

UNDERSTANDING POST’S AND MEIKLEJOHN’S MISTAKES: THE CENTRAL ROLE OF ADVERSARY DEMOCRACY IN THE THEORY OF FREE EXPRESSION

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INTRODUCTION

The assertion that democracy and free expression are inextricably intertwined in a symbiotic relationship should hardly be controversial. Democracy could not exist, in any meaningful sense, absent a societal commitment to basic notions of free expression, nor could free expression flourish in a society uncommitted to democracy. It is therefore not surprising that among the most prominent and widely accepted theories of the First Amendment are those that explain the Free Speech Clause as either a catalyst for or a protection of democracy itself.¹ Such “democratic” theories of

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¹ See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

the First Amendment posit that speech receives constitutional protection because it is essential to a functioning and legitimate democracy. Different democratic theories of the First Amendment suggest competing explanations of exactly how free speech advances or defends democracy. Some suggest that free speech facilitates the informed decisionmaking that self-rule requires.² Others argue that free speech furthers democracy by allowing individuals to recognize themselves as self-governing.³ Still others simply conclude, without elaboration, that democracy would be “meaningless” without the freedom to discuss government and its policies.⁴ Every democratic theory of the First Amendment, though, in one way or another, views free speech as a means to a democratic end.

Of course, “democracy” itself is an amorphous concept, both historically and theoretically.⁵ Despite its simple translation to “rule by the people,” political theorists since Aristotle have advanced competing theories of democracy that are inconsistent, if not contradictory.⁶ To say that the First Amendment advances “democracy” without more, then, is to say much less than First Amendment scholars often assume.⁷ Still, “democracy” is not so empty a referent that it is impossible to evaluate whether so-called democratic theories of the First Amendment are indeed democratic. This Article’s central claim is that two of the most prominent democratic theories of the First Amendment—those of Alexander Meiklejohn and Robert Post—are in tension with democracy, properly defined. Moreover, both of these theories conflict with democracy even as Meiklejohn and Post themselves define it.

Any democratic theory must encompass two principles. First, democratic theories must respect the principle of self-rule. They may differ about what it means, precisely, for the people to govern themselves, but they must at least accept the basic premise that democracy requires self-government.⁸

² See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

³ See, e.g., ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 7 (1995) [hereinafter POST, *CONSTITUTIONAL DOMAINS*].

⁴ See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 23 (1971).

⁵ See DAVID HELD, *MODELS OF DEMOCRACY* 2 (1987) (“The history of the idea of democracy is complex and is marked by conflicting conceptions. There is plenty of scope for disagreement.”); JAMES G. MARCH & JOHAN P. OLSEN, *DEMOCRATIC GOVERNANCE* 1 (1995) (“‘Democracy’ has become a term of such general legitimacy and indiscriminate use as to compromise its claim to meaning.”).

⁶ See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 3 (1989). Dahl explains that the word democracy comes from the Greek word *demokratia*, which combines the Greek root *demos*, meaning the people, with the root *kratia*, meaning rule or authority. *Id.*

⁷ Cf. Dan M. Kahan, *Democracy Schmemocracy*, 20 *CARDOZO L. REV.* 795, 795 (1998) (making the same point with regard to so-called “democratic theories” of congressional delegations).

⁸ Of course, individuals in a *constitutional* democracy may ratify a constitution as a “precommitment” or “entrenchment” device that places certain decisions beyond the grasp of majoritarian decisionmaking. See Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig’s Theory of Translation*, 65 *FORDHAM L. REV.* 1435, 1455 (1997) (describing the Constitution as an “entrenchment” device); John O. McGinnis & Michael B. Rappaport, *The Constitutional-*

Otherwise, democracy would collapse into authoritarianism. Democratic theories, as a result, must respect the principle of epistemological humility—they must assume that no determinate “right” or “good” exists, apart from what the electorate, or those responsive to it, determine. Democratic theories must therefore commit such substantive valuations to the people to decide through democratic procedures.⁹ Epistemological humility is a direct outgrowth of the principle of self-rule: the people cannot be self-governing if some external concept of rightness or goodness coercively determines their decisions.

Second, democracy must mean that government follows the self-governing decisions of the people—either because the people themselves make and implement their decisions, or because the people’s elected representatives are accountable for doing so. Again, democratic theories can differ about how exactly this occurs, particularly in a representative democracy. The point, though, is that democracy must at least assume that authority is “controlled by public opinion, not public opinion by authority.”¹⁰ This second principle overlaps with the first: public opinion must be autonomous from government in order to control government. As a result, any democratic theory must prohibit the government from managing public opinion, whether by overt coercion or by the indirect manipulation that comes with forcing a people to be ignorant. In the words of Thomas Jefferson, “If a nation expects to be ignorant and free . . . it expects what never was and never will be.”¹¹

Because Meiklejohn and Post disregard, or at least marginalize, different aspects of these fundamental democratic principles, their theories of free expression necessarily fail as democratic theories of the First Amendment. They do so for varying reasons and to different degrees. In this Article, we explain those mistakes in depth, not only to critique each theory’s individ-

ity of Legislative Supermajority Requirements: A Defense, 105 YALE L.J. 483, 510 n.126 (1995) (“The Constitution is itself a societal precommitment to limit the range of future choices . . .”). Thus, scholars have long suggested that the Constitution creates a “countermajoritarian difficulty”: to the extent the Constitution prevents the majority from making self-governing decisions that conflict with its provisions, it interferes with self-rule. See, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (2d ed. 1962) (coining the term “countermajoritarian difficulty”). A constitutional democracy remains a democracy, though, because the people *themselves* choose to limit their decisionmaking authority according to the norms they adopt and continue to retain in their constitution.

⁹ See Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433, 1435 (1990) (coining the term “epistemological humility”).

¹⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

¹¹ Letter from Thomas Jefferson to Colonel Yancey (Jan. 6, 1816), in 6 *THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENT, REPORTS, MESSAGES, ADDRESSES AND OTHER WRITINGS, OFFICIAL AND PRIVATE* 517 (H.A. Washington ed., 1859). Jefferson continued, “[t]he functionaries of every government have propensities to command at will the liberty and property of their constituents. There is no safe deposit for these but with the people themselves; nor can they be safe with them without information.” *Id.*

ual missteps, but more importantly, to illuminate the common understanding of democratic autonomy that underlies both free speech theories and to propose an alternative in its place.

