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ARTICLES

PARTICIPATORY DEMOCRACY AND FREE SPEECH

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I begin with the premise that interpreting the First Amendment involves explicating our national dedication to freedom of expression. The task is not to determine what is "in the abstract" the best possible theory of freedom of speech but instead to offer the best possible account of our actual historical principles. The authority of these principles is a collective achievement that endows the First Amendment with legitimacy. It does not flow merely from logic or reason but rather from "the Nation's commitment to protect freedom of speech."[1] Determining the meaning of this commitment involves reflective equilibrium; it requires us to interpret our history in light of our best ideals while simultaneously reexamining our ideals in light of our actual history.

Communication is a pervasive human behavior. If every state regulation touching on what we call, in ordinary language, "communication" were to be subject to constitutional review under the standards of the First Amendment, large swaths of perfectly common forms of regulation would be constitutionalized. (Think here of the law of contracts.) This is not our practice. Nor would it be desirable. It follows that the First Amendment does not and should

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[1] Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 581 (1995).

not protect "speech as such," as Justice Souter once put it.[2] It also follows that First Amendment doctrine cannot rest merely on a suspicion that government ought not to be trusted to regulate what, in ordinary language, we call communication, as has at times also been suggested.

It is helpful to begin with a distinction between the "scope" of the First Amendment, which designates when government regulation should be subject to constitutional scrutiny under the specific standards of First Amendment doctrine, and the "protection" of the First Amendment, which designates when speech is actually immune from government regulation.[3] If the scope of the First Amendment does not extend to speech as such, then what defines its boundaries? It makes sense to conclude that the scope of the First Amendment extends only to those forms of speech (or regulation) that implicate constitutional values.[4] There are presently three major candidates for such values: (1) the creation of new knowledge; (2) individual autonomy; and (3) democratic self-government.

The creation of new knowledge, which often goes under the appellation of the "marketplace of ideas," is a process that requires both freedom of thought and disciplined application of existing standards. Freedom of thought by itself creates merely anarchy. Freedom of thought is transmuted into new knowledge only when it is integrated into those forms of social practices that define and establish knowledge. Typically, such practices depend upon positive intellectual virtues like respect, reason, fairness, accuracy, integrity, honesty, logic, and civility. The fusion of critical freedom with the discipline of these virtues characterizes all contemporary

[2] Glickman v. Wileman Bros. & Elliot, 521 U.S. 457, 478 (1997) (Souter, J., dissenting).

[3] In this regard, see the distinction of Professor Fred Schauer between the "coverage" and the "protection" of the First Amendment. Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265, 267–70 (1981).

[4] I have elsewhere argued that the scope of the First Amendment is defined in reference to specific government regulations, particularly to "what conduct" a particular government regulation seeks to control and to "why" a particular government regulation has been enacted. These logically distinct inquiries refer roughly to the object and purpose of a government regulation. See Robert Post, Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249, 1255–56 (1995).

social structures that are actually dedicated to the creation of new knowledge, from universities to scientific journals.

Standard First Amendment doctrine is unsuited for the creation of new knowledge. This is because First Amendment doctrine is deeply hostile to all censorship based upon viewpoint-based discrimination, as well as to content-based discrimination. Indeed, "The First Amendment recognizes no such thing as a 'false' idea."[5] The creation of knowledge, however, depends upon practices that continually separate the true from the false, the better from the worse.

Alexander Meiklejohn was quite correct to conclude that, within ordinary First Amendment doctrine, there is an "equality of status in the field of ideas."[6] The value of equality, however, attaches to persons, not to ideas. The strong theme of equality in First Amendment jurisprudence is thus best interpreted as expressing ethical or political values, rather than cognitive values. One such ethical value that stresses equality is the Kantian commitment to the equal dignity of persons to be governed by their own sense of reason. This is often formulated as the constitutional value of autonomy, which is sometimes referred to as "self-fulfillment" or "self-expression." From the perspective of this value, the First Amendment regards all ideas as equal because all ideas equally reflect the autonomy of their speakers, and because this autonomy deserves equal respect.

