DEMOCRATIC PARTICIPATION AND THE FREEDOM OF SPEECH: A RESPONSE TO POST AND WEINSTEIN

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I think it is useful to search for a theory that has as one of its justifications its superior fit with either the case law or the fundamental commitments and shared understandings of the political community, preferably with both. So even if someone were to convince me that she has in hand a normatively superior theory of free speech, whether grounded in the commitment to democracy or otherwise, I would still be interested in what Professors Post and Weinstein are trying to do.

Why exactly is that? Partly because the explanatory project introduces one kind of discipline that can stimulate normative insights and judgments that might not be forthcoming in a zero-based normative inquiry. Also, the kind of normative analysis that law professors undertake is almost inevitably of the second-best variety. For lack of training and temperament, few of us are capable of the purest forms of truth seeking. For the most part, our principal audiences give considerable weight to ease of explanation and comprehension, feasibility of implementation in an imperfect institutional environment, path-dependent intuitive appeal, and the like. These expectations and demands shape our thought processes even when we are not operating in explanatory mode. Moreover, rationalization can be a socially functional enterprise, at least when it does not entirely preempt or crowd out independent critical evaluation. So I am ready to engage Post and Weinstein on their own terms, broadly speaking, just as I would be happy to engage on their own terms others who advance normative theories that make no claim to explain any part of the inheritance.

I say "broadly speaking" because I think it is an interesting question what kind and degree of fit are necessary for the purpose of the project that Post and Weinstein have undertaken. How detailed or specific a template must the theory explain? Both authors

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invoke our nation's widely agreed-upon commitment to "democracy" as a reason to give lexical priority in First Amendment analysis to the value of the equal opportunity of each citizen to participate in the formation of those dimensions of public opinion that shape governance.[1] This commitment to "democracy" does not, however, lead them to give nearly as much weight to the value of generating all the information that at least some responsible segments of the electorate would find relevant to their voting decisions. They argue for the prioritization of participation at least partly on explanatory grounds—not only on the ground that the case law supports their claim of priority but also on the ground that the basic commitment to democracy does.[2] It is not obvious, however, that a commitment to democracy entails a commitment to prioritize participation in the strong way that both Post and Weinstein suggest.

I concede that certain aspects of the nation's history of working out the meaning of its commitment to democracy—most notably the pattern of continually expanding the franchise by constitutional amendment[3]—might imply that participation is a special concern: broadening the electorate may or may not lead to better-informed voting, but it certainly enhances participation. Moreover, popular folklore about what it means to live in a democracy emphasizes citizen empowerment, although mainly empowerment by virtue of the vote rather than the soapbox. Then again, the fact that the par-

[1] Robert Post, Participatory Democracy and Free Speech, 97 Va. L. Rev. 477, 486 (2011) ("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."); James Weinstein, Participatory Democracy as the Central Value of American Free Speech Doctrine, 97 Va. L. Rev. 491, 497 (2011) ("While vigorous disagreement persists about what other values might also be central to the First Amendment, . . . at least one such core norm is democracy. . . . [T]his core precept recognizes the right of every individual to participate freely and equally in the speech by which we govern ourselves.").

[2] Post, supra note 1, at 487 (suggesting that alternative theories "would be inconsistent with the overriding value of democratic accountability"); Weinstein, supra note 1 at 505 ("I want here to slightly refine Redish's and Michelman's observations by claiming that the consensus they identify extends not just to democracy writ large but also embraces an uncontestable right of each individual to free and equal participation in the political process . . . .").

[3] U.S. Const. amend. XV, § 1; U.S. Const. amend. XIX, § 1; U.S. Const. amend. XXIV, § 1; U.S. Const. amend. XXVI, § 1.

ticular version of democracy that has developed in this country features election procedures and traditions that produce relatively low voter turnout rates, a large role for money, and the prevalence of the two-party system (in preference, say, to proportional representation, which gives more voice to minorities) suggests that participation has not been the dominant concern at the level of public understanding. Furthermore, in a far-flung polity of hundreds of millions of people, opportunities to hear one's distinctive voice reflected in public opinion are, to put it mildly, rare. Yes, we can amplify our voices by joining groups. And there is such a thing as local public opinion, even neighborhood public opinion, as well as national. Even so, I am not as convinced as Post and Weinstein apparently are that what most American citizens value about living in this particular large-scale democracy is their opportunity to be heard as distinctive persons with individualized messages[4] rather than as members of voting blocs.

