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# Constitutional Dom

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# *Constitutional Domains*

*To my loving parents, Ted and Thelma*
*and to my beloved family, Fran, Sasha, and Amelia*
*and to the future I hope they may inhabit*

# *Acknowledgments*

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# *Introduction*

# The Social Domains of Constitutional Law

American constitutional scholars of my generation inhabit the aftermath of legal realism. No longer for us can the law glow with an innocent and pristine autonomy; no longer can it be seen to subsist in elegant and evolving patterns of doctrinal rules. Instead we naturally and inevitably read legal standards as pragmatic instruments of policy. We seek to use the law as a tool to accomplish social ends, and the essence of our scholarly debate revolves around the question of what those ends ought to be.

This orientation has carried with it the unfortunate tendency to separate social ends from the concrete legal arrangements in which they must necessarily find their ultimate fulfillment. Many years ago Lon Fuller identified this tendency and subjected it to a searching critique. He observed that "any social goal, to be meaningful, must be conceived in structural terms, not simply as something that happens to people when their social ordering is rightly directed."[1]

The implication of Fuller's point is that constitutional values often subsist in the very legal structures in which they find their actual embodiment. These structures frequently involve patterns of rules that establish recognizable forms of "social ordering." Constitutional values inseparably inhere both in these forms of social ordering and in the experience these forms facilitate and make possible. For this reason the realization of constitutional principles requires careful attention to the relationship between constitutional law and systemic forms of social order.

The essays in this volume represent an effort to reinterpret constitutional law in the light of this insight. The essays seek to demonstrate the pervasively important ways in which essential constitutional principles are embodied in specific forms of social order that carry their own internal logic and integrity. Three distinct forms of social order are especially relevant to understanding our constitutional law. I call these community,

management, and democracy. To put the matter briefly and aphoristically, one might say that law creates community when it seeks authoritatively to interpret and enforce shared mores and norms; it is managerial when it organizes social life instrumentally to achieve specific objectives; and it fosters democracy by establishing the social arrangements that carry for us the meaning of collective self-determination.

Each of the three forms of social order—community, management, and democracy—embodies a different social goal that requires for its fulfillment a distinct kind of internal logic and coherence. The three are for this reason in tension with one another in significant respects. And yet, as the essays in this volume argue in detail, these three forms of social order also presuppose and depend upon one another in ways that are fundamental and essential. We might say that community, management, and democracy are simultaneously complementary and contradictory.

This paradoxical relationship leads me in the essays that follow to use a characteristic metaphor of "domains" and "boundaries." Within a given domain the logic of a specific form of social order will hold sway, excluding its competitors. But because these forms of social order are ultimately interdependent, the excluded logics cannot be suppressed. They are instead displaced, so that constitutional law can usefully be conceptualized as a process of establishing boundaries between differing and incompatible social domains.

I have selected the essays in this volume with particular attention to making historically and sociologically visible the efforts of American constitutional law to establish a distinctive and bounded domain of democracy. I have tried to illustrate the many subtle ways in which this democratic domain has required for its full realization the maintenance of the complementary but incongruous domains of community and management, and I have attempted to make salient the elemental but largely unappreciated struggles within our constitutional tradition about how the boundaries between these distinct realms are to be fixed.

In thus partitioning the social world among different forms of social order, American constitutional law has not itself functioned as a transparent instrument. We must understand the law generally as a social system that impinges upon the behavior of those it seeks to regulate. By varying the quality of its rules, the complexion of its reasoning, or the allocation of power within its organization, the law can alter its own institutional characteristics so as to make them more or less compatible with distinct kinds of social orders. Like a chameleon, the law transforms

itself to mimic and enhance the social domains it establishes and sustains.

The essays in this volume use First Amendment doctrine to illustrate these complex dynamics. First Amendment jurisprudence provides many occasions to observe how constitutional law divides social life into the discrete domains of community, management, and democracy, and also how constitutional law itself changes in the process.

In the remainder of this introduction I offer an outline of this general approach to legal analysis. First I sketch the defining characteristics of community, management, and democracy; then I discuss the ways in which the law itself varies in these different domains; and finally I offer a broad overview of the mutual interdependence among these three important forms of social order.