There is no doubt that this form of liberal autonomy has deep roots in American constitutionalism, and it is clear that its influence can be detected in First Amendment doctrine. But in my view this value is not especially helpful in explaining the actual scope of the First Amendment; nor, in my view, is it particularly helpful in normatively explaining what this scope ought to be. I offer three reasons.

First, the value of autonomy extends not merely to the speech of persons but also to the actions of persons. This suggests that the value of autonomy is not unique to speech but instead extends to the full libertarian protection of personal action. From this per-

[5] Hustler Magazine v. Falwell, 485 U.S. 46, 51 (1988).

[6] Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1948).

spective, the First Amendment ought to be interpreted as merely one instance of a more general libertarian constitutional commitment. Although concern for autonomy is detectable in various constitutional situations, it is far from a master principle. It is not even given sway in the area of free exercise of religion.[7] If this value were the force behind First Amendment rights, it would be odd indeed to discover that it finds full expression only in the area of freedom of expression. Because both speech and autonomy are pervasive, using the value of autonomy to protect speech creates the distinct risk of Lochnerism.

Second, there are many situations in which the autonomy of a speaker conflicts with the autonomy of an audience. Examples include defamation, invasion of privacy, insults, fighting words, outrageous infliction of emotional distress, professional medical and legal advice, and so on. If autonomy were the master value by which First Amendment doctrine were to be interpreted, the doctrine would lack resources to resolve such conflicts. Yet the systematic resolution of these conflicts is the bread and butter of First Amendment doctrine.

Third, there are many common situations in which the autonomy of a speaker and the harm done by speech remain constant, and yet First Amendment analysis appears to depend upon values extrinsic to either harm or autonomy. Consider defamation.

Situation 1:	Speaker *A* defames Individual *C*, a private person, about a matter of private concern.
Situation 2:	Speaker *B* defames Individual *D*, a public official.

It makes no difference that the autonomy interests of Speaker *A* and Speaker *B* are equal or that the damage done to the reputations (or autonomy) of Individuals *C* and *D* is equal. Basic First Amendment doctrine will nevertheless award little or no protection to the expression of Speaker *A* but a great deal of protection to Speaker *B*. This difference cannot turn on the value of autonomy. This kind of situation repeats itself frequently within First Amendment doctrine. Consider, for example, cases like *Connick v.*

[7] Employment Div. v. Smith, 494 U.S. 872, 882 (1990).

Myers,[8] *Bartnicki v. Vocker*,[9] *Hustler Magazine v. Falwell*,[10] and, most recently and dramatically, *Snyder v. Phelps*.[11] In such situations the value of autonomy remains constant, but the scope of First Amendment doctrine varies according to values that are extrinsic to autonomy.

These objections hold true even if—in the manner of Professor Tim Scanlon—we apply the value of autonomy to an audience rather than to a speaker. Consider a simple case: a dentist wishes to advise his patients to remove their silver fillings because he believes that the mercury contained in the fillings can damage their health.[12]

Circumstance 1: The dentist proclaims this message to the world, including his patients, in a TV or radio interview or through the medium of a newspaper editorial.

Circumstance 2: The dentist provides this advice to a particular patient or patients in the course of treatment and in the context of a dentist-patient relationship.

The autonomy interest of the dentist as a speaker is equal in Circumstances 1 and 2; the autonomy interest of the audience to receive the information is equal in Circumstances 1 and 2. Yet, under standard First Amendment doctrine, the dentist's speech in Circumstance 1 is within the scope of the First Amendment, but his speech in Circumstance 2 is outside the scope of the First Amendment.[13] Were it otherwise, all of physician malpractice, which often occurs through forms of communication, would be constitutional-

[8] 461 U.S. 138 (1983).

