1. Gag rules or the politics of omission

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A conversation is invariably shaped by what its participants decide not to say. To avoid destructive conflicts, we suppress controversial themes. In Cambridge, Massachusetts, old friends shun the subject of Israel in order to keep old friendships intact. Burying a divisive issue, of course, can be viewed censoriously – as evasiveness rather than diplomacy. But conflict-shyness is not merely craven: it can serve positive goals. By tying our tongues about a sensitive question, we can secure forms of cooperation and fellowship otherwise beyond reach.

Strategic self-censorship occurs in a variety of settings, from international summits to midnight trysts – including perhaps the limiting case of amnesia. In collective life, unmentionables abound. Within every group, speaking about tabooed subjects will provoke general consternation and embarrassment. After all, no one should wash his dirty linen in public. At faculty meetings, even garrulous professors will not prattle interminably about their alcohol problems or marital relations. Such universally appreciated uncommunicativeness can be easily explained. For one thing, no group’s information-processing capacity is infinite. People cannot talk about everything at once; life is short; to avoid cognitive overload, different groups focus on different topics at different times.

Other reasons for sealing one’s lips are less general and more pertinent to democratic theory. Sometimes an issue appears “unspeakable” because open airing would mortally offend prominent individuals or subgroups and permanently injure the cooperative spirit of the organization. Alternatively, a group can utilize its scarce resources more effectively if it dodges an irksome issue. By refraining from opening a can of worms, discussion leaders can prevent its lively contents from absorbing 100% of everyone’s attention – at least for
the time being. Despite the warnings of popular psychology, in other words, repression can be perfectly healthy.

Some preliminary examples

In law, statutes of limitation preclude prosecutions for temporally remote crimes. Similarly, various nonjusticiability doctrines enable the Court to silence itself about difficult legal issues. The "political questions" doctrine, as well as "case and controversy," "ripeness" and "standing" are all "devices for deciding not to decide," 1 strategies by which members of the Court limit the range of problems on which they are required to pronounce. Every institution is equipped to resolve certain difficulties better than others. By staying its hand, the Court can improve its overall performance. By refusing either to uphold or overturn a governmental action, it can avoid decisions that might damage its credibility and overtax its limited problem-solving capacities.

Scholarly communities similarly regulate the area of permissible and pertinent speech. Universities, for example, are generally thought to have a limited mission. True, controversy rages about how audible or muted, say, the university's political voice should be. Conservatives assert that divestment from companies doing business in South Africa is not a suitable subject for formal consideration by a university faculty. But liberals, while castigating what they perceive as moral evasiveness, concur that the docket of faculty meetings must be confined in some ways, for example, that they should not leave time for an exhaustive diagnosis of faculty spouses.

Finally, to select a quite different example, John Rawls has argued for the political utility of what he calls "the method of avoidance." 2 In any group, a cleverly formulated gag rule can profitably shift attention away from areas of discord and toward areas of concord. Certain metaphysical assumptions about the human person are now, and will probably remain, controversial. To establish a public conception of justice acceptable to all members of a diverse society, we must abstract from questions which elicit radical disagreement. In a liberal

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social order, the basic normative framework must be able to command
the loyalty of individuals and groups with widely differing self-
understandings and conceptions of personal fulfillment. As a result,
theorists of justice can achieve their principal aim only by steering
clear of irresolvable metaphysical disputes.

Similar side-stepping techniques are familiar in political life. Like
"self-binding" in general, tongue-tying may be one of constitutional-
ism's main gifts to democracy. Some constitutional limits, at least, can
be usefully redescribed as expressing a community's decision to
silence itself, or its representatives, on selected issues. Legislators are
enjoined from officially discussing questions which, if placed under
the control of electoral majorities, would (it is thought) induce
governmental paralysis, squander everyone's time or exacerbate
fractional animosities.

Self-denying ordinances

Conspiracy theorists have taught us to conceive agenda-narrowing as a
technique by which sinister elites exert power over their hapless
victims: "power may be, and often is, exercised by confining the scope
of decision-making to relatively 'safe' issues" or, less circumlocutiou-
sly: "He who determines what politics is about runs the country." Three
Indeed, power-wielders do not always act surreptitiously when silenc-
ing others or constricting the range of issues which can be freely
discussed. By limiting campaign contributions or discontinuing legal
aid to the poor, public officials effectively stifle the voice of certain
citizens without actually commanding them to remain silent. But
direct censorship, at least since the invention of printing, has easily
rivaled the withdrawal of resources as an instrument of political
control. Today, for example, state legislatures no longer forbid
doctors to distribute contraceptive information; but they may well, to
choose another random example, restrain tobacco companies from
advertising cigarettes.

Freedom of speech, in point of fact, does not outlaw every sort of
gag order. Judges seal records, tell lawyers not to inform the jury

Three Peter Bachrach and Morton S. Baratz, "Two faces of power," American Political
Science Review, 56 (1962), 948; E. E. Schattschneider, The Semisovereign People: A
Realist's View of Democracy in America (Hinsdale, Illinois, The Dryden Press, 1975),
p. 66.
about a defendant’s earlier mistrial for the same offense. More rarely, a judge may prohibit lawyers from discussing a case with reporters while the trial is going on. Various laws regulate disclosure by government employees. The Justice Department can, in exceptional circumstances, impose prior restraint to prevent newspapers from publishing a story that might endanger national security. Similarly, and more generally, libel law is a system of rules about what people cannot say.

In sum, one individual or group can gag another, using threats or paying hush money. But individuals and groups can also gag themselves. Self-denying ordinances are perfectly possible. Witnesses plea the Fifth Amendment, declining to testify for fear that what they say may incriminate them. Analogously, nominees to the federal bench duck senatorial cross-examination, averring that they must never rule in advance and without benefit of a concrete case. Panel members recuse themselves because of conflicts of interest. Legislators abstain from voting when countervailing pressures cannot be reconciled and when taking a position one way or the other might cost them essential electoral support.

Such garden-variety examples of strategic self-censorship could be multiplied indefinitely. Legislative bodies interdict debate on delicate issues in a somewhat more systematic manner. In the early American Senate and House, a parliamentary technique (then called “the previous question”) was employed “for avoiding either undesired discussions or undesired decisions, or both.”4 Like individuals, in other words, organizations and collectivities can leave selected topics undiscussed for what they consider their own advantage. In order to present a united front, members of a political party may refrain from publicizing internal conflicts. To attract public attention, by contrast, members of rival parties may choose to highlight their differences, remaining mute about the principles and goals they share in common. Sometimes important objectives can only be achieved so long as they are left unspoken. Marriages may founder on attempts to delineate, in a written contract, precisely who is to do what and when. Affirmative action may be yet another example: if the government talks too freely

about what it is trying to do (for instance, create the conditions for self-respect among minorities), it may needlessly throw obstacles in its own path. In such a case, public officials are wise to gag themselves. At the very least, soft-spokenness is desirable because it may help prevent not unwanted conflict but rather unwanted humiliation. To make their policies successful, in sum, groups too find it prudent to cultivate the arts of omission.

Positive uses of negative liberty

No issue is more frequently classified as “worthy of avoiding” than religion. Sectarianism, is understandably considered to be divisive, a serious threat to communal cooperation. Religious disputes, it is said, cannot always be resolved politically, or even rationally. On this premise, many communities have decided to draw a “line” between the public and the private – to consign religious attachments to the nonpolitical sphere, beyond the jurisdiction of majorities and officials. Paradoxically, such compartmentalization is thought to reinforce social cohesion. Other controversies will be easier to resolve if religious schisms do not crystallize into political factions.

If accepted, such a claim throws interesting light on the doctrine of nonentanglement. Viewed from this perspective, the “wall” between church and state does not merely shelter the private sphere from unwanted incursions; it also unburdens the public sphere of irresolvable problems. In general, students of “negative liberty”\textsuperscript{5} have neglected the disencumbering or agenda-uncluttering function of private rights. Limits on the government’s jurisdiction are typically justified by reference to the fragility and intrinsic value of protected domains. But why not invert the picture and examine what benefits accrue to public life if certain issues are excluded from the public agenda? While screening one realm, private rights may simultaneously lighten the

\textsuperscript{5} For present purposes, I shall define positive liberty as collective self-government (not as “the realization of the real self” or “the exercise of authentic capacities,” to which self-government is often narcissistically assimilated); negative liberty, by contrast, can be preliminarily defined as the absence of coercive interference by the government or other wielders of power. It is profoundly confusing to identify positive liberty with both democracy and individual self-realization, I believe, because (1) the absence of coercion is typically prized as a necessary precondition for the development of human faculties, and (2) obligatory and full-time political participation may condemn many humanly important capacities to wither on the vine.
charge on another. Negative liberty "privatizes" certain questions, erasing them from the list of problems to be resolved politically. This unloading tactic makes all remaining controversies more amenable to compromise. When viewed from a slightly different angle, what formerly seemed a protective device now appears as a disencumbering strategy. By gagging themselves about religion, to return to that example, public officials seem to gain as much freedom as do private sectaries. The autonomy of politics increases simultaneously with the autonomy of religion.