## Community

Community, as Philip Selznick writes in *The Moral Commonwealth*, turns on "a framework of shared beliefs, interests, and commitments" that "establish a common faith or fate, a personal identity, a sense of belonging, and a supportive structure of activities and relationships."[2] Laws instantiating community seek to reinforce this shared world of common faith and fate. They characteristically articulate and enforce norms that they take to define both individual and social identity.

Chapter 2 offers an extended account of the common law tort of invasion of privacy, which is an exemplary instance of the law organizing itself to instantiate the social order of community. Some have contended that the very existence of legal rights is incompatible with the ability of law to serve this function, because legal rights necessarily imply "an image of the rights-bearer as a self-determining, unencumbered, individual, a being connected to others only by choice."[3] But, in Chapter 2, I argue that this contention is inaccurate, for the rights created by the tort of invasion of privacy explicitly serve to define and defend social norms, which the tort conceptualizes as essential for maintaining the stable identity of individuals. Like other legal actions redressing "dignitary harms,"[4] the tort conceives personal dignity as subsisting in socially defined forms of respect.[5] The tort protects these forms of respect and thereby safeguards the particular community that makes this dignity possible.

Legal attempts to instantiate community always rest on claims that are essentially normative. For this reason the empirical fact of a common cultural identity must be distinguished from the continual effort of the

law to articulate and enforce such an identity. The former exists in the realm of descriptive phenomena, perhaps to be ascertained by the investigations of competent social scientists. The latter is a normative orientation adopted by the law whenever it seeks to speak for a particular vision of community. The purpose of using law to instantiate community is to realize a form of social life in which we may share common "commitments and identifications" that will enable us "to determine from case to case what is good, or valuable, or what ought to be done."[6] The extent to which such a common culture already actually exists might be highly relevant to this purpose, but it is not by itself determinative.[7]

Because the purpose of using law to establish community is essentially normative, legal attempts to accomplish this purpose are intrinsically contestable. The normative force of community mores is neither given nor fixed, but always the result of interpretation and critique. Contingent historical circumstances will affect whether legal efforts to articulate and enforce cultural values will be received as integrative and harmonious or whether they will provoke bitter controversy. The former is likely when law seeks to uphold values that are in fact widely shared, the latter when law is perceived as taking sides in divisive cultural disputes. Where the formal jurisdiction of the law is defined geographically and spans a diversity of cultures, legal endeavors to assert the values of a single dominant culture may also be attacked as hegemonic. Such disagreements are more or less endemic to the underlying effort to fuse culture and the state by having the law articulate and enforce a common cultural identity.

Legal attempts to establish the social order of community are also subject to a different and more fundamental challenge. Such attempts must ultimately be justified on the grounds that the conduct regulated by the law ought to be governed by shared social norms. But this justification may be resisted. It may be argued that the law ought to structure its interventions according to the principles of a different form of social order altogether.

## Management

An increasingly common alternative is for law to structure its interventions according to the form of social order I call management. Management, as Philip Selznick writes, "suggests rational, efficiency-minded, goal-driven organization."[8] Management arranges social life for the achievement of given objectives. It ignores the independent requirements

of community values or identity, following instead the logic of instrumental rationality.

The distinction between community and management can be seen in the contrast between a criminal law that seeks to predicate punishment on a moral allocation of blame and responsibility, and a criminal law that attempts instead narrowly and strictly to fulfill the goal of preventing harmful forms of behavior. By seeking to align criminal punishment with relevant cultural norms, the former displays the authority of community; by seeking instead instrumentally to achieve an explicit objective, the latter regulates conduct with the authority of management.

In general the twentieth century has witnessed a significant shift from the former to the latter. This may be seen in the striking transformation of older forms of duty-based tort law, which attempted to use the normative construction of the reasonable person to infuse legal rules with the values of the ambient community, into the more modern forms of strict and efficiency-based liability rules, which seek to use tort law as a means of engineering the accomplishment of discrete objectives, such as the achievement of efficient allocations of risk.