[9] 532 U.S. 514 (2001).

[10] 485 U.S. 46 (1988).

[11] 131 S. Ct. 1207 (2011).

[12] This case, *Bailey v. Huggins Diagnostic & Rehabilitation Center, Inc*., 952 P.2d 768 (Colo. App. 1997), is discussed in Robert Post, Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech, 2007 U. Ill. L. Rev. 939, 947 n.38.

[13] I am referring here to the scope of the First Amendment, not to its protection, so I mean by this observation that the dentist in Circumstance 2 will be subject to malpractice regulation without having this regulation subject to First Amendment scrutiny. Circumstance 2 is not a case in which the importance of the health interest of the patient outweighs whatever First Amendment safeguards may attach to the dentist's speech. It is a case in which there are no such safeguards at issue at all.

ized.[14] Notice also that, from the perspective of the value of creating new knowledge, the constitutional value of the speech is equally important in Circumstance 1 and Circumstance 2.

Examples like this can be multiplied indefinitely, and they suggest that the structure of First Amendment doctrine is responsive to a value other than autonomy (or than the creation of new knowledge). In my view, the best possible explanation of the shape of First Amendment doctrine is the value of democratic self-governance. Many who advocate this value, like Meiklejohn, Professor Owen Fiss, and Professor Robert Bork, believe that the value of democratic self-governance lies in informed democratic decision making. They therefore believe that the value attaches to the audience of speech rather than to speakers. For reasons that I have explained at length in many places, I believe that this account of democratic self-governance is mistaken.[15] It identifies democracy with collective decision making rather than with self-governance.

Democracy involves far more than a method of decision making; at root democracy refers to the value of authorship. Democracy refers to a certain relationship between persons and their government. Democracy is achieved when those who are subject to law believe that they are also potential authors of law. Elections and other mechanisms that we ordinarily associate with democratic decision making are simply institutions designed to maximize the likelihood that this relationship obtains.

The value of democratic legitimation occurs, as Habermas and many others have theorized, specifically through processes of communication in the public sphere.[16] It requires that citizens have access to the public sphere so that they can participate in the formation of public opinion, and it requires that governmental decision making be somehow rendered accountable to public opinion.[17] This analytic structure is capable of providing guidance to aspects

[14] With the qualifications noted in Post, supra note 12, at 989.

[15] Robert Post, Democracy and Equality, 603 Annals Am. Acad. Pol. & Soc. Sci. 24, 25 (2006); Robert Post, Equality and Autonomy in First Amendment Jurisprudence, 95 Mich. L. Rev. 1517, 1524 (1997) (book review).

[16] Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy app. I, at 472–77, 486–90 (William Rehg trans., Polity Press 1996) (1992).

[17] These conditions are necessary for democratic legitimation; they are not sufficient.

of First Amendment doctrine in ways that the autonomy theory is not.

The value of democratic self-governance theorizes First Amendment protections in terms of the importance of participating in the formation of public opinion, which is understood as a form of communicative action. It thus contains within it the capacity to distinguish between speech and action, which autonomy theory does not. Democratic theory categorizes as "speech" those speech acts and media of communication that are socially regarded as necessary and proper means of participating in the formation of public opinion. For purposes of clarity, I shall henceforth refer to these speech acts and media as "public discourse." Public discourse is presumptively within the scope of the First Amendment.

The function of public discourse is to enable persons to experience the value of self-government. Within public discourse, therefore, persons should be regarded as autonomous in many of the ways that autonomy theory would predict. But because the source of this autonomy is political, rather than ethical, persons outside public discourse are not necessarily regarded as autonomous. The law properly regards neither the dentist nor the patient in Circumstance 2 as autonomous. The dentist is regarded as a fully accountable professional; the patient as a person dependent upon the fiduciary responsibility of the dentist. Because there are many, many social relationships outside public discourse in which the law properly does not regard persons as autonomous actors, speech in such relationships is frequently outside the scope of the First Amendment. Consider the relationship between manufacturer and consumer, between lawyer and client, or between teacher and student. Such relationships are commonly regulated in ways that are inconsistent with the basic premise of autonomy theory, which requires persons be afforded the right to assert independence from social relationships *as well as* from state regulation. On the account I am offering of the value of democratic self-governance, by contrast, such social relationships are constitutive of First Amendment analysis.

