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The Irony of Free Speech and Liberalism Divided Book Review

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Citizenship and Speech. A Review of Owen M. Fiss, The Irony of Free Speech *and* Liberalism Divided

Owen M. Fiss, *The Irony of Free Speech*. Cambridge: Harvard University Press, 1996. Pp. 98 [Hardcover U.S. $18.95; Softcover U.S. $12.95].
Owen M. Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power*. Boulder: Westview Press, 1996. Pp. 192 [Hardcover U.S. $65; Softcover U.S. $24].

Reviewed by Paul Horwitz*

This review offers a critique of two recent publications by Owen Fiss which present his views on contemporary issues of free speech. Fiss argues that where contemporary conditions stifle public debate, the state may properly regulate expression; thus, the state may be a friend of freedom rather than its enemy. The author argues that Fiss overstates the need for regulation in the contemporary marketplace of ideas, and understates the risks of state intervention.

Drawing on the opinion of Brandeis J. in *Whitney* v. *California*, the author proceeds to offer an alternative conception of citizenship and its relationship to speech that suggests that citizens in a free and democratic society must police the arena of public debate themselves rather than rely on state intervention. Though this conception of citizenship and its obligations may be onerous, it is the best way to respect citizens' autonomy and encourage them to become active and responsible members of society. The implications of this argument for Canadian freedom of expression jurisprudence are explored through an examination of recent election-related cases.

Cette recension jette un regard critique sur deux ouvrages récents dans lesquels Owen Fiss présente son point de vue sur la liberté d'expression. Fiss considère que si certaines circonstances de la vie moderne étouffent le débat public, il peut être approprié pour l'État de réglementer ce débat. Ainsi, l'État peut être un allié plutôt qu'une menace pour la liberté. L'auteur est d'avis que Fiss exagère le besoin de réglementer le marché contemporain des idées, tout en sous-estimant les risques de l'interventionnisme étatique.

Partant de l'opinion du juge Brandeis dans *Whitney* c. *California*, l'auteur poursuit en développant une autre conception de la citoyenneté et de sa relation avec la libre expression. Cette conception propose un rôle actif au citoyen du régime démocratique pour assurer l'ordre dans les débats publics, plutôt que de recourir à l'intervention de l'État. Bien que les exigences d'un tel système soient lourdes, il s'agit du meilleur moyen de respecter l'autonomie des citoyens et de les encourager à devenir des membres actifs et responsables de la société. Les conséquences de ce système pour la jurisprudence canadienne sur la liberté d'expression sont évaluées à travers l'examen d'arrêts récents touchant au processus électoral.

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Introduction

For better or worse, freedom of expression under the *Canadian Charter of Rights and Freedoms*[1] has long fought to emerge from the shadow of the Speech and Press Clauses of the First Amendment.[2] In their context and operation, the respective expression clauses of the Canadian and American constitutions display significant differences as well as similarities. In their divergent results on key free speech controversies[3] and in their divergent methodological approaches,[4] the Canadian and American courts reflect important differences in the histories, political and juridical cultures, and constitutional texts of the two nations.[5] Given these differences, it was inevitable that a uniquely Canadian approach to freedom of expression would emerge from the free speech dramas that play out before Canadian courts.[6]

Despite these differences, a deep and troubled relationship remains. A powerful attraction leads Canadian courts to draw on the ample scholarship and jurisprudence of the First Amendment. At the same time, however, there is always the "anxiety of influence,"[7] the struggle to escape the magnetic pull of this foreign jurisprudence and to craft doctrines and solutions that respond to Canada's unique history and values. Canada has experienced fifteen years under the *Charter*; another fifteen years may pass and an ever more organic and self-referential model of freedom of expression may develop. Even then, Canadian freedom of expression jurisprudence will not be entirely free of the shades of Brandeis and Holmes, Brennan and Black. Nor ought that to be the goal. By looking abroad to well-established traditions and considering

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[1] Section 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[2] U.S. Const. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press..."

[3] Compare *R.* v. *Butler*, [1992] 1 S.C.R. 452, 70 C.C.C. (3d) 129 [hereinafter *Butler* cited to S.C.R.] (holding that obscenity regulations in section 163(8) of the *Criminal Code*, R.S.C. 1985, c. C-46, are justifiable infringements on freedom of expression, on the basis of Catharine A. MacKinnon's approach, *infra* note 11), with *American Booksellers Association* v. *Hudnut*, 771 F.2d 323 (7th Cir. 1985), summarily aff'd, 475 U.S. 1001 (1986) (holding unconstitutional anti-pornography regulations in section 16-3 of the Indianapolis Code that adopted a model ordinance drafted by Catharine A. MacKinnon and Andrea Dworkin. See C.A. MacKinnon & A. Dworkin, *Model Ordinance*, online: A. Dworkin <http://www.igc.apc.org/Womensnet/Dworkin/OrdinanceMassComplete.html> (date accessed: 31 July 1998)); *R.* v. *Keegstra*, [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1 [hereinafter *Keegstra* cited to S.C.R.] (upholding a hate propaganda provision of the *Criminal Code*, *ibid.*) with *R.A.V.* v. *St. Paul (City of), Minn.*, 505 U.S. 377, 112 S. Ct. 2538 (1992) [hereinafter *R.A.V.* cited to U.S.] (holding unconstitutional a local hate speech ordinance).

[4] See K. Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton: Princeton University Press, 1995) c. 2.

[5] See *ibid.* at 11.

[6] See C. Beckton, "Freedom of Expression in Canada — 13 Years of Charter Interpretation (Subsection 2(b))" in G.-A. Beaudoin & E. Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3d ed. (Toronto: Carswell, 1996) at 5-2.

[7] A phrase drawn from H. Bloom, *The Anxiety of Influence: A Theory of Poetry* (New York: Oxford University Press, 1973), who uses the phrase somewhat differently.

their possible application in the domestic context, Canada may discover as much about who it is as about who it is not.[8]

This pluralistic approach to Canadian constitutional interpretation should not, however, treat First Amendment doctrine and jurisprudence as unanimously endorsing one approach to free speech. While Canadian scholars and judges have debated whether to accept or to reject the American tradition of free speech jurisprudence, Americans themselves increasingly disagree about what that tradition means.

Even as the United States Supreme Court maintains its allegiance to a strictly protective approach to speech that is profoundly suspicious of government intervention,[9] critics and commentators have divided sharply on the wisdom of that approach. On a narrow but contentious range of issues, the most prominent of which may be the ongoing struggles over the regulation of hate speech[10] and pornography,[11] a community of legal scholars heretofore allied in many of its political and legal goals has divided on the question of state intervention in the realm of speech. Once, the banner of free speech served as a rallying point for those who would defend political outcasts and disfavoured groups against the oppressive conduct of the state.[12] The heroes of the First Amendment were communists or black civil rights activists, and the state sought

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[8] See P. Horwitz, "Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion" (1997) 47 DePaul L. Rev. 85 at 154. For other reflections on the value of comparative jurisprudence, with particular attention to the comparison of American and Canadian perspectives on freedom of expression, see M. Moran, "Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech" [1994] Wis. L. Rev. 1425 at 1497-1514. The current review is admittedly somewhat less concerned about the divergences between the two nations' approaches than is Professor Moran, and is more concerned with current and possible similarities. This emphasis stems in part from a belief in the useful and transformative power of the ideas presented in Part V, below, and a belief that they deserve greater prominence in Canadian jurisprudence.

[9] See *e.g. Denver Area Educational Telecommunications Consortium Inc.* v. *Federal Communications Commission*, 116 S. Ct. 2374, 35 L. Ed. 2d 888 (1996) [hereinafter *Denver Area* cited to S. Ct.]; *Cincinnati (City of)* v. *Discovery Network, Inc.*, 113 S. Ct. 1505, 23 L. Ed. 2d 99 (1993); *44 Liquormart* v. *Rhode Island*, 116 S. Ct. 1495, 134 L. Ed. 2d 758 (1996); *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995).

[10] Compare M.J. Matsuda *et al.*, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder: Westview Press, 1993) (making the affirmative case for hate speech regulations) with H.L. Gates *et al.*, *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* (New York: New York University Press, 1994) (arguing against such regulations). For a useful collection of materials on this issue, covering both sides of the debate, see S.J. Heyman, ed., *Hate Speech and the Constitution* (New York: Garland, 1996).

[11] Compare C.A. MacKinnon, *Only Words* (Cambridge: Harvard University Press, 1993) (arguing for the regulation of pornography) with N. Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (New York: Scribner, 1995) (arguing against such regulations).

[12] See *e.g.* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York: Oxford University Press, 1960); H. Kalven Jr., *The Negro and the First Amendment* (Chicago: University of Chicago Press, 1965). See also D.M. Rabban, *Free Speech in its Forgotten Years* (New York: Cambridge University Press, 1997) at 20; R. Delgado & J. Stefancic, *Must We Defend Nazis?: Hate Speech, Pornography, and the New First Amendment* (New York: New York University Press, 1997) at 161.

to limit their speech on the often dubious grounds of public order or national security. Today, issues such as hate speech and pornography attract a different set of plaintiffs and a different set of justifications for state limits on speech, such as equality and dignity.[13] As a result, these issues "strain, indeed shatter, the liberal consensus."[14] The First Amendment may be the most important and influential text in all of American letters,[15] but it is once again a battleground.

Enter Owen Fiss, a professor at Yale Law School and one of the foremost liberal legal scholars to emerge from the Warren era of the United States Supreme Court.[16] In two new books,[17] *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (a revised collection of essays previously published in various law reviews over the past decade) and *The Irony of Free Speech* (a slim volume of original writing offering a unified account of the views collected in *Liberalism Divided*), Fiss presents what might be termed the new liberal argument against the old liberal position on freedom of expression. The linchpin of this argument is a position which represents a departure from common American thinking about freedom and the state, but which will be familiar to Canadian audiences: the state, far from being a threat to freedom, should be considered its ally.[18]

Part I of this review compares the texts of the American and Canadian constitutional guarantees of freedom of expression, and suggests that both provisions leave essential questions about the content of the right unanswered. Part II provides a brief summary of Fiss's arguments in favour of an expanded state role in the regulation of expression. Part III offers some arguments against state intervention, while Part IV critiques Fiss's view that state action is necessary to provide greater diversity in the marketplace of ideas and to guard against the silencing effects of some forms of expression.

The remainder of this review casts its focus beyond Fiss's books. Part V suggests that Fiss shares with current Canadian freedom of expression jurisprudence an inadequate conception of the rights and duties of citizenship and their effect on the proper bounds of state regulation of expression. Instead, a more compelling picture of the relationship between citizenship and speech can be found in the concurring opinion of

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[13] See O.M. Fiss, *The Irony of Free Speech* (Cambridge: Harvard University Press, 1996) at 5-10 [hereinafter *Irony*]; K. Sullivan, "Discrimination, Distribution and Free Speech" (1995) 37 Ariz. L. Rev. 439 at 439-40.

[14] *Irony*, *ibid.* at 11.

[15] See *e.g.* H.L. Gates Jr., "War of Words: Critical Race Theory and the First Amendment" in Gates *et al.*, *supra* note 10 at 18: "[I]f America has a civic religion today, the First Amendment may be its central credo."

[16] For their tale, see L. Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996). See also P. Horwitz, "The Past, Tense: The History of Crisis — and the Crisis of History — in Constitutional Theory", Book Review of Kalman, *ibid.* (1997) 61 Albany L. Rev. 459.

[17] See O.M. Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder: Westview Press, 1996) [hereinafter *Liberalism*]; *Irony*, *supra* note 13.

