolution* (London: Penguin Books, 1965), 30.

118 Ostwald tells us that *nomos* abruptly replaced *thēsmos* as the Greek word for law, and that this occurred at the time of the democratic reforms of Cleisthenes around 508-07 B.C. While *thēsmos* signifies 'something imposed by an external agency, conceived as standing apart and on a higher plane than the ordinary,' *nomos* implies an obligation 'motivated less by the authority of the agent who imposed it than by the fact that it is regarded and accepted as valid by those who live under it.' Martin Ostwald, *Nomos and the Beginnings of the Athenian Democracy* (London: Oxford University Press, 1969), 55, 158-60.

119 Aristotle, *Politics* 1317a40–1317b2-10. For an apt summary, see Kurt A. Raaflaub, 'Equalities and Inequalities in Athenian Democracy,' in *Dēmokratia*, 140; see also Ostwald, 'Shares and Rights,' 54. Aristotle, of course, was suspicious of democracy in which number replaces merit and 'the poor have more power than the rich.'

120 Thus, Vlastos (*Studies in Greek Philosophy*, 103) observes that: 'Equal law, equal liberty of speech, equal power in government – each of these seizes on features so essential to democracy that none of them could exist without the others, none could be realized without the support of the whole constitution, so that any of them singly could serve to designate the whole.'  
See also Raaflaub, 'Equalities and Inequalities,' 144-47.

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tos (103) tells us, became the ‘favorite ideological slogan’ of the democratic *polis* and, as Victor Ehrenberg remarks, ‘the watchword of democracy.’<sup>121</sup> But distribution of power and popular rule were as much an issue for Athenian democrats as they are for us. What *was* different was their emphasis on active and equal citizenship. *Isonomia* represented the ‘equality of active citizen privileges under the laws, combined with equality of interpersonal respect.’<sup>122</sup> As Ehrenberg (531) says, it set up an ‘ideal, emphasizing the equal share of all citizens in the State’ and represented ‘a new conception with its apparent stress on absolute equality.’ Vlastos (107) explains that *isonomia* ‘designates a political order in which the rule of law and responsible government are maintained by the equal distribution of political power.’<sup>123</sup>

‘No-rule’ is every bit as illusory an ideal as ‘self-rule.’ In the real world, we necessarily engage with others in an ongoing scheme of social life. One might ask whether insistence on equal participation and power doesn’t once again ensnare us in the institutional difficulty. But the question would be misplaced. ‘Equal power’ is not the same as Kantian autonomy. Both concepts affirm the dignity of the person. But, the former is a *political* ideal premised on equal participation in the practical affairs of collective life, while the latter is a *philosophical* ideal that presupposes the individual consciousness as the basis of moral value.<sup>124</sup>

The democratic ideal designated by *isonomia* is not one that promises to each individual actual – or, Michelman’s words,<sup>125</sup> ‘nonfictively attributable’ – authorship of the laws. Rather, it promises the dignity of equal participation in governance

121 Victor Ehrenberg, ‘Origins of Democracy,’ *Historia: Zeitschrift für Alte Geschichte* 1 (1950): 531. Subsequent page numbers are given in the text.

122 Paul Cartledge, ‘Democracy, Origins of: Contributions to a Debate’ in *Origins of Democracy in Ancient Greece*, ed. Kurt A. Raaflaub, Josiah Ober, & Robert W. Wallace (Berkeley: University of California Press, 2007), 162 (citing Vlastos, *Studies in Greek Philosophy* and Ostwald, *Nomos*).

123 Ehrenberg and Vlastos disagree over the origin and derivation of *isonomia*. Ehrenberg (‘Origins of Democracy,’ 530-31) says that it derives from *isa*, meaning ‘equal,’ and *nemein*, meaning ‘to distribute’ or ‘share.’ On his account, it first emerged as an aristocratic concept referring to equality among peers and subsequently, though quickly, became identified with democracy. See also Raaflaub, ‘Equalities and Inequalities,’ 144-45. Arendt’s discussion of *isonomia* follows Ehrenberg. Arendt, *On Revolution*, 285 n. 12. Vlastos (*Studies in Greek Philosophy*, 97-102), however, marshals a substantial amount of linguistic evidence against Ehrenberg’s derivation, including the fact that the Greeks used the word *isomoiria* – which connoted economic as well as political equality and included a (failed) claim for land redistribution – to designate the concept of equal distribution. See also Raaflaub, ‘Equalities and Inequalities,’ 140. Ultimately, Ehrenberg conceded the point to Vlastos. Ostwald, *Nomos*, 123.

