DISSENT, DEMOCRATIC PARTICIPATION, AND FIRST AMENDMENT METHODOLOGY

Steven Shiffrin[*]

TOO many values interact in too many complicated ways to expect that a single value, or small set of values, would emerge as the transcendent master value in resolving freedom of speech questions. Because of this, an eclectic approach is both the most descriptive and the best normative methodology with which to approach free speech issues.[1] It follows that a politically centered approach to the First Amendment is overly limited. Indeed, I will argue that if one is forced to find a center for the First Amendment, the protection and promotion of dissent is far more promising.[2]

I. AN ECLECTIC APPROACH

Freedom of speech should be valued for many reasons—not only liberty, self-realization, freedom, and autonomy but also truth, combating injustice, adaptation to change, democracy, equality, association, freedom of thought, and even order. At the same time, the exercise of free speech can interfere with order, reputation, privacy, decency, and intellectual property, among others.

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[*] Charles Frank Reavis, Sr., Professor of Law, Cornell University.

[1] Steven H. Shiffrin, The First Amendment, Democracy, and Romance 9–45 (1990) [hereinafter Shiffrin, Romance]; Steven Shiffrin, The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment, 78 Nw. U. L. Rev. 1212, 1216, 1251–55, 1283 (1984); Steven Shiffrin, Defamatory Non-Media Speech and First Amendment Methodology, 25 UCLA L. Rev. 915, 917, 955–58 (1978).

[2] See Steven H. Shiffrin, Dissent, Injustice, and the Meanings of America 127–30 (1999); Shiffrin, Romance, supra note 1, at 100–01, 108–09. There is a difference between the First Amendment as a source of national identity and as a source of law regulating human relations. Identifying the protection and promotion of dissent with the First Amendment has considerable advantages over political participation. I do not maintain that a pluralistic approach to First Amendment values is an effective source of national identity, though it is important for wise decision making. At the same time, it is important to recognize the special importance of both dissent and political participation in decision making—though, as I will suggest, dissent frequently deserves protection even when it is not "political."

In dealing with these conflicts, the Court has balanced the relevant values at stake, sometimes creating rules, sometimes creating standards. No theory has dominated the Court's complex accommodations. The Court did not need an overarching theory to produce clarity. Its common-law method has produced a system of rules and standards that provides relatively clear guidance over a broad area of human conduct. To put it another way, Isaiah Berlin, with his emphasis on the complexity of social reality and the necessity for tragic choices,[3] explains First Amendment doctrine better than Jürgen Habermas, Professor James Weinstein, or Professor Robert Post.

It would be surprising if politicians wearing black robes, negotiating to forge compromises, produced doctrine that is supported by a lexically ordered theory. It would be even more surprising if Courts led by Chief Justices Rehnquist and Roberts, joined by the merry band of Federalists who help them create majorities, produced a theory-backed doctrine that could satisfy progressives. I cannot imagine, for example, Post arguing that the Court's crabbed conception of equality was even remotely attractive.

II. CENTERING ON POLITICAL PARTICIPATION AND PUBLIC DISCOURSE

Post's and Weinstein's theoretical approaches to freedom of speech have three dominant themes: political participation, a robust public sphere, and the importance of self-government.[4] Certainly, political participation by the citizenry is a vital part of democratic theory or practice; so is a robust public sphere. But it is worth noting that political participation and the public sphere are not co-extensive. First, the public sphere contains speech that is far broader than needed for political life. Much literature, art, music, science, and speech about religion, travel, and daily life (consider, for example, computer magazines or sport's magazines) is not relevant to and will not be used in political life. Even if it were poten-

[3] See, e.g., Isaiah Berlin, Against the Current: Essays in the History of Ideas 68–70 (1980).

[4] Robert Post, Participatory Democracy and Free Speech, 97 Va. L. Rev. 477 (2011); James Weinstein, Participatory Democracy as the Central Value of American Free Speech Doctrine, 97 Va. L. Rev. 491, 499 n.45 (2011).

tially relevant to political life, we would be hard-pressed to say that the "real reason" we protect literature, science, or religious speech is because it assists or is an instance of political participation.[5] Weinstein concedes that this is a problem.[6] Post does not, since he appears generally to emphasize public discourse and not political participation.[7] I would think that the justification of generous protection for the public sphere lies in John Dewey's conception of a democratic culture, a notion of democracy that is not confined to politics or political participation.[8]