[18] See *Irony*, *supra* note 13 at 2. See Moran, *supra* note 8 at 1486 (noting the differences between the American and Canadian courts' portrayal of the state in freedom of expression cases).

Justice Brandeis in *Whitney* v. *California*.[19] Part VI considers how the Brandeisian conception of citizenship and speech might be applied in Canada, and takes as an example several recent cases involving the regulation of election-related expression. To give full content to the right of freedom of expression contained in section 2(b) of the *Charter*, and to properly understand the limits imposed by section 1, a clearer picture of the duties of citizenship and the risks of state intervention must be developed.

I. Comparing the Constitutional Texts

Before laying out Fiss's argument, it is worth pausing to note that despite their apparent textual differences, the Canadian and American freedom of expression guarantees are not as dissimilar as they might appear at first blush. The First Amendment commands that Congress shall make "no law abridging the freedom of speech."[20] Occasionally, an absolutist will insist that "no law" means "*no* law."[21] No limiting clause in the United States Constitution offers guidance as to whether or how restrictions on speech can be justified, though plainly the courts have permitted such restrictions.[22]

By contrast, while section 2(b) of the *Charter* is worded to offer a broad and expansive view of "freedom of thought, belief, opinion and expression"[23] as fundamental, the document also offers an explicit formula for the approval of state-imposed limitations on that freedom: infringements will be justified where they constitute "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[24] Thus, the texts appear to suggest two approaches: an expansive American approach in which a highly protective, largely content-neutral and context-neutral set of tests and categories determine whether and when speech may be regulated, and a Canadian approach that is more context-sensitive and more willing to permit state intrusion.

That is certainly one way to read the texts, but it is hardly the only way. It has commonly been remarked, and Fiss echoes this observation, that the First Amendment does not forbid the abridgment of "speech" alone, or even of "freedom of speech." Rather, it states that Congress may not abridge "*the* freedom of speech," a phrase suggesting that the drafters of the First Amendment had a particular vision in mind of the freedom involved, and thus expected that some speech would fall outside of the guarantee. As Fiss writes, the phrase "implies an organized and structured understanding of freedom, one that recognizes that the state's power over speech is lim-

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[19] 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) [hereinafter *Whitney* cited to U.S.].

[20] *Supra* note 2.

[21] See *e.g. New York Times* v. *United States*, 403 U.S. 713 at 717-18, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971), Black J., concurring.

[22] See *e.g. Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942) (excluding from the full protection of the First Amendment classes of speech including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"). These categories, however, have proved fluid and contestable over time.

[23] *Supra* note 1, s. 2(b).

[24] *Ibid.*, s. 1.

ited but not denied altogether."[25] In short, the clause does not necessarily guarantee a wide-open approach to free speech in the United States; instead, it describes a type of freedom that is embedded in a particular social context, a particular vision of a free society, and which may be limited accordingly.

A contrary argument may be made with respect to the *Charter*. Though section 1 ensures that the fundamental freedoms guaranteed by the *Charter* will not be absolute, it does not help to determine what kinds of infringements of these freedoms can be justified in a free and democratic society. One approach is that, in a democratic society, a legitimately constituted legislature is entitled to enforce almost any limitations it perceives to be necessary. Another approach would argue that it is the very essence of a free and democratic society that almost any limitation on our foundational freedoms cannot be justified. Still another interpretation might require that the word "demonstrably" in section 1 be treated as demanding a very heavy burden of proof in order to justify an infringement of these freedoms.

In any event, neither the First Amendment nor section 2(b) of the *Charter* clearly requires either an absolutist approach or one that is highly permissive of state intervention. To be sure, the presence of a justification provision in the *Charter*, when contrasted with the absolute language of the First Amendment, suggests there may be differences in approaches. Nonetheless, both provisions confront, with little textual guidance, the same issues: what is the role of speech in a free society, and what limitations on that speech are compatible with our conception of what freedom and democracy entail?

II. The State as the Friend of Freedom

Fiss addresses these issues by presenting what he sees as two conflicting visions of free speech, which he calls the "libertarian" and "democratic" conceptions of speech.[26] The libertarian conception treats freedom of expression as a protection of individual self-expression or autonomy for its own sake, reflecting "the individualistic ethos that so dominates our popular and political culture."[27] The democratic conception, however, treats speech as worthy of protection "because it is essential for collective self-determination."[28] In this view, freedom of expression is valuable not for its liberating effect on the individual but for its social purpose of preserving "the fullness and openness of public debate [and ensuring] that the people are aware of all the issues before them and the arguments on both sides of these issues."[29] Public debate, to use the language of Justice Brennan in the landmark case of *New York Times* v. *Sullivan*, must be "uninhibited, robust, and wide-open."[30]

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[25] *Liberalism*, *supra* note 17 at 113.

[26] See *Irony*, *supra* note 13 at 3.

[27] *Ibid.* at 3; *Liberalism*, *supra* note 17 at 13.

[28] *Irony*, *ibid.*

[29] *Liberalism*, *supra* note 17 at 5.

[30] 376 U.S. 254 at 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

These differing conceptions of speech, Fiss argues, lead to very different attitudes toward the state. The libertarian conception of speech views any infringement of speech rights as an improper violation of individual autonomy. From this perspective, the state poses a constant threat to freedom. By contrast, the democratic conception does not value freedom of speech for its own sake, but only for its ability to safeguard broad and robust public debate. Thus, state intervention is neither inherently good nor inherently bad. Rather, "[t]o assess the validity [of the state's intervention] the reviewing court must ask, directly and unequivocally, whether the intervention in fact enriches rather than impoverishes public debate."[31] Under some circumstances, then, state regulation can be a friend, not an enemy, of expression by ensuring a wide and informed public debate.

Moreover, Fiss notes the increasing recognition of the principle of equality as "one of the center beams of the legal order."[32] Typically, the legal struggle for equality has required extensive state intervention in order to reform the existing social structure. Accordingly, Fiss argues, "the traditional commitment of liberal theory to state minimalism necessarily has become compromised."[33] The ascendance of equality thus leads liberals such as Fiss to embrace rather than reject the possibility of state intervention, and provides a significant countervailing value that may influence how we treat speech within the sphere of public debate.

From these simple premises come some far-ranging conclusions. First, Fiss finds that the current state of free speech falls far short of his apparent ideal of full and robust public debate. If left alone by the state, the marketplace of ideas[34] simply fails to provide the wide-ranging debate necessary for the proper functioning of the democratic state. The market itself, with its emphasis on commercial success, will distort public debate by rewarding what is popular and effectively drowning out voices at the fringe.[35] The speaker on the street corner, the romantic hero of free speech mythology, has been overtaken by media giants like CBS.[36] Moreover, expression such as pornography or hate speech actively prevents disadvantaged or politically disfavoured groups from speaking at all, or from being taken seriously when they do manage to speak.[37]

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[31] *Liberalism*, *supra* note 17 at 26.

[32] *Irony*, *supra* note 13 at 11.

[33] *Liberalism*, *supra* note 17 at 4.

[34] The metaphor is drawn from the famous dissenting opinion of Holmes J. in *Abrams* v. *United States*, 250 U.S. 616 at 630, 40 S. Ct. 17, 63 L. Ed. 1173 (1919): "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market." See also *Lamont* v. *Postmaster General*, 381 U.S. 301 at 308, 85 S. Ct. 1493, 14 L. Ed. 2d 382 (1965), Brennan J.

[35] See *Irony*, *supra* note 13 at 51-55; *Liberalism*, *supra* note 17, c. 1 & 2. For a full discussion of the distorting effects of the economic market on full public debate, see C.R. Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1993).

[36] See *Liberalism*, *ibid.* at 13ff.

[37] See *Irony*, *supra* note 13 at 16. For more detailed versions of this argument, see Matsuda *et al.*, *supra* note 10; MacKinnon, *supra* note 11.

Accordingly, Fiss concludes that "sometimes we must lower the voices of some in order to hear the voices of others."[38] Regulation of speech may be necessary and appropriate to ensure that hate speech or pornography does not prevent women or members of racial minorities from having their voices heard in public debate. More extensive campaign-spending regulations must be allowed, reversing the permissive speech regime of *Buckley* v. *Valeo*,[39] which treats money as the equivalent of speech and thus allows wealth to distort political debate. The media, both broadcast and print, should be required to allow aggrieved individuals to provide their side of the story, and perhaps to ensure wider public access to the ideas of speakers from across the spectrum of public debate.[40]

Perhaps most curious is the conclusion Fiss draws from a recent controversy provoked by conservative anger among some American politicians over the federal funding for exhibitions of the often homoerotic art of Robert Mapplethorpe. Fiss argues that since the state's foremost duty is to widen the scope of public debate, artistic merit alone is not a sufficient reason to allocate scarce funding for a work of art, since that criterion does not consider whether the funding decision will enrich or impoverish public debate. Indeed, "'good art' may undermine democratic values, while 'bad art' may further them."[41] Though Fiss is not so bold as to argue that we ought therefore to fund bad art in the name of public debate, he concludes that arts funding decisions must be judged according to their ability to improve public debate. Such decisions must consider, for example, the relative degree of exclusion of the artist's perspective from public debate, the relevance of the art to the "choices and questions that are presently on the public agenda,"[42] and whether the speech might silence others.[43] Moreover, if politicians are moved to reduce arts funding in the face of this new regime, courts may move to impose "a freeze or even an increase in levels of funding to protect First Amendment values."[44]

In Fiss's conception, the state must act "as a fair-minded parliamentarian, devoted to having all views presented."[45] The state should not simply enforce basic rules of order, but should actively police the speech arena, silencing some and subsidizing others in order to ensure that "public choice [is] made with full information and under suitable conditions of reflection."[46] Fiss does acknowledge the danger inherent in requiring the state to make such intrusive and content-specific decisions about freedom of expression.[47] However, he finds the risks no greater than the cost of leaving in place the present system of market-distorted and minority-disadvantaging speech. To reduce

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[38] *Irony*, *ibid.* at 18.
[39] 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).
[40] See *Irony*, *supra* note 13, c. 3.
[41] *Ibid.* at 40; see also *Liberalism*, *supra* note 17 at 101.
[42] *Irony*, *ibid.* at 44 [emphasis omitted].
[43] *Ibid.* at 44-45.
[44] *Liberalism*, *supra* note 17 at 106.
[45] *Irony*, *supra* note 13 at 21.
[46] *Ibid.* at 23.
[47] See *e.g. ibid.* at 26, 83; *Liberalism*, *supra* note 17 at 25.

the risk, he recommends placing as much of the power for content-regulation decisions as possible in the hands of individuals who are "removed from the political fray,"[48] such as agency administrators. Moreover, a significant burden of monitoring these decisions would fall to the judiciary, which is even more independent.[49]

Ultimately, then, Fiss acknowledges the fears that underlie the hesitance to allow state intervention in the system of free expression. But he foresees a greatly expanded role for legislatures and courts as guardians of robust public debate. He writes: "We must learn to embrace a truth that is full of irony and contradiction: that the state can be both an enemy and a friend of speech; that it can do terrible things to undermine democracy but some wonderful things to enhance it as well."[50]

III. The State as a Threat to Freedom

Fiss makes a provocative case, and in some instances a strong one, for his more intrusive, state-friendly point of view. Ultimately, however, his case is not convincing. Though he argues valiantly for an expanded state role in the system of free speech, his argument is replete with problems, some of them small but in their totality overwhelming.