According to Isaiah Berlin, "there is no necessary connection between individual liberty and democratic rule." This connection, he continues, "is a good deal more tenuous than it seemed to many advocates of both."

If my suggestion has any merit, Berlin is at least partially mistaken: private rights contribute vitally to democratic government by expunging irresolvable disputes from the public sphere. By the narrowing of the political agenda to problems manageable by discussion, certain individual rights may be said to subserve self-government. Their function, once again, is not merely to shield the private but also to disencumber the public.

Issue-suppression sounds tyrannical: to gag is to choke. But self-denial may be indispensable in self-regulating polities. For one thing, conflict-resolution often presupposes conflict-avoidance. Democracy becomes possible, according to many democratic theorists, only when certain emotionally charged solidarities and commitments are displaced from the political realm. By keeping religious questions off the legislative agenda, as I have been suggesting, the principle of nonentanglement may help fashion a certain kind of public – a public susceptible to democratic methods of conflict-resolution. Self-gagging is thus a form of self-control, not of self-strangulation. To repeat: by agreeing to privatize religion, a divided citizenry can enable itself to resolve its other differences rationally, by means of public debate and compromise.

Democracy is conventionally associated with glasnost, freedom of speech and the overthrow of censorial government. Thus, it seems perverse to focus on the contribution of gag rules to self-rule. Nevertheless, the shape of democratic politics is undoubtedly determined by the strategic removal of certain items from the democratic

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Some theorists have even argued that issue-suppression is a necessary condition for the emergence and stability of democracies.

According to Joseph Schumpeter, for instance, one of the essential prerequisites for a successful democracy is that "the range of political decision should not be extended too far." Robert Dahl argues that moral conflict need not subvert democracy: disagreement about goals is compatible with collective self-rule so long as there remains ample group autonomy within a society, i.e., plenty of lee-way for groups to follow their own goals unharassed. Because he views religion as a prime source of rationally irresolvable conflict, Samuel Huntington asserts that cultures lacking a sharp separation between religion and politics, between spiritual and secular domains, are not "hospitable to democracy." When ultimate ends color all concrete political acts, compromise or piecemeal reform becomes next to impossible. Democratization is doomed from the start, according to this line of argument, without some sort of socially acknowledged boundary between religion and politics.

Types of gag rule

Gag rules can be either autonomous or heteronomous, i.e., self-imposed or imposed by others. Self-imposed gag rules, in turn, can be ratified by unanimity or only by a majority. They can also be either formal or informal. For example, some legislative vows of silence are explicitly incorporated into the constitutional framework, while others are based on a tacit agreement among political elites. The autonomous/heteronomous, unanimous/majoritarian and formal/informal distinctions will prove very useful in our analysis, below, of two classic attempts at issue-avoidance: the efforts, in the United States, to suppress political controversy first about slavery and then about religion. Several other variations among kinds of gag rule should also be mentioned at the outset.

Some gag rules are designed only to postpone a discussion or avoid a
precipitate decision; others are meant to bury a topic definitively. Some gag rules debar everyone from raising a ticklish question; others are more narrowly targeted, silencing only a selected class of speakers. For instance, when a technical question arises, laymen ordinarily defer to specialists. Modern democracies contain many semi-autonomous institutions, each with its own agenda. Thus, we must also distinguish between the universal suppression of a theme and the mere transferral of that theme to a different institutional context. Unspeakable in one room or devant les enfants, embarrassing revelations may be thoroughly canvassed in a more secluded part of the same house. Rather than tinkering with an explosive issue, a high official may pass the buck, handing it over to expendable functionaries not too closely associated with the party in power.

Less deviously, some topics are excluded from the national legislative agenda only to be consigned to state legislatures or to the courts. Contrariwise, by decamping from the political thicket, the Court silences itself; but it simultaneously invites executive and legislative officials to speak out. In such cases, gag rules institute a division of labour which can help clarify responsibilities for all parties. Much more radical is the decision to remove an issue from the jurisdiction of all branches and levels of government.

Finally, some items are excluded from the political agenda without any conscious decision having been made. Agendas are not infinite; and it would be preposterous to assume that all issues are naturally on the agenda and only fail to appear because they are consciously taken off. Parochial habits of mind, cultural blinders or a lack of imagination all help explain why politicians fail to seize upon (what seems to us) an important theme. In the United States, unlike European nations with Communist Parties, the legitimacy of private property is never debated in formal legislative settings. But the issue was never deliberately suppressed because, for a variety of reasons, it was never raised.

Political agendas are constantly expanding and contracting. Why an issue captures or escapes public attention is an important subject for historical and sociological research. To analyze processes of agenda-narrowing and agenda-broadening would require, among other things, careful attention to the conditions for successful and abortive

10 The opposite of postponing a discussion is cloture: the decision to prohibit discussion after a certain point.
social movements. Understandably, my concerns are more narrow. At least some issues which would otherwise be at the center of political attention are consciously deleted from the range of subjects to be discussed. To make the concept of a gag rule useful for comparative analysis, we must restrict it to such overt, fully purposive and tactically justified acts of omission.

The transition to democracy

Consider the decision of several recently restabilized democracies to offer immunity from criminal prosecution to military leaders who wielded power in the old regime. Although guilty of atrocities, some of these officers have been willing to relinquish power peacefully to a civilian government. But they did so only in exchange for a legislative and judicial vow of silence about their past wrongdoings. Amnesties, in fact, are classic examples of democracy-stabilizing gag rules. They embody what Nietzsche called aktive Vergeßlichkeit, but on a national or at least governmental scale. By closing the books on the past, keeping retribution for former crimes off the political agenda, the organizers of a new democracy can secure the compliance of strategically located elites – cooperation which may be indispensable for a successful transition from dictatorship to self-government. Without an overriding desire for national unity, however, we can assume that opposing groups will be unlikely to silence themselves about the issues that most radically divide them.

Freedom is sometimes defined as a coincidence of desires and capacities. Governments presumably strive to ensure that their abilities and resources are adequate to the problems they face and the objectives they intend to pursue. Deleting unanswerable questions from the political agenda is thus a natural strategy for any state, especially a recently founded one. New regimes have shallow roots

11 Freudian repression must suppress not only the event to be forgotten but also the act of repressing itself (J.-P. Sartre, L’Etre et le nant [Paris, Gallimard, 1943], pp. 88–93). An effective gag rule, by contrast, requires all parties to know that – and remember why – they are avoiding a touchy question.


and may be destroyed by the first storm that strikes, as Machiavelli observed. A newborn government is especially unlikely to survive if forced to make controversial decisions about historically intractable problems.

According to Dankwart Rustow, an intense but obviously unwinnable struggle is an essential precondition for the transition to democracy.\(^\text{14}\) All parties will soon become weary of interminable hostilities. If they possess the talent and will, key elites can then negotiate a settlement — a system of power-sharing and mutual accommodation in the interest of all major factions. This bargain among subgroups and sections may assume the form of a constitution. Eliminating divisive questions from the jurisdiction of state officials is likely to be an essential element in any such regime-founding compromise.

If the government is to survive, Rustow argues, the original constitutional settlement must be a boot-strap operation. The constitution cannot be imposed autocratically from above. To have the exemplary power essential to any successful act of founding, the initial peace treaty must at least appear to be designed cooperatively by the rival factions.\(^\text{15}\) In other words, consensus on fundamentals should not be overrated as a precondition for democratization. Without major divisions, there would be no incentive to devise democratic institutions in the first place. These institutions, we may add, will only succeed in handling latent conflicts if they incorporate mechanisms for side-stepping divisive issues.

Paradoxically, as Clifford Geertz has argued, citizenship and community are sometimes incompatible.\(^\text{16}\) At the very least, communal loyalties present serious obstacles to the integration of recently created national states. Geertz is concerned with the consolidation of any sort of national state, not solely with the creation of democracies.


\(^{15}\) "The first grand compromise that establishes democracy, if it proves at all viable, is in itself proof of the efficacy of the principle of conciliation and accommodation. The first success, therefore, may encourage contending forces and their leaders to submit other major questions to resolution by democratic procedures" (ibid., 358).