Speech is typically categorized as within or as outside of public discourse according to whether it occurs within social relationships that are regarded as requiring autonomy or interdependence. It is this distinction that separates Situation 1 from Situation 2. In the

latter, Speaker *B* is participating in public discourse, which we understand to require that speakers be regarded as autonomous. "Public men," as the Court once observed, "are, as it were, public property."[18] Situation 1, by contrast, is outside public discourse, because in the absence of special circumstances, we wish to regard persons as socialized and as interdependent. For this reason we allow the law to be used in Situation 1 to protect private reputation. It follows that Speaker *A* can be held legally accountable: the law subordinates his autonomy to speak.[19] This is true even though the autonomy of the speaker is equally at stake in Situation 1 and Situation 2, and even though the harm caused by the speech in the two situations is otherwise identical.

The presumption of autonomy within public discourse follows from the primacy of the value of democratic self-governance. This is a common structure in First Amendment jurisprudence, as is evidenced by cases like *Connick*, *Bartnicki*, *Hustler*, and *Snyder*, which explicitly base their holdings on whether the speech act in question should or should not be regarded as part of the formation of democratic public opinion. Speakers participating in public discourse are constitutionally presumed to be engaged in the formation of public opinion, to the end of making government responsive to their views. All citizens within public discourse, and their audiences within public discourse, have equal autonomy in this regard, which reflects the political equality that all citizens enjoy within a democracy.

It is this equality that underwrites the First Amendment doctrine's refusal to distinguish between good and bad ideas, true or false ideas, or harmful or beneficial ideas. The equality of status of ideas within public discourse follows directly from the equality of

[18] Beauharnais v. Illinois, 343 U.S. 250, 263 n.18 (1952).

[19] For a full account, see Robert C. Post, Between Democracy and Community: The Legal Constitution of Social Form, *in* Democratic Community: NOMOS XXXV 163, 181 (John W. Chapman & Ian Shapiro eds., 1993) [hereinafter Post, Democratic Community]; Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v. Falwell*, 103 Harv. L. Rev. 601, 684 (1990) [hereinafter Post, Constitutional Concept]; Robert C. Post, The Social Foundations of Defamation Law: Reputation and the Constitution, 74 Cal. L. Rev. 691, 733–37 (1986); Robert C. Post, The Social Foundations of Privacy: Community and Self in the Common Law Tort, 77 Cal. L. Rev. 957, 995–97 (1989).

political status of citizens who attempt to make the government responsive to their views. Outside public discourse, by contrast, the state typically distinguishes true from false ideas, as when physicians or lawyers are held liable for false or misleading opinions.

Outside the domain of public discourse, the state frequently regards the relationship between speakers and their audiences as one of dependence and reliance, so that speakers are held strictly to account for false or misleading ideas. Think here of the law of product liability for failure to warn. Because, within public discourse, the political imperatives of democracy demand that speakers and their audiences be regarded as presumptively autonomous, the rule of caveat emptor reigns.

Within public discourse, speech may almost never be compelled, because such compulsion would compromise the value of having each person attempt to make public opinion responsive to his or her own views; outside public discourse, however, speech is routinely and widely compelled.[20] These sharp distinctions in the treatment of speech are inexplicable on any account of the First Amendment that does not ultimately ground itself on the political prerogatives of self-government.