A critique of Fiss's approach might begin at a relatively foundational level. It is difficult to object to a treatment of free speech that emphasizes its value to public debate. Plainly, one of the essential reasons for protecting freedom of expression is that it is utterly necessary to the proper functioning of a democracy.[51] It is not even untoward to point out, as Fiss does, that arguments based on the autonomy of the speaker often have less to do with the value of individual autonomy than with the recognition that protection of individual autonomy will ultimately lead to freer public discussion. In fact, as will be argued below, it is impossible to adequately protect the democracy-enhancing aspects of free speech without also showing some regard for individual autonomy.[52]

Even if Fiss's efforts to sunder the libertarian and democratic justifications for free speech are accepted, however, his relentless focus on public debate may still be questioned. Is healthy public debate really the only purpose of free speech?[53] Canada's

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[48] *Irony*, *ibid.* at 24.

[49] *Liberalism*, *supra* note 17 at 44.

[50] *Irony*, *supra* note 13 at 83. It should be acknowledged at this juncture that in addition to the issues discussed above, and which form the core of this review's critique, *Liberalism Divided* speaks out on a slightly broader range of issues than does *The Irony of Free Speech*, including the free speech doctrines of the public forum and prior restraint: see *Liberalism*, *supra* note 17, c. 3, 7. Still, the analytic core of these additional discussions stems from the arguments detailed above, and the lion's share of both books deals with the specific issues outlined here.

[51] See *e.g. Edmonton Journal* v. *Alberta (A.G.)*, [1989] 2 S.C.R. 1326 at 1336, 64 D.L.R. (4th) 577 [hereinafter *Edmonton Journal* cited to S.C.R.].

[52] See Part V below.

[53] See *e.g.* Greenawalt, *supra* note 4 at 3-6; K. Greenawalt, "Free Speech Justifications" (1989) 89 Colum. L. Rev. 1.

highest court has recognized that freedom of expression is equally meaningful and worthy of protection because of its importance to the self-fulfillment and flourishing of the individual and the expression of human identity.[54] Fiss surely errs, then, in running his entire analysis through the single lens of public debate.[55] If speech serves other functions, there may be other reasons for protecting it. In particular, some speech that might not deserve protection if considered on the basis of its contribution to public debate may still be worth protecting on the basis of other free speech values; abstract art, lyric poetry or even television drama might fall into this category.[56] When Fiss, discussing his proposed public-debate criterion for arts funding, writes that "[t]he best art is art that enriches public discourse ... by opening our eyes and thereby transforming our understanding of the world,"[57] has he considered the fate of a community playhouse or local orchestra, particularly one in a small town or rural environment? Neither forum is likely to present much work that would meet Fiss's criteria for funding. Yet it is precisely these kinds of institutions that may serve a vital part of the life of small communities, and they are also the artistic institutions least likely to survive in the absence of public subsidies. In short, some public art may be intrinsically worthy, and important to a community, while contributing little or nothing to public debate.[58] Thus, even if it is permissible to regulate expression, other justifications besides Fiss's principle of public debate, such as individual autonomy and self-fulfillment, must be considered before that expression may be properly restricted.[59]

Moreover, in emphasizing his political conception of the value of free speech, Fiss gives short shrift to the value of truly free and undistorted public debate. As Robert Post has noted, Fiss argues for the regulation of expression in order to enhance democracy's promise of collective self-determination. However if the state intrudes into the procedure of self-determination by attempting to ensure what it believes to be the proper order of public debate, then it is settling an issue that itself ought to be

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[54] See *Irwin Toy* v. *Quebec (A.G.)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577; *Ford* v. *Quebec* (A.G.), [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577.

[55] See S.M. Gilles, "Images of the First Amendment and the Reality of Powerful Speakers" (1995) 24 Cap. U. L. Rev. 293 at 307 (criticizing an earlier version of an essay published in *Liberalism Divided*).

[56] See also R. Post, "Equality and Autonomy in First Amendment Jurisprudence" (1997) 95 Mich. L. Rev. 1517 at 1521 (review of *Liberalism Divided* noting other areas of First Amendment activity, such as speech between patients and doctors or commercial speech, that "cannot be explained purely by reference to the value of democratic self-governance").

[57] *Liberalism*, *supra* note 17 at 104-105.

[58] Fiss also fails to pay adequate attention to another point: that some art that does contribute to public debate may be particularly worthy of protection because of its aesthetic qualities rather than its political views (which might, in fact, be trite or obvious). See also Sullivan, *supra* note 13 at 449: "Robert Mapplethorpe's photographs become, for Fiss — who would protect them — not ambiguously suggestive art works or formal studies but rather two-dimensional political poster art — propaganda for gay rights." Of course, neither Sullivan nor this review suggests that Mapplethorpe's work is not worth protecting or funding even as mere propaganda, but to treat political art as "political" first and "art" second, thus distilling a flat message from what might be a far more nuanced and ambiguous work, robs it of much of its power as artistic *or* political statement.

[59] See Post, *supra* note 56 at 1522.

subject to collective determination: "[T]o use the coercive power of the state to suppress public discourse on the basis of ... a particular vision of national identity would be to decide in advance the very issue of collective identity that public discourse is meant to be the means of resolving."[60]

Behind this specific complaint is a more general problem, which Fiss acknowledges but does not satisfactorily address: that is, the very real fear that the state will prove to be an enemy, not a friend, of free and unfettered speech. On Fiss's argument, the state-as-parliamentarian is charged with the duty of impartially surveying the landscape of speech to determine whether all points of view are being heard. If necessary, the state will intervene to silence one speaker or enhance another's opportunity to speak. At the judicial review stage, the court will determine the validity of the state's intervention by asking, "directly and unequivocally, whether the intervention in fact enriches rather than impoverishes public debate."[61]

At both stages, this task is fraught with peril. Will the state, in fact, be "the friend of freedom?"[62] Consider the structural infirmities in democratic government that make this unlikely. In order to win the support that Fiss argues they deserve, disfavoured groups are likely to have to lobby for speech protection. The very fact that these groups are disfavoured and silenced suggests that the groups most in need of such protection are also the least likely to succeed in their efforts to receive protection or subsidies, since they are unlikely to come to the state's attention or win its support.[63]

On the other hand, if a group does succeed, its ability to attract attention and legislative recognition suggests that its need for such protection is not sufficiently acute to warrant state intervention.[64] This scenario is not far from the present reality of speech regulation in Canada, in which well-organized groups argue eloquently and publicly for the regulation of speech on the basis that they are being silenced. If an unpopular group succeeds in gaining protection against others who would deprecate it, this suggests the victimized group is not so silenced as to be unable to command attention and gain allies. In fact, it may not be as powerless or unpopular as the group against which it seeks protection.

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[60] R.C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge: Harvard University Press, 1995) at 277.

[61] *Liberalism, supra* note 17 at 26.

[62] *Irony, supra* note 13 at 2.

[63] It is little answer to this contention to point to the existing hate speech legislation in Canada, which might indicate that disfavoured groups can win the support of the state-as-parliament. First, despite any general assumptions and notwithstanding the history of discrimination against them, it is not entirely certain that the groups that are the focus of such laws are actually the groups that are the most disfavoured or the most in need of state support. In any event, in practice such a law is most likely to protect the groups that are able to loudly demand that the law be enforced, while ignoring other less favoured or visible groups. Ironically, only once a group has reached a level of public visibility and relative strength as a lobby is it likely to enjoy the full benefit of a law intended to protect disfavoured groups. As an example, consider that it is only in recent years that gays and lesbians have been successful in invoking anti-discrimination laws that had long been enjoyed by other identifiable groups.

[64] For a similar point, see B.A. Ackerman, "Beyond Carolene Products" (1985) 98 Harv. L. Rev. 713.

Of course, it is likely that few will object to this outcome when the politically powerless group is a gang of neo-Nazis, and the relatively more powerful group is a coalition of religious and ethnic minorities seeking to criminalize the dissemination of hate propaganda. The very fact that such minority groups can organize effectively suggests that they are not so subject to the pressures of silencing as to warrant state intervention. Moreover, it should be remembered that these now relatively more powerful groups were themselves once powerless and subjugated by the law. Many of these groups gained a measure of recognition largely because they were able to engage in speech that the governing majority found offensive — marches, activism, and other angry public displays. This is the classic model of the civil rights movement in the United States, and it finds its echo in the modern-day activism of gay and lesbian groups. Other groups, while perhaps less drawn to mass activism, have also owed a measure of their advancement to their ability to associate and make their own arguments for acceptance and change in the face of an unfriendly public and indifferent or hostile governments. Thus, groups that have suffered at the hands of the state should be particularly reluctant to endorse state regulation of the speech of those speakers who are the least favoured by society.

Fiss's argument that the independence of the judiciary will compensate for legislative bias is equally problematic. He points to the conservative rulings of judges in the early New Deal period to suggest that they may, in fact, at times "achieve too much independence from social forces."[65] The example is telling, but perhaps not in the way Fiss would wish. The judicial resistance to New Deal legislation in the United States illustrates perfectly why judges are but poorly qualified to judge the adequacy of public debate and protect the interests of fringe speakers. Judges are appointed for a long tenure, and thus may succumb to intellectual ossification or reactionary political views. Both the cloistered nature of their offices and the length of their tenure can leave them poorly informed about developments on the fringes of society. In addition, they are appointed by governing majorities, and are thus likely to reflect mainstream political and cultural beliefs. They may be capable of safeguarding civil liberties by enforcing broad, content-neutral rules against the regulation of speech, but they are plainly not well-suited to the role of actively deciding what public debate ought to sound like.

Moreover, not every restriction of freedom of expression will end up before the courts. Even when the courts do rule on a restriction of expression in the equality-oriented way that Fiss recommends, there is no guarantee that the government officials and bureaucrats who enforce the laws will follow the spirit or the letter of the courts' instructions. Consider, for example, the fate of obscenity regulation in the wake of *Butler*.[66] That decision purported to liberate obscenity law from its moralistic roots as a prohibition of "dirt for dirt's sake," and to focus instead on the alleged harm (particularly to women) that might be caused by some pornography. However the en-

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[65] *Liberalism*, *supra* note 17 at 44.

[66] *Supra* note 3. For recent critical remarks on *Butler*, focusing more on the judgment itself and its interpretation by the courts than on its enforcement, see D.A. Crerar, "'The Darker Corners: The Incoherence of 2(b) Obscenity Jurisprudence After *Butler*" (1996-97) 28 Ottawa L. Rev. 377.

forcement of obscenity provisions since *Butler* has hardly fit the profile suggested by the apparent new purpose of those laws. Pornography as a whole has continued to flourish as a commercial enterprise in Canada. Meanwhile, customs and other law-enforcement officers have disproportionately targeted expression produced by and for members of traditionally disfavoured groups, such as the gay and lesbian communities. Furthermore, they have done so in contexts where it is highly unlikely that the materials in question would cause the social harms the obscenity laws are now supposed to be addressing.[67] Even some material written to illustrate feminist arguments against pornography has been seized by customs officials.[68]

Anti-pornography activists who support censorship have dismissed this uneven and unjust enforcement pattern as merely reflecting a long-standing pattern of improper customs seizures. They also argue that the guidelines followed by customs officers do not directly reflect *Butler*, that some materials that are wrongly seized have subsequently been released, and that these actions by law-enforcement officials may actually violate the rule in *Butler*.[69] These arguments largely miss the point. Certainly censorship is not just a post-*Butler* phenomenon. However, as Brenda Cossman and Shannon Bell have written, *Butler* "has lent legitimacy to this censorial climate."[70] Some complainants may succeed in showing that law-enforcement officials have violated the rule in *Butler* or that customs guidelines or obscenity provisions have been misapplied. Even these lucky few, however, must still bear not only the burden of litigating these claims but also the temporary denial of access to the seized literature and the risk that the seized material will have been lost or destroyed before it can be recovered. Ultimately, *Butler* illustrates that a misapplication of any censorship rule, particularly in ways that target unpopular communities, is exactly what we should expect when we give state officials the discretion to regulate speech.[71] Even a well-

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[67] See *e.g.* B. Cossman *et al.*, *Bad Attitude/s on Trial: Pornography, Feminism, and the* Butler *Decision* (Toronto: University of Toronto Press, 1997) at 4-7; Strossen, *supra* note 11 at 230-46; K. Busby, "LEAF and Pornography: Litigating on Equality and Sexual Representations" (1994) 9 Can. J.L. & Soc'y 165 at 184-87; T. McCormack, "Censorship in Canada" (1993) 38 N.Y.L. Sch. L. Rev. 165. For arguments favouring the regulation of homosexual pornography from a harm-based perspective, see C.N. Kendall, "'Real Dominant, Real Fun!': Gay Male Pornography and the Pursuit of Masculinity" (1993) 57 Sask. L. Rev. 21.