But his insights are nevertheless revealing for our inquiry. “Primordial attachments,” as he describes them, can be religious, racial, linguistic, tribal, regional or customary; but they are always tinged with sectoral xenophobia and are thus in tension with membership in the state as a whole. Some of the world’s most intractable problems arise when primordial ties are politicized by attempts at national integration.\(^\text{17}\)

Minority security is a common good – good for the majority as well as the minority. By designing a constitution to allay the fears of defenceless ethnic subgroups, the framers of a regime-founding compromise can secure the national cooperation necessary for economic prosperity and military independence. Any nation split into “primordially defined groups” must discover a “form competent to contain the country’s diversity.” This “form,” once again, is a political constitution in the broad sense. It establishes law-making and law-enforcing bodies, but also organizations, such as political parties, “within which primordial conflicts are being informally and realistically adjusted.”\(^\text{18}\)

Party organization, the domestication of factional loyalties and the diplomatic skill of elites are essential for social stability in a religiously and ethnically diverse country. But such factors must be supplemented by a strategic narrowing of the national political agenda. Primordial loyalties must be shielded from the police and not only directed into “proper” political channels but also (at least to some extent) channeled away from politics altogether.\(^\text{19}\) De-politicization, in conjunction with other forces, can increase the chances for rational compromise in a divided society.

One traditional solution to the problem of primordial divisions is secession or partition. Another is ethnocracy: a single religious, linguistic, racial or regional group can expel, assimilate or subjugate all others. This is “community” in the strong and antiliberal sense. But if diversity can be neutralized constitutionally, it can also be

\(^{17}\text{Ibid. pp. 263, 272.}\)

\(^{18}\text{Ibid., pp. 282-3. What leaders must strive to establish is “an effective civil framework within which very intense primordial issues can be adjusted and contained rather than allowed to run free in parapolitical confusion” (ibid., p. 285).}\)

\(^{19}\text{This must be what Geertz means by the importance of “divesting [primordial loyalties] of their legitimizing force with respect to governmental authority” (ibid., p. 277).}\)
accommodated within the four corners of a single state. Clever framers can design institutions which cushion conflict. By so doing, they are laying the foundations for “a civil politics of primordial compromise.”

A compromise-minded politics of this sort has long been the focus of Arend Lijphart’s studies of consociationalism. In primordially divided societies, self-government requires “cooperation by the leaders of different groups which transcends the segmental or subcultural cleavages at the mass level.” Paradoxically, elites must both represent and not represent their constituents. They must hold their followers’ loyalty but not reproduce their uncompromising attitudes in national negotiations. Such cross-sectarian cooperation among elites requires “a strengthening of the political inertness of the nonelite public and their deferential attitudes to the segmental leaders.”

The spirit of compromise among elites is a necessary but not sufficient condition for self-rule in a divided society. Equally important is “segmental autonomy” – Lijphart’s expression for the removal of divisive issues from the national agenda. Ideally, there will be a “high degree of freedom for the segments in the conduct of their internal social and cultural affairs.” In other words, the national government must muzzle itself on certain issues. On matters of regional or sectarian but not national interest, “decisions and their execution can be left to the separate segments.” When national decisions cannot be avoided, each group must be granted influence proportionate with its numbers and, crucially, armed with a veto. The reason for taking such elaborate precautions is simple: “in a political system with clearly separate and potentially hostile population segments, virtually all decisions are perceived as entailing high stakes, and strict majority rule places a strain on the unity and peace of the system.” When the stakes are high, the jurisdiction of national majorities must be narrow. To ensure its own authority on other

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20 Ibid., p. 310.
22 Ibid., p. 53.  
23 Ibid., p. 169.  
24 Ibid., p. 151.  
25 Ibid., p. 41.  
26 Ibid., p. 28. “When such decisions affect the vital interests of a minority segment, such a defeat will be regarded as unacceptable and will endanger intersegmental elite cooperation” (ibid., p. 36).
issues, the national majority must gag itself on issues destined to provoke sectarian animosity.

For divided societies, Lijphart advocates coalition governments, a mutual veto, proportionality in the allocation of civil service jobs as well as government subsidies and, as I mentioned, segmental autonomy. He favors three or four parties over two, a parliamentary to a presidential system, proportional representation to majority rule and federalism over a unitary government. He also prefers a "coalescent" to an adversarial style of decision-making. Political choices should be made in secret negotiations among rival elites (on the basis of log-rolling, package deals and so forth) and should be arrived at by virtual unanimity. Consociationalism, in other words, means democracy without an opposition. According to Lijphart, the societies in question are too deeply divided to withstand open political contestation.

The gag rule of 1836

Before the Civil War, the United States itself was a profoundly divided society. Its leaders, too, shied away from open conflict over the most divisive of all issues. In 1836, for example, the U.S. House of Representatives adopted the first in a series of gag rules:

'Resolved, That all petitions, memorials, resolutions, propositions, or papers, relating in any way, or to any extent whatsoever, to the subject of slavery, or the abolition of slavery, shall, without being either printed or referred, be laid on the table, and that no further action whatever shall be had thereon."

This act of legislative self-censorship and the parallel measure adopted in the Senate were tactical compromises, "coalescent" attempts to split the difference between North and South. Only a self-denying ordinance would permit mutual adjustments and rational discussion of other issues among the sections. Only a gag rule could scale back the responsibilities of the federal government, making them roughly

proportionate to its modest problem-solving capacities. Curiously enough, Congress’s decision to stay its own hand was attacked not only, as one would expect, by abolitionists; it was also assailed by proslavery advocates of states’ rights (such as John Calhoun) who themselves yearned for absolute congressional silence on the slave question. The precariousness of all self-gagging arrangements is usefully underlined by southern hostility to this bill.

The debate of 1836 about gagging Congress occurred under the shadow of a larger controversy about gagging the abolitionist press. Northern antislavery societies had decided to use the mails to flood the South with emancipationist tracts. Predictably, southerners refused to allow these works to circulate freely. In their view, such pamphlets threatened their very survival, i.e., constituted open invitations to slave insurrection. The federal government, unwilling to enforce its own laws on such a sensitive issue, turned a blind eye while southern states proceeded to censor the mails.28

Staunting the flow of abolitionist literature across southern borders was not sufficient for the proslavery forces. They were equally anxious to quell unending congressional debates about slavery. President Jackson himself argued, in the words of his biographer, that “all discussion in Congress of the slave issue” was “ultimately undemocratic.”29 Incessant slavery agitation was crippling the national legislature’s capacity to deal with other issues. Talk of slavery was simply disruptionist. Mutual recriminations between proslavery and antislavery forces had even led some congressmen to arrive at the House and Senate chambers armed with knives – a sure sign that parliamentary courtesy was fraying at the edges.

Of particular concern to the South were petitions requesting Congress to abolish slavery, or at least the slave trade, within the District of Columbia. The antislavery position was that all citizens had a right to petition the government for redress of grievances.30 According to slavery’s advocates, by contrast, Congress should refuse even to

30 A significant majority from both sections, however, voted to gag the slaves themselves, i.e., to deny them a right to petition Congress (Register of Debates, vol. XIII, 24th Congress, 2. session [February 11, 1837] p. 1733).
receive these petitions on the grounds that the federal government had no authority to abolish slavery anywhere. Exactly like the abolitionists, Senators and Representatives should be fully gagged on the slave question: "The subject is beyond the jurisdiction of Congress – they have no right to touch it in any shape or form, or to make it the subject of deliberation or discussion." While appealing to formal rights and lines of jurisdiction, Calhoun was essentially concerned with political consequences. The abolitionists were fanatics and incendiaries. Their "insulting petitions" vilified the South, taught hatred and threatened to destroy the Union. Attempts publicly to disgrace and humiliate slaveholding states could not be profitably discussed in Congress. Such discussions, however perfunctory, could only further polarize the nation.

As a compromise measure, Henry Pinckney introduced a series of resolutions in the House stipulating that Congress could not, as a matter of constitutional principle, regulate slavery in the South, and should not, as a matter of expedience, regulate slavery in the District. The attached gag-rule clause, cited above, declared that petitions concerning slavery would be formally "received" by Congress; but they would then be automatically tabled and never discussed.

As I said, Calhoun in the Senate and fellow nullificationists in the House "considered Pinckney's gag rule a disastrous southern defeat." It struck Congress dumb, but not deaf. In retrospect, proslavery objections to the rule seem almost hysterically legalistic. The resolutions, they argued, implicitly granted Congress the right to discuss slavery and to abolish it in the District, even though Congress currently refused to exploit these rights. Abolition petitions, at any rate, should not be received and tabled but simply not received. Congress's mouth should be gagged; but its ears must also be plugged. The initial reception of petitions, Calhoun explained, was "our Thermopylae." We must, he added, "meet the enemy on the frontier."