A competing conception of democracy emphasizes the role of public opinion in helping to ensure that the objectives pursued by officials are consonant with the objectives that ordinary citizens value the most. Under this constituent-service conception of democracy, what counts is governmental outputs rather than inputs, the reverse of Post and Weinstein's priority. Another competing conception of democracy accords priority to the objective of checking the most serious abuses of political authority. Finally, there is Alexander Meiklejohn's listener-oriented informed-voter conception of democracy, which he defends on social contract grounds.[5] Surely we have a deep historical commitment to and contemporary consensus celebrating democracy, but I question whether either the commitment or the consensus extends to the particular conception of democracy that drives the arguments of Post and Weinstein. The move from embracing democracy to treating participation as the highest priority is not axiomatic; it requires considerable justification.

[4] Post, supra note 1, at 482 (rejecting theories that "identif[y] democracy with collective decision making rather than with self-governance"); Weinstein, supra note 1, at 497 ("[T]his core precept recognizes the right of every individual to participate freely and equally in the speech by which we govern ourselves.").

[5] Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 25 (1948).

The explanatory argument for prioritizing participation over the other benefits of an independent public opinion fares even worse on the score of aligning with the case law. In ruling upon First Amendment claims pertaining to elections, for example, the Court seems to me to have given the participation interest rather short shrift. Thus, campaign spending limits cannot be imposed to prevent the drowning out of impecunious voices[6] or to free up candidates from round-the-clock fundraising that diverts them from spending time with ordinary voters.[7] Election-related debates sponsored by public entities are not public forums in which candidates with narrow support and weak prospects must be allowed to participate.[8] High barriers to ballot access[9] and write-in voting[10] are permitted in the name of electoral efficiency.

In other domains of First Amendment adjudication, moreover, there are some striking failures of the case law to reflect a prioritization of the participation value. A First Amendment that valued participation in public discourse above all else would, I should think, recognize an access right of the sort proposed by Jerome Barron and roundly rejected by the Court.[11] At a minimum, such a First Amendment would not recognize a right of institutional autonomy that makes impossible a legislatively mandated right of access to the mass media. *Miami Herald Publishing Co. v. Tornillo*, of course, recognized just such a participation-limiting right, and a very robust one at that.[12] A First Amendment that valued participation above all else might be expected to generate a far more extensive concept of the public forum than the Court has embraced. This is because the necessary sites for effective participation in the shaping of public opinion surely extend far beyond streets, parks, sidewalks, and spaces previously designated by government officials in their discretion as appropriate for public discourse.

[6] Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).
[7] Randall v. Sorrell, 548 U.S. 230, 246 (2006).
[8] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669 (1998).
[9] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 354 (1997).
[10] Burdick v. Takushi, 504 U.S. 428, 430 (1992).
[11] Compare Jerome A. Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1647–56 (1967), with Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 247–48, 258 (1974).
[12] 418 U.S. at 258.

Post in particular rests a great part of his explanatory argument on the way that the participation rationale can make sense of the Court's (and our) willingness to uphold all sorts of content-sensitive, often viewpoint-discriminatory, regulations of speech in various managerial domains.[13] I agree with his claims regarding how well his participation theory fits with the case law relating to this subset of First Amendment disputes.[14] That accomplishment of fit, however, is not unique to his theory. The other major rationales for free speech can also explain why speech may be regulated when the balance of considerations includes the often powerful regulatory interests that are present in most managerial domains. That the participation rationale offers a way to value speech less in managerial domains, in addition to valuing the interests threatened by speech more, is not as important as Post believes. I can discern no reason to prefer a limiting principle that emphasizes one side of the ledger rather than the other in explaining the diminished protection accorded speech in managerial domains.

To be sure, other rationales for free speech that build from the consensual commitment to democracy have their own problems explaining the case law. Were the checking value to be prioritized, surely the case law would grant far more protection to the speech of public employees than is accorded by *Pickering v. Board of Education*'s open-ended balancing test.[15] Were the checking value to be prioritized, the *Pentagon Papers* holding would not have been so qualified and would not today be so fragile.[16] Were Meiklejohn's listener-oriented informed-voter conception of self-government to be realized, the First Amendment would grant sovereign citizens a more comprehensive right to observe government institutions at work than is accorded by the Court's First Amendment jurisprudence.[17] My contention is not that the democratic participation theory is worse than its closest competitors in explaining the case law.

[13] Post, supra note 1, at 480–83.

[14] Id. at 480–81.

[15] See Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[16] See New York Times Co. v. United States, 403 U.S. 713 (1971) (referring to the per curiam opinion with six concurrences and three dissents).