[68] See Strossen, *ibid.* at 237.

[69] See "Statement by Catharine A. MacKinnon and Andrea Dworkin Regarding Canadian Customs and Legal Approaches to Pornography" (26 August 1994), online: A. Dworkin <http://www.igc.apc.org/Womensnet/dworkin/OrdinanceCanada.html> (date accessed: 14 July 1998) [hereinafter "Statement"]; Busby, *supra* note 67.

[70] B. Cossman & S. Bell, "Introduction" in Cossman *et al.*, *supra* note 67 at 7.

[71] In fairness, this point is acknowledged by anti-pornography advocates such as MacKinnon and Dworkin, who argue that it is better to address pornography through laws enabling a broad category of "victims" of pornography to sue producers and distributors than through the criminal law. See "Statement," *supra* note 69; Busby, *supra* note 67 at 172, 187. It is not certain that similar abuses would not occur in a regime of civil suits rather than criminal prosecutions, both because it could be expected that politically motivated civil suits by plaintiffs other than those envisioned by MacKinnon and Dworkin, against defendants other than the ones they envision, and because such suits would still be adjudicated and enforced by potentially biased state officials — namely, judges and court officers.

intentioned effort to give a limited discretion to state officials to censor speech will quickly go awry.[72] Such abuses of discretion are an inevitable by-product of the state power to censor, and cannot be dismissed as isolated incidents.

In short, Fiss's statement that "there is no reason for *presuming* that the state will be more likely to exercise its power to distort public debate than would any other institution. It has no special incentive to do so"[73] is highly suspect. In fact, there is every reason to fear that rather than remedy the injustices of the marketplace of ideas, the state will add a few injustices of its own.

IV. Another Look at the Marketplace of Ideas

In any event, it is not clear that resort must be made to the risky expedient of allowing the state to silence expression in the name of public debate. In addressing this point, two central elements of Fiss's argument for speech regulation warrant close consideration: namely, his arguments regarding the promotion of diversity and the prevention of silencing. The diversity argument posits that forces in the marketplace of ideas may fail to provide a sufficiently broad range of public debate or may drown out certain speakers. Accordingly, the state must intervene to "put on the agenda issues that are systematically ignored and slighted, and it must enable us to hear voices and viewpoints that would otherwise be silenced or muffled."[74] The silencing argument asserts that since some speech may "inculcate" in a disfavoured group "the habit of silence," or lead to its not being taken seriously by others,[75] it is up to the state to "establish the preconditions for free and open debate"[76] by restricting this form of expression.

A. Diversity and the Modern Media

Fiss's argument that valuable speech is being drowned out of public debate by media monopolies and other distortions of the market[77] is on particularly shaky

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In any event, while Dworkin and MacKinnon do suggest that improper uses of Canadian customs regulations could be challenged under *Butler*, they also suggest that Canada "has every right to control its borders" (see "Statement", *ibid.*). Thus, even if they prefer civil suits to criminal prosecutions, it appears that they would still approve of the enforcement of obscenity provisions by customs officials.

[72] Nor can such misuses of state power be pinned on a few isolated individuals of low rank, who may be viewed as unfortunate but exceptional in their abuse of censorship laws. As David Crerar notes, in cases such as *Ontario (A.G.)* v. *Langer* (1995), 123 D.L.R. (4th) 289, 40 C.R. (4th) 204 (Ont. Gen. Div.), or *Little Sisters Books and Art Emporium* v. *Canada (Minister of Justice)* (1996), 131 D.L.R. (4th) 486, 18 B.C.L.R. (3d) 241 (S.C.), beyond the capricious decisions of lower ranked law enforcement officials, the willingness of the police to lay charges, and of the Crown to prosecute, were also required. See Crerar, *supra* note 66 at 386.

[73] *Liberalism*, *supra* note 17 at 39 [emphasis in original].

[74] *Ibid.* at 40-41.

[75] *Ibid.* at 85.

[76] *Ibid.* at 87.

[77] *Ibid.* at 50.

ground these days. Fiss is transfixed by his belief that the forces of the market will distort public debate and crush valuable speech. With the paradigmatic case of CBS in mind,[78] he envisions a world of ratings-driven media conglomerates which control all the meaningful channels of communication and jealously limit access to those speakers who will bring profits and not controversies. This is simply an inadequate picture of the actual market in speech, which has been the beneficiary of an explosion in reduced printing costs, desktop publishing, decreased video production costs and, of course, the development of the Internet. Furthermore, his proposed solutions do not adequately account for the ways in which individuals choose among the speakers who compete for our attention.

Even a quick look at the modern media reveals problems with Fiss's theory. Glossy magazines complaining of media bias and purporting to set the record straight can be found on thousands of news-stands, often cheek-by-jowl with the very journals they accuse of bias. Public access to broadcast media, though slow to develop, is now reasonably plentiful.[79] Radically alternative voices, often decrying their silencing despite all evidence to the contrary, shout from a thousand expertly designed World Wide Web pages.[80] If it was once accurate to say that "[f]reedom of the press is guaranteed only to those who have one,"[81] it must now be acknowledged that the functional equivalent of press ownership, or access to channels of communication, is now available to a vastly increased pool of individuals. Certainly not everyone owns a computer or publishes a web-page; but a representative of virtually every economic class, ethnic or religious group or political opinion likely does.[82]

Perhaps Fiss's real complaint, then, is not that some viewpoints are going unexpressed because of imperfections in the marketplace of ideas, or even that these viewpoints are being drowned out. His real complaint may be that, in his opinion, certain worthy viewpoints are not being paid an appropriate or proportionate degree of attention. Certainly some of his writing would suggest this.[83] However, short of coercing an

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[78] See *e.g. ibid.* at 13-17.

[79] For a description of the American system of public access and leased-access cable channels, see *Denver Area, supra* note 9.

[80] See *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

[81] See E. Volokh, "Cheap Speech and What it Will Do" (1995) 104 Yale L.J. 1805 at 1806 (quoting A.J. Liebling).

[82] Fiss is not unaware of these developments and their potential implications for his public debate-oriented theory, though he appears to have reserved his judgment as to whether the Internet represents promise or peril. See O. Fiss, "In Search of a New Paradigm" (1995) 104 Yale L.J. 1613; *Liberalism, supra* note 17 at 8.

[83] See *Liberalism, ibid.* (conceding that radical critics can buy airtime or publish newspapers, write "op-ed" pieces and letters to the editor, and broadcast public access cable shows, but concluding that these speech opportunities are limited and inadequate). For criticism of this attitude, see C. Fried, "The New First Amendment Jurisprudence: A Threat to Liberty" in G.R. Stone, R.A. Epstein & C.R. Sunstein, eds., *The Bill of Rights in the Modern State* (Chicago: University of Chicago Press, 1992) at 252: "What these people [who complain of being drowned out] really mean is that not many people are interested; or are not interested for long; or, like myself, if interested are not at all persuaded. In this respect these critics are like annoying children who whine at their parents, 'you're not listening to me,' when what they mean is, 'however much I go on, you don't think I'm right.'"

audience into paying attention to particular speakers, the state can do little to ensure that private citizens will give their time and attention to a wide range of views. Even if it could require that different and radical viewpoints receive five minutes on the evening news or free space in the *Globe and Mail*, the likely result would be a decline in viewership or readership, not an increase in public debate. After all, though readers may disagree with many of its editorial decisions, most of them read the *Globe and Mail* — or other newspapers — precisely because it filters and clarifies public debate by demanding accuracy and newsworthiness rather than offering reams of space to everyone who has an ax to grind. Suffice it to say that most viewpoints can now find access to some channels of reasonably effective communication.[84] It would be utterly counterproductive to engage in speech regulation on the supposition that people should or will actually pay attention to these varied viewpoints for longer than the time it takes to reject them. Nor is this entirely unfortunate. Some ideas may be antiquated, poorly stated, or so mistaken to not merit serious time or attention. It would be unfortunate if such viewpoints were enhanced or subsidized by the state at the expense of other, stronger arguments, in the name of full and open public debate.[85]

B. The Sound of Silence

Fiss's second central argument, the silencing argument, has been a staple of recent writing on hate speech and pornography, including the decision of the Supreme Court of Canada in *Butler*.[86] This is a contentious argument. At best, it is unclear whether

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[84] Of course, this again raises the question of what constitutes a channel of "reasonably effective" communication. If the Green Party, for example, has unlimited access to the World Wide Web and substantial access to radio and community-based television programming, but virtually no access to more powerful mainstream media such as the *Montreal Gazette* or the CBC, does it have access to channels of reasonably effective communication, or has it been unfairly denied access to the real centers of public debate? A common complaint of advocates arguing along Fiss's line is that as long as these significant outlets for the expression of disparate voices are unavailable, the public will be in the grip of a media monopoly of the few and powerful, and the result will be a world in which "a real choice [of opinion] is rarely offered." See *e.g.* D. Shelledy, "Access to the Press: A Teleological Analysis of a Constitutional Double Standard" Note (1982) 50 Geo. Wash. L. Rev. 430 at 447-48; S.L. Carter, "Technology, Democracy, and the Manipulation of Consent" (1984) 93 Yale L.J. 581 at 582. It is certainly true that not all media outlets are created equal or identical: a larger and different audience will be reached on prime-time television than in the pages of *The National Review* or *This Magazine*. But the argument remains: if some media outlets are more popular than others, it is often precisely because of the way they grant or refuse access, or the way they edit content. Ultimately, no access-allocation scheme can cure a group of its marginality; if a profusion of marginal groups were allowed widespread access to a popular media outlet such as a mass-audience newspaper, they would be more likely to decrease the popularity of the outlet than to increase their own popularity. This may counsel efforts, especially in the schools, to encourage more people to take an interest in seeking out a diverse range of political viewpoints. But the belief that a widespread disinterest in fringe political groups can be cured by thrusting them before the people during prime-time in the name of "access" is chimerical.

[85] See R.C. Post, "Subsidized Speech" (1996) 106 Yale L.J. 151 at 188-89; Post, *supra* note 56 at 1531.