32 Frechling, Prelude to Civil War, p. 355.
33 For similar reasons, Calhoun rejected President Jackson's offer to debar incendiary publications from being circulated in the South: to accept federal help on this matter would be dangerously to extend federal authority into the internal affairs of the states.
pationist tongue. Indeed, Calhoun and his compatriots wanted the impossible, for Congress to be so tightly handcuffed and corseted on this issue that it could never even aspire to slip its bonds: "nothing short of the certainty of permanent security can induce us to yield an inch."\footnote{35}

The gag rule of 1836, precisely because it was a political compromise, is emblematic of the mainstream approach to the slavery question in American politics from the Founding to the Civil War. First the emergence and subsequently the maintenance of national self-rule presupposed the strategic avoidance of this divisive theme. At the very outset, a clause opposing the slave trade was dropped from the Declaration of Independence. The Constitution itself discreetly abstained from using the words "slave" or "slavery." The Framers acknowledged the institution of slavery, of course.\footnote{36} But they resorted to euphemism and indirectness when describing it – as if the disagreeableness of the thing could be mitigated by fastidiousness about the name. The sectional compromise at the heart of the Constitution, one might say, demanded that the issue remain latent and largely unspoken.\footnote{37} Discussing the bargains by which divided nations are united, Geertz comments that "the mere prejudices that must be tolerated in order to effect such reconciliations are often repugnant."\footnote{38} The creation of a national republic in the United States seems to be a case in point. As time went by, many northerners became more

\footnote{35}Ibid., p. 106.
\footnote{36}For example, by agreeing to tolerate the slave trade until 1808 (Art. I, sec. 9, para. 1), and by accepting the three-fifths rule (Art. I, sec. 2, para. 3), which helped balance northern and southern power in the House.
\footnote{37}The classical "pro-democratic" argument for suppressing a divisive issue was made by Senator Benton in 1848: "This Federal Government was made for something else than to have this pestiferous question constantly thrust upon us to the interruption of the most important business ... What I protest against is, to have the real business of the country, the pressing, urgent, crying business of the country stopped, prostrated, defeated, by thrusting this question upon us. We read in Holy Writ, that a certain people were cursed by the plague of frogs, and that the plague was everywhere. You could not look upon the table but there were frogs, you could not sit down at the banquet but there were frogs, you could not go to the bridal couch and lift the sheets but there were frogs! ... Here it is, this black question, forever on the table, on the nuptial couch, everywhere! ... I remember the time when no one would have thought of asking a public man what his opinions were on the extension of slavery any more than what was the length of his foot" \textit{(Congressional Globe, 30th Congress, I session, appendix, p. 686; cited in Andrew McLaughlin, A Constitutional History of the United States [New York, Appleton-Century-Crofts, 1935], p. 509).}
\footnote{38}Geertz, "The integrative revolution," p. 310.
and more morally opposed to slavery. Most remained even more averse to dismembering the Union, however. Nationalism, as is often the case, made them unwilling to stir up sectional hostilities.

The Constitution as a bargain

Under any system of majority rule, members of an outvoted minority must agree to an outcome they oppose. That is, they must consent to a decision to which they do not consent. Majoritarianism is thus inherently paradoxical. It escapes inconsistency only because consent can be aimed at different targets. Even if they do not consent directly to the decision being made, members of an outvoted minority can consent to the procedures by which that decision was reached and even bind themselves indirectly to abide by whatever outcome the accepted procedure produces. But the difficulty here cannot be so easily dismissed. Why do minorities accept majority rule? Without a minority’s acquiescence in decisions which its members, by definition, dislike, democracy would be impossible. But how is a minority’s acquiescence politically guaranteed?

One answer is offered by the theory of “multiple membership.” If every individual belongs to several groups at once, then most citizens will be aligned with both majority and minority coalitions on different questions. Outvoted on one issue, citizens will have good self-regarding reasons to accept an unwanted decision: in other circumstances they, too, will benefit from majority rule. Contrariwise, members of an obviously temporary majority will be inspired to display self-restraint. Cross-pressured by their rival group allegiances and expecting to be outvoted on other issues, the winners-of-the-moment will be unlikely to run roughshod over the deepest values of the losers.

When majority and minority coalitions become stable across the most important issues, no system of mutual restraint and accommodation based on multiple membership can gain a purchase. Such was roughly the situation in the United States before the Civil War. Only a Constitution placing strict limitations on majority power could foster minority security and thereby induce a southern minority to accept the decisions of a northern majority. Federalism, paradoxically, was the structural provision most essential for securing national cooperation in the face of “primordial” divisions. Relative decentralization gave
all states a stake in the system and guaranteed that their deepest values
would not be trampled upon by national majorities.

In every deeply divided society, majoritarianism must be qualified
by segmental autonomy. Not surprisingly, southern unionists con-
ceived American democracy in proto-consociational terms. For
democracy to function in a morally disunified country, national
majorities must tactfully yield to intense sectional minorities. Simple
outvoting on highly charged issues would bring the entire system
crashing down. In the American case, the moral status and political
future of slave ownership was too hot to handle and touched nerves
too deep to be subjected to majoritarian politics on the national
level.

Northerners offered southerners the following *quid pro quo*: if the
slave states would submit other issues to majority control, the free
states would agree to exclude the slave question from the national
majority's jurisdiction. Legislative self-censorship was justified as
essential to national cooperation. This strategy of avoidance seems to
have been a working principle of American government in the first
half of the nineteenth century. Pinckney's gag rule of 1836 simply
codified a generally accepted practice and applied it to a particular
case. The Union could be preserved only by removing the slave issue
from the Congress's agenda. The Missouri Compromise corroborates
this interpretation; it, too, was a package deal in the classic consoci-
ational manner.

Calhoun came very close to formulating the argument in precisely
this way. Slave-holders had a constitutionally guaranteed private right
to hold their property. But the prohibition against federal regulation
of slavery did not merely protect a private sphere and the attendant
values of personal autonomy; it also unburdened the public sphere
and thus subserved the values of democracy. Orderly democratic
consideration of other problems would become impossible if such a
passion-charged and divisive issue were placed at the center of
legislative deliberation.

This pro-democratic defense of agenda-narrowing follows directly
from Calhoun's general theory of constitutionalism. Constitutions, he

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39 Lijphart, in fact, expressly modeled his own theory on Calhoun's doctrine of
"concurrent majorities"; for his references to Calhoun, see Democracy in Plural
Societies, pp. 37, 125, 149.
argued, are bargains. Indeed, the development and acceptance of a constitutional framework can occur only as the contingent result of irresolvable conflict:

The constitutions [of both Rome and Britain] originated in a pressure occasioned by conflicts of interests between hostile classes or orders and were intended to meet the pressing exigencies of the occasion, neither party, it would seem, having any conception of the principles involved or the consequences to follow beyond the immediate objects in contemplation.\textsuperscript{40}

And, he adds, it seems “impossible” for constitutional governments of this sort to arise in any other manner.\textsuperscript{41}

The initial willingness of rival factions to compromise on a constitutional framework is usually motivated by battle fatigue and a yearning for the fruits of peaceful cooperation. But all parties must be assured that “ultimate values” – the things they care about most – will not be dragged through the mud of contestation. When factions negotiate, they put their differences aside and build on common ground. Both northerners and southerners desired peace and detested the thought of being ruled by foreigners. Burying differences, in Calhoun’s view, meant removing them from the national political agenda in order to concentrate on problems likely to mobilize greater social consensus.

Despite all gagging efforts, the slave issue would not subside. Eventually, it cracked the frame, that is, became too explosive to be handled within the institutional structures established by the Framers and reaffirmed by the Missouri Compromise. Abolitionists, of course, had always been repelled by the bargainish character of America’s quasi-consociational system. William Lloyd Garrison, for example, denounced the Constitution as “a covenant with death, and an

\textsuperscript{40} John C. Calhoun, \textit{A Disquisition on Government} (Indianapolis, Bobbs-Merrill, 1953), pp. 78–9.
\textsuperscript{41} Like Rustow, Calhoun believes that it is inconceivable for a constitution to be created within a faction-free society: “[i]t is difficult to conceive that any people among whom [constitutions] did not exist would or could voluntarily institute them in order to establish such governments, while it is not at all wonderful that they should grow out of conflicts between different orders or classes when aided by a favorable combination of circumstances” (\textit{ibid.}, p. 79).
agreement with hell." Slavery was sinful and odious; and it was the essence of immorality for legislators to silence themselves about such an abomination. If forcing slavery on to the legislative agenda caused the breakdown of national democracy, so be it. An issue of this magnitude was worth a civil war.

What cannot remain unspoken

To a surprising degree, the great Lincoln–Douglas debates of 1858 hinged precisely upon the question of what should and should not be said. According to Douglas, any discussion of the moral status of slavery was a grave insult to southerners, tending to put the Union at risk. By unceremoniously branding slavery as "evil" and declaring that slaves had an inalienable right to the fruits of their own labor, Lincoln was acting no differently than extreme abolitionists such as Garrison. He, too, was threatening the Union and inviting sectional war. Basically, according to Douglas, Lincoln was an agitator who refused to let sleeping dogs lie, a Gesinnungspolitiker, driven by abstract idealism and unappreciative of the tactical compromises implicit in the Constitution. By announcing that slavery must be placed on the course of ultimate extinction, he was terrorizing a vulnerable southern minority, engaging in a "conspiracy to wage war against one-half of the Union." The slave question was so charged with "passion," moreover, that rational discussion about it was precluded. Theorists of negotiation and mediation typically urged that "[w]hen anger and misperception are high, some thoughts are best left unsaid." Douglas would have concurred. Lincoln simply did not understand that preserving the American republic required self-censorship about the most emotional and galling of all issues.