Despite their differences, both Meiklejohn's and Post's theories of free speech understand democratic autonomy in its collective sense. Meiklejohn believed that democracy is simply a "compact" among individuals to govern for the common good.¹² Post likewise begins with the premise that "democracy is not about individual self-government, but about collective self-determination"¹³ and ends with the conclusion that "democracy requires individual autonomy only to the extent that citizens seek to forge 'a common will, communicatively shaped and discursively clarified in the political public sphere.'"¹⁴ As such, both ultimately understand democracy largely as a cooperative pursuit in which individuals collectively "plan[] for the general welfare"¹⁵ or "forge a common will."¹⁶ We therefore characterize each theory as assuming a "cooperative" ideal of democracy.

Yet as much as democracy includes this potential for cooperation it also embraces the inevitability of competition. It recognizes the centrality of diversity and potential competition among the backgrounds, statuses, values, needs, and interests of the citizens. And it recognizes the need for peaceful and orderly processes by which those often competing needs, values, and interests may be resolved. Indeed, to deny or ignore these individual needs, interests, and values would be to deny the individuality and integrity of the citizens, thereby rendering the democratic process a counterproductive exercise. At its core, American democracy involves a form of adversary process, in which citizens may determine for themselves what governmental choices will improve their lives or implement values they hold dear.

Thus, contrary to the cooperative ideal of democracy that Meiklejohn and Post assume, we adopt a notion of democracy built on the concept of "adversary democracy" from modern political theory. Based on the premise that democracy involves adverse and competing interests, we argue that the purpose of democracy is to guarantee each individual the equal opportunity to affect the outcomes of collective decisionmaking according to her own values and interests as she understands them. We therefore conclude

¹² See MEIKLEJOHN, *supra* note 2, at 14–15.

¹³ Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169, 175 (2008) [hereinafter Post, *Viewpoint Discrimination*].

¹⁴ *Id.* at 176 (quoting JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION 81 (Thomas McCarthy trans., Beacon Press 1987) (1981)).

¹⁵ See MEIKLEJOHN, *supra* note 2, at 39, 57, 62–63. Compare *id.* at 46 (describing the First Amendment as "offer[ing] defense to men who plan and advocate and incite toward corporate action for the common good"), with *id.* at 94 (describing the First Amendment as not protecting "men . . . engaged . . . in argument, or inquiry, or advocacy, or incitement which is directed toward our private interests, private privileges, private possessions").

¹⁶ Post, *Viewpoint Discrimination*, *supra* note 13, at 176 (internal quotation omitted).

that a valid democratic theory of the First Amendment must protect all speech that allows individuals to discover their personal needs, interests, and goals—in government and in society at large—and to advocate and vote accordingly.

This Article proceeds in three parts. Part I critiques Alexander's Meiklejohn's democratic theory of the First Amendment and argues that many of its flaws originate in Meiklejohn's cooperative notion of democracy. First, we argue that key aspects of Meiklejohn's free speech theory contradict the core democratic principle of epistemological humility. This flaw has been largely overlooked by commentators, probably because other famous elements of Meiklejohn's theory posit that the First Amendment absolutely forbids the suppression of any speech based on the viewpoint it conveys. Yet Meiklejohn effectively screened speech according to his own viewpoint about how individuals should govern themselves in a democracy even though he insisted that democracy precludes any singular idea of what is "wise," "fair," or "American" and that the First Amendment prohibits any speech regulation based on such judgments.¹⁷ Convinced that democracy entails a compact among citizens to pursue the common good, Meiklejohn summarily, albeit inconsistently, excluded certain speech in pursuit of private economic self-interest from the protective reach of the First Amendment.¹⁸ Thus, we argue, Meiklejohn allowed himself the identical power he denied government: the authority to adjust the protection of speech on the basis of his particular opinion of what is "wise" and "American."¹⁹

We also demonstrate that Meiklejohn's cooperative notion of democracy caused him to propose a free speech theory that conflicts with his own premise that the fundamental objective of democracy is the "voting of wise decisions."²⁰ Although he argued that the First Amendment's sole purpose is to ensure *listeners'* access to information and opinion to facilitate their informed decisionmaking, Meiklejohn occasionally determined whether speech was worthy of First Amendment protection based on the *speaker's* purpose for speaking. Put simply, when the speaker's motive was too self-interested for Meiklejohn's tastes, he considered the speech unworthy of First Amendment protection regardless of its informational value to the audience. Much as an underinclusive speech regulation suggests government's underlying motive to discriminate against a certain viewpoint, this mismatch between Meiklejohn's *theory* for protecting speech and his *criteria* for doing so further demonstrates Meiklejohn's willingness to censor speech he considered ideologically distasteful.

¹⁷ See MEIKLEJOHN, *supra* note 2, at 25–27.

¹⁸ See *infra* Part I.

¹⁹ Cf. MEIKLEJOHN, *supra* note 2, at 26 (“[U]nwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American.”).

²⁰ *Id.* at 25.

Part II next dissects Robert Post's democratic theory of the First Amendment. Although Professor Post's theory does not compromise the notion of democracy with the same transparency as Meiklejohn's, we argue that it sets aside core democratic principles and conflicts with democracy as even he defines it. First, we argue that Post's participatory model fails as a democratic theory of the First Amendment because it fundamentally miscalculates the nature and degree of autonomy that democracy presupposes, and the necessary implications of that autonomy. Ironically, Post has faulted Meiklejohn for this very mistake, labeling Meiklejohn's approach a "collectivist" theory of the First Amendment that misunderstands the role of individual autonomy in democracy.²¹ He has argued that "the value of individual autonomy is inseparable from the . . . aspiration for self-government."²² He has, moreover, insisted that "the ideal of autonomy is . . . foundational for the democratic process."²³

In reality, however, Post's commitment to autonomy—both individual and collective—is limited at best. Post's participatory theory of democracy grows out of the fundamental premise that "[t]he value of collective self-determination does not inhere in the people's power to decide their own fate, but rather in their warranted conviction that they are engaged in the process of deciding their own fate."²⁴ As a result, Post concludes that the essence of democracy lies predominantly in the individual's ability to participate in public discourse—rather than in her exercise of the vote, which he considers "merely a mechanism for decisionmaking,"²⁵—because it is this participation that allows the individual to recognize herself as self-governing or attain a sense of "democratic legitimacy."²⁶ Post's participatory theory rests on the mistaken premise that legitimacy has a unique democratic value far more central than the value of actual autonomy. In reality, the individual's subjective understanding of herself as self-governing is valuable if, and only to the extent that, self-government *itself* is valuable.