[86] *Supra* note 3.

such silencing occurs on a sufficiently meaningful level to justify the restrictions Fiss seeks. Though he is surely right to argue that pornography has attained "industrial dimensions,"[87] it is not at all clear that this increase in the availability of sexually explicit material bears a correlation to the oppression or silencing of women. In fact, it might be more accurately viewed as an outgrowth of the same social forces that have contributed to women's increased liberation and outspokenness in the past few decades. Ironically, the silencing argument has increased in popularity just as women have begun to emerge from conditions of silence.[88]

Moreover, there is a danger in arguing that silencing occurs not as a result of the virulent content of some speech but by virtue of the cumulative effects of hate speech or pornography on public debate. This "sociological"[89] approach begs the question of where regulation should begin or end. Why focus on these extreme forms of expression while ignoring the vast array of speech, from advertising to mainstream films to the pronouncements of politicians, that is far more effective in shaping widespread public values? If Catharine MacKinnon would draw the line of acceptable speech to exclude *Playboy*,[90] which reaches several million adults in a month, on what side of the line is it appropriate to place sexually-oriented beer commercials or television sitcoms, or racially insensitive but not virulently racist music videos, that reach tens of millions in a moment?[91] Fiss apparently resolves this dilemma by stating that such questions are "matter[s] that can well be trusted to legislative judgment."[92] This rather glib response is cold comfort to more cynical observers who are reluctant to abdicate such decision-making to government. As the discussion concerning the misuse of discretion before and after *Butler* illustrates, such reluctance may be well-founded.[93]

There is another fundamental problem with Fiss's silencing argument. As noted above, his arguments focus on the value of public debate. Since he downplays the importance of the autonomy principle in favour of the democratic justification for free speech, his concern should be less with the effects of hateful speech on any given individual and more with whether such speech renders certain groups voiceless or ig-

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[87] *Liberalism*, *supra* note 17 at 85.

[88] See R.A. Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1995) at 366; R.A. Posner, *Sex and Reason* (Cambridge: Harvard University Press, 1992) at 365-66. Posner notes an apparent stable or decreasing rate of rape in the United States at the same time as pornography became increasingly available. More generally, he notes that women's status as a whole improved during this period. He offers the hypothesis that the decline of social prudery, which has helped to increase the opportunities available to women, has made possible the greater availability of graphic sexual materials.

[89] *Liberalism*, *supra* note 17 at 85.

[90] See MacKinnon, *supra* note 11 at 22-23.

[91] See Posner, *Overcoming Law*, *supra* note 88 at 366. See also G. Kateb, "Freedom of Worthless and Harmful Speech" in B. Yack, ed., *Liberalism Without Illusions: Essays on Liberal Theory and the Political Vision of Judith N. Shklar* (Chicago: University of Chicago Press, 1996) 220 at 228: "the harm done by expression that scarcely anyone would think of abridging far exceeds the harm (if any) done by expression that is already abridged."

[92] *Liberalism*, *supra* note 17 at 86.

[93] See *supra* note 66ff and accompanying text.

nored in the broader realm of public debate. His central concern is that "the public hears all that it should."[94] Even if one assumes that some individuals have indeed been silenced by virulent forms of speech, it would be wrong to argue that public debate has entirely ignored the viewpoints Fiss seeks to protect. Evidence of this lies in the fact that Fiss and many others have heard and been moved by the eloquent voices of authors such as Catharine MacKinnon and Mari Matsuda, who argue against the subordination of disfavoured groups. Again, Robert Post has written tellingly on this point:

> Paradoxically, therefore, the question of whether public discourse is irretrievably damaged by racist speech must itself ultimately be addressed through the medium of public discourse. Because those participating in public discourse will not themselves have been silenced (almost by definition), a heavy, frustrating burden is de facto placed on those who would truncate public discourse in order to save it. They must represent themselves as "speaking for" those who have been deprived of their voice. But the negative space of their silence reigns inscrutable, neither confirming nor denying this claim. And the more eloquent the appeal, the less compelling the claim, for the more accessible public discourse will then appear to exactly the perspectives racist speech [or pornography] is said to repress.[95]

V. The Role of Citizenship

Fiss's approach is clearly replete with difficulties. Such problems are hardly unexpected in a sweeping treatment of the complex issues surrounding freedom of expression, and they hardly eliminate the usefulness of these provocative works. However, another feature of these books is surprising and ultimately disappointing; Fiss never advances a clear conception of what citizenship in the realm of public debate ought to entail, or of what it would mean for his argument. Though both books argue in the service of public debate, they provide few clues as to what kind of citizen would inhabit this brave new world of uninhibited, robust and wide-open public debate.[96] If anything, these books offer a distrustful view of the average citizen. Fiss paints a picture of an individual alternately silenced by racists and pornographers, conned by wealthy political campaigners, drowned out by large corporations, and indifferent to or ignorant of a range of viewpoints. Ultimately, the picture that emerges from his writing is of a passive citizen, a privileged but silent spectator at a public debate that is always conducted by other people.[97]

Fiss's failing in this regard is, unfortunately, Canada's failing too. Canadian freedom of expression jurisprudence often speaks in broad terms of the individual citizen's capacity for self-fulfillment, self-expression, and participation in the democratic process. When it comes to the crunch, however, the citizen suddenly becomes irra-

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[94] *Irony*, *supra* note 13 at 17.

[95] Post, *supra* note 60 at 317-18.

[96] But see *Liberalism*, *supra* note 17 at 46 (citizens should not be consumers or mere performers for an unengaged audience).

[97] See Post, *supra* note 56 at 1526.

tional, a captive of emotion rather than reflection, capable of being "swept away by hysterical, emotional appeals."[98] The citizen-hero becomes a target, an accident waiting to happen, a victim in need of protection.[99] In the Canadian jurisprudence, as in Fiss's arguments, citizens are ultimately passive spectators who are privileged to witness the workings of democracy, rather than active participants in the democratic debate. Their contribution begins and ends at the voting booth.[100]

If no better can be expected of the citizen-speaker, it is no wonder that state intervention becomes a tempting option. However there are other possibilities. Conceptions of citizenship might be adopted that reinforce the conclusion that the state ought not to be enlisted to regulate speech as a "friend of freedom." According to this view, citizenship may be conceived of as implying a set of strongly held rights and a corresponding set of duties and responsibilities, among them the positive duty of each citizen to recognize and respond to foolish or dangerous speech. If society is to remain free and democratic, the legal and political implications of citizenship may require that citizens become active and independent monitors of and participants in the realm of public and private debate. Their response to foolish or harmful speech should be neither to stand idly by nor to lobby for state regulation, with all the risks of abuse that this entails. Rather, they must add their own voice to the chorus of public debate. In general terms, this suggests that committed citizens should respond to speech with counter-speech, meeting foolish arguments with strong ones and demonstrating that though some citizens may hold despicable ideas, the weight of public opinion runs against them.[101] Words of vilification or hatred may be met by words of condemnation,

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[98] *Keegstra, supra* note 3 at 747 (quoting the *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1966) (also known as the *Cohen Committee*). In response, Jamie Cameron has written:

> If the marketplace is imperfect, it must be because individuals are incapable of rational decision-making. By the same token however, government authority can only be exercised by individuals who inevitably must respond to the same social and political pressures as those in the marketplace. In the circumstances, there is little reason to believe, either in theory or practice, that government will act in a way that is presumptively more rational (J. Cameron, "Abstract Principle v. Contextual Conceptions of Harm: A Comment on *R.* v. *Butler*" (1992) 37 McGill L.J. 1135 at 1155-56).

Cameron's point is particularly well-taken where political speech is involved, as legislators are more likely to act in an irrational or self-serving fashion in order to consolidate their own hold on power. For examples, see cases discussed in Part VI.*B*, below.

[99] This dichotomous view of the individual is described well in R. Moon, "The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication" (1995) 45 U.T. L.J. 419, although the author does not agree with all of the conclusions drawn by Professor Moon.

[100] See *e.g. Libman* v. *Quebec (A.G.)*, [1997] 3 S.C.R. 569, 151 D.L.R. (4th) 385 [hereinafter *Libman* cited to S.C.R.]: "In both elections and referendums, voters can freely express their choice after being informed of the issues during the election or referendum campaign, as the case may be.... Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions" (*ibid.* at paras. 46-47).

[101] For arguments against counter-speech as a viable alternative to state action in the case of hate speech, see R. Delgado & D.H. Yun, "Pressure Valves and Bloodied Chickens: An Analysis of Pater-

and of solidarity with the target of the hateful speech. Words of ignorance may be countered by correction and information. Even privately consumed expressive materials, such as pornography, though they may not be countered directly, may certainly be responded to by public efforts to call these materials into question or to discourage their spread.

This more demanding conception of citizenship will ultimately serve to strengthen and enrich democratic discourse, and to buttress each individual's ability to withstand harmful speech. Bearing the weight of responsibility for managing and surviving in the public arena, the citizen is more likely to be impervious to the potential harms caused by other public or private speakers. Indeed, this resilience will only be bolstered by the individual's new-found confidence to talk back.

A. Whitney *and the Brandeisian Conception of Citizenship*

Such a citizen is described by Justice Brandeis in the classic case of *Whitney* v. *California*.[102] This description presents a vision of citizenship that not only differs from Fiss's implicit view of citizenship, but also substantially negates the need for the speech regulations that Fiss proposes:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable gov-

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nalistic Objections to Hate Speech Regulation" (1994) 82 Cal. L. Rev. 871; R. Delgado & J. Stefancic, "Ten Arguments Against Hate-Speech Regulation: How Valid?" (1996) 23 N. Ky. L. Rev. 475. For a response defending counter-speech, see C.R. Calleros, "Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun" (1995) 27 Ariz. St. L.J. 1249. There are surely a number of arguments against relying on counter-speech, such as its potential inefficacy and the burden it places on the counter-speaker, though this burden is arguably not an unfair weight but an enriching part of the duties of citizenship. However Delgado and his co-authors offer a weak "straw man" version of the counter-speech argument, treating it as if counter-speech consists of talking directly "back to the aggressor." Delgado and Yun argue that this kind of counter-speech merely places the respondent at the risk of physical harm at the hands of bigots (*ibid.* at 883). Of course, counter-speech does not consist of a direct and immediate response to violent or hateful individuals. As the text above indicates, it consists of adding one's voice to public debate in order to counter harmful speech and demonstrate the wide public support for different and better social values.

[102] *Supra* note 19, Brandeis J. concurring.

> ernment; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.
>
> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears....
>
> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.[103]

It would be a mistake to disregard Brandeis J.'s view as a mere romantic, unattainable ideal, better suited to the eighteenth century than the present day.[104] What is really at work in this opinion is something more than a rhapsodic description of a citizen who does not exist. It is a reminder that if "authority is to be reconciled with freedom," each citizen has an active role to play in the project of self-government. Brandeis J. calls each citizen to engage in and be responsible for the conduct of public debate.

This call to duty will benefit individuals as well as the wider public. Active citizens engaged in "free and fearless reasoning" and in public discussion are less likely to become the kind of victims-in-waiting, the irrational and easily manipulated individuals, implicit in Fiss's writing and explicit in some judgments of the Supreme Court of Canada.[105] By growing accustomed to the exercise of the civic courage that Brandeis J. describes as the "secret of liberty," individuals are more likely to recognize bad speech and counter it effectively with good speech. They may even come to cultivate a love of civic participation, a desire to become fully active participants in public debate rather than passive listeners.[106] Only if courage and commitment flag will silencing and other harmful influences pose a threat.[107] Early state intervention in the

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[103] *Ibid.* at 375-77.

[104] See *e.g. Liberalism, supra* note 17 at 16, 37-38.

[105] Borrowing a phrase from Epictetus, George Kateb suggests that "civil courage means the willingness to manage one's impressions....to try to reduce the shock or outrage or disgust or hatred one feels in encountering certain kinds of expression." See Kateb, *supra* note 91 at 238.