While painting Lincoln as an extremist, Douglas portrayed himself as a moderate and a politiqu
e. He was willing to compromise about

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44 Ibid., p. 265.  
almost anything except union and peace. The peace party of sixteenth-century France had believed that national unity was compatible with religious diversity, i.e., that a divided house could stand. Three centuries later, the unionist Douglas asserted that national unity was compatible with a diversity of laws and customs concerning slavery. The nation was not based upon moral consensus about black slavery: northerners thought it evil, while southerners thought it good. The Constitution was nevertheless able to unify the country by abstracting from this underlying normative dissonance. Instead of demanding that all citizens adopt a common attitude toward slavery, the Framers forged a modus vivendi among a morally divided people. The Constitution was a “form designed to contain the country’s diversity.” By their incessant ranting about the evils of slavery, Lincoln and the abolitionists were wrecking this skillfully wrought bargain from which great benefits had ensued.

Lincoln, needless to say, denied Douglas’s fundamental premise. The basic division in the land was not between those loyal and those indifferent to the Union. Much more important was the disagreement between those who believed slavery was wrong and those who considered it comely and beneficial. In a valiant attempt to be even-handed, to ply an intermediate course between secessionists and abolitionists, Douglas struggled to say nothing at all about the moral status of slavery. As Lincoln ironically noted: “He has the high distinction, so far as I know, of never having said slavery is either right or wrong.” But tongue-tying neutrality on this issue was unacceptable. Especially in the final debates, Lincoln repeatedly maneuvered his opponent into an either/or situation: Douglas must throw off his conciliatory pose, ungag himself and take sides. To remove the slave issue from the political agenda may appear fair to all sections, but it actually “muzzled” the nation’s conscience. Self-gagging was simply immoral. To suppress this issue, in any case, was implicitly to take sides. According to Lincoln, Douglas was “in favor of eradicating, of pressing out of view, the questions of preference in this country for free and slave institutions; and consequently every sentiment he utters discards the idea that there is anything wrong in slavery.”

would-be fence-sitter could avoid making a moral pronouncement one way or the other.

While cautious himself, Lincoln nevertheless ridiculed the idea that conflict-avoidance should be a politician’s paramount concern. Douglas was opposed to discussing the slave issue in moral terms, he mockingly suggested, only because such discussions “will make a fuss.” Conflict was not amusing, of course; and Lincoln was willing to grant important concessions to the South to preserve peace and the Union. But there could be no lasting compromise with evil. Ultimately, political horse-trading must yield to moral conscience. Not even a majority of voters, local or national, can make a wrong into a right. Here Lincoln appears at his most anti-propitiatory and anti-politique. The Framers were not solely concerned to establish a modus vivendi between morally discordant sections. They agreed to tolerate slavery, but only on the assumption that it would eventually disappear. The Constitution was not merely a bargain; it was also an acknowledgement of fundamental norms. Despite Calhoun, American democracy was never meant to be a consociational system. The “pluralism” of slaveholding and nonslaveholding states could not be accommodated indefinitely: a house divided cannot stand. The nation was founded on a unifying moral creed: all men are created equal. The institution of slavery was an affront to that creed and ultimately had to be extinguished if the nation was to endure.

Douglas was an eloquent spokesman for the democracy-reinforcing function of segmental autonomy. His basic thesis was that national harmony would reign if every state would leave the others alone. The sovereignty of local majorities promoted national concord by preventing one state from using federal powers to pester another. “Each state must do as it pleases” was his maxim. This was a principle, he proudly announced, that travelled well, i.e., could be embraced in Illinois as well as South Carolina. Unfortunately for Douglas and for the unity of his party, deference to local majorities was not universally admired. By advocating what he thought was an intermediate posi-

49 Ibid., p. 256.


51 The Lincoln–Douglas Debates, p. 216.
tion, Douglas (like Pinckney) lost southern support. But why was segmental autonomy ultimately unacceptable in the South?

Even the most extreme nullificationists supported the fugitive slave clause in the Constitution. This provision placed the weight of federal authority on the side of the individual slaveholder against the pretensions of local majorities who might be inclined to pass laws protecting runaway slaves. Despite talk of states’ rights, in other words, southerners were never willing fully to embrace segmental autonomy. If safe havens were available, planters might be deprived of their property without due process of law.

Rights-based thinking is essentially antimajoritarian, impatient with local as well as national majorities. The *Dred Scott* decision, although an act of the federal government, was hailed by proslavery forces because it debarred local majorities from interfering with property rights in slaves. As a shrewd polemicist, Lincoln exploited the contradiction between Douglas’s absolute deference to the Supreme Court and his absolute deference to local majorities. The compromise position to which Douglas retreated was remarkably illogical: the territories had no right to prevent the entrance of slave property, but they could exclude slavery in practice by enacting unfriendly legislation. Naturally enough, this “solution” (whereby territorial majorities could make slave property worthless) proved unpopular in the South.

To deny the federal government a power is to assign that power somewhere else. Everything depends on the arena to which forbidden decisions are subsequently transferred. To take a question off the national agenda may be to place it on the local agenda and to subject it to the control of local majorities. On the other hand, a decision may be withdrawn from all branches and levels of government and consigned to private individuals. Some conspicuous examples are whom to marry, how many children to have, what career to pursue, where to live, what religion if any to embrace and (to introduce a discordant note) where to establish a plantation with one’s slaves. That, according to Lincoln, was the individualistic logic of *Dred Scott*. Given planter concern for property rights, it is small wonder that Douglas’s enthusiasm for local majorities alienated southern Democrats.

Lincoln stressed another weakness of segmental autonomy. Local

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52 Article IV, sec. 2, para. 3.
communities might be just as divided by the slave question as the national community. Kansas, in fact, was cursed with just such a division. Territorial sovereignty there, which Douglas believed would place a quietus on slavery agitation, had led instead to bloody conflict.\textsuperscript{53} Even from a pure \textit{politique} standpoint, Douglas's \textit{cuius regio, eius religio} solution was inadequate. Local control did not cause any abatement of the slavery turmoil. On the contrary, the struggles in Kansas reopened old wounds and increased rather than decreased national tensions.

The modus vivendi between North and South was destroyed by a thirst for expansion. As Lincoln said: "we have generally had comparative peace upon the slavery question, and \ldots{} there was no cause for alarm until it was excited by the effort to spread it into new territory."\textsuperscript{54} The open question of whether the new states to be carved out of the western territories would be slave or free perturbed both factions and enfeebled congressional vows of silence. Slavery in the South was the real evil; but what ultimately mobilized northern indignation, that is, provoked mainstream northern politicians into talking openly about the immorality of slavery, was the mere anticipation of slavery in the federal territories. Reticent about repealing an old gag rule, northerners were nevertheless unwilling to accept a new one.\textsuperscript{55}

The old Whig and Democratic parties had purchased internal cohesion by intra-party decisions to suppress the slave issue. Thus, both parties had adherents in the North as well as in the South. After slavery had been placed squarely on the national agenda by the acquisition of vast new territories, however, the old nation-straddling parties were doomed to disintegration. Once slavery had become the outstanding political issue, a massive realignment was inevitable:

\textsuperscript{53} \textit{The Lincoln–Douglas Debates}, pp. 199, 236. As one commentator puts it: "To publicize Kansas as an arcadia for homesteaders and planters alike, and then to legislate that the people in the territory would decide the burning issue of slavery on the basis of squatter sovereignty, was to thrust two gamecocks into a barrel" (James MacGregor Burns, \textit{The Vineyard of Liberty} [New York, Knopf, 1982], p. 550).

\textsuperscript{54} \textit{The Lincoln–Douglas Debates}, p. 136.

sectional parties arose, notably the Republican. And fissiparous tendencies began to threaten the Union as well.

Strategic self-censorship did not prevent conflict between the pro-slavery and the antislavery forces in the long run. Although it could be successfully squeezed off the legislative agenda for several decades, the slave issue was never off the agenda of public discussion. Congress could gag itself temporarily; but it could not effectively gag the public or the press. The temporary and selective nature of gag rules, however, does not necessarily destroy their usefulness. By 1860, many historians have argued, the North was finally strong enough to impose abolition on the South. Abolitionists could never have achieved military and industrial superiority without a provisional agreement to silence Congress on the slave question. By postponing the discussion of a difficult issue, in other words, a group or a nation may increase its capacity to solve the underlying problem when it can no longer be repressed.