The triumph of the progressive vision of the administrative state has ensured the increased prominence of management in modern law. This is because management is necessary whenever the state, in Walter Lippmann's prescient words, wishes to exercise "mastery" over the "drift" of society, and so "to deal with it deliberately, devise its social organization, alter its tools, formulate its method, educate and control it."[9] The trend toward management compounds itself, because the growing rationalization of society undermines cultural norms that might otherwise sustain the alternative authority of community.

Laws establishing the social order of management can be controversial in a variety of ways. The goals that they seek to achieve may be challenged. In the concluding chapter, for example, I discuss how disputes over hate speech regulation in universities can most profitably be understood as disagreements over the underlying mission of educational institutions. Managerial laws may also be challenged because they do not actually achieve their goals. An important strand of the contemporary debate concerning public regulation of the media turns on whether such regulation in fact achieves its objective of establishing a fairer and more informative press. Controversies of this kind are implied by and internal to the logic of management.

A more fundamental challenge to managerial laws involves the repu-

diation of managerial authority itself. This kind of challenge can be illustrated by Justice Goldberg's famous query in Griswold v. Connecticut. Appealing to "the traditional relation of the family—a relation as old and as fundamental as our entire civilization," Goldberg asked whether the Constitution could possibly permit, in the absence of "a showing of a compelling subordinating state interest," a law requiring "that all husbands and wives must be sterilized after two children have been born to them."[10] The point of Goldberg's question was to reveal our reluctance to find such a statute constitutional merely upon a showing that it bears some instrumental connection to a legitimate end. Goldberg suggested that the constitutionality of the statute ought instead to be assessed by reference to the "traditions and [collective] conscience of our people."[11] In essence, therefore, Goldberg was advocating that the constitutionality of regulations of procreation within the family ought in most instances to be determined by reference to community norms rather than by reference to the instrumental logic of management.[12]

## Democracy

In contemporary constitutional adjudication, it is most common to find both community and management challenged by the claims of yet a third form of social order, which I call democracy. In the succinct words of Karl Marx, democracy entails "a self-determination of the people."[13] Democracy carries this same specific meaning within the American constitutional tradition: "Democracy promises collective self-determination."[14] Collective self-determination, like any other value, requires particular social arrangements for its realization. In this volume I shall speak of constitutional law as seeking to establish democracy when it promulgates the rules necessary for these arrangements.

This formulation is meant to break fundamentally with the approach of a previous generation of constitutional scholarship, which conflated self-determination with "majoritarian democracy," which is to say with a "commitment to control by a majority of the governed."[15] This approach is subject to the same critique that Habermas so tellingly makes of Schumpeter. It "defines democracy by procedures" rather than by the underlying values that the procedures are meant to embody.[16] The significance of majority rule lies in its function as a mechanism to realize the value of collective self-determination. Viewing majoritarianism as an end in itself leads to difficulties that are plain in John Hart Ely's work. He recognizes

that simple majoritarian processes can through prejudice turn oppressive and antidemocratic, but he nevertheless struggles to present a purely procedural account, which is inherently incapable of offering a convincing explanation of this phenomenon.[17]

Rousseau saw early on that the question of collective self-determination was theoretically inseparable from the question of individual self-determination. Democracy locates agency in the people collectively, who are authorized to govern themselves. But we could not plausibly characterize as democratic a society in which "the people" were given the power to determine the nature of their government, but in which the individuals who made up "the people" did not experience themselves as free to choose their own political fate. Imagine a society, for example, in which every detail of daily life was fixed by continual votes, so that the collective will of the society was unrestrained, but in which the individuals composing the society felt continuously oppressed.[18] We would most likely reject such a society as fascist or totalitarian. Jean Piaget had it exactly right, therefore, when he observed that democracy requires us "to replace the unilateral respect of authority by the mutual respect of autonomous wills."[19] The essential problematic of democracy thus lies in the reconciliation of individual and collective autonomy.