[106] See Kateb, *ibid.*

[107] These themes are developed at greater length and with greater eloquence by Vincent Blasi in "The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney* v. *Califor-*

arena of public debate, far from protecting the weak and giving voice to the voiceless, may contribute instead to an impoverished public debate by discouraging the habits of civic courage that free speech was intended to bring about.

Thus, in the Brandeisian conception, citizenship involves a duty of public participation in public debate. It is an onerous responsibility, and it falls on the shoulders of each citizen and not on the state alone. Yet this burden is also a benefit. Accepting the civic duty to preserve free speech will make citizens better able to handle the difficulties inherent in the continuing experiment in self-government. The free play of speech and counter-speech is not just an instrumental part of the machinery of self-government. It lies at the very heart of what it means to be a self-governing society.

Two further observations, both relevant to Fiss's arguments, follow from this conception of free speech as both a right and a civic responsibility. First, it demonstrates that there is something artificial and even futile in attempting to separate autonomy-based arguments for free speech from democracy-based arguments, as Fiss does. The Brandeisian conception of free speech suggests that free speech and democratic debate both rely on and require the same kind of citizen: an autonomous, morally responsible agent who is capable of withstanding disagreeable speech and voicing opposition.[108] Laws that intervene in the arena of free speech fail to respect the moral agency of individual citizens and ultimately do little to cultivate or perpetuate those qualities of citizenship that are vital to the success of self-government. Thus, autonomy-based arguments for free speech cannot be dismissed without also weakening the foundations of democracy-based arguments for free speech.

Second, there is something equally artificial in distinguishing between political and non-political speech. Though the Brandeisian conception of free speech seems to speak primarily to the category of political speech, the idea of civic courage that it advances cannot easily be limited to this sphere. Since free speech must respect and en-

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nia" (1988) 29 Wm. & Mary L. Rev. 653. See also R.M. Cover, "The Left, the Right and the First Amendment: 1918-1928" (1981) 40 Md. L. Rev. 349; H. Kalven Jr., *A Worthy Tradition: Freedom of Speech in America*, ed. by J. Kalven (New York: Harper & Row, 1988) at 156-66; Rabban, *supra* note 12 at 355-71; G.E. White, "The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America" (1996) 95 Mich. L. Rev. 299. Echoes of these themes may also be found in Kateb, *ibid.* See also P. Hughes, "Reconciling Valuable Interests; Or Academic Freedom as Academic Responsibility" (1995) 44 U.N.B. L.J. 79 at 85-86:

> If speech has a societal value, we all share the onus of ensuring that it is used wisely and maintained effectively. As listeners, we have a responsibility to live up to the term: to listen and not to jump to conclusions, to inquire about intention, and to be aware of context. We should be aware that learning often comes from seeing analogies, taking things to extremes, and being forced to defend one's views. The recipient of speech needs to know that satire can be a formidable weapon which can turn words around and show their power. The recipient has an obligation to be aware and questioning. The danger to the value of free speech from lazy listeners is as serious as the danger to equality from cavalier speakers.

[108] See also R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996) at 200.

courage the autonomy of citizens, both "as an end and a means,"[109] it is difficult to isolate political speech from other kinds of speech. The Brandeisian citizen should be prepared to confront and respond to any speech. To a large extent, then, even non-political speech such as advertising or pornography arguably should still fit within the structure of rights and duties that forms the Brandeisian conception of free speech.[110]

Brandeis J.'s demanding conception of citizenship is admittedly susceptible to the accusation that it is insensitive to the real status of disadvantaged groups and that it shifts the burden of citizenship to those least able to bear it. It is true that if the Brandeisian view of speech and citizenship becomes an excuse not to hear the voices of those individuals and groups, to shut out their stories with platitudes about sticks and stones, then this approach can indeed become insensitive.[111]

Nonetheless, the charge of insensitivity hits wide of the mark. It is still possible to show sensitivity and compassion for those who have been harmed by speech while asserting that civic courage and counter-speech are the best remedies for harmful speech. It is simplistic to assume that those who champion free speech claims are insensitive to the targets of hateful speech. Conversely, it is possible to champion the suppression of hateful speech without showing any real sensitivity to the victims of that speech. Support for such restrictions may be based on deference to the legislature rather than respect for the victims; or a whole new set of stereotypes and boilerplate phrases may be developed about the victims of harmful well-meaning speech and their need for protection, without actually paying those victims any real attention.[112]

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[109] *Whitney*, *supra* note 19 at 375.

[110] It is assumed for the purposes of this argument that advertising or pornography are not political speech in any significant sense. But see *e.g.* L. Kipnis, *Bound and Gagged: Pornography and the Politics of Fantasy in America* (New York: Grove Press, 1996) at 122-206 (discussing issues of class, politics and culture that surround pornography and its regulation and that may be found in the material itself, and arguing that it tends to play a transgressive role in the culture).

[111] See *e.g.* Moran, *supra* note 8 at 1475-78 (arguing that American judges have tended to "discount or ignore the perspectives of the targets" of hate speech); L. Lederer & R. Delgado, "Introduction" in L. Lederer & R. Delgado, eds., *The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography* (New York: Hill and Wang, 1995) 1 at 8.

[112] In fact, *really* listening to the victims of harmful speech may be instructive for the *proponents* of the regulation of harmful speech, as well as its opponents. This is illustrated by Lederer and Delgado's collection, *The Price We Pay*, *ibid.* Many of its authors argue that the regulation of hate speech and pornography is necessary to remedy the harms caused by those kinds of speech. Part One of the book offers "first-person accounts, empirical research, and new legal and social analyses of the harm of racist speech, hate propaganda and pornography... [b]ecause of a growing sense that theories and action must be grounded in the lived experience of actual people" (Lederer & Delgado, "Introduction" in Lederer & Delgado, *ibid.* at 11). But some of the accounts presented there suggest that at least some of the victims of harmful speech had needs that could not be satisfied through the suppression of speech, or that could be remedied in other ways, or ultimately came to benefit from strategies of counter-speech. Thus, the victims of the cross-burning episode litigated in *R.A.V.*, *supra* note 3, note that the prosecution of the cross-burners for their speech turned the episode into a free speech issue and forced upon them unwanted media attention, which obviously cannot be cured by state action. Ultimately the cross-burners were convicted for civil rights violations rather than for hate speech *per se*; the convictions themselves, the victims say, were "what we had wanted all along" (L.J. Lederer,

Moreover, the Brandeisian requirement that disadvantaged groups — and all other citizens — respond to hateful speech through methods other than government regulation is by no means an unfair burden. This duty, onerous as it may be, is the very essence of citizenship; the vigorous, self-reliant cycle of speech and counter-speech that it engenders is the best way over the long-term to ensure that words will wound less easily.

This is a compelling view of citizenship and its relationship to free speech, and this review should not be taken to suggest that it is entirely antithetical to Fiss's own views. Fiss doubtlessly appreciates the value of civic courage and active speech by citizens evoked by Brandeis J.'s concurrence in *Whitney*. His project in these books is, after all, to encourage public debate. Still, how and why public debate should be encouraged is a matter of continuing controversy. As Parts III and IV have suggested, changing social circumstances, such as the growth of media monopolies and the silencing effects of some forms of speech, lead Fiss to demand at least some state intervention in order to ensure full and open public debate. This review argues that a strong Brandeisian conception of citizenship and speech applies just as much now as it did when *Whitney* was written, and that such a conception of citizenship not only counsels against the measures proposed by Fiss but renders them largely unnecessary. In any event, the absence of a full discussion of citizenship and its obligations in Fiss's work is lamentable.[113] As Part VI will demonstrate, a proper conception of citizenship and speech may have a significant and beneficial effect on modern freedom of expression jurisprudence.

VI. Applying the Brandeisian Conception of Citizenship and Speech to Canada

A. The Governing Assumptions of Freedom of Expression Jurisprudence

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"The Case of the Cross-Burning: An Interview with Russ and Laura Jones" in Lederer & Delgado, *ibid.* at 29, 31). Meanwhile, the former executive director of a Jewish synagogue defaced by anti-Semitic symbols and slogans describes the galvanizing effect on the synagogue and the community when they decided to publicize the incident and invite the community to gather to express its outrage, rather than "withdraw and turn inward" — in short, to engage in counter-speech. Here, too, a legal remedy was found in the civil rights laws rather than through laws directed at speech itself (see M. Levin, "Desecration in Darkness" in Lederer & Delgado, *ibid.* at 39-44). The director of the Anti-Defamation League notes his organization's conclusion that "the best answer to 'bad' speech is more and better speech, by the decent majority who do not hate" (A. Schwartz, "Hate Activity and the Jewish Community" in Lederer & Delgado, *ibid.* at 102-03). Of course, many victims of hate speech, including those described above, might nonetheless favour the regulation of this or other forms of harmful expression. But these stories do suggest that really listening to the victims' stories might lead to the conclusion that what they really demand is a response from an active and concerned community, which might entail counter-speech rather than regulation.

[113] More generally, for criticisms of Fiss's implicit treatment of citizenship that accord with those presented in this review, see Post, *supra* note 56 at 1526-27.

How would this richer conception of citizenship affect Canadian freedom of expression jurisprudence? Primarily, it would alter the underlying, often unspoken presumptions and suppositions that quietly influence the courts' decisions in this area.[114] It may be difficult to identify the background assumptions that inform the courts' approach to freedom of expression; yet these assumptions are vital to a proper understanding of why the courts reach the results they do. As has been suggested, the texts of section 1 and section 2(b) of the *Charter* themselves offer insufficient guidance.[115] Even the more definite test offered by *R.* v. *Oakes*,[116] to the extent that it still governs section 1 jurisprudence,[117] speaks in broad, abstract terms. As for section 2(b), there is little direction except for the few general statements of principle the Supreme Court has offered in justifying the importance of freedom of expression. So to understand what drives the courts' decisions, it is necessary to probe the legal or political presumptions that inform their thinking about freedom of expression.

One key assumption has been evident in the courts' approach to freedom of expression. Almost without regard to the fundamental nature of the right infringed, they have shown deference to the legislature when it attempts to justify its actions. This is apparent, for example, in the relatively weak standard of scrutiny imposed on the legislature's efforts to demonstrate a pressing and substantial concern, or to show a rational connection between its objective and the means it chooses to achieve it.[118] It is equally apparent in the way courts regularly treat the minimal impairment test as demanding judicial deference to a legislative scheme rather than requiring rigorous scrutiny of the effectiveness of the scheme and the possibility of alternative measures.[119] Though the courts often expressly recognize the value of free expression, it is not evident that they have really absorbed this value as an important background presumption.

In the Brandeisian relationship between citizenship and speech, the balance between the state and the rights-holder would reflect different assumptions and thus lead to different outcomes. Courts would assume that the enshrinement of freedom of expression as a fundamental right suggests that its exercise is essential to the proper functioning of a democracy. They would assume that the value of speech in a democracy extends beyond the value of the particular messages or ideas that are conveyed. Free speech is vital to the ongoing process of self-government, both for the actual discussions that emerge from political speech and for the way it forces citizens to develop a capacity to judge and respond to the speech of others. Given this latter function, courts would be less likely to assume that speech can be infringed where it does not directly serve healthy democratic viewpoints. Even speech that disserves or at-

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[114] See *e.g.* Moran, *supra* note 8 at 1500-01 (noting the power of comparative jurisprudence to uncover the "crucial yet unstated assumptions which underlie" the courts' approaches to hate speech).

[115] See Part II above.

[116] [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes*].