The political divisiveness doctrine

This brief overview of efforts to keep the slave issue off the national agenda suggests the usefulness, for historical analysis, of a theory of gag rules. As a second example, offered in the same tentative spirit, consider now the question of self-government in religiously divided societies. I will be focusing here on recent constitutional disputes. While attempts to side-step the slave issue were morally questionable and ultimately unsuccessful, collective self-censorship about religious disagreements seems to be a happier arrangement all around.

Even when obviously useful for preventing sectarian conflict, legislative gag orders may be annulled if they appear repugnant to the Free Exercise Clause. But the Establishment Clause has led the Court to issue gag orders of its own. Most notably, school prayers – even silent prayers conducted on a “voluntary” basis – have been declared unconstitutional. Religious conservatives claim that the

56 According to Douglas, “the great revolution” was that the new parties “seem to be divided by a geographical line” (The Lincoln–Douglas Debates, p. 116).
57 Classically, Cantwell v. Connecticut, 310 U.S. 296 (1940), where a law construed as barring Jehovah’s Witnesses from playing anti-Catholic records in a Catholic neighborhood was declared unconstitutional.
Court has prohibited children from praying. But the Court’s intention has been only to impede children of a majority sect from harassing, embarrassing and pressuring children with different beliefs. More importantly, the school prayer rulings seem reconcilable with free exercise values because the gag orders in question are not aimed principally at children at all but rather at public employees. The government must gag itself (i.e., its functionaries) on religious questions to avoid conveying a message that the state endorses or approves any sectarian practice. To send such a message would insultingly suggest that non-adherents of the endorsed religion are second-class citizens. By refusing to be a party to sectarian controversies, public officials can not only do their jobs more effectively but can also promote an atmosphere of cross-sect cooperation essential for the proper functioning of the political processes outlined in the Constitution.

Consider, as one historical illustration, the New York state school law of 1842. A fiery, brick-heaving conflict was raging around this time between antiforeign Protestants and recent Irish-Catholic immigrants. Catholics sought public financial support for their own schools, while anti-Irish nativist forces aimed to reserve all state aid for Protestant schools. Moderate politicians agreed that “it was imperative that this disruptive issue be removed from the political arena.”59 The problem would not subside, however, unless Catholics could be appeased without Protestants being outraged. Various segmental solutions were proposed, allowing local majorities to determine the religious content of publicly financed education. But the New York legislature ultimately rejected segmentation among districts and embraced the separation between church and state: no public funding would go to schools where sectarian practices were inculcated.60 The gag rule imposed by the bill was quite narrowly targeted. Publicly paid teachers could not indoctrinate students on school premises. But religious indoctrinators remained free to practice their arts outside school walls.

60 The bill of 1842 actually contained a mixed strategy: the attempt to separate politics from religion was complemented by a concession to the religious loyalties of local majorities. Bible-reading survived the general ban on sectarian practices in the schools; but the King James version was used in Protestant areas and the Douay edition in Catholic districts (ibid., p. 189).
In this century, at least, when the Supreme Court has removed religious questions from the national agenda, it has not transferred them to local majorities: that would have been a consociational solution. Conservative and religiously inclined scholars, to be sure, claim that such a decision would have been more faithful to the Constitution. But it is difficult to believe that the Framers wished to pacify and harmonize the national political scene by fostering political divisions along religious lines within the states. In any case, a strategy of segmentation remains incompatible with the Court's present attitude towards separation between church and state. When the Court removes religious questions from the control of national majorities, it privatizes them, i.e., turns them over not to localities but to individuals.

If religion can be made into a wholly private matter, then religious attachments will no longer provide the basis for "politically salient subgroup solidarity." Political divisions will not directly reduplicate religious cleavages. The de-politicizing of religious conflict is accompanied by the desacralizing of political conflict. When both occur, the benefits of an adversarial style of decision-making begin to outweigh its dangers. The apparent ease with which a government-versus-opposition pattern has been sustained in the United States may be due not merely to the "Lockian consensus" stressed by Louis Hartz, but also to the robustness of a public/private boundary which inhibits religious antagonisms from ossifying into political oppositions.

Like other protective devices, as I said earlier, the "wall" of separation between church and state can also serve as a disencumbering strategy. On the one hand, it shelters the integrity of individual conscience. On the other hand, its contribution to social cohesion was noted from the start. Unifying a divided nation may not require a "naked public square." But a political sphere marked by general indifference to sectarian practices may well be a significant precondition for nation-building in a country such as the United States. Neutral territory - a schoolroom where all sects were debarred from stigmatizing others as un-American - seems to have played an essential role in unifying this religiously pluralistic society.

The No Establishment clause is commonly said to have denied the right to establish a church to the national government only in order to protect established churches in the states. For a counterargument, see Leonard Levy, "The original
Justice Frankfurter, calling the public school "the symbol of our democracy," advanced this argument for the democracy-reinforcing function of a secular education:

Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must be kept scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.62

In a multidenominational society, rival and exclusive religious communities pose a potential threat to inclusive political citizenship. Frankfurter did not contrast affectless legal neutrality with affective moral community. Rather, he argued that political community cannot flourish unless the government adopts a modest institutional neutrality toward all sects. In essence, by gagging indoctrinators on public premises, we can promote a sense of shared identity among Catholics, Protestants and Jews. Relieved from sectarian harassment, local religious minorities will not develop "a feeling of separatism."63 Frankfurter emphatically denies that the secularization of public life diminishes the social importance of religion. The vitality of religion in nonpolitical domains may usefully prevent citizens from deifying their country. But a nonsectarian school system can help children develop the "habits of community" 64 essential for the proper functioning of democratic institutions.

During the last fifteen years, the need to avoid political divisiveness has become a central -- although controversial -- theme of Estab-

62 McCollum v. Board of Education (1947) 333 U.S. 203, 231, 216-17. Reviewing the history of the state-church issue as it affected public education, Frankfurter also noted that "In Massachusetts, largely through the efforts of Horace Mann, all sectarian teachings were barred from the common school to save it from being rent by denominational conflict" (ibid., at 215).
63 333 U.S. 203, 227. 64 Ibid., 203, 227.
lishment Clause jurisprudence.**65 Because it may “strain a political system to the breaking point,” Judge Harlan wrote, “political fragmentation on sectarian lines must be guarded against.”**66 According to Paul Freund, too, “[w]hile political debate and division is normally a wholesome process for reaching viable accommodations, political divisions along religious lines is one of the principal evils that the First Amendment sought to forestall.” Clinching his case, Freund added that “President Kennedy, as a candidate, was able to turn off some of the questions addressed to him on church–state relations by pointing to binding Supreme Court decisions.”**67 Lucky the politician who can gag reporters by gagging himself!

A well-functioning majoritarian democracy, as political scientists, too, have argued, may require cross-cutting cleavages. Consociationalism, secession and civil war seem to become the only available options when political divisions map neatly on to religious schisms. All three solutions, however, are plainly unacceptable in the United States. Thus, a coincidence of political and religious cleavages must be avoided at all costs. Artfully crafted gag rules can be justified whenever they help prevent the consolidation of religiously defined political constituencies.

In *Lemon v. Kurtzman*,**68 the locus classicus of the divisiveness doctrine, Chief Justice Burger explicitly echoed Freund’s argument. The entanglement between church and state produced by public aid to parochial schools is dangerous precisely because of its community-splintering potential. The religious provisions of the First Amendment, too, are meant to foster democratic politics:

Ordinarily political debate and division, however vigorous or even

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**68** 403 U.S. 602 (1971).
partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect . The potential divisiveness of such conflict is a threat to the normal political process.

More concretely, "[t]o have States and communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency." If Protestants, Catholics and Jews began to battle over yearly school appropriations, the community's capacity for collective self-rule would be severely damaged. To preserve a climate of national cooperation and thus secure the majority's authority on other more pressing issues, citizens must agree to let their public officials gag themselves on religious questions.