The American constitutional tradition understands this reconciliation to take place within an open structure of communication. I call this structure "public discourse." If public discourse is kept free for the autonomous participation of individual citizens, and if government decision-making is subordinated to the public opinion produced by public discourse, there is the possibility that citizens will come to identify with the state as representative of their own collective self-determination. Protecting freedom of public discourse thus satisfies a necessary (although not sufficient) condition for the realization of democratic self-government. That is why our constitutional tradition regards the First Amendment as "the guardian of our democracy,"[20] even though the Amendment is itself frankly anti-majoritarian in purpose and effect.

The reconciliation of individual and collective self-determination entails a serious internal tension. On the one hand, a democratic social structure must provide an appropriate space for individual autonomy. Within that space democracy must function negatively; it must refuse to foreclose the possibility of individual choice and self-development by imposing preexisting community norms or given managerial ends. On the other hand, a democratic social structure must also function positively, to

foster an identification with the processes that enable the collective experience of self-determination. I argue in Chapters 4 and 7 that these processes presuppose forms of social cohesion that depend upon community norms and that these processes also often require strategic managerial intervention.

There is thus a paradox at the center of democracy. Democratic theorists tend to finesse this contradiction by conceptualizing the community and managerial structures necessary for democratic social cohesion as voluntary—hence Brandeis' famous observation that democracy "substitutes self-restraint for external restraint."[21] But in point of fact enforceable legal obligations are sometimes required, and for this reason laws attempting to establish democracy are intrinsically contestable. It can always be maintained either that they have overly stressed the preconditions of social cohesion and hence have impaired the individual autonomy necessary for democratic legitimacy, or, conversely, that they have overly stressed individual autonomy and hence have impaired the social cohesion that is equally necessary for democratic legitimacy. This tension is internal to the domain of democracy.

It is also possible, however, to transcend that domain and to argue that particular aspects of social life ought not to be organized according to a democratic logic. Democratic forms of social ordering have a particular and bounded sphere of appropriate application, which is defined by reference either to those aspects of persons deemed morally necessary for the participation of autonomous citizens or to those aspects of society deemed necessary for the success of collective processes of self-determination. It is always open to contention whether specific behavior regulated by the law ought to lie outside the boundaries of this sphere and be ordered instead according to the logic of community or management.

During the era of Lochner v. New York,[22] for example, the sphere of democratic authority was delineated by reference to the will of the individual citizen, as concretely expressed in the institution of private property. It was believed that depriving a citizen of his "property, which is the fruit and badge of his liberty, is to . . . leave him a slave."[23] Hence "due protection for the rights of property" was "regarded as a vital principle of republican institutions."[24] Accordingly, property rights were strictly enforced as a bulwark of the struggle of democracy against socialism. But this underlying concept of the person crumbled during the triumph of the New Deal, and a different moral image of the autonomous citizen emerged that focused on the independence of reason rather than of will.

As a consequence the First Amendment was fundamentally reinterpreted along democratic lines, and regulations of property were largely relegated to the managerial authority of the state.

Analogous debates about the proper scope of democratic authority are reflected in contemporary disputes over the application of substantive due process principles that seek to safeguard from state control the capacity "to define one's identity that is central to any concept of liberty."[25] When Justice Brennan interpreted Griswold in Eisenstadt v. Baird as protecting "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child,"[26] he was in essence repudiating the logic of community evoked by Justice Goldberg. Brennan was seeking instead to bring the domain of childbearing and its attendant sexuality within the logic of democratic authority. Brennan's implicit claim was that this domain was so essential to the autonomy of the individual citizen that its routine subjection to either managerial imperatives or community norms would be inconsistent with the requirements of a democratic social structure.[27]

American constitutional law is exceptional in the intensity of its commitment to the social order of democracy. This is most plainly visible in our First Amendment jurisprudence, which is demonstrably idiosyncratic among national legal systems because of its ambition to maintain public discourse free from the control of community norms. Recent Canadian decisions upholding regulations of public discourse prohibiting pornography and hate speech are typical of the tendency of other nations legally to subordinate public discourse to fundamental community values of respect and civility.[28] American constitutional law generally condemns such efforts as impermissibly paternalistic.