The boundary between public discourse and nonpublic discourse is, as I have argued, ultimately a normative one.[21] If a private in the army writes a letter to his Senator condemning the actions of his commanding officer, the question of whether the letter should be characterized as public discourse, or instead as insubordinate speech within an organization, is a matter of normative constitutional characterization.[22] Such boundary questions frequently arise, and the value of autonomy does not help us to explain or understand them. By contrast, the value of democratic self-governance illuminates the normative stakes in such cases.

Those who embrace the value of democratic decision making as explaining the basic thrust of First Amendment doctrine sometimes assert, following Meiklejohn's early writings, that speech cannot come within the scope of the First Amendment unless it

[20] Robert Post, Compelled Subsidization of Speech: *Johanns v. Livestock Marketing Association*, 2005 Sup. Ct. Rev. 195, 213–16.

[21] See Post, Constitutional Concept, supra note 19, at 668–72.

[22] Robert C. Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. Rev. 1713, 1807 (1987).

concerns the subject matter of democratic decision making.[23] If one accepts, however, the value of democratic self-governance, speech comes within the scope of the First Amendment whenever it is included within public discourse, because the constitutional value at stake is participation in the effort to change public opinion. Public discourse includes all communicative processes deemed necessary for the formation of public opinion. Art and other forms of nocognitive, nonpolitical speech fit comfortably within the scope of public discourse. Public discourse depends upon the maintenance of a public sphere, which is a sociological structure that is a prerequisite to the formation of public opinion. Media like newspapers are major components of this structure and indeed are the historical grounds for its emergence. This is why First Amendment doctrine typically regards communication within recognized media as presumptively within public discourse and hence within the scope of the First Amendment.

Speech outside public discourse may also on occasion be invested with First Amendment value. Where speech which is not otherwise in public discourse conveys information or knowledge that is valuable for the formation of public opinion, its communication may come within the scope of the First Amendment. But the forms of constitutional protection extended in such circumstances have a very particular character: they protect the right of persons to receive information, not the autonomous right of speakers to convey that information. They thus allow content discrimination, state censorship on the basis of truth or falsity, and the compulsion of expression in order to ensure that communication is not misleading. First Amendment safeguards extended to commercial speech are a good example of such protections.[24] Such safeguards, in fact, are analogous to those that would follow from a Meiklejohnian model of the First Amendment.

There are also occasions in which speech whose content is about matters of public concern is communicated by a speaker who is not constitutionally regarded as a participant within the process of self-governance. *Red Lion Broadcasting Co. v. FCC*, for example, is a

[23] Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 20–26, 30–35 (1971).

[24] See Robert Post, The Constitutional Status of Commercial Speech, 48 UCLA L. Rev. 1, 28 (2000); Post, supra note 12, at 949.

case in which broadcast media are regarded as fiduciaries for the speech of others, rather than as speakers in their own right.[25] Because the case does not categorize broadcast media as exercising their own right of democratic participation, it does not bring them within the scope of the First Amendment. Instead, it regards them as proxies for the First Amendment rights of their audiences to receive information relevant for public discourse. Under the conceptual structure of *Red Lion*, therefore, broadcast media are subject to special forms of First Amendment doctrine that follow the prescriptions of a Meiklejohnian model.[26]

The most normatively desirable account of the First Amendment is to conceive its fundamental purpose as protecting the processes of opinion formation that are necessary for democratic self-governance. The purpose of fostering a marketplace of ideas is an implausible goal of First Amendment doctrine because new knowledge cannot be created without the concomitant power to judge ideas as true or false, as better or worse. The authority of such discrimination is routinely exercised by any editor of any scientific journal or by any academic department responsible for evaluating a tenure case. To accord such power to the government for communication within public discourse would not be acceptable. It would be inconsistent with the overriding value of democratic accountability. The First Amendment has traditionally been dedicated to the creation of free public *opinion*, not to the creation of public knowledge.