Conservatives, worried that the general prohibition against church-state entanglement is somehow demeaning to religion, have recently raised numerous doubts about the utility of the divisiveness test. Divisiveness cannot be measured; sectarianism in America has become almost unbearably bland; sects are no different from other interest groups; the danger of explosive conflict among denominations is vanishingly remote. At the very least, the potential for divisiveness alone, without other factors, does not suffice to make a statute unconstitutional. Some antiseparationists even suggest that the idea of political divisiveness along religious lines is a twentieth-century

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69 Ibid.
70 Ibid. See also Aquilar v. Felton 105 S. Ct. 3232, 3240 (1985), Powell concurring.
71 Recall, once again, that an overriding desire for national unity is probably an essential precondition for the willingness of rival groups to set aside their differences. Only a shared concern for military security, for example, seems to have induced secular and fundamentalist Israelis to postpone any clear-cut decision about the status of religion in their country (Nadav Safran, Israel: The Embattled Ally [Cambridge, Mass., Harvard University Press, 1981], pp. 200–19).
72 Justice Rehnquist, for example, refers slightly to the "rather elusive" inquiry into divisive political potential (Mueller v. Allen 463 U.S. 388, 403, n. 11 [1983]); consider also: "The Court's reliance on the potential for political divisiveness as evidence of undue entanglement is also unpersuasive" (Aquilar v. Felton, 105 S. Ct. 3232, 3247 [1985], Justice O'Connor, dissenting); and "In my view, political divisions along religious lines should not be an independent test of constitutionality" (Lynch v. Donnelly, 104 S. Ct. 1355, 1367 [1984]).
73 Brennan concurs but stresses that political divisiveness remains a useful signal of impermissible entanglement (Lynch v. Donnelly, 104 S. Ct. 1355, 1374 [1985]).
The idea that collective self-censorship might help avert religious conflict, however, had already occurred to peace-makers soon after the Reformation split the Christian world into rival sects. To eighteenth-century philosophes, and thus to the framers of the First Amendment, it was a truism.

Another hostile critic asks: “Does a potential for even minor division justify silencing the churches in public debate over fundamental values?” But such a question reveals an elementary misunderstanding: the divisiveness doctrine requires the government to gag not citizens but itself. Religious groups and individuals can freely express their views; the government, however, is debarred from providing aid which, because it benefits one religion at the expense of other sects and of nonbelievers, would significantly deepen sectarian animosities.

More theoretically interesting is the objection that the norm of conflict avoidance exposes a society to manipulation by anyone willing to threaten conflict. In the Pawtucket crèche case, for example, the Court noted that the challenged nativity display had caused no sectarian dissension in its forty-year history. It is ludicrous for litigants to adduce their own complaint as evidence that an offending govern-

75 Free discussion exacerbates the tendency of religious opinions to become dangerously sectarian. Thus, according to Jean Bodin, “the princes of the Germans at a great assembly at Augsburg, after destructive and lengthy wars, proclaimed that there would be no more discussion about religion among Catholics and priests of the Augsburg confession. When one man rashly violated this edict, he was put to death, and the uprisings in that city were quelled up to the present” (Colloquium of the Seven about Secrets of the Sublime [Princeton University Press, 1975], p. 167). By force of tradition, most sixteenth- and seventeenth-century political theorists believed that no nation could endure part Catholic and part Protestant. But moderates and politiques eventually realized that, if salvation were conceived as a wholly private matter, a divided house could stand. The no-more-discussion rule, mentioned here, was a first and somewhat crude attempt to maintain civil order by excluding religious controversy from the public square.
77 According to the leading advocate of the divisiveness doctrine: “The State’s goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association” (McDaniels v. Paty, 435 U.S. 618, 641 [1978], Brennan, concurring).
mental action is politically divisive. Along the same lines, the goal of eliminating religious divisiveness does not justify judicial attempts to promote "safe thinking" among citizens or even among public officials. Obviously enough, anodyne and useless political discussions would result if the divisiveness test were carried to extremes.

These and similar demurrers raise some doubts about the legal future of the divisiveness doctrine. But the very debate between its advocates and its opponents confirms once again that gag rules have played (and no doubt will continue to play) a central role in the functioning of democratic political institutions.

A note on abortion

No catalogue of recent acrimonious disputes could omit abortion. Some twentieth-century Americans feel as passionately as about this issue as nineteenth-century Americans felt about abolition. Walter Berns once wrote quite sympathetically of Calhoun's desire to repress emancipationist pamphlets and petitions. More recently, he has argued that the success of the American legislative process depends upon "its ability to exclude issues - the abortion issue comes to mind - on which there can be only one winner and one loser." Those who disagree about this question do not hesitate to smear each other publicly with hate-provoking names such as "murderer." One side, at least, seems religiously motivated. There may be no room for compromise here, and little capacity for either side to listen to the other. If such a burning issue became central to the legislative process, would not Congress's capacity to solve other problems be drastically curtailed? Why waste national resources on an issue that will never command widespread consensus, when there are equally pressing problems (such as teenage pregnancy) about which everyone agrees that something should be done?

These considerations are not without weight. But persuasive arguments have also been mounted on the other side – against the wisdom

of removing the legitimacy of abortion from the legislative agenda. For one thing, dire predictions that the issue will necessarily overload and destabilize a democratic political system seem exaggerated. Furthermore, restricting the political process to a limited range of issues is never a perfectly neutral procedure. Even when agenda-narrowing is not a tool in the hands of sinister elites, it still favors some parties and disfavors others. The congressional gag rules of the 1830s and 1840s were moderate but not impartial; on balance, they were much friendlier to slaveholders than to abolitionists. Similarly, withdrawing the legality of abortion from the jurisdiction of Congress and state legislatures means affirming the status quo, i.e., resting content with a pro-choice stance. Legislatures may be compelled to adopt a “hands off” attitude; but winners and losers remain. In the case of abortion, when the Court constricted the agenda of state legislatures, it was wielding power and doing so for particular ends. Not surprisingly, some pro-life activists view wresting abortion from the Court and putting it back on the legislative agenda as their principal political objective.

Both slaveholders and abolitionists adduced unassailable rights (property rights, on the one hand, and the right to the fruits of one’s labor, on the other). These rights were considered indefeasible, regardless of how political majorities happened to vote. Douglas’s position fell between the two rights-based views: let the people of each state decide by majority rule. An uncannily similar pattern reappears in the abortion debate. Each side asserts an indefeasible right (the fetus’s right to life and the woman’s right to choose). This time, the intermediary position is occupied by Justice White: “Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people.” The Court, in other words, should loosen its grip on the abortion question and consign it to majority rule in the states.

In Roe v. Wade, the Court decided to take the issue of abortion out of legislative hands. On the basis of a fundamental right to privacy, it assigned the right to decide to the individuals directly involved. But

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82 This is more or less the conclusion of The Abortion Dispute and the American System, edited by Gilbert Y. Steiner (Washington, D.C., Brookings, 1983).
83 But not the question of whether federal funds should be used to pay for abortions.
Roe also reallocated power from state legislatures to the Court. As a result, all sides in the dispute now argue for the moral, legal and political appropriateness of some sort of gag rule. Differences arise only over which branch of government should be gagged. What I have described as the intermediate position is antijudicial and deferential toward local majorities. From the divisiveness of the issue, Justice White interestingly concludes that abortion must be handled legislatively rather than judicially. The Court should gag itself because, by constitutionalizing such an explosive issue, it not only has thrown the legitimacy of judicial review into question but also has polarized the national community more radically than if it had allowed the problem to be solved on a decentralized basis by ordinary processes of pluralistic bargaining. Far from dampening conflict, Roe exacerbated a diffuse and latent antagonism, drawing it on to the national scene. After the decision, tempers flared and battle fronts hardened. Keeping abortion off the legislative agenda, far from consigning it peaceably to the domain of private conscience, has given it higher visibility on the agenda of public agitation and discussion. Removing abortion from the Court’s docket might conceivably be a more effective political sedative than deleting it from the legislative agenda of the states.

In contrast to White, pro-life and pro-choice advocates cannot, on principle, consistently defer to the opinions of local majorities (or national ones, for that matter). Despite the tactics and rhetoric of antiabortion forces, they do not believe that a fetus’s right to life hinges upon the election-day behavior of voters. Pro-life advocates, it is true, wish they could have gagged the Roe Court. But (apparently unlike White), they would welcome a judicial decision which declared abortion unconstitutional and, in a gagging maneuver, denied state legislatures any further power to authorize or fund it.

Like the slavery controversy, though on a less tragic scale, the abortion dispute raises questions about the wisdom of political self-censorship. It, too, underlines the lesson that gag rules, although often presented as impartial measures serving the cause of communal peace, can easily be turned into weapons in a partisan struggle.
Proscribing creationist legislation

In *Epperson v Arkansas*, the Court overturned a state law prohibiting the teaching of Darwin’s evolutionary theory in public schools and universities. The majority justified its decision on the grounds that “fundamentalist sectarian conviction was and is the law’s reason for existence.” Antievolution statutes, in other words, were declared to breach the wall of separation. Only because they interpret Genesis in a literalist manner have fundamentalists attempted to gag schoolteachers who would otherwise teach Darwinist theories as a matter of routine.

In his separate opinion, Justice Black suggested that a community could justifiably side-step this problem by deleting all mention of the development of the human species from classes in biology. Banning evolutionary theory on religious grounds violates the Establishment Clause. But state governments have a right to withdraw emotional subjects from the school curriculum; and nothing prohibits a blanket vow of silence designed to reduce disruptive conflict in the classroom. In Black’s view, in sum, there is nothing objectionable about a community’s self-muzzling decision that “it would be best to remove this controversial subject from its schools.”