²¹ Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 COLO. L. REV. 1109, 1115–23 (1993) [hereinafter Post, *Meiklejohn's Mistake*] (contrasting his theory with "collectivist" theories of the First Amendment such as Meiklejohn's that sacrifice individual autonomy to ensure that public discourse achieves a "specific 'objective'").

²² *Id.* at 1120; see also Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1524 (1997) [hereinafter Post, *Equality and Autonomy*] ("Individual autonomy . . . is intrinsically connected to democratic self-governance.").

²³ Post, *Meiklejohn's Mistake*, *supra* note 21, at 1123.

²⁴ Post, *Equality and Autonomy*, *supra* note 22, at 1523. Post's suggestion that this conviction must be "warranted" suggests that he is not focused on the individual's subjective understanding of democratic legitimacy alone. Indeed, it even seems to suggest that the objective reality of democratic self-determination is a necessary condition for democratic legitimacy. Even so, Post's participatory theory is strangely dismissive of democratic processes that promote the objective reality of democratic self-determination. See *infra* Part II.B.1–2.

²⁵ Post, *Equality and Autonomy*, *supra* note 22, at 1524.

²⁶ See, e.g., POST, CONSTITUTIONAL DOMAINS, *supra* note 3, at 7–8.

In fixating on participation's potential to create a sense of democratic legitimacy, Post underestimates other aspects of autonomy that are equally if not more essential to the individual's subjective understanding of herself as self-governing and her actual status as such. As a result, he either underestimates or mishandles the democratic value of information, understanding it as only relevant to the production of truth²⁷ or, alternatively, to what he deems the relatively less significant process of decisionmaking.²⁸ He never recognizes, as Jefferson did, that information protects autonomy from the ignorance that can easily cripple it. If Meiklejohn's fundamental mistake was in allowing his personal ideological preferences to lead him astray from the logical implications of his listener-oriented theory, Post's fundamental mistake simply is in failing to appreciate the importance of the listener's role in democracy in the first place.

Because Post self-consciously anticipates this critique, his participatory theory is not the transparent affront to democracy that Meiklejohn's proves to be. Post acknowledges that the individual's ability to participate in public discourse cannot, in itself, constitute democracy.²⁹ Moreover, he often concedes that informed decisionmaking is a necessary condition for democracy.³⁰ Yet on a number of occasions Post has insisted that informed decisionmaking is of "lexically" inferior democratic value to participation in public discourse, without ever explaining how one necessary condition for democracy can be lexically inferior to another.³¹ Ultimately, then, Post's concessions reveal that he is aware of core democratic principles though he fails to accord them the respect they deserve.

In any event, Post's participatory theory compromises democracy even in the unduly truncated manner in which he defines it. As already noted, Post defines democracy according to the value it furthers, which, he argues, is the individual's sense of "democratic legitimacy."³² He therefore concludes that the First Amendment protects public discourse because it facilitates democratic legitimacy. Yet, because he miscalculates the democratic value of information, Post marginalizes the very speech that ensures that the

²⁷ See Post, *Equality and Autonomy*, *supra* note 22, at 1525 (distinguishing the "constitutional interest" in informed decisionmaking from that in collective self-determination and concluding that the former is an interest in the production of truth whereas the latter is an interest in furthering the "value of democratic self-governance").

²⁸ See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 14 (2000) [hereinafter Post, *Commercial Speech*] (suggesting that the availability of information is relevant to democratic decisionmaking but not to democratic legitimation).

²⁹ See, e.g., *id.* at 12 (describing public discourse as a "necessary (but not sufficient) precondition for democratic legitimation").

³⁰ See, e.g., Post, *Equality and Autonomy*, *supra* note 22, at 1528 ("I do not mean to deny, of course, that voting is an important means of participation in a democratic polity. I only claim that voting is not by itself sufficient to realize the value of democratic self-governance.").

³¹ See Robert C. Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2373 (2000) [hereinafter Post, *Reconciling*].

³² See Post, *Commercial Speech*, *supra* note 28, at 7.

individual's participation in public discourse truly reflects her own free will.³³ And, because he fails to acknowledge the democratic value of the vote, he undervalues the very process that forces government to be responsive to public will. Post's participatory theory thus provides insufficient protection to the speech that protects the individual's actual *status* as self-governing.³⁴ Moreover, because Post defines the category of expression falling within the "public discourse" in wholly manipulable terms and even incorporates majoritarian norms to determine its scope, his participatory theory actually *creates* the means for governmental authority to regulate public opinion.³⁵

In Part III we explain the adversary model of democracy and fashion a new theory of free expression based on its premises. In doing so, we underscore the artificial and misguided nature of the expressive dichotomies that Post and Meiklejohn draw in their understanding of both democracy and free expression. Under the adversary theory of free speech, no distinctions are to be drawn between the values of participation and voting, between listener and speaker, between receipt of information and participation in discourse, between private-oriented and public-oriented expression, or among different categories of speakers. All of these categories are centrally involved in the dynamic interactions of adversary democracy.