124 Arendt (*Between Past and Future*, 161) points out that Montesquieu ‘expressly distinguished between philosophical and political freedom, and the difference consisted in that philosophy demands no more of freedom than the exercise of the will ..., independent of circumstances and of attainment of the goals the will has set. Political freedom, on the contrary, consists in being able to do what one ought to will.... For Montesquieu as for the ancients it was obvious that an agent could no longer be called free when he lacked the capacity to do....’

125 Michelman, ‘The Subject of Liberalism,’ 146-47 (‘Political democracy, then, or popular political self-government, is first of all the ongoing social project of authorship of a country’s fundamental laws by the country’s people, in some non-fictively attributable sense.’).

under terms of mutual recognition and respect. Self-governance, on this view, is a function of contribution and not control.

To be more precise, self-governance can better be understood in Arendtian terms as the ability to exercise initiative with respect to one's fate.<sup>126</sup> And that is only possible through collective action. If I want to stop global climate change, for example, it will not be enough to adjust my thermostat and replace my incandescent light bulbs with the squiggly, planet-friendly kind. Even sexual autonomy, the most intensely personal arena of freedom in the modern age, requires the participation and assistance of others. Self-governance, whether democratic or personal, is a social phenomenon. It requires politics. It is not a matter of self-legislation but of effective social action that depends on cooperation and coordination. Only through such collective action can we hope to 'dispose of the future as though it were the present.'<sup>127</sup>

Which is not to say that personal self-governance is illusory, only that it is radically incomplete. As the classical republican theorists well understood, personal and collective self-governance are mutually constitutive and reinforcing. Some capacity to engage in personal self-governance is necessary for me to exercise the initiative to engage with others in order to influence our shared fate; successful participation in collective self-governance reinforces my sense of competence and ability to manage my fate.

Within the civic republican tradition, the concept of freedom has always had an active, social dimension. Politics requires civic virtue – which, in its classical sense, refers to the citizen's capacity to place the common good before his or her own. But as Pocock elaborates, virtue in the civic republican thought of Machiavelli takes on a second or doubled meaning as the capacity to impose form on fortune.<sup>128</sup> For Machiavelli, we might say, virtue requires the capacity to *pursue* the common good. It requires, in other words, not just the motivation to subordinate one's own interests to those of the polity but also the capacities – boldness, forti-

126 Arendt, *The Human Condition*, 175-247; eadem, *Between Past and Future*, 143-71. As Arendt (ibid., 146) succinctly puts it: 'The *raison d'être* of politics is freedom, and its field of experience is action.'

127 As Arendt (*The Human Condition*, 245) notes: 'Sovereignty, which is always spurious if claimed by an isolated single entity, be it the individual entity of the person or the collective entity of a nation, assumes, in the case of many men mutually bound by promises, a certain limited reality. The sovereignty resides in the resulting, limited independence from the incalculability of the future.... Th[e] superiority [of a body of people bound ... by an agreed purpose ... over those who are completely free] derives from the capacity to dispose of the future as though it were the present, that is, the enormous and truly miraculous enlargement of the very dimension in which power can be effective.'

128 'It was the virtue, as it was the end, of man to be a political animal; the polity was the form in which human matter developed its proper virtue, and it was the function of virtue to impose form on the matter of *fortuna*.' J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975), 184.



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tude, adaptability, resilience, judgment, and most importantly initiative – necessary to achieve it.<sup>129</sup>

One of Machiavelli's singular contributions to republican thought was his recognition that military virtue conduces to civic virtue in both these senses and, therefore, that a militia of citizen-soldiers was an indispensable element of a 'sociology of liberty.'<sup>130</sup> Among his arguments for the citizen-soldier was the observation that the use of mercenaries conduces to corruption: the citizens are corrupted because they allow others to do what they should do themselves for the common good; the soldiers become instruments of corruption because they act for purely mercenary reasons – that is, without concern for the common good; and the leader can thereby destroy the republic because he can employ military force for his purposes without the constraint of civic virtue that, as a result of their passivity, the citizens have allowed to pass out of public control.<sup>131</sup> This, precisely, was the political dynamic of the Iraq War with its toxic mix of wayward president, professional army, and manipulated and quiescent public; indeed, it is hard to imagine that the American involvement in Iraq could have been sustained for as long as it was with a civilian army composed of draftees.