For a student of self-imposed gag rules, *Epperson* is interesting for another reason as well. What would be the indirect effect upon democratic government if majorities were allowed to rewrite scientific textbooks? The rationalist outlook central to the development of seventeenth-century science had a decisive influence on the shaping of seventeenth-century parliamentary institutions. Could challenging the autonomy of science inadvertently threaten one of the essential preconditions of democratic government?

According to Robert Bork, what majorities are not allowed to do must be left up to individual freedom. To protect democracy against

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85 393 U.S. 97 (1968).  
inherent self-destructive tendencies, the Court must defend the right of individuals to engage in political speech. Because most speech is not political, however, most speakers remain constitutionally susceptible to majoritarian censorship and control. Bork’s ultimate concern here is to justify gag orders which his more squeamish colleagues are loath to impose: the Constitution is not a suicide pact, and the government has a right to silence anyone advocating its forcible overthrow. Generalizing about the need to gag the talkative, Bork adds: “Government cannot function if anyone can say anything anywhere at any time.” En passant, he also denies that the Court has a right to protect scientific inquiry against majority rule. He even suggests that, constitutionally speaking, scientific conclusions are a matter of taste; and on questions of taste, the Court should remain aloof and allow majorities to have their way. If he retreated from this implausible claim, moreover, Bork would have only one available alternative: the discovery and propagation of scientific truths must be left to “individual freedom.”

How adequate to the creationism controversy is this dichotomy between majority rule and individual freedom? For one thing, scientific theories are not preferences. Science is not an interest group (even though scientists may sometimes act like one); and the outcome of a scientific inquiry is not a free choice. Science has a logic and dynamic of its own; and its results cannot simply be “adjusted” to personal or political demands. By the Enlightenment standards on which our constitutional settlement was based, a community’s attempt to compel scientific outcomes congenial to its nonrational attachments should probably be described as a form of self-injury. Creationists doggedly reinterpret fossil evidence to make it accord with their reading of Genesis. The conclusion they want to reach is fixed beforehand and is, in principle, a conclusion which no counterevidence could ever lead them to revise. Why not view the Court’s prohibition against creationist tampering with textbooks in this light? Keeping scientific

90 Ibid., 21. 91 Ibid., 20, 28.
92 As is well known, some philosophers dispute the rationality of the process of scientific inquiry. But even Paul Feyerabend would be able to tell the difference between a criminal justice system in which the verdicts were set in advance and one where prejudgments were at least conceivably revisable in the light of evidence.
conclusions off the majority's agenda may protect "reason" itself, rather than merely individual freedoms. How could the scientific method, in a minimal sense of the examination of embarrassing facts and the hearing of rival viewpoints, be overridden without undermining an essential element of democratic government itself?

Keeping scientific results off the political agenda (and thus beyond indirect religious control) may allow a nation to shelter the preconditions of rational debate. A gag rule of some sort is obviously required to defend the integrity of science – and its standards of evidence, argument, inference and disproof – from nonrational attachments. To prohibit creationist legislation may also be to defend democracy from itself. A majority should be empowered to act for the nation, one might say, only if its religious motivations are neutralized constitutionally. By invalidating creationist legislation, arguably, the Court (implicitly, if not explicitly) intended to confer authority on what the Framers called the deliberate sense of the community, that is, on the opinions the majority holds when it discusses matters in a consecutive, disciplined, fact-minded and thoughtful way.

When a decision is withdrawn from national majorities, it may be consigned either to local majorities or to individuals: what majorities are not allowed to do must be left to individual freedom. But the creationist case raises a third alternative. Decisions may be withdrawn from all branches and levels of government and from individuals as well. The proper "place" for discussing evolution and determining the contents of biology textbooks is the social system of science, a system which operates under imperatives other than maximizing the independence and preference-satisfaction of its individual practitioners and which is largely indifferent to majority opinion. The Constitution nowhere mentions the autonomy and authority of science. But if the Court must protect the preconditions of democratic government, can it be completely oblivious to the attitude toward truth inculcated in public schools? In any case, neither Establishment Clause concerns nor the need to protect political speech and individual autonomy seem sufficient to explain what seems to be a rationally defensible countermajoritarian ban on antievolution statutes.
Some problems and a cautionary tale

While substantial, especially in divided societies, the benefits of agenda-narrowing are usually accompanied by significant drawbacks. Democracy is not only made possible but also made imperfect by a systematic thinning out of the issues under majority control. In a majoritarian democracy within a unified nation, bowdlerizing the legislative agenda will inevitably trivialize public life and drain it of human significance. To remove all issues of high moral importance and assign them to individual conscience or even to the courts may make democratic politics unbearably bland and useless as an arena for national self-education. Gag rules, moreover, are seldom neutral; they implicitly support one policy and undermine alternatives. Suppressing a theme may surreptitiously insure the victory of one party over its rivals. Finally, the strategy of avoidance can exacerbate pent-up social tensions, eventually engendering terrorism or a revolutionary explosion by denying legitimate expression to deeply felt beliefs.

At first glance, it seems reasonable to skirt an issue which promises to unleash paralyzing hostilities. Such evasiveness has serious disadvantages, however. For one thing, conflict-averseness makes a group hostage to anyone willing to threaten conflict. Prickliness and unwillingness to compromise may be feigned. If a group openly declares conflict-avoidance to be its highest priority, it invites the power-hungry strategically to misrepresent their preferences. Indeed, intractable conflict is not merely an independent variable to which gun-shy groups respond by imposing vows of silence on themselves. If a group habitually gags itself on divisive issues, it will give individuals and subgroups a powerful incentive for bluffing. If threats trigger collective silence, threats will be forthcoming. Willingness to yield will never pay; shortness of temper will always be rewarded. By redescribing their annoyance as utter horror, individuals and subgroups can prevent issues from being raised which could otherwise, and more justly, be resolved by compromise. Indeed, a policy of self-gagging may eventually produce a culture where the threat of violence or secession is a common political tactic.

Finally, the dangers of founding a relationship on a suppressed theme is strikingly illustrated in a tale recounted by Gregory of Tours.
Two noblemen could only remain friends and reveling companions so long as they kept silent about the embarrassing fact that, years earlier, Sichar had butchered Chramnesind’s family. One evening, the healing silence was broken:

Sichar drank far more wine than he could carry and began to boast at Chramnesind’s expense. He is reported to have said: “Dear brother, you ought to be grateful to me for having killed off your relations. There is plenty of gold and silver in your house now that I have recompensed you for what I did to them. If it weren’t for the fact that the fine I’ve paid has restored your finances, you would still today be poor and destitute.” When he heard Sichar’s remarks, Chramnesind was sick at heart. “If I don’t avenge my relatives,” he said to himself, “they will say that I am as weak as a woman, for I no longer have the right to be called a man!” Thereupon he blew the lights out and hacked Sichar’s skull in two.93

Like the peaceful coexistence of slave and free states, the precarious companionship of Sichar and Chramnesind was destined not to last. An individual’s thirst for wine, like a nation’s thirst for expansion, may irreversibly destroy a long-established etiquette of omission. To win otherwise unattainable cooperation, people voluntarily muzzle themselves about divisive topics. Self-gagging may be a short-lived experiment, however. From moment to moment, there can be a return of the repressed.

Conclusion
Communities, like individuals, can silence themselves about selected issues for what they see as their own good. Although seldom studied in a systematic manner, strategic self-censorship seems to be an almost universally employed technique of self-management and self-rule. While somewhat slippery and difficult to control, the idea of gag rules, as I have been discussing it, does focus attention usefully on the advantages and disadvantages shared by widely varying techniques of

issue-suppression. As a result, the concept may well become a serviceable tool for comparative analysis.\textsuperscript{94} To show how such a conception might be developed theoretically and applied to a few important cases has been the principal purpose of this chapter.

Many questions, of course, remain unanswered. Under what cultural and psychological conditions, for example, can gag rules be adhered to successfully? Normative theorists, on the other hand, will want to know when gag rules can be morally justified. Can we provide a principled rationale for removing one issue rather than another from the community’s or an individual’s agenda? While the slave issue could not (and should not) have been permanently suppressed, religious disagreements probably can (and should) be. I believe this, but can I explain it? On the abortion question, opinions differ about the advisability of gag rules – just as they do on every other aspect of the issue. In general, so it seems, the foregoing discussion emphasizes only the moral ambiguity of strategic self-censorship. To prevent overload, all individuals and groups must suppress some controversial problems. An essayist, for instance, may have no choice but to relegate an unanswerable question to a perfunctory conclusion where he can shiftily “postpone” it to a later work. But issue-avoidance, however attractive, will always be one-sided and potentially dangerous. We can neither dispense with gag rules nor allay the guilty consciences they inevitably produce.

\textsuperscript{94} For an interesting example, see Beryl L. Bellman, \textit{The Language of Secrecy} (Rutgers University Press, 1984).