I. THE DEMOCRATIC IRONY OF MEIKLEJOHN'S FIRST AMENDMENT

A. *Meiklejohn's Theory of Free Expression*

Alexander Meiklejohn proposed the earliest democratic theory of the First Amendment. Meiklejohn understood the First Amendment as "a deduction from the basic American agreement that public issues shall be decided by universal suffrage."³⁶ In order for that system of self-government

³³ We should note at the outset that there is no small amount of confusion in the manner in which Post treats the listener's interest in the receipt of information for First Amendment purposes. In virtually all of his scholarship to date, Post has treated the listener's interest in receiving information as lexically inferior to the speaker's interest contributing to public discourse. However, in his as-yet unpublished Rosenthal Lectures, delivered at Northwestern University School of Law in April 2008, Post appeared to alter his approach to the receipt of information. Now, rather than ranking information as of *lower* value, Post appears to view it simply as a *different* value, one he places under the heading of "democratic competence." He contrasts it with the more familiar "democratic discourse," which he treats quite differently. Robert Post, *The Rosenthal Lectures: Knowledge and the First Amendment, Lecture Two: Knowledge and the Learned Professions* (Apr. 2008) (unpublished manuscript, on file with authors) [hereinafter Post, *Rosenthal Lectures*]. For the most part, we confine our analysis of his theory to the long-established version of lexical inferiority.

³⁴ *Cf.* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) (recognizing that democracy requires that "[a]uthority . . . is . . . controlled by public opinion, not public opinion by authority").

³⁵ See *infra* Part II.B.

³⁶ MEIKLEJOHN, *supra* note 2, at 26–27. Zechariah Chaffee criticized Meiklejohn for linking the First Amendment to the principle of "universal suffrage" since, at the time of the First Amendment's

to be a “reality rather than an illusion,”³⁷ he argued, the “voting of wise decisions” requires that citizens have access to all relevant information and opinion.³⁸ As a result, the First Amendment provides an absolute prohibition on the regulation of speech on the basis of the offensiveness of the idea it expresses.³⁹ If (and only if) speech is relevant to the people’s self-governing decisions, Meiklejohn argued, the First Amendment guarantees it absolute protection against governmental regulation because of disdain for or disagreement with the views expressed.

Meiklejohn’s First Amendment thus assumed three fundamental principles. First, speech is constitutionally valued exclusively for its potential to facilitate democratic decisionmaking. Second, speech facilitates democratic decisionmaking by conveying relevant information and opinion to the *listener* so that the listener may make an informed decision when it comes time to vote. Thus, to the extent the First Amendment protects the right to speak, it does so only as incident to the listener’s right to listen. Meiklejohn argued, for example, that the First Amendment’s “ultimate interest is not the words of the speakers, but the minds of the hearers”;⁴⁰ that the First Amendment “does not require that . . . every citizen shall take part in public debate” nor that “everyone . . . have the opportunity to do so”;⁴¹ that the “primary purpose of the First Amendment is . . . that all the citizens shall, so far as possible, understand the issues which bear upon our common life”;⁴² and that “it is th[e] mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.”⁴³

Third, Meiklejohn believed that, in order for the electorate to be sufficiently informed, the needs of democratic decisionmaking require that citizens have access to *all* relevant information and opinion, not simply that which the government favors: “[U]nwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American.”⁴⁴ As Meiklejohn wrote, “the reason for this equality of status in the field of ideas lies deep in the very foundations of the self-governing processes. When men govern themselves, it is they—and no one

Framing, the right to vote was anything but universal. See Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 896 (1949).

³⁷ Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263 (1961).

³⁸ MEIKLEJOHN, *supra* note 2, at 25–26.

³⁹ See *id.* at 26.

⁴⁰ *Id.* at 25.

⁴¹ *Id.*

⁴² ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 75 (1960).

⁴³ MEIKLEJOHN, *supra* note 2, at 26.

⁴⁴ *Id.*

else—who must pass judgment upon unwisdom and unfairness and danger.”⁴⁵

On the basis of these three principles, Meiklejohn concluded that while the First Amendment prohibits regulation of speech for the idea it conveys, it does not preclude the imposition of procedural regulations on the agenda or form of public discussion to ensure the quality of the public debate and to facilitate the voting of wise decisions. Thus, just as the “moderator” of the New England town meeting may rightly enforce certain rules of order to regulate the “talking” and “get business done,” so may the state regulate speech.⁴⁶ The moderator of the New England town meeting may suppress speech when she determines that “everything worth saying [has been] said” or when the question of the speech is not “before the house.” Indeed, she may censor the “boor” or the “public nuisance,” “by force if necessary,” and may “deny the floor” or “throw[] out” of the meeting anyone who “threatens to defeat the purpose of the meeting.”⁴⁷ So too, Meiklejohn suggested, may the state regulate speech in a democracy.⁴⁸ On the other hand, consistent with the third principle underlying Meiklejohn’s theory of free expression, the moderator may not prohibit speech simply because he disagrees with the idea it conveys. Indeed, Meiklejohn insisted that “the First Amendment condemns with its absolute disapproval” such viewpoint-based regulation.⁴⁹

Meiklejohn’s assertion that democracy requires an “equality of status in the field of ideas” has become the paradigmatic expression of the precept that democracy assumes that no absolute “right” or “wrong” exists. Instead, democracy commits such substantive valuations to the people to decide through democratic procedures. Yet, as eloquently and emphatically as Meiklejohn defended this ideal—what one of us has described as the ideal of “epistemological humility”⁵⁰—more careful examination reveals that his theory of free expression ultimately undermines it. Indeed, it arguably rejects the ideal of epistemological humility altogether.

B. The Democratic Difficulties Plaguing Meiklejohn’s Theory

Meiklejohn’s theory ultimately defies the very principle of epistemological humility with which he is so widely associated because it would deny speech First Amendment protection purely on the basis of Meiklejohn’s

⁴⁵ *Id.*

⁴⁶ *See id.* at 23 (“The meeting has assembled, not primarily to talk, but primarily by means of talking to get business done. And the talking must be regulated and abridged as doing of the business under actual conditions may require.”).

⁴⁷ *Id.* at 22–25.

⁴⁸ *See id.* at 23–24 (“These speech-abridging activities of the town meeting indicate what the First Amendment to the Constitution does not forbid.”)

⁴⁹ *Id.* at 27.