Freedom and democracy require something more than the formal opportunity for citizens to participate and register their choice through voting. As the example of the Iraq War suggests, citizens must also have the active habit of exercising responsibility and control.<sup>132</sup> To be a free, self-governing people, citizens must display the fortitude and initiative – the virtue – to insist on public control of the institutions of public power. Freedom, democracy, and self-governance are not goods or states-of-being that one just 'has.' They are fragile social creations that

129 Ibid., 194 ('*Virtú* must be constitutive of virtue.'). Thus, Arendt observes that: 'Freedom as inherent in action is perhaps best illustrated by Machiavelli's concept of *virtú*, the excellence with which man answers the opportunities the world opens up before him in the guise of fortuna. Its meaning is best rendered by "virtuosity," that is, an excellence we attribute to the performing arts....' *Between Past and Future*, 153.

130 Pocock, *The Machiavellian Moment*, 201-2, 211-13. This was the import of the militia clause of the Second Amendment, so deftly denatured by Justice Scalia in his majority opinion in *District of Columbia v. Heller*, 554 U.S. 570, 577-78 (2008); cf. Pocock, *The Machiavellian Moment*, 528 ('the Second Amendment to the Constitution, apparently drafted to reassure men's minds against the fact that the federal government would maintain something in the nature of a professional army, affirms the relation between a popular militia and popular freedom in language directly descended from that of Machiavelli ...'). For a linguistic analysis of the Second Amendment that demonstrates how badly the Court misread the militia clause, see my 'Frame Semantics and the "Internal Point of View,"' in *Current Legal Issues Colloquium: Law and Language*, ed. Michael Freeman & Fiona Smith (Oxford: Oxford University Press, forthcoming).

131 Pocock, *The Machiavellian Moment*, 203-4.

132 Cf. John Bradley Thayer, *John Marshall* (Charleston: Nabu Press, 2010), 106 (originally published 1901): 'It should always be remembered that the exercise of judicial review, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting out the question in the ordinary way, and correcting their own errors.... [T]he tendency of a common and easy resort to this great function [is] to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.'

require active cultivation and constant maintenance. Self-governance is a *practice* that is not reducible to a set of values or institutional arrangements.

Reification in this form is the dirty little secret of contemporary liberal democracy. Just as autonomy is transformed into a capacity, it is reified in an institutional arrangement. Even the idealized form of representative democracy in which candidates offer substantive policies and programs between which voters choose (and this, of course, is a far cry from our actual electoral politics) is already a commodified and degraded form of democracy. Voters are reduced, in Arendtian terms, to mere clients or passive consumers who choose among pre-existing products rather than self-governing citizens exercising initiative with respect to their fate. More profoundly, perhaps, citizens are in this picture fetishized in their role as voters.<sup>133</sup> The 'one person, one vote' principle signifies, according to Post, 'that each person is to be regarded as formally equal to every other in the influence that their agency can contribute to public decisions.'<sup>134</sup> This is not a social imaginary of human beings engaged together in collective action, but the picture of an inanimate mechanism composed of interchangeable parts.

It is this very picture that many in the advanced democracies are currently calling into question.<sup>135</sup> The second wave of democratization confronts us with a fundamental challenge: How do we engage with others in their full humanity and not as fetishistic objects? If we are to take initiative with respect to our collective fate and do so with any hope of success, we must engage with one another as neither a means nor an end in him/herself, but as partners and collaborators.

133 Cf. Arendt, *On Revolution*, 253 ('Jefferson ... had at least a foreboding of how dangerous it might be to allow the people a share in the public power without providing them at the same time with more public space than the ballot box and with more opportunity to make their voices heard in public than election day.').

134 Post, 'Democracy and Equality,' 148.

135 Nicholas Kulish, 'As Scorn for Vote Grows, Protests Surge Around the Globe,' *New York Times*, September 28, 2011, 1.