[117] See *e.g.* J. Cameron, "The Past, Present, and Future of Expressive Freedom Under the *Charter*" (1997) 35 Osgoode Hall L.J. 1 at 58-59.

[118] See *e.g. Butler*, *supra* note 3 at 504.

[119] See *e.g. Keegstra*, *supra* note 3.

tacks fundamental values such as equality can still play a useful function by moving other citizens to respond.

The courts would also assume, as a counterweight to the general assumption of legislative deference, that the state should be subject to a greater burden when it infringes political speech. This approach is necessary both because infringement runs the risk of benefitting the present government rather than the people, and because it is a central duty of citizenship to bear responsibility for political speech by listening to it, evaluating it and participating in it. More generally, given the fundamental importance of free speech to the inculcation of personal responsibility and good democratic habits, the courts would assume that the state must bear a reasonably high burden of proof that infringement of any speech is justified. Finally, despite the presumption of deference to the legislature, the courts would assume that an infringement of a fundamental freedom such as the right of free speech is unjustified where it is largely ineffective to remedy the mischief it purports to correct. The same assumption would hold where the government aims only at expression while ignoring other possible remedies.[120]

Many of these assumptions have, at one time or another, found voice in the opinions of the Supreme Court and lower courts. In *RJR-MacDonald Inc.* v. *Canada (A.G.)*,[121] for example, McLachlin J. stressed that the government must clearly demonstrate the reasonableness of its infringement. She concluded:

> To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.[122]

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[120] See *e.g. Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 113 S. Ct. 2217 at 2234, 124 L. Ed. 2d 472 (1993): "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling"; *Florida Star* v. *B.J.F.*, 491 U.S. 524 at 541-42, 105 L. Ed. 2d 443 (1989), Scalia J. concurring in part and concurring in judgment: "[A] law cannot be regarded as protecting an interest of the highest order and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited" [internal quotation marks omitted]; M.S. Paulsen, "A RFRA Runs Through It: Religious Freedom and the U.S. Code" (1995) 56 Mont. L. Rev. 249 at 264:

> [A]n interest cannot be "compelling" where government fails to uniformly pursue that interest wherever it arises, but only pursues it occasionally, sporadically, or inconsistently....In the free speech context, a statute treading on expression is unconstitutionally "overnarrow" if the government does not pursue its assertedly compelling justification in other contexts *not* presenting the same interference with expression.

This "overnarrowness" doctrine shares some kinship with the Supreme Court of Canada's revision of the proportionality branch of the *Oakes* test in *Dagenais*, *infra* note 123, inasmuch as both tests suggest that the legislature cannot simply rely on its statements about the importance of its objectives, but must actually show a good-faith effort to meet its goals effectively.

[121] [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 [hereinafter *RJR MacDonald* cited to S.C.R.].

[122] *Ibid.* at para. 136; see generally *ibid.* at paras. 126-42.

In *Dagenais* v. *Canadian Broadcasting Corporation*,[123] Lamer C.J.C.'s opinion reflected the assumption that an infringement of expression must actually be effective in order to pass constitutional muster. This assumption was apparent in two aspects of the Chief Justice's opinion: he suggested that a publication ban with respect to trial proceedings would be less appropriate or necessary where technological innovations such as the Internet would render the ban ineffective,[124] and he strengthened the third branch of the *Oakes*[125] test to emphasize that there must be a clear proportionality between the "*actual* salutary effects of impugned legislation" and the deleterious effects of the legislation.[126] More recently, in *Libman* the Court reaffirmed that notwithstanding the general assumption of deference to the legislature, state restrictions on political speech demand a heightened standard of justification.[127] The idea that expression itself deserves a heightened degree of protection in a democratic society surfaced in Cory J.'s opinion in *Edmonton Journal*:

> The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be overemphasized. No doubt that was the reason why the framers of the Charter set forth s. 2(b) in absolute terms ... It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.[128]

These kinds of statements suggest that the courts will occasionally adopt a set of assumptions that favour expression and demand a high level of justification from the state when it seeks to infringe free speech. Judging by the infrequency with which these principles have actually tilted the balance, however, it cannot be said that the courts have really internalized them to the same degree that they have internalized the principle of legislative deference; nor can it be said that the courts adequately acknowledge the importance of demanding a high level of justification in the particular context of restrictions on political speech.

B. A Case Study: The Election Cases

The importance of these underlying assumptions to the outcome of free speech litigation is confirmed by reference to the contrasting approaches of two courts of appeal in recent cases involving section 2(b) challenges to provisions of the federal

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[123] [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 [hereinafter *Dagenais* cited to S.C.R.].

[124] *Ibid.* at 886.

[125] *Supra* note 116.

[126] *Supra* note 123 at 888 [emphasis added].

[127] *Libman*, *supra* note 100 at para. 60. In this case, however, the Court went on to suggest that since the measure at issue — the spending restrictions of the Quebec *Referendum Act*, R.S.Q. c. C-64.1 — was attempting to strike a balance between "the democratic values of freedom of expression and referendum fairness," it would accord the legislature "a certain deference" (*Libman*, *ibid.* at para. 61). Since the state is always a suspect party when it comes to either the regulation of political speech or the protection of "referendum fairness" this was not an appropriate case in which to defer to legislative judgment. *Libman* is discussed further below.

[128] *Edmonton Journal*, *supra* note 51 at 1336.

Elections Act,[129] as well as the Supreme Court of Canada's recent treatment of a challenge to provisions of Quebec's *Referendum Act*.[130]

1. *Thomson*

In *Thomson Newspapers Co.* v. *Canada (A.G.)*,[131] the Ontario Court of Appeal confronted a challenge to section 322.1 of the *Elections Act*, which prohibits the broadcast, publication or dissemination of opinion poll results with respect to elections or election issues in the three-day period leading up to an election.[132] The Court concluded that the legislation was intended to address the concern that "when opinion surveys are published as bare results, without methodological information, they have the potential to be deceiving, and even with such information they may require a response to explain their true significance."[133] Elsewhere, without referring to the problem of inaccurate polls or polls published without explanations of the methodology involved, the court referred to the general concern that "public opinion survey results that are released late in an election campaign when there is no longer a sufficient opportunity to respond" would have a "distorting effect."[134] The Court held that the provision was a justifiable infringement of section 2(b), a "modest restraint" enacted in the hope of eliminating "distortion and unfairness."[135] Moreover, though the Attorney General had not contested this finding of the trial judge, the Court of Appeal reversed the lower court and held that "hamburger polls" and other informal surveys that obviously do not purport to be accurate or scientific also fall under the restriction of section 322.1, since "survey results obtained in an unscientific manner have a greater potential to be inaccurate and hence distorting in their effect."[136]

The Court of Appeal's approach in *Thomson* illustrates the judges' underlying assumptions about free speech, democracy and judicial review. Influenced by the assumption of deference to Parliament, the Court of Appeal accepted the legislative claim that the prohibition on poll reporting would preserve the integrity of the elec-

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[129] R.S.C. 1985, c. E-2.

[130] *Supra* note 127.

[131] (1996), 30 O.R. (3d) 350, 138 D.L.R. (4th) 1 (Ont. C.A.) [hereinafter *Thomson* (C.A.) cited to O.R.], affirming (1995), 24 O.R. (3d) 109, [1995] C.C.L. 2701 (Gen. Div.) [hereinafter *Thomson* (Gen. Div.)]; leave to appeal granted, [1997] 1 S.C.R. xi, 41 C.R.R. (2d) 375. Shortly before this review went to press, the Supreme Court of Canada, in an important section 2(b) ruling, reversed the Court of Appeal's judgment and held section 322.1 to be an unjustifiable infringement of freedom of expression. See *Thomson Newspapers Co.* v. *Canada (A.G.)*, [1998] S.C.J. No. 44, online QL (SCJ) [hereinafter *Thomson* (S.C.C.)]. The Supreme Court's judgment is discussed briefly below.

[132] For other commentary on this case, see N.E. Devlin, "Opinion Polls and the Protection of Political Speech — A Comment on *Thomson Newspapers Co.* v. *Canada (A.G.)*" (1996-97) 28 Ottawa L. Rev. 411; C.C.J. Feasby, "Public Opinion Poll Restrictions, Elections, and the *Charter*" (1997) 55 U.T. Fac. L. Rev. 241. See also J.A. Fraser, "The Blackout of Opinion Polls: An Assault on Popular Sovereignty" (1995) 4 M.C.L.R. 365.

[133] *Thomson* (C.A.), *supra* note 131 at 353.

[134] *Ibid.* at 354-55; see also *ibid.* at 359.

[135] *Ibid.* at 361.

[136] *Ibid.* at 356.

toral process by responding to "widespread perceptions that opinion surveys can be distorting" and misleading.[137] Citing *Butler*,[138] the Court concluded that the government was only required to show a "reasoned apprehension of harm" to meet the rational connection test.[139] Given this posture of deference, it did not demand more proof that the evils claimed by the government were real, despite widespread disagreement about the effects of polls.[140]

In short, the Court of Appeal did not ask, but should have, why most of the effects of opinion polls, accurate or otherwise, should be considered distortions in the first place. The kinds of distorting effects that have been ascribed to political polls are simply reminders that in addition to voting their consciences, voters are entitled to engage in strategic voting. Voters may join the bandwagon if they believe a party is likely to win, or they may vote against the likely winner in the hope of creating a responsible minority government. Alternatively, they may simply stay home if they believe a particular outcome is a foregone conclusion.[141] Whatever the wisdom of strategic voting, such decisions are well within the category of reasonable decisions that voters in a democracy are entitled to make.[142] State restrictions on voters' access to information should be highly disfavoured under any theory of free speech, even if they might lead to voters making foolish decisions.[143]

Moreover, the Court of Appeal did not give any weight to a rather obvious but important point: though the legislation purports to guard against distortions in the democratic process and to ensure the integrity of the electoral process, it does not prevent political parties (or the media, or others who have the resources to do so) from continuing to take polls at any point during the campaign.[144] There is nothing to prevent candidates from using fresh poll results to inform their efforts to manipulate voters in the seventy-two hours preceding the election, just as they are free to engage in poll-driven campaign rhetoric, demagoguery and even outright deceptiveness[145] in the

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[137] *Ibid.* at 359.

[138] *Supra* note 3.

[139] *Supra* note 131 at 360.

[140] See *e.g. Thomson* (Gen. Div.), *supra* note 131 at 117-22; H. Kushner, "Election Polls, Freedom of Speech and the Constitution" (1983) 15 Ottawa L. Rev. 515 at 517-22 and sources cited therein; R.D. Sloane, "Politics, Polls and the Press: What Are They Doing to the Ballot?" (1990) 12 Comm. & L. 55 at 67-70 and sources cited therein.

[141] The effects of opinion polls are summarized by Somers J. in *Thomson* (Gen. Div.), *ibid.* at 117-18. See also G. Lachapelle, *Polls and the Media in Canadian Elections: Taking the Pulse* (Toronto: Dundurn Press, 1991) at 13-14.

[142] See also Fraser, *supra* note 132 at 365.

[143] See, for example, the remarks of the Right Honourable James Callaghan, a former Prime Minister of England: "In any case, a restriction in the publication of these polls implies that people cannot be trusted with the vote and many people outside Parliament would question the right of Parliament to determine what is proper for the electorate to read in helping them to make up their minds, as to for whom they should vote" (U.K., H.C., *Parliamentary Debates*, 5th ser., vol. 770, col. 44 (14 October 1968)), quoted in Kushner, *supra* note 140 at 520, n. 19 and accompanying text.

[144] *Thomson* (C.A.), *supra* note 131 at 357.