⁵⁰ *See Redish, supra* note 9, at 1435.

personal, moral, or political views of what speech is “unwise,” “unfair,” and “un-American.”⁵¹ Put simply, because he considered “excessive individualism” to be toxic to democracy,⁵² Meiklejohn concluded that speech pursuing an individual interest, rather than the common good, is beyond the scope of the First Amendment all together.⁵³

Our critique differs substantially from more traditional criticisms leveled by free speech scholars against Meiklejohn in the past. Other critiques have questioned Meiklejohn's analogy to the New England town meeting as a metaphor for what speech regulations the First Amendment does *not* prohibit; suggested that Meiklejohn was blinded by a rather myopic understanding of the kinds of speech relevant to democratic decisionmaking; and argued that the logic of Meiklejohn's theory requires that it apply equally to protect speech that facilitates an individual's decisionmaking as it does to speech that facilitates collective decisionmaking.⁵⁴ Our claim here is more basic and ultimately more damning. In contrast to prior criticisms, we argue that Meiklejohn's approach to free expression fails as a democratic theory of the First Amendment simply because, in a number of its core elements previously ignored or overlooked by commentators, it abandons the principle of epistemological humility so central to the foundations of democracy.

This abandonment originates with Meiklejohn's division of freedom of speech into two different components: that freedom protected under the First Amendment and that freedom protected under the Due Process Clause of the Fifth Amendment (and, by corollary, the Fourteenth Amendment).⁵⁵ The former, which Meiklejohn describes as an “absolute” freedom, defends “public” discussion and “planning for the general welfare”; the latter, a limited freedom that, much like most other substantive interests protected by the Fifth Amendment's Due Process Clause, can be sacrificed for the interest of the common good, protects the individual's “private” speech in pur-

⁵¹ Cf. MEIKLEJOHN, *supra* note 2, at 26 (“When men govern themselves, it is they—and no else—who must pass judgment upon unwisdom and unfairness and danger.”).

⁵² See *id.* at 71 (criticizing Justice Oliver Wendell Holmes' First Amendment jurisprudence for its basis in a “philosophy of . . . excessive individualism”); *id.* at 75 (as part of this critique, arguing that Justice Holmes “does not pay attention [to] the Constitution itself” because he says nothing about the “fundamental agreement among us” to be a “self-governing community”).

⁵³ See, e.g., *id.* at 62–63.

⁵⁴ See, e.g., Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1419 (1987) (“Meiklejohn . . . so idealizes the . . . town meeting as to virtually ignore the value of speech that might advance any other form of self-governance.”); Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 40 (1975) (critiquing Meiklejohn for the assumption that the state can be an impartial moderator that determines when “‘everything worth saying’” has been said) (quoting MEIKLEJOHN, *supra* note 2, at 25); Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267, 291–92 (1991) (arguing that the New England town meeting is an inapt analogy to modern society).

⁵⁵ See MEIKLEJOHN, *supra* note 2, at 37–41.

suit of his own interest or “advantage.”⁵⁶ Meiklejohn justified this division of speech on the basis of an understanding of our dual role as citizens. As self-governing citizens, Meiklejohn argued, we are both the “rulers” and the “ruled.” As rulers, “we think and speak and plan and act for the general good” and our speech is “public.”⁵⁷ As the ruled, we “rightly pursu[e] [our] own advantage” and “seek[] [our] own welfare,” and our speech is “private.”⁵⁸ Only when we speak as rulers—only when we are “planning for the general welfare”—is our speech protected under the First Amendment.⁵⁹ Thus, despite insisting that the First Amendment’s “ultimate interest is not the words of the speakers, but the minds of the hearers,”⁶⁰ Meiklejohn evaluated speech’s claim to First Amendment protection based on the *speaker’s* purpose for speaking. Specifically, he argued that the First Amendment “offers defense to men who plan and advocate and incite toward corporate action for the common good,”⁶¹ and not to “men . . . engaged . . . in argument, or inquiry, or advocacy, or incitement which is directed toward [their] private interests, private privileges, private possessions.”⁶²

Meiklejohn’s distinction between public and private speech, as well as his complete banishment of so-called private speech from the scope of the First Amendment, is immediately suspect because Meiklejohn’s asserted criteria for drawing this distinction contradict his own theoretical premises. The problem is not merely that the distinction between private and public speech is ultimately illusory, though that is certainly the case.⁶³ Nor is it merely that the distinction incoherently excludes from the First Amendment speech that facilitates self-government simply because it is an exercise of individual—rather than collective—self-government that is being facilitated.⁶⁴ Even assuming that the line between public and private speech

⁵⁶ See *id.* at 39, 57, 62–63; compare *id.* at 46 (describing the First Amendment as “offer[ing] defense to men who plan and advocate and incite toward corporate action for the common good”), with *id.* at 94 (describing the First Amendment as not protecting “men . . . engaged . . . in argument, or inquiry, or advocacy, or incitement which is directed toward our private interests, private privileges, private possessions”).

⁵⁷ *Id.* at 95.

⁵⁸ *Id.*

⁵⁹ *Id.* at 39.

⁶⁰ *Id.* at 25.

⁶¹ *Id.* at 46.

⁶² *Id.* at 94.

⁶³ Cf. Chafee, *supra* note 36, at 899–900 (describing the premise of a boundary between private and public speech as “the most serious weakness” of Meiklejohn’s theory). Meiklejohn himself recognized that public and private interests are “curiously intermingled.” MEIKLEJOHN, *supra* note 2, at 40. For more detailed criticism of his theory due to the impossibility of separating private and public speech, see Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Value of Free Expression*, 39 GEO. WASH. L. REV. 429, 438–43 (1971).

⁶⁴ See Martin H. Redish *The Value of Free Speech*, 130 U. PA. L. REV. 591, 606–07 (1982) (arguing that the same level of protection should be afforded to speech that facilitates individual decisionmaking

could be drawn with perfect clarity and coherence under *some* reasonable theory of free speech, the primary problem is that Meiklejohn's theory differentiates speech protection on the basis of criteria that conflict with its underlying postulates. Recall the three fundamental principles of Meiklejohn's theory: first, speech is constitutionally valued for its potential to facilitate democratic decisionmaking; second, speech facilitates democratic decisionmaking by conveying relevant information and opinion to the *listener* so that she may make an informed "governing" decision when it comes time to vote; and third, in order to perform their governing choices most effectively, voters must have access to *all* relevant information and opinion, regardless of the government's judgment of the wisdom of that information and opinion.⁶⁵ Given these theoretical principles, all of which proceed on the assumption that the constitutional value of free speech grows exclusively out of its effect on the listener, it is a non sequitur to differentiate "public" speech from "private" speech *based on the speaker's purpose for speaking*, rather than on the speech's potential effect on the listener.