[17] See, e.g., Houchins v. KQED, Inc., 438 U.S. 1 (1978) (denying First Amendment claims of access for citizens and journalists to inspect prison conditions); Pell v. Procunier, 417 U.S. 817 (1974) (same).

Rather, my point is that there is no apparent reason to prefer the participation theory on the basis of its explanatory power.

I may be treating Post and Weinstein unfairly in assuming that they intend their explanatory claim to do more work than in fact they mean it to do. Perhaps the strongest defense of their position would employ a far more limited explanatory contention. The basic, undifferentiated American commitment to democratic governance establishes, at a minimum, the need for a public opinion that is independent, in the modest sense of not being dominated by government. The case law recognizes that need powerfully in decisions such as *West Virginia Board of Education v. Barnette*,[18] *Brandenburg v. Ohio*,[19] the *Gertz v. Robert Welch, Inc.* dictum,[20] and *Kingsley International Pictures Corp. v. Regents*.[21] Once the priority of protecting public opinion due to its political role is established on explanatory grounds—a move that still does not establish the priority of participation over the other political benefits that flow from an independent public opinion—normative arguments might do the rest of the work of justifying the priority of participation.

Much of that work has yet to be completed in what Post and Weinstein have given us. It is by no means obvious that the normative appeal of participation as a rationale for free speech is greater than that of the constituent-service, informed-voter, or checking rationales, each of which also derives from the foundational commitment to democracy. If, as I contend, the participation theory is no better than many of its rivals in explaining the case law and the common understanding, Post and Weinstein do need a superior normative argument if they are to defend their prioritization of participation.

So what might that normative argument look like? It might take the form of a consequentialist argument, perhaps grounded in a claim about the welfare-enhancing pleasures of participation. Many persons derive satisfaction from participating in politics. Many do not. Of course, both Post and Weinstein conceive of the

[18] 319 U.S. 624, 634 (1943).

[19] Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (embracing Brandeis's reasoning in his concurrence in Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring)).

[20] 418 U.S. 323, 339 (1974) (suggesting there is "no such thing as a false idea").

[21] 360 U.S. 684, 688 (1959).

phenomenon of participation that serves democracy more broadly than simply participating in elections or explicitly political discussions. In their arguments, any effort to influence public opinion on almost any topic, at least any effort to do so in one of the "recognized media" of mass communication, counts as democratic participation.[22] By broadening the domain of politically significant participation, they succeed in demarcating a sphere in which just about everyone wants to participate. Such participation enables us to experience pleasure by developing connections with other persons: influencing them, achieving recognition from them, developing a sense of place and/or purpose in relation to them, and so forth. Those are good effects. Surely they provide consequentialist reasons to value democratic participation.

The problem for Post and Weinstein, were they to defend their privileging of participation on consequentialist grounds, is that the various satisfactions of democratic participation may not enhance aggregate welfare as much as do some other democracy-related potential effects of the freedom of speech, effects that assume particular importance in the rival conceptions of democracy canvassed above. Consider the checking value. When serious abuses of official power are prevented or contained, the material benefits can be considerable. Consider the constituent-service conception of democracy. When government policies fail to reflect the priorities of the citizenry, the cost to human well-being in the form of lost opportunities and perpetuated inefficacies can be widespread and long-term. Consider Meiklejohn's informed-voter priority. When policies do reflect citizen preferences, but those preferences are neither well-informed nor sharpened by public debate, large numbers of citizens are less well-off than they would have been had their preferences been better calculated to advance either their interests or their notions of the common good.[23] The consequentialist argument for prioritizing democratic participation over the other democratic goods that flow from an independent public opinion seems to me to be dubious at best.

[22] Post, supra note 1, at 486.

[23] Meiklejohn advances a duty-driven argument from commitment for the freedom of speech, not a consequentialist argument. Meiklejohn, supra note 5, at 25. However, his listener-oriented focus on the supreme importance of an informed electorate capable of independent judgment could also be defended on consequentialist grounds.