[145] Though these are all perennial aspects of the rough-and-tumble of electoral politics, these strategies are surely more worrisome and influential "distortions" than the purported distortions addressed

weeks preceding the election.[146] The only thing that changes is that the voters are now denied access to the same data, which might have helped them to evaluate the candidates' strategies and promises in the closing moments of the campaign with a more critical eye.[147] In defending the poll blackout provision and arguing for a longer blackout period, Colin Feasby has written that the absence of polls would force the media "to focus on substantive issues for a sustained period at the end of an election campaign."[148] Government infringement of speech as a means of forcing the news media to conform to the state's views about what constitutes legitimate or substantive reporting on election campaigns would, of course, be unjustifiable under the *Charter*. In any event, as long as the key players continued to have access to polling data while the public does not, people could expect less rather than more fairness and integrity in election campaigns and in the arena of public debate.

Section 322.1 is essentially ineffective in safeguarding the election process. By allowing candidates continued access to fresh polling data in the closing moments of a campaign while denying the voters access to the same data, it serves the candidates far more than it does the voters. If anything, section 322.1 creates greater distortions in the political process than those imagined distortions it set out to cure.

A court with a stronger underlying conception of the relationship between free speech and citizenship would have approached the *Thomson* case very differently (as the Supreme Court ultimately did). It would have recognized that citizens themselves are responsible for monitoring and filtering political speech, including election polls, and cannot shift that responsibility to government. However these presumptions play little part in the Court of Appeal's decision, while its assumptions about the importance of deference to Parliament play a substantial role.

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by the *Elections Act*, *supra* note 129 and by the Court of Appeal in *Thomson*, *ibid.* Yet they remain unregulated, and appropriately so, given the importance of such core political expression. But the fact that these elements of campaign flim-flammery are left unregulated while voters' access to statistical data is restricted again calls into question whether either the legislature or the courts are in a position to determine what speech is a "distortion" of the political process and what speech is part of a hypothetical "undistorted" political process.

[146] See also Kateb, *supra* note 91 at 226:

> In regard to political speech, is it wrong to call most of it mendacious? Think of the constant stream of outright political lies, distortions, evasions, hypocrisies; they are the *primary* stuff of free political expression as we receive it in the media, because of the political class or because of the very nature of the media. The primary stuff is sickening. Yet I still want to defend its freedom, and to do so with a whole heart.

[147] See also Fraser, *supra* note 132 at 394: "the prohibition preserves for the few what popular sovereignty would demand for all: the ability to vote with full knowledge of information which concerns an impending election"; Lachapelle, *supra* note 141 at 48: "Limitations on the release or publication of polls during election periods raise another important issue: Can a democratic society tolerate a situation where only some individuals have exclusive access to certain information?"

[148] Feasby, *supra* note 132 at 244.

2. Somerville

By way of contrast, consider the decision of the Alberta Court of Appeal in *Somerville* v. *Canada (A.G.)*.[149] There, the court faced challenges to provisions of the *Elections Act* which restrict campaign advertising during large periods of an election campaign, and which establish near-total bans on campaign advertising by third parties. Compared to the *Thomson* opinion, Madam Justice Conrad's opinion in *Somerville* showed a strong awareness of the duties of citizenship and of the danger of state controls on political speech. She recognized the importance of a broadly informed vote to a free and democratic society, without presuming that the state may heavily police the kind of information which voters are entitled to receive.[150] In discussing the government's burden of justification under section 1, she quoted the more stringent language of McLachlin J. in *RJR-MacDonald* and the statement about the importance of freedom of expression given by Cory J. in *Edmonton Journal*.[151] Conrad J.A. stated:

> The importance of the [legislative] objective must be approached keeping in mind the significance of the rights infringed. This case deals with the infringement of the most fundamental democratic rights — freedom of expression and association *during an election*, and the right to vote.[152]

Given this emphasis, she was more comfortable subjecting the government's evidence to careful and stringent scrutiny[153] and voicing skepticism about the actual effectiveness of the legislation. It is hardly surprising that the Court concluded that the infringement was not justified.

3. *Libman*

More recently, in *Libman*,[154] the Supreme Court offered an example of its own views of the relationship between speech and citizenship; it also provided a glimpse into how it might choose between the opposing assumptions evident in *Thomson* and *Somerville*. In *Libman*, the Court held that spending restrictions that effectively barred third parties from participating in referendum campaigns unless they joined or affiliated themselves with the principal "Yes" or "No" campaigns constituted an unjustifiable infringement on freedom of expression. The Court suggested, however, that relatively stringent restrictions on third-party spending (and thus on third-party expression) would be appropriate and beneficial.

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[149] (1996), 136 D.L.R. (4th) 205, 39 Alta. L.R. (3d) 326 (Alta. C.A.) [hereinafter *Somerville* cited to D.L.R.].

[150] *Ibid.* at 225.

[151] *Ibid.* at 227-28 referring to *RJR-MacDonald*, *supra* note 121, and *Edmonton Journal*, *supra* note 51.

[152] *Ibid.* at 229 [emphasis in original].

[153] See *ibid.* at 230-32.

[154] *Supra* note 100.

The constitutional failure of the legislative provisions in *Libman* would suggest a victory for political speech, or for freedom of expression more generally. Ultimately, however, the decision is more distressing than it is heartening. After all, the Court in *Libman* expressly disapproved of the Court of Appeal's decision in *Somerville*, which relied on strands of section 2(b) doctrine developed by the Supreme Court itself.[155] Moreover, while the Court found that a $600 limit on independent speech-related expenditures for organizing and holding a meeting was impermissibly low, it added that a slightly higher limit of $1,000 would be an acceptable way of providing equality and integrity in the referendum campaign process.[156]

More interesting than the result in *Libman*, however, is the approach the Court adopted. Here, in a nutshell, is an example of a court adopting Fiss's state-as-parliamentarian view of freedom of expression, complete with its anemic view of citizenship. In its focus on the need for "equality of participation and influence" and its emphasis on the need to ensure "that some positions are not buried by others,"[157] the Court voiced precisely the kind of parliamentarian arguments advanced by Fiss. The Court saw the referendum process as one in which most voters "freely express their choice" — presumably by voting — "after being informed of the issues during the election or referendum campaign."[158] Similarly, the Court held that

> [e]lections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions so that election discourse is not dominated by those with access to greater financial resources.[159]

This approach sounds equitable enough. However, its vision of the citizen as a passive creature, listening to but not participating in election discourse, slights the full range of rights and responsibilities entailed in freedom of expression. Moreover, the Court's stated concern with equality of participation and a diversity of voices is cast into doubt by its approval of a resource allocation scheme that will invariably allow the major political parties to dominate the Yes and No committees in referendum campaigns.[160] It also held that third party speakers must be subject to stricter limits on independent spending than the major political parties.[161] Ultimately, the Court's deci-

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[155] See *ibid.* at paras. 55, 79.

[156] See *ibid.* at para. 80.

[157] *Ibid.* at para. 41. Note that the Court refers here to "equality of participation and influence *between the proponents of each option*" [emphasis added]. In other words, in the midst of urging full and open public debate on equal terms, the Court weakens this promise by narrowing the field to focus on the elemental choice between "Yes" or "No" in a referendum, rather than encouraging the flourishing of voices urging other options.

[158] *Ibid.* at para. 46.

[159] *Ibid.* at para. 47.

[160] See *e.g. ibid.* at paras. 8-13, 56.

[161] See *ibid.* at paras. 50-51, 56. The Court argues that these measures are necessary in order to ensure that third parties do not throw their weight behind one candidate. Such a restriction also helps ensure that the major parties receive more funding and more attention than smaller parties, fringe candidates, and independent speakers who might diversify the agenda of public debate by raising issues that the major candidates and parties have ignored.

sion in *Libman* is guilty of what Robert Post calls "a reductive decisionism"[162] — a tendency to emphasize the end result of the decision-making process over the value of full public participation in the debate leading to that decision.

4. Charting a New Course

The Supreme Court has now reversed the Court of Appeal in *Thomson*.[163] Time and space constraints foreclose a definitive discussion of the judgment, but it does raise interesting questions about the themes discussed in this review. Bastarache J.'s opinion with its lack of deference, its refusal to "take the most uninformed and naïve voter as the standard by which constitutionality is assessed,"[164] and its presumption that Canadian voters "have a certain degree of maturity and intelligence,"[165] exemplifies the assumptions that should govern the courts' approach to section 2(b). In particular, it shows a respect for the autonomy of individual voters, and an expectation that they should be free to inform themselves, and scrutinize the information they receive, so that they may take responsibility for their own decisions as citizens. That accords with the Brandeisian conception of citizenship and speech that has been advanced here. However, the fact that three Justices could dissent in what should have been an easy case is a reminder that other assumptions may still influence the courts' approach to section 2(b). And the Supreme Court's efforts in *Thomson* to distinguish *Libman*[166] are not truly convincing. The difficulty of reasonably reconciling both opinions, in light of the assumptions of voter autonomy and intelligence voiced in *Thomson*, suggests that the Court must do more thinking about the implications of these assumptions.

The divergent views in these opinions provide an excellent illustration of what is missing from Fiss's argument, as well as from most of Canadian courts' discussions of freedom of expression.[167] These cases suggest that it is not enough for the courts to subsist on boilerplate recitations about the importance of free speech while viewing any argument about the distorting effects of speech as a sufficient justification for its suppression. Instead, it is necessary to tie ideas about free speech to a more demanding conception of citizenship in which the essence of self-government is the responsibility to listen critically and participate actively in the arena of public discussion. This may be a heavy burden, but it will ultimately prove beneficial to the vitality of a free and democratic society. If these assumptions were present in the thinking of more judges, significant changes in section 2(b) jurisprudence would surely result.

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[162] Post, *supra* note 56 at 1523.

[163] See *Thomson* (S.C.C.), *supra* note 131.

[164] *Ibid.* at para. 128.

[165] *Ibid.* at para. 101.

[166] *Supra* note 100.

[167] This is not to suggest, however, that Fiss would argue in favour of the *Elections Act* restrictions at issue in *Thomson* and *Somerville*, or the *Referendum Act* provisions implicated in *Libman*.

Conclusion

The Brandeisian conception of citizenship and free speech is largely missing from Fiss's challenging work — as is, indeed, almost any significant discussion of the duties of citizenship in the arena of wide-open public debate. Again, though Brandeis J.'s conception of citizenship and its requirement of civic courage and active participation in public debate is highly demanding, it is not falsely romantic or unattainable. And with its duties come great benefits. The Brandeisian citizen does not have the same need for intrusive state measures to protect speech, with all the risks that are engendered by state intervention in public debate. Fiss acknowledges the dangers of state regulation of speech but argues that the system is already so flawed that it is worth the risk that the state will be freedom's enemy rather than its friend. Yet as Brandeis J. recognizes, in the arena of freedom of expression, if freedom and authority are to be reconciled, then sometimes citizens must be their own friends.

Though we may yet learn much from Fiss's books and his challenging arguments, this central flaw — the failure to offer a strong conception of the citizen who is to be the apparent beneficiary of the speech regulations that Fiss proposes — may prove the most educational aspect of these works. For Brandeis J.'s words need not carry to American ears alone. If Canadians are to preserve their rights of free expression in the face of section 1 of the *Charter*, they must begin to consider, more deeply than they have, the question of what duties citizenship carries with it in a free and democratic society for both the speaker and the listener. By recognizing the extent of their duties and the risks of passivity, citizens may appreciate the true dangers that are posed when the state purports to act in their best interests by silencing them.