A democratic theory of free speech could conceivably distinguish public speech from private speech from two different perspectives, depending on one's choice of the underlying rationale for protecting speech in the first place. The first would evaluate speech from the perspective of the audience. From this perspective, speech would be "public" and deserving of First Amendment protection if and only if its content was relevant to the *listener's* self-governing decisions. Pursuant to this framework, the speaker's identity and motive for speaking would logically be immaterial: the sole determinative factor would be the content of the speech and its democratic value to the listener.⁶⁶ Evaluating the public/private speech distinction from this angle logically follows from a theory of free speech that, like Meiklejohn's, assumes the democratic value of free speech to center exclusively

as that afforded to speech that facilitates collective decisionmaking because "whether . . . decisions are made collectively or by the individual, in a democracy we assume the moral value of self-rule").

⁶⁵ See *supra* Part I.A.

⁶⁶ Some of the time Meiklejohn does actually appear to adopt this perspective. At one point, he argues that

such books as Hitler's *Mein Kampf*, or Lenin's *The State and the Revolution*, or the *Communist Manifesto*, or Engels and Marx, may be freely printed, freely sold, freely distributed, freely read, freely discussed, freely believed, freely disbelieved, throughout the United States. And the purpose of that provision is not to protect the need of Hitler or Lenin or Engels or Marx to "express his opinions on matters vital to him if life is to be worth living." We are not defending the financial interests of a publisher, or a distributor, or even of a writer. We are saying that the citizens of the United States will be fit to govern themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favor of those institutions, everything that can be said against them.

MEIKLEJOHN, *supra* note 2, at 91 (quoting ZECHARIAH CHAFEE, JR., FREE SPEECH AND ITS RELATION TO THE UNITED STATES 33 (1942)); see also *id.* at 94 (concluding that First Amendment protection extends to "speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest").

on speech's role as facilitator of the audience's self-governing choices. If speech is constitutionally valuable solely because of its effect on its listeners, whether speech is "public" and deserving of First Amendment protection must logically turn solely on its significance for its listeners.

The second possible perspective from which to measure the democratic value of free speech would be that of the speaker. On this basis, whether speech is "public" would turn on whether it facilitates the *speaker's* self-government. The speech's effect on its audience, consequently, would be immaterial. This perspective logically flows from a theory that understands the democratic value of free speech to accrue to the speaker herself.⁶⁷ If speech is constitutionally valuable because of its effect on the speaker, whether speech is "public" and deserving of First Amendment protection must depend on its significance to its speaker.

Of course it is also possible to propose a standard that simultaneously incorporates both perspectives, either in the disjunctive or conjunctive. The disjunctive hybrid would define speech as "public" when it contributes *either* to the audience's *or* to the speaker's self-government. This standard would flow logically from a theory that understands free speech to be democratically valuable both to the speaker and the audience.⁶⁸ The conjunctive hybrid, on the other hand, would require speech to be relevant to the listener's *and* the speaker's self-government in order for it to be deemed "public."⁶⁹

While Meiklejohn at certain points claims that his theory focuses exclusively on a listener perspective (a choice that could in any event be challenged as underinclusive because it ignores speech's important benefit to the speaker), at other points he restricts the scope of expressive protection on grounds having nothing to do with that perspective. Indeed, by selectively altering speech protection on the basis of the personal motivation of

⁶⁷ Thus, Robert Post's participatory theory of the First Amendment adopts something approaching this perspective in defining "public discourse," because his theory posits that the principal democratic value of free speech is its potential to engender democratic legitimacy in the speaker. For a full discussion of this point, see *infra* Part II.B.1.

⁶⁸ Though it does not suggest that speech be classified according to a public/private dichotomy, the adversarial theory of free expression that we subsequently propose falls into this category to the extent it recognizes democratic value both in the individual's full access to information relevant to her self-determination and in the individual's full ability to advocate in order to influence the self-determination of others. See *infra* Part III.

⁶⁹ For an example of a conjunctive definition of public speech, see Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 304 (1992) (classifying speech as "political speech" when "*it is both intended and received as a contribution to public deliberation about some issue*"). Such a hybrid is illogical for a theory of free speech that recognizes the value of free speech to accrue either to listeners or speakers. If the theory posits that the value of free speech accrues to listeners, it is underinclusive to the extent it excludes speech that might be relevant to listener's self-governing interests because it is not democratically significant to its speaker. If the theory posits that the value of free speech accrues to speakers, it is underinclusive to the extent it excludes speech that might be democratically significant to the speaker because it is not relevant to its audience's democratic decisions.

the speaker, Meiklejohn defeats his goal of listener self-government. The fact that the speaker is motivated by self-interest in no way necessarily implies that what the speaker has to say would not be of value to the listener.

To understand how his public-private dichotomy would compromise the goals Meiklejohn set for his theory, we need to apply it in a real-world context. Consider, for instance, a manufacturer of body and truck armor for American soldiers in Iraq. As part of its campaign to get the public to pressure the government to purchase its product, it begins an advertising campaign promoting recent technological advances in combat armor and the statistical decrease in combat-related casualties such armor promises. The motivation for the manufacturer's expression is obviously grounded in the desire to make a profit. Does that fact make its speech any less relevant to its audience's self-governing decisions about whether government should reequip its military forces? Presumably not. Indeed, it is reasonable to presume that the manufacturer's personal interest gives it greater incentive to marshal supporting facts and to disseminate its message as widely as possible. It is true, of course, that the manufacturer's expression would likely be slanted by its self-interest. But in no sensible framework of free expression is advocacy excluded, and the category of protected expression confined to impartial and objective speech.