There is another reason why I believe that Post and Weinstein do not fully make the case for their prioritization of democratic participation. There is a consequentialist case for free speech which has explanatory and normative appeal that does not rest on the consensual commitment to democracy. Any explanatory analysis of either the case law or the public understanding of the freedom of speech needs to address the pervasiveness and durability, even to the extent of gaining traction in popular culture, of the marketplace-of-ideas figure of speech. Post does that, but only by reducing the theory suggested by the marketplace metaphor to a quest for the kind of knowledge that depends for its validation on disciplined, authoritative evaluation.[24] Once that move is accomplished, surely he is correct to conclude that a prioritization of that activity, an activity usually undertaken by trained experts, hardly explains one of the defining features of the First Amendment tradition: the protection, indeed celebration, of "uninhibited, robust, and wide-open" debate,[25] much of it by zealots and demagogues, most of it by speakers entirely lacking in credentials, whose offerings by design are subject to no standards of authoritative evaluation. But Post's understanding of the marketplace metaphor, which permits him to minimize its significance, is not the only one available. We could view the marketplace of ideas as most notable for its low barriers to entry and its service as a cultural symbol of the need for constant adaptation to ever-changing conditions. In this view, markets are all about dynamic adjustment, not expert resolution. So understood, the marketplace-of-ideas "theory" might be that free speech is most valuable for its effects on the attitudes of the general population toward such phenomena as change, challenge, disagreement, and persistent lack of settlement. Learning to appreciate the fact that life is more unstable and less fully ordered than one might like is a precondition for productive, innovative adjustment. I am con-

[24] Post, supra note 1, at 478.

[25] New York Times Co. v. Sullivan, 376 U.S. 254, 270 ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

vinced that Holmes, stout Darwinist that he was, had something like this in mind when he introduced the marketplace metaphor.[26]

I would not claim that this view of the First Amendment has unusual explanatory power so far as the case law is concerned. In fact, I would say that the adaptation rationale for free speech is rather indeterminate in its implications for doctrine. It is not so easily embarrassed by the case law as are the participation and checking rationales, but invulnerability by reason of indeterminacy is not much of a credential. I would, however, claim that the adaptation rationale has considerable normative appeal. Few capacities matter more in the generation of human welfare than the ability to observe changing conditions and adjust to them. For that reason, the adaptation rationale exceeds even the checking rationale in its normative appeal on consequentialist grounds. Post's discussion of the marketplace metaphor is incomplete for failure to consider this rationale.

If I understand Post and Weinstein correctly, the normative parts of their arguments are not really consequentialist. In particular, Post's mention of "legitimation" signals a non-consequentialist turn.[27] Even a duly elected government, so the argument goes, cannot require its subjects to obey its decrees if those subjects have been denied the right to participate in public discourse. Take away a robust, participation-focused understanding of the freedom of speech and you take away the government's authority legitimately to command compliance with its laws. This, I take it, is why Post describes his autonomy conception as political rather than ethical.[28]

We are talking here about the requisite conditions for the creation of political authority. There are some such constitutive conditions, I have no doubt. Presumably, we can look to the meaning of the nation's commitment to democracy to discover what those irreducible, not-to-be-balanced-away conditions might be. Why aren't free elections enough? Why isn't adherence to the rule of law enough? Why isn't a minimalist Borkean right to engage in the explicit discussion of government behavior, policy, or personnel (so

[26] Abrams v. United States, 250 U.S. 616, 624, 630 (1919) (Holmes, J., dissenting). I have developed this reading of Justice Holmes in Vincent Blasi, Holmes and the Marketplace of Ideas, 2004 Sup. Ct. Rev. 1.

[27] Post, supra note 1, at 482.

[28] Id. at 483.

long as the speaker does not advocate the violation of law) enough?[29] Why isn't the enforcement of specified minority rights enough? Why must each subject whose obedience is demanded be accorded the opportunity to participate in the full range of discussions (at least in "recognized media") that help to shape public opinion on a wide variety of subjects?

These questions take me out of my depth. I don't know my Habermas very well and lack the perseverance required to correct that deficit. I do know that some thoughtful political philosophers (John Simmons is one) question whether any coherent case can be made for the duty to obey.[30] If they are right, I suppose that the case for an individual right to participate in the forming of public opinion will have to be justified by an argument that does not rest on legitimation. That might force us back to consequentialism or to Kantian "ethical," rather than "political," autonomy.

I will stop here, except to say that I understand why Post and Weinstein might want to search for a nonconsequentialist theory and why they might find the most available such theory, autonomy in its more traditional sense with the broader implications, problematic on the score of fit with the case law and common understanding. As someone whose relatively untutored inclination is to go consequentialist, I understand why others might wince at relying on the breathtakingly speculative claims about likely aggregate effects that must inform a consequentialist evaluation of almost any practice and certainly the practice of free speech. That said, I continue to have more confidence in the historically grounded and not particularly optimistic predictions of consequences that lead me to embrace the checking and adaptation rationales for free speech than I do in the prospect of our developing either explanatory or normative reasons to single out democratic participation as a lexically ordered good.

[29] See Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 27–31 (1971).

[30] See, e.g., Christopher Heath Wellman & A. John Simmons, Is There a Duty to Obey the Law? 93–95 (2005).