Although the American position follows from the internal logic of democracy, it is not required by that logic. It could be said either that Canadians experience the withdrawal of legal support from fundamental community values as compromising the social cohesion necessary for collective self-determination, or, conversely, that Americans experience legal enforcement of such values as compromising the individual autonomy necessary for self-government. How a national legal system negotiates between these dialectically opposing positions is a matter of contingent historical and cultural circumstance.

In this regard, the American position has no doubt been deeply influenced by our classic commitment to individualism—to that "calm con-

sidered feeling which disposes each citizen to isolate himself from the mass of his fellows."[29] Without question this individualism has sensitized us to the personal autonomy side of the democratic equation. And, more subtly, it has transformed our sense of community identity into something that is experienced as voluntaristic, provisional, and negotiated. This means that we understand the diverse and antagonistic communities within American life to perpetuate themselves by competing for the allegiance of individuals.

The American effort to exempt public discourse from the legal imposition of community norms might in fact be analogized to the truce among hostile religious groups created by the Establishment Clause. Just as the Clause ended competition among religious groups for domination of the nascent American state by placing government altogether off-limits to religious control, so the First Amendment has since the New Deal enforced a similar neutrality within the sphere of public discourse. That sphere has been placed off-limits to the control of all community norms, and hence all communities are free to use public discourse as a "marketplace of communities" to compete on equal terms in the search for new adherents.

## Social Orders and the Concept of the Person

Management, community, and democracy each assume a different image of the person. Within management, persons are objectified. They are relevant only as facts of nature to be arranged for the achievement of the state's purposes. Within community, persons are normalized. They are conceived as thickly embedded within a constitutive skein of social norms that simultaneously defines their identity and invests them with dignity. Within democracy, persons are represented as autonomous. They are imagined as beings who seek to determine their own fate and who are consequently able to transcend both the constitutive norms that happen to define them and the managerial purposes that constrict them.

These differences may perhaps be made more concrete by considering the distinct ways in which the law is required to organize itself to fulfill the different prerequisites of management, community, and democracy. Consider regulations of the theater. A legislature concerned with the dangers of fire might pass a statute, call it statute M, which bans all theatrical costumes made from flammable material. The purpose of statute M is to control the behavior of actors so as to achieve the end of safety. A system is thus created in which the legislature directs and the

actors obey. In this system agency is transferred from the actors to the legislature. The actors exist only as counters in the comprehensive scheme of the legislature.

Compare statute M to a different statute, call it statute C, in which actors are charged with the duty of taking all "reasonable" safety precautions. Because the measure of "reasonableness" is "the normal standard of community behavior,"[30] statute C necessarily assumes that actors can understand and apply community standards. It assumes that actors possess this knowledge and capacity because they are competent and appropriately socialized members of the community.

Statute C thus seeks to enforce standards that are conceived as internal to the very identity of the actors. Statute M, in contrast, imposes standards that are externally dictated. Thus while statute M objectifies actors, statute C understands itself as requiring actors to behave in ways that they themselves would regard as responsible. In this way statute C restores to the actors a normalized form of agency.

Statute C also demands that actors exercise complex forms of judgment, far more complex than those required by statute M. This is because community standards are characteristically "flexible, substantive, and circumstantial" in nature.[31] Managerial legislation like statute M, on the other hand, typically strives to sweep with scythe-like precision and indifference through the entangled fields of such contextualized community norms. From the perspective of statute M, community norms can only interfere with the clear line of command emanating from the legislature.

Suppose now these statutes were challenged under the First Amendment as inconsistent with our system of freedom of expression. Because the theater is undoubtedly included within public discourse, a court would analyze the constitutional issues according to the logic of democracy. It would ask whether the statutes unacceptably compromise the ability of those engaged in theatrical productions to participate in the communicative processes necessary for democratic self-determination.

Presupposed by this question is the notion that actors can make original contributions to public discourse. This is a very different representation of the actor than that projected by either statute C or statute M. The actor is envisioned as an autonomous subject rather than as an object or as a normalized agent. The actor is deemed capable of transcending the internalized norms that, from the perspective of community, create individual identity. The actor is also deemed capable of resisting managerial regulation by seizing the power to determine his own ends.