There can be little doubt that, because of the manufacturer's underlying commercial motive, Meiklejohn would categorize the manufacturer's speech as private and therefore relegate it to the lesser protection of the Fifth Amendment. Thus, he argued that the radio is bereft of First Amendment protection because those who control it are motivated by considerations of profit rather than the pursuit of the common good.⁷⁰ He suggested that a paid lobbyist's speech may well be "private" for the same reason.⁷¹ Yet as our hypothetical manufacturer demonstrates, information valuable to the listener and private self-interest often co-exist in the same speech. In-

⁷⁰ See MEIKLEJOHN, *supra* note 2, at 104 ("[R]adio . . . is not . . . entitled to the protection of the First Amendment. It is not engaged in the task of enlarging and enriching human communication. It is engaged in making money. And the First Amendment does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage. It intends only to make men free to say what, as citizens, they think . . . about the general welfare.").

⁷¹ See *id.* at 39; *cf.* Cass, *supra* note 54, at 1419–20 (finding it "baffling" that Meiklejohn would exclude the paid lobbyist's speech from the First Amendment because "his speech is not unimportant to political debate nor useless to individuals interested in influencing public policies that affect them"); Chafee, *supra* note 36, at 899 ("[I]f discussing public questions with money in sight is outside the First Amendment, how about speeches by aspirants to a \$75,000 job in Washington or editorials in newspapers or books on Free Speech?"). Also relevant is Meiklejohn's discussion of the clause of the First Amendment that forbids the government from "abridging . . . the right of the people . . . to petition the government for a redress of grievances." U.S. CONST. amend. I. Such claims by individuals are "public" and deserving of the unqualified protection of the First Amendment, Meiklejohn argued, because those who petition the government for redress "are not saying 'We want this; please give it to us.' They are saying to officials who are their agents, 'You have made a mistake; kindly correct it.'" MEIKLEJOHN, *supra* note 2, at 40–41.

deed, the Supreme Court has recognized as much in routinely holding that speech does not lose its constitutional protection simply because it is in a form sold for profit.⁷²

Meiklejohn's exclusion of commercially self-interested speech from the First Amendment is both a *logical* mistake because it results from his adoption of criteria that are antithetical to his underlying rationale for protecting speech in the first place and a *pragmatic* mistake because it ignores the potential of commercially self-interested speech to deliver information relevant to democratic decisionmaking. To the extent that Meiklejohn's theory excludes protection for speech purely because of its speaker's self-seeking motivation, it illogically denies the people "acquaintance with information or opinion or doubt or disbelief or criticism, which is relevant" to the process of self-government.⁷³ According to Meiklejohn's own principles, his theory of free speech is decidedly antidemocratic.

But, as significant as this mistake is, the ominous democratic irony of Meiklejohn's First Amendment runs much deeper. Meiklejohn's mistake concerning the definition of "public" speech under the terms of his own theory is not solely the result of confusion about the contours and logical implications of his approach. The difficulties are more profound than that. In effect, Meiklejohn's public/private distinction amounts to an indirect form of viewpoint regulation, which filters out the types of speech that Meiklejohn personally found ideologically distasteful and inappropriate in a democracy.

Of course, Meiklejohn recognized that different substantive visions of the common good exist, and insisted that the First Amendment protect expression of them all, regardless of how offensive those visions seem to many of us. By positing that speech cannot receive First Amendment protection if it is motivated by personal commercial gain, however, Meiklejohn's theory implicitly imposes its own normative perspective on the process of democracy and free speech. To be sure, Meiklejohn's viewpoint regulation is not equivalent to the direct censorship of speech due to disdain for the substantive idea it expresses. But his form of viewpoint regulation is no less problematic as a matter of constitutional and democratic theory. Instead of discriminating on the ground of personal disagreement with the substantive message, Meiklejohn excludes expression from the First Amendment's reach because of his own normative distaste for the self-interested motivation of the speaker. In Meiklejohn's world, a speaker who refuses to believe in the value of community and instead seeks solely to further his own personal interests through expression is to be constitutionally

⁷² See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (newspaper advertisements); *Smith v. California*, 361 U.S. 147, 150 (1959) (books); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (motion pictures); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) (religious literature).

⁷³ See MEIKLEJOHN, *supra* note 2, at 26.

shunned.⁷⁴ But what is this, other than an ideological prerequisite that a speaker commit himself to communitarianism, rather than to individualism and economic pluralism? Mystifyingly, Meiklejohn created his entire free speech theory in response to the Supreme Court's approval of communist speech regulations grounded in ideological disdain.⁷⁵ Yet he proceeded to restrict expressive rights on the basis of the very type of ideological disdain and epistemological arrogance that his theory was explicitly designed to avoid in the first place.

Seriously complicating (and darkening) the epistemological arrogance inherent in Meiklejohn's focus on speaker motivation is a second level of motivational selectivity in his determination of when and whether to protect speakers. Reconsider our body and truck armor hypothetical. Instead of the manufacturer, assume that the speaker is the mother of a marine serving in Iraq. Her expression is surely "self-interested," in that her primary concern is likely her son's well-being. Yet there is little question that Meiklejohn would extend full protection to this form of "self-interested" speech. The only difference between the two forms of self-interest is that the manufacturer's is commercial and the mother's is not. It was thus not purely personal interest that Meiklejohn disdained as speaker motivation. It was, rather, the presence of personal *commercial* motivation that led him to exclude a speaker from the First Amendment's scope. This fact renders his speaker selectivity even more ideologically suspect, for it suggests an indirect form of anticapitalism that strays quite far from the premise of epistemological humility.⁷⁶

Adding a substantial element of intellectual incoherence to Meiklejohn's First Amendment theory is his addition of yet a third level of selectivity. When Meiklejohn asserts—again, without the slightest rational grounding in the logical dictates of his own asserted First Amendment goals—that speech motivated by economic gain is to be characterized as "private" expression unprotected by the First Amendment, he could not reasonably have intended to extrapolate that precept to its logical conclusion. To do so would surely have proven too much because it would have necessarily led to the characterization of all commercially produced books and newspapers as unprotected private speech, a conclusion Meiklejohn made clear that he never intended.⁷⁷ But at no point did he ever attempt to distinguish the speech of radio broadcasters and lobbyists, which he excluded as private speech, from the fully protected sale of books and newspapers, to which he extended full First Amendment protection. Yet both are sold;

⁷⁴ We here ignore the obvious and insurmountable difficulty that Meiklejohn's regime would encounter in seeking to have a reviewing court attempt to discern a speaker's subjective motivation in an individual case.

