RESPONSES

IS DEMOCRACY A SOUND BASIS FOR A FREE SPEECH PRINCIPLE?

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PROFESSORS James Weinstein and Robert Post sustain remarkably similar central themes. They equally diverge from that proposed by Alexander Meiklejohn, at least as it is understood to value free speech primarily for its instrumental contribution to democracy—that is, Meiklejohn wishes only to assure that everything worth saying, if relevant for democratic government, can be said.[1] By contrast, both Post and Weinstein are in effect autonomy-based theorists of democratic speech—the individual's right to participate in public discourse is constitutive of democratic self-government.[2] Possibly the most interesting difference between them, from which others follow, lies in how they identify instances of that participation.

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[1] Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 26 (Harper & Bros. Publ'g 1948). For a different interpretation of Meiklejohn, see C. Edwin Baker, Human Liberty and Freedom of Speech 25–31 (1989) [hereinafter Baker, Human Liberty].

[2] Robert Post, Participatory Democracy and Free Speech, 97 Va. L. Rev. 477, 483 (2011) ("The value of democratic self-determination implies that the function of public discourse is to allow persons the experience of governing themselves."); James Weinstein, Participatory Democracy as the Central Value of American Free Speech Doctrine, 97 Va. L. Rev. 491, 491 (2011) ("The function of public discourse is to enable persons to experience the value of self-government.").

For Post, relevant participation largely depends on the speech occurring within public discourse.[3] This formulation largely takes the issue of speech content out of the equation, an admirable result in that the consequent guarantee of content freedom prevents dominant groups from imposing on public discourse their own view of its proper subject or method, making discourse, in this sense, truly free. Adjuring content criteria for public discourse also allows acceptance, Post says, of the Court's dicta that the First Amendment unquestionably protects Jackson Pollock's art and Arnold Schoenberg's music.[4]

Of course, there remains the serious difficulty of identifying when the person is engaged in protected public discourse. By a step that creates some danger of circularity, Post gives as one measure of being in public discourse "whether the First Amendment requires the speakers and audience for the speech to be regarded as autonomous."[5] (Possible circularity occurs because one suspects that Post would say that the relevant "political" conception of autonomy makes whether a person is "[w]ithin public discourse" determinative of whether she should "be regarded as autonomous.") If the proper attribution of autonomy follows theorists such as Habermas, whom Post invokes here,[6] the attribution would apply generally within the lifeworld, which in Habermas's construction is distinguished primarily from the systems realms and is much broader than the democratic public sphere. If Post makes this move, his theory becomes virtually identical in scope to my version

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[3] Post, supra note 2, at 488 ("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.").

[4] Id. at 486 ("Public discourse includes all communicative processes deemed necessary for the formation of public opinion. Art and other forms of noncognitive, nonpolitical speech fit comfortably within the scope of public discourse."); see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.") (internal citation omitted).

[5] See Post, supra note 2, at 483 ("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.").

[6] See id. at 482 ("The value of democratic legitimation occurs, as Habermas and many others have theorized, specifically through processes of communication in the public sphere.").

of autonomy theory, differing only in rationale, but he holds back somewhat when he says this autonomy is "political, rather than ethical." Clearly, Post seeks a narrower, but still non-content-based, conception of public discourse and a democratic theory rationale for its significance.

Though I will postpone remarks about case law, one potential complexity can be noted here. Post illustrates the descriptive power of his approach using defamation law.[7] When a newspaper publishes a story, existing doctrine (which I criticize in this respect) makes a lot turn on content—giving, for example, at most minimal protection if the story is about a matter of only private concern involving a private person. Meiklejohn might have had little problem with this—but Post? As protection for abstract art implies, content should not be relevant and newspapers are, he says, institutions of the public sphere.[8] Should not all newspaper content be as protected as it is when describing public officials' performance of public duties?

Although without any explicit deviation from Post, Weinstein (at least as I read him) understands "public discourse" to have both context and content components: "[S]peech on matters of public concern, or, largely without respect to its subject matter, of expression in settings dedicated or essential to democratic self-governance."[9] This added content criterion makes Weinstein's conception narrower than Post's: Weinstein questions the justification for coverage of abstract art and symphonic music.[10] This narrowing usefully allows Weinstein (much more clearly than Post) to argue for stronger protection for what is covered. (Most absolutists—certainly Meiklejohn and Emerson, though maybe not Justices Black and Douglas—have noted that as a theory covers more speech, the burden increases in arguing for providing absolute protection.) In making content a crucial criterion, Weinstein's theory more closely resembles not only most other political speech theories but also virtually all of the Court's dicta suggestive of political speech theories.