But this exposes a second problem. That public discourse is protected and sometimes privileged over private discourse does not lead to the conclusion that private discourse is not or should not be protected under the First Amendment. Post maintains that defamation of public figures in private among friends is part of public discourse.[9] He is less sure that private discussions of politics generally are part of public discourse.[10] This makes it clear that political participation is not playing a major role in Post's theory. Fortunately, I see nothing in judicial doctrine that supports any uncertainty. Of course, despite Post's position to the contrary, the daily conversations of millions of citizens are protected, with few exceptions, whether or not they are about politics.[11]

[5] Post argues that 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. Post, Participatory Democracy and Free Speech, supra note 4, at 483. I do not believe that judges make any such presumption about literature, music, most philosophy, and the like. This constitutional presumption, if it exists at all, presumes what does not exist.

[6] Weinstein, supra note 4, at 499 n.45 ("[I]ts greatest explanatory shortcoming is that a theory based in participatory democracy cannot easily explain the rigorous protection that current doctrine affords non-ideational art such as abstract paintings or symphonic music.").

[7] Post, Participatory Democracy and Free Speech, supra note 4, at 486 ("Art and other forms of noncognitive, nonpolitical speech fit comfortably within the scope of public discourse.").

[8] See generally Robert B. Westbrook, John Dewey and American Democracy 433–34 (1991).

[9] Robert Post, Participatory Democracy as a Theory of Free Speech: A Reply, 97 Va. L. Rev. 617, 623 (2011) [hereinafter Post, Reply].

[10] Id. ("There are no doubt close cases—for example, whether family conversations about presidential politics should be protected as public discourse.").

[11] Post argues that private defamatory speech was not protected at common law and that defamation exceptions were formed for public discourse that did not obtain in private discourse. Post, Participatory Democracy and Free Speech, supra note 4, at

Finally, I reject the third theme of Post[12] and Weinstein.[13] I do not believe it is desirable to maintain that Americans engage in self-government or that they are authors of their own laws in a representative democracy.[14] To be sure, they participate in a process that can influence law. But the idea that each of the hundreds of millions of citizens is actually the author of American laws is a fiction and a bad fiction at that. Elected representatives author the law, and the law they produce is the product of representing some citizens more than others. Far too often that law represents the desires of those with the money to contribute to the representatives' reelection, rather than the desires of the People (even assuming the knowledge and homogeneity necessary to make the latter a meaningful concept).

III. DISSENT

It seems to me that the First Amendment should be interpreted as part of a Constitution designed to achieve justice (but failing badly) and to empower those who would combat injustice by engaging in dissent. I do not believe that legitimacy is possible in a large-scale society. Any such society will be riddled with hierarchies that contain features of injustice. Injustice occurs in public and private, at least within the terms of the theories posited by Post and Weinstein. Millions of people experience injustice in workplaces, schools, universities, hospitals, and other institutions. In my view, people should be free to criticize unjust hierarchies, and they should, for the most part, be protected in doing so. Although there may be limits on such criticism (consider, for example, the military), nothing should turn on the fact that such criticisms of injustice take place within local, nongovernmental entities. To be sure,

480. That private defamation was unprotected does not authorize a leap to the conclusion that private speech altogether is not protected.

[12] Id. at 482 ("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 to believe that they are also potential authors of law.").

[13] Weinstein, supra note 4, at 498–99 ("Such a justification for suppressing speech is contrary to the fundamental premise of a democratic society that the people are the ultimate sovereign and have a right to govern.").

[14] John Stuart Mill understood this. John Stuart Mill, On Liberty, *in* The Basic Writings of John Stuart Mill 3, 5–7 (2002).

such local criticism might be relevant to a larger public issue, but it would be a theoretical mistake to suppose that the main reason we should protect such criticism from governmental regulation is because it might be related to a public issue.

Not all dissent is worthwhile, however, and not all dissent should be protected. But no system of democracy or free speech is worth its salt if it does not protect and promote dissent—that speech which criticizes existing customs, habits, institutions, and authorities. Of course, other speech should be protected, and judges should rarely be authorized to make ad hoc, case-by-case judgments about what qualifies as dissenting speech (but instead should make such judgments about categories of speech and recognize dissent's important value).

The emphasis on dissent is related to my criticism of the metaphor of self-government. If we are to encourage citizens to criticize our laws, we should refrain from encouraging citizens to believe that they are the authors of those laws. If self-authorship is taken seriously, we encourage a quiescent citizenry. Instead, we should encourage the view that laws were supposed to be made *for* the citizenry, not *by* them.