⁷⁵ See, e.g., Meiklejohn, *supra* note 2, at x–xiv.

⁷⁶ See *supra* Part I.A.

⁷⁷ See Meiklejohn, *supra* note 2, at 91.

there exists no *ex ante* basis on which to assume that one is necessarily more motivated by profit concerns than the other.

This inconsistency in his theory should have served as a red flag to Meiklejohn, indicating that he needed to return to the theoretical drawing board. It should have signaled to him that if one focuses on the value of speech to the listener, the speaker's motivation is wholly irrelevant. In any event, he should have been aware that speech motivated by considerations of economic gain can be as valuable to the maintenance of a vibrant democratic system as speech motivated by purely altruistic or communitarian concerns. He should also have realized that to exclude from First Amendment protection all economically motivated speech would in fact eliminate much political speech and cause serious harm to the health of a democratic system. In addition, he should have recognized that it is absurd to assume mutual exclusivity of expressive motivation: just as a newspaper publisher or a book author may simultaneously intend to contribute to public discourse as well as to profit from their expression, so too may lobbyists or radio broadcasters have multiple goals and motivations for their expression.

Essentially, Meiklejohn excluded self-interested speech from the First Amendment because he mistook his personal vision of democracy for democracy itself. Of course, on a purely normative level one might well agree with Meiklejohn that individuals engaged in democratic self-government *should* ignore private self-interest to pursue the common good, though even that point is itself the subject of reasonable debate. But this is simply one political opinion about what democracy should be, rather than a logical outgrowth of a commitment to a system of free expression.⁷⁸

If epistemological humility means anything, it must mean that the state cannot regulate speech according to a particular viewpoint as to how democratic decisionmaking should function—or, indeed, whether it should exist at all. It must mean that individuals possess autonomy not only over the substantive policy choices they make but also over *how* and *why* to make those substantive choices.⁷⁹ Without this citizen autonomy over the “how” or “why” of democratic decisionmaking, government could control the outcome of democratic decisions simply by dictating the criteria for

⁷⁸ History alone provides ample reason to question this viewpoint. Consider the role economic self-interest played in demands for democratic political institutions in the first place. See THEODORE DRAPER, *A STRUGGLE FOR POWER: THE AMERICAN REVOLUTION* 470 (1996) (arguing that the British “economic exploitation” of American colonists was a “root” cause of the Revolution). Some historians have gone even further to argue that the Constitution itself reflects the Framers’ economic self-interest. See, e.g., CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 17 (Dover Pubs. 2004) (1913) (arguing that the Constitution “was not the product of an abstraction known as ‘the whole people,’ but of a group of economic interests which must have expected beneficial results from its adoption”).

⁷⁹ See Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 757 (2007) (describing these antecedent decisions as “process-based autonomy” decisions).

making them. Autonomy requires that the individual be as free to consider her own self-interest when she votes, as Meiklejohn was free to ignore his.

Meiklejohn compromised this core principle of epistemological humility by infecting his First Amendment theory with his own ideology as to how individuals should proceed when they engage in democratic decision-making. He thus made himself far more than merely the moderator of debate at a nationwide version of a New England town meeting. Contrary to the limits he placed on the hypothetical moderator, Meiklejohn allowed himself full and unreviewable authority to assess what speech is “wise,” “fair,” and “American”⁸⁰ on the basis of his personal assessment of the speaker’s motivation. He also allowed himself, on the basis of that assessment, to determine whether speech has *any* claim to First Amendment protection in the first place. As a result, his theory not only reveals an underlying inconsistency, it also fails as a democratic theory of the First Amendment.

II. POST’S “PARTICIPATORY” FIRST AMENDMENT

A. Participation, Self-Government, and Democratic Legitimacy

Robert Post developed his participatory theory as an alternative to Meiklejohn’s democratic explanation of the First Amendment.⁸¹ Although Post and Meiklejohn start with the identical premise that the First Amendment is designed to promote democratic self-government, they put forth alternative conceptions of democracy and, as a result, alternative theories of free expression.

Post adopts the basic premise that “[d]emocracy is not about individual self-government, but about collective self-determination.”⁸² He and Meiklejohn agree on that much, at least. For Post, however, democracy is about values, not procedures.⁸³ Thus, while Meiklejohn considered democracy to inhere in the collective “voting of wise decisions,”⁸⁴ Post considers the vote to be “merely a mechanism for decisionmaking.”⁸⁵ What defines democracy is its ideal value—self-government—and the people’s ability to recog-

⁸⁰ Cf. MEIKLEJOHN, *supra* note 2, at 26 (“[U]nwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American.”)

⁸¹ See, e.g., Post, *Reconciling*, *supra* note 31, at 2367–68 (describing two “historically . . . competing accounts of the practice of self-determination”).

⁸² Post, *Viewpoint Discrimination*, *supra* note 13, at 175.

⁸³ See, e.g., POST, CONSTITUTIONAL DOMAINS, *supra* note 3, at 6. Post argues, for instance, that majority rule is significant only because it is a “mechanism to realize the value of collective self-determination.” *Id.* Treating majority rule as “an end in itself,” he suggests, is a mistake. *Id.*

⁸⁴ See MEIKLEJOHN, *supra* note 2, at 25.

⁸⁵ Post, *Equality and Autonomy*, *supra* note 22, at 1524.

nize themselves as self-governing.⁸⁶ Thus, “[t]he value of collective self-determination does not inhere in the people’s power to decide their own fate, but rather in their warranted conviction that they are engaged in the process of deciding their own fate.”⁸⁷ Democracy, in other words, is not primarily about what individuals *do*, but rather about how they *feel*.⁸⁸ “Democratic legitimacy,” according to