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[7] See id. at 480–81.
[8] Id. at 486.
[9] See Weinstein, supra note 2, at 493.
[10] See id. at 499 n.45.

Despite this and other differences in nuance, Post's and Weinstein's main normative arguments—grounding the theory in a universal acceptance of democracy as a core value of free speech and the claim that this free speech is necessary for democratic legitimacy—are sufficiently similar that I feel justified in focusing the following theoretical critique on Post's contribution, with the assumption that it usually applies to both. The final discussion of the descriptive adequacy, however, more explicitly considers both contributions.

I put aside, however, one issue that greatly occupied both. Post and Weinstein emphasize their approach's superiority to autonomy theory.[11] I simply observe that the autonomy approach they criticize resembles my own approach, which I have defended elsewhere, even less than Post's democratic self-government theory resembles Meiklejohn's or Professor Robert Bork's theory.[12]

I. CRITIQUE: PROFESSOR POST'S THEORY

Though I agree with much in Post's argument—in particular the centrality of the free speech guarantee to legitimatizing the legal regime and the relevance of this point to a proper interpretation of free speech—my quarrels are quite basic and focus on the aim of interpretation and the value of democracy. The disagreement involves two assumptions and a conclusion that lie at the base of his argument. Post "begin[s] with the premise that interpreting the First Amendment involves explicating our national dedication to freedom of expression."[13] In carrying out this explication, Post relies on the claim that "the value of democratic self-governance is desirable [among other reasons] because democracy is commonly agreed to be a central constitutional value."[14] Apparently, largely from this second point, he is able to move to his conclusions. Specifically, he concludes that "[t]he value of democratic self-governance theorizes First Amendment protections in terms of the importance of participating in the formation of public opinion,

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[11] Post, supra note 2, at 479–80; Weinstein, supra note 2, at 506–09.

[12] Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971).

[13] See Post, supra note 2, at 477.

[14] Id. at 488.

which is understood as a form of communicative action."[15] He relatedly argues that "democratic legitimation . . . requires that governmental decision making be somehow rendered accountable to public opinion."[16]

I do not challenge a claim that democratic legitimization depends, among other things, on people having the right to participate freely as presumed autonomous agents in a political public sphere. The first two premises, however, seem question-begging and are given an unconvincing scope. To start, interpretation can never be mere "explication" but must always represent a "motivated" inquiry—and this motivation should be described and defended. Even if this point is put aside, as an alternative to Post's initial interpretative premise consider: "The interpretation should aim at contributing to making our legal order legitimate." This interpretative stance understands the constitutional project as part of an aim of achieving legitimate government. This attributed aim then constitutes an overwhelming factor in interpretation.

Why choose one or the other interpretative premise (though their consistency cannot be ruled out, obviating the need for choice)? I suspect the first premise is neither possible nor appealing unless guided by a deeper (normative) commitment such as the one offered by the alternative. When courts find that laws violate the First Amendment, they implicitly reject a legislative body's understanding of the content or extent of our national commitment to free expression. Which expression—Congress's or the Court's—constitutes our national commitment?

This raises for Post the technical, sociological, and ethical question of why we ought to identify the national commitment with judicial doctrine and therefore interpret, as he does, that doctrine rather than interpret democratic politics? A reply might be that, given widespread acceptance of judicial review, the Court's interpretation takes priority, but only definitional fiat could take the public's or legislature's difficulty in overturning a court's invalidation, which leaves the Court's interpretation effectively dominant, as evidence that the Court's views represent the nation's commitment. Even then, however, a problem would remain. If the Court's

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[15] Id. at 483.
[16] Id. at 482.

opinions are the content (or evidence) of the national commitment, where should the Court look for guidance for its own conclusions? Seeing the constitutional project as aiming at establishing prerequisites of legitimate government would provide the Court a guide—a guide, though, that is at base theoretical and normative, not sociological or empirical. As compared to the implicitly sociological inquiry stated by Post, this guide (even if inevitably contested) could be an element in justifying rejection of conclusions of democratic politics to restrict speech. That is, if left as sociology, reliance on the national commitment is vacuous. If seen through a normative lens, it is hard to resist the view that interpretation should aim at promoting legitimacy.

Post could accept (and at times seems to accept) this alternative, more normative, interpretative premise. He could do so consistent with his conclusions by combining it with an extreme version of his second point: "[D]emocracy 'is' commonly agreed to be a 'central' constitutional value,"[17] though as written this statement may need amending. Instead of "is," substitute or add "should be." If legitimacy is the grounding interpretive motivation, the aim is not merely to tell someone—such as the majority who passed the law that the court invalidates or the dissenter forced to abide by a law to which she objects—that there is "common agreement" on a proposition she does not hold. She should be given reasons why this (purported) agreement is proper and why she should accept it whether or not generally agreed to. Also, "central" is not quite adequate; rather, Post needs to, and does, claim that democracy (as he defines it) is in some sense a master legal/political value—has "primacy"[18]—to be honored even if in conflict with other popular or constitutional values.

Nevertheless, Post's claim about the centrality of democracy as a "constitutional" value is as controvertible as the first claim about interpretative aim. Though few doubt that some version of democracy is essential to any legitimacy aim, many understand the "constitutional"in "constitutional democracy" to represent a view that democratic processes are legitimate only if limited in various ways,

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[17] See id. at 488 (internal quotation marks added).

[18] See id. at 484 ("The presumption of autonomy within public discourse follows from the primacy of the value of democratic self-governance.").

especially by guarantees of individual rights that restrict the domain of popular decision making. That is, democratic processes must be limited by guarantees that restrict precisely the lawmaking that Post hopes responds to public opinion. Though some academics read the Bill of Rights as largely protecting only the process of democratic self-authorship,[19] many (most?) academics join much of the public in conceiving the Constitution as limiting popular self-governance, a limitation probably necessary even if not sufficient to make democratic government legitimate. In this view, an emphasis on democracy is not the central "constitutional" value but rather the other half of a whole that is essential to legitimacy. Post here must provide argument for his view, not reliance on "common agreement."

How, then, to choose among these competing claims about what "is" or "should be" "commonly agreed"? It is hard to see either that history provides a clear answer or how history justifies the significance of its answer. Justification likely requires an inherently, whether or not historically contextualized, moral or ethical argument—that is, Post would need to show the proper appeal of his vision of democracy.

A final issue is internal to Post's argument. If democracy is "a" central value, how should democracy be understood? Certainly majority rule could be a virtually pervasive standard. People could have (self-governance) authority to adopt almost any law, even laws restricting virtually any speech within a public sphere, as long as these people (or their representatives) retain the bare but ultimate power to propose and vote on (but not necessarily to discuss) repealing the speech restrictions. Post's response seems to be that the better value-based understanding of democracy (better, apparently, because it connects democracy to legitimacy) relates to making the legal order more a matter of self-authorship.[20] For this to hold, he could suggest, requires a more robust right of free speech within the public sphere. I do not doubt his position is largely right.

Still, this argument leaves two major concerns. First, if self-authorship provides the normative underpinning of democracy,

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[19] See John Hart Ely, Democracy and Distrust (1980).

[20] See Post, supra note 2, at 482 ("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 the law.").

why does respect for self-authorship not apply more broadly? Why does it not equally require honoring a person's personal self-governing choices (at least those for which an attribution of autonomy can be sustained) against limitation by coercive law? The moral significance of the attribution necessary to justify democracy should also justify limits on democracy. The value calls for respecting equally individual self-government and democratic collective government.

Second, people presumably would have better grounds to view public opinion, which law should reflect, as an embodiment of self-authorship if discourse within the public sphere were regulated to promote equal and full access (campaign limitations, speech subsidies) and to embody at least some of the values that relate to the integrity of truth seeking, such as "respect, reason, fairness, accuracy, integrity, honesty, logic, and civility."[21] Post excludes these as grounds to regulate the public sphere[22]—but why? My own view is that to the extent governmental interventions designed to promote these features of discourse occur in a manner consistent with respect for people's autonomy, the interventions are fine.[23] Since, however, the ultimate value of democracy lies in respecting the autonomy that a legal order, in order to maintain its claim to legitimacy, must attribute to the people it asks to obey its laws, these interventions must not employ means inconsistent with this attribution. Post, I expect, agrees. I see no reason, however, why this limi-

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[21] Id. at 478.

[22] Id. at 479.

[23] Post notes that he has no conceptual objections to my views on media regulation except that they are "radically inconsistent with the historical treatment . . . outside the broadcast media." Post, supra note 2, at 487 n.26. My view objects to any censorship of the media but recommends that the inevitable structural regulation of the media should consciously aim at promoting their democratic role. Given *Turner Broadcasting*'s emphasis that *Miami Herald* was based on the fact that the law there censored, that is, penalized, the newspaper's speech choices, I know of no Supreme Court case inconsistent with my view. Turner Broad. v. FCC, 512 U.S. 622, 653 (1994). The Court has upheld laws that require newspapers, broadcasters, and cable operators to include content that they would rather leave unpublished. Media-specific laws have played major roles in structuring the newspapers, including by provision of major subsidies, treatment of advertising, and exemptions from labor or antitrust laws, with Congress sometimes recognizing that its law favored some newspapers and some newspaper orientations over others. See C. Edwin Baker, Advertising and a Democratic Press 3–4 (1994); see also C. Edwin Baker, Media Concentration and Democracy: Why Ownership Matters 164–67 (2007).

tation on governmental regulation of speech is not equally required when the democratic legal order attempts to structure the lifeworld as it is when it structures the political sphere. (Of course, since the rationales of "systems realms" lie precisely in their different relation to autonomy, the demand to respect autonomy would, as I have argued since the 1970s, have little force in these "systems realms.")

Why does and how can Post stop short and offer an autonomy theory that applies only to collective decision making? Maybe this is due to skepticism about relying on abstract moral principles—though I do not see how he escaped such reliance in his account of democracy. I cannot see how either sociology (our national commitment) or a commonly accepted conception of democracy is a value that can adjudicate between his narrow or my wider autonomy theory as a prerequisite for legitimacy.[24] For that adjudication, one cannot avoid moral or ethical theory.

Finally, one answer that Post offered, though here only in passing, is that stopping short "permits the values of dignity and civility to be enforced outside of public discourse."[25] I have no doubt that the human personality could not develop or be maintained without such norms or civility rules, but do they need legal enforcement? Another possibility is that these norms are sufficient and are only nonoppressive if their maintenance or enforcement is left to voluntary behavior. The difference is between liberal (or open) communitarianism and authoritarian (or closed) communitarianism. Moreover, I wonder if enforcement of such norms outside the public sphere undermines Post's core conception of democracy relating to freely formed public opinion. I suspect that the identity of the leading candidates for the Democratic presidential nomination in 2008 reflects not merely current public discourse but also, and maybe even more, the private discourse of the 1960s and 1970s happening in the kitchen about who does the dishes, in the bedroom about who will be on top, and at the household door about whom the daughter brings home for dinner. It would be too bad for democracy as well as for freedom if the law had enforced the prior civility rules.

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[24] Ed Baker, Autonomy and Free Speech, 27 Const. Comment. (forthcoming 2011).
[25] See Post, supra note 2, at 488.

II. CRITIQUE: CASE LAW FIT

Clarity about the significance and meaning of fit between theory and case law is needed.[26] Both Weinstein and Post quite clearly believe a merit of their approach is descriptive fit. Weinstein proclaims that his approach "explains the great majority [of cases], and, significantly, is contradicted by none."[27] For intellectual history and sometimes for judicial advocacy, interpretative fit is undoubtedly a great merit. It would also be an obvious criterion if the goal is to be an apologist for the status quo. My ambition, however, would be for a theory to which people in the United States can reasonably and should subscribe. If we were living in the early twentieth century, for example, should we be impressed with the theory that fits *Plessy*'s separate-but-equal doctrine[28] or *Lochner*'s distinction between promoting private and public welfare?[29] At the time these doctrines prevailed, should a person have taken their existence as a reason to continue abiding by them? Surely, a person can reasonably assume—though with an ever-present willingness to be shown otherwise—that existing constitutional doctrine reflects (to some degree) a process of inquiry by intelligent people that produces generally reasoned results. This hardly translates, though, into the notion that a constitutional theory to which one should subscribe is determined by how well it fits the total set of results. Post is undoubtedly right when he invokes the notion of reflective equilibrium[30] unless the reflective task is to be apologetic rather than to aim ultimately at the most appealing theory—even if this "appealing" theory partakes of our history and context. From this critical rather than apologetic perspective, the significance of "fit" between theory and doctrine becomes murky. Instead, a theory could be measured by how well it casts light on what is good about portions of doctrine that are good and what is bad about portions

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[26] I put aside the problem that measuring fit, given almost inevitable discrepancies, will require a counting mechanism that cannot be purely descriptive but must be normative in counting and weighting deviant cases.