IV. THE PROBLEM OF FIT

Post's and Weinstein's theses, that their politically centered approaches explain the First Amendment or our American democracy, are difficult to sustain. America is hardly a land of equal political participation. Institutions like the winner-take-all system in politics, gerrymandering, the United States Senate, and the recent decision in *Citizens United v. FEC* upholding the rights of business corporations to spend unlimited funds to influence the outcome of election campaigns[15] all conspire to create a system that makes the participation of some citizens count more than the participation of others.

Political speech is limited in many contexts, including some advocacy of illegal action, much defamation, protections for intellectual property, the burning of draft cards, and a long line of cases limiting demonstrations on public property in ways that cater to

[15] 130 S. Ct. 876 (2010).

bureaucratic preferences at the expense of political participation. My focus is on that part of the doctrine that Weinstein regards as a "starkly apparent" affirmation of his approach: First Amendment limitations on defamation suits.[16] Weinstein maintains that public discourse receives heightened scrutiny,[17] but defamation rules were forged by balancing the interests of freedom of speech and press against those of reputation, without any reference to levels of scrutiny. Weinstein states that public discourse is "[expression] on matters of public concern . . . in settings dedicated or essential to democratic self-governance, such as books, magazines, films, the internet, or in public forums such as the speaker's corner of the park."[18] Defamation law provides heightened protection for speech about public officials, but notice that such speech need not be in public settings. As I have suggested, it would be an odd democratic theory that afforded reduced protection for citizen conversations about politics in their homes or in coffee shops or bars that are not directed to the general public. I assume that "public discourse" for Weinstein includes much "private discourse" about politics (with the recognition that some restrictions in some circumstances might obtain, as in the military, workplaces, and the like).[19]

Libel law affords heightened protection to speech about public figures, but this category does not fit sensible democratic theory. A figure as powerful as the Chair of General Motors is not automatically a public figure, but Wolfgang Puck, a famous chef, probably is. Given the powerful role that business corporations play in our government, it would be hard to construct a democratic theory that made it easy to criticize a chef but difficult to criticize a powerful player in government and the economy.

Libel law involving speech about private persons seems to support the views of Post and Weinstein in some respects. At least if we accept the view propounded by a plurality of the Court, speech about matters of public concern receives more protection than

[16] Weinstein, supra note 4, at 494–95.
[17] Id. at 493.
[18] Id.
[19] I am less sure about Post's position. See Post, Reply, supra notes 9–10 and accompanying text.

matters of private concern.[20] Nonetheless, this speech on public concern is not "highly protected." A showing of negligence and falsity is sufficient to make out a claim. Moreover, once falsity is shown to the satisfaction of a jury, the readiness to find negligence is well known. I think it fairer to conclude that this speech on matters of public concern is "expression that receives some, but not the most rigorous, protection from content regulation."[21] A fair description of the law of defamation is that Post's and Weinstein's views of the First Amendment comprise an important factor in the construction of the law, but various accommodations have been made in a manner that resembles a more eclectic view.

I close with a mention of *Connick v. Myers*, a case where an assistant district attorney was discharged for engaging in activity that was critical of the District Attorney of New Orleans.[22] Post[23] and Weinstein[24] regard this as a triumph for their position because the speech was regarded as private, not public. Let us indulge the fantasy that criticism of the District of New Orleans is not political speech. Although government has a substantial interest in maintaining order in the workplace, in my view, the First Amendment stands for the proposition that government should not have an unbridled license to curb dissent of this kind. The way to handle these cases is not somehow to discern the wavy line between public and private. As is true in many circumstances, it would be far better to weigh, in eclectic fashion, the First Amendment interests that protect dissent in public or private contexts against the relevant government interests.

[20] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–61 (1985). The plurality declined to make a media/non-media distinction in resolving the case. Id. at 753 (affirming for reasons other than the distinction upon which the Vermont Supreme Court relied). In so declining, the Court might mean simply to say that some speech about private persons in non-media contexts is public and some of it is private. But the Court might in addition mean to say that some speech in public media is private. If so, the Court will squarely be rejecting any notion that speech in public media is always public discourse. Indeed, the commercial speech doctrine already rejects such a notion.

[21] Weinstein, supra note 4, at 492.

[22] 461 U.S. 138, 140–41 (1983).

[23] Post, Participatory Democracy and Free Speech, supra note 4, at 480–81.

[24] Weinstein, supra note 4, at 493–94.

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