The purpose of protecting autonomy is not a useful foundation for First Amendment doctrine because it contains no intrinsic distinction between speech and action, and therefore it cannot helpfully define the scope of the First Amendment. The value of autonomy is potentially at stake whenever human beings act or speak, which implies that virtually all government regulation is po-

[25] 395 U.S. 367, 386–90 (1969).

[26] The Court has had a great deal of difficulty maintaining the consistency of this conceptual structure. See Robert C. Post, Subsidized Speech, 106 Yale L.J. 151, 152 (1996). Professor C. Edwin Baker proposes that this conceptual structure be extended to all media, at least to all media with corporate form. See C. Edwin Baker, The Independent Significance of the Press Clause Under Existing Law, 35 Hofstra L. Rev. 955, 985–1013 (2007). I do not see any conceptual objection to this proposal, with the conspicuous exception that it is radically inconsistent with the historical treatment extended to corporate entities outside the broadcast media.

tentially subject to constitutional review. This is the essential vice of Lochnerism. The value of autonomy lacks resources to adjudicate the many situations in which the autonomy of speakers and the autonomy of audiences are in tension.

The value of democratic self-governance is desirable because democracy is commonly agreed to be a central constitutional value. It is desirable because it both permits the autonomy necessary for self-governance and the paternalism necessary for any well-run administrative state. It is desirable because it permits the values of dignity and civility to be enforced outside of public discourse and hence authorizes law to define the boundaries of public discourse in ways that accord appropriate scope to these indispensable values. Democracy cannot survive without maintaining this delicate balance.[27] Interpreting the First Amendment according to the value of democratic self-governance allows this necessary balance to be squarely faced and theorized.

Of course, there are difficult normative problems that attend the interpretation of the First Amendment according to the value of democratic self-governance. Because the boundaries of public discourse are inherently normative, value judgments must be made about the forms of speech that are and are not necessary for the maintenance of democracy. No First Amendment jurisprudence can proceed in the absence of such value judgments, but they are, in the last analysis, the value judgments that we ought to be making.

I do not contend that the value of democratic self-governance can explain all First Amendment decisions. Our constitutional jurisprudence is too sprawling and messy to sustain any such claim. I argue instead that this value best corresponds to the major outlines and structure of our inherited decisions and that it is independently desirable as a constitutional principle. There are no doubt some decisions, like *Stanley v. Georgia*, that can be explained only by reference to the value of autonomy.[28] As the bureaucratic grip of the state grows ever more firm around the contours of private life, it may even be the case that the value of autonomy will increase in constitutional importance. I do not wish to argue that such cases

[27] Post, Democratic Community, supra note 19, at 180.
[28] 394 U.S. 557 (1969).

are wrongly decided. I do not wish to argue that values like autonomy should play no role at all in First Amendment doctrine.

Instead, I believe that the First Amendment commitments we have historically inherited plainly place the protection of public discourse at the core of the First Amendment and that we might imagine that competing "theories of the First Amendment can be arranged according to a 'lexical priority.'"[29] When theories of the First Amendment conflict with each other, courts must decide the order in which such theories should take precedence. Historically speaking, the theory of democratic self-government has been preferred. Theories like "individual self-fulfillment," or even the marketplace of ideas, are not powerful because they cannot independently explain many decisions whose outcomes are not also required by lexically prior theories.

This way of conceptualizing the relationship of doctrine to theory accepts that we shall always have inconsistent regimes of First Amendment doctrine, but it also promises that this inconsistency can itself display a certain kind of order. The rules of the participatory theory will be imposed when required by that theory; the rules of the Meiklejohnian perspective will be imposed when required by that perspective and not incompatible with the participatory theory; the rules of autonomy theory will be imposed when required by that theory and not incompatible with the participatory and Meiklejohnian approaches; and so forth.

[29] Robert Post, Reconciling Theory and Doctrine in First Amendment Jurisprudence, 88 Cal. L. Rev. 2353, 2373 (2000).

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