[27] Weinstein, supra note 2, at 499.

[28] Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

[29] Lochner v. New York, 198 U.S. 45, 53 (1905).

[30] Post, supra note 2, at 477 ("Determining the meaning of this commitment involves reflective equilibrium; it requires us to interpret our history in light of our best ideals while simultaneously re-examining our ideals in light of our actual history.").

that are bad, and we should be as morally and ethically insightful as possible at distinguishing the two.

Despite these caveats concerning the relevance of the inquiry, I will critique a few examples of fit that Post and Weinstein offer and then offer a few with which I believe they would have trouble.

Both Weinstein and Post find support in *Connick v. Myers*.[31] An autonomy theorist should take employment as a context where the employee rationally gives up, and the government employer can properly demand that she give up, her autonomy to the extent required for proper performance of her job—at least as long as she voluntarily continues her employment. Despite a possibly more persuasive conclusion on the facts by the dissent, the Court in *Connick* found appropriate "deference to the employer's judgment" that the employee's speech constituted a "mini-insurrection" and interfered with needed work requirements.[32] Admittedly, another plausible interpretation would be that in this context the employee's speech was simply outside public discourse. In a similar employment case where the Court protected the employee's speech,[33] however, it is difficult to see that public discourse includes the friendly banter between a woman and her boyfriend in a back office—even political banter but of a sort that the speaker would likely be unwilling to express in a public context while at work. The banter, however, can easily be protected as an autonomous act that did not interfere with job performance.[34]

Weinstein, in showing how well his approach captures our intuitions, argues that "[w]hereas a ban on cigarette advertising presents a difficult First Amendment issue, a ban on speech in favor of repealing smoking laws . . . is so inimical to a fundamental precept of democracy that no jurisdiction in the United States would even seriously consider passing such a law."[35] The intuition about political censorship is surely right, but it is unclear how much work democracy and how much work autonomy are doing in the background. As I argued earlier, a person committed simply to majoritarian democracy could accept a majority's judgment to le-

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[31] 461 U.S. 138 (1983).
[32] Id. at 141–42.
[33] Rankin v. McPherson, 483 U.S. 378, 392 (1987).
[34] Id. at 390–91.
[35] Weinstein, supra note 2, at 508.

gally ban advocacy to repeal (or adopt) a law, say about favoring Nazism or Communism, as long as people retain power to propose and vote to repeal this speech restriction. Robert's Rules of Order might rule some speech out of order but still recognize—and require putting to immediate vote without discussion—a motion to overturn the ruling.[36] My agreement with Weinstein's intuition is grounded, instead, on the view that the limitation on political advocacy is inconsistent with a political order premised on respect for individual autonomy. There is no reason to think that this required respect does not apply equally outside political speech. So how can these different intuitions be tested?

The controversial aspect of Weinstein's hypothesized advertising ban lies precisely in the controversial issue of whether this ban violates a constitutionally required respect for individual autonomy—not whether the Constitution requires respect for autonomy. Elsewhere, I have offered four independent reasons to conclude that autonomy theory does not require or support protection of commercial advertising, but the controversy continues.[37] Observe, though, that no law regulating commercial speech has ever attempted paternalistically to keep people from hearing a particular message. Rather, these regulations have (sometimes) attempted to restrict the speech of certain self-interested speakers (commercial entities) whose autonomy is due no moral or constitutional respect. These restrictions on advertising thereby leave discussion of the topic to those whose autonomy (and democratic participation) do merit respect.

Intuitions comparing democratic discourse and autonomy theory need a fairer test. Apparently most influential in getting teenagers to smoke or not to smoke is not advertising but the speech (and related behavior) of their peers. So the question I would put beside Weinstein's is whether any state would seriously consider barring all individuals, especially in private (where political discourse seems not to be on the table), from telling a friend or spouse that smoking is fun, sexy, or otherwise enjoyable? If not, maybe we

[36] Henry M. Robert, Robert's Rules of Order 624–28 (Sarah Corbin Robert et al. eds., Perseus Publishing 10th ed. 2000) (1876).

[37] C. Edwin Baker, The First Amendment and Commercial Speech, 84 Ind. L.J. 981, 996–98 (2009).

have an autonomy right both to participate in public discourse and to talk about what is important to us!

Not only Post's grant of *Stanley v. Georgia*[38] but also many arguably core cases are not well explained by a democratic public discourse theory. The school child in *West Virginia Board of Education v. Barnette* who refused to salute the American flag did not ask for freedom to participate in public discourse but rather the freedom, whether or not in public, to abjure mandated expression.[39] Her refusal, I would think, was not even a refusal to participate in public discourse. Compelled saluting in the classroom seems hardly part of that discourse, as it asserts nothing; the compelled act simply dramatizes the child's subordinate position, denying her autonomy. From a public discourse perspective, Justice Frankfurter's dissent got it right. As he said:

> It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part of both children and of their parents to disavow as publicly as they choose . . . the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents.[40]

In contrast, the greatness of the Court's opinion lay in its passionate, ringing language recognizing the child's liberty, her claim to autonomy, and as Professor Steven Shiffrin might remind us, her dissent.[41]

Covering up the ideological motto that the state placed on your car's license plates could constitute expressive participation in public discourse. After noting this public discourse argument,[42] the Court put it aside and instead protected the act on what it called "more appropriate First Amendment grounds"—essentially, the "infringement upon personal liberties" represented by coerced dis-

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[38] Post, supra note 2, at 488 (discussing *Stanley v. Georgia*, 394 U.S. 557, 563–65 (1969)). *Stanley* is, I believe, controversial not because it protected speech outside public discourse but because it protected possession of "speech" that it had also held to be outside First Amendment protection.

[39] 319 U.S. 624, 630–31 (1943).

[40] Id. at 664.

[41] Steven Shiffrin, Dissent, Democratic Participation, and First Amendment Methodology, 97 Va. L. Rev. 559, 562–63 (2011).

[42] Wooley v. Maynard, 430 U.S. 705, 713 (1977).

play, a holding which the Court also said involved the "broader concept of 'individual freedom of the mind.'"[43] Clearly individual autonomy, freedom from this state coercion, was the Court's animating concern.

Of course, Post emphasizes his disagreement with the early Meiklejohn view that speech only comes within the scope of the First Amendment on the basis of its content, saying instead it is within the scope when a part of public discourse.[44] "[T]he constitutional value at stake," Post says, "is participation in the effort to change public opinion" and thus speech is protected "whenever it is included within public discourse."[45] As noted above, these are the reasons, he says, for protection of newspapers and of "[a]rt and other forms of noncognitive, nonpolitical forms of speech."[46] One might suspect that the explanation for the Court's reference to Pollock and Schoenberg[47] had little to do with a view that these and other artists aim to participate in the formation of public opinion concerned with democratic government. Though artists might aim to influence public opinion about aesthetics, many probably want simply to produce good art—that is, the Court most likely sees itself as protecting exercises of expressive autonomy.

The Court's comments, usually in dicta, that refer to political speech being at the core of the First Amendment can be counterpoised to possibly the most widely invoked black letter rule—the presumptive unconstitutionality of content discrimination.[48] The idea is that one cannot favor or disfavor labor speech (aimed at labor rather than governmental matters), religious speech, political speech, mindless entertainment, or personal musings. This doctrine is well-known as a land mine, both unappealing and nondescrip-

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[43] Id. at 713–14.

[44] See Post, supra note 2, at 485.

[45] Id. at 486

[46] Id. ("Art and other forms of noncognitive, nonpolitical forms of speech fit comfortably within the scope of public discourse.").

[47] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 569 (1995).

[48] For language from cases rejecting a political speech focus, see Baker, Human Liberty, supra note 1, at 296 n.43. In explicitly rejecting "the adjective 'political'" as being crucial, the Court said, "our cases have never suggested that expression about philosophical, social, artistic, economic, literary or ethical matters—to take a nonexhaustive list—is not entitled to full First Amendment protection" and then listed twelve cases illustrating that proposition. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231–32 (1977).

tive. Still, it is hard to deny its force in the Court's and scholars' understandings of the First Amendment. The doctrine implicitly asserts a view contrary to the language identifying political speech at the core of the First Amendment, particularly if that language is understood as saying political speech is to receive any greater or special protection. The doctrine of content neutrality is deeply confused, but it is a major part of the doctrine and it does not square with the theory of the First Amendment advanced by Professors Post and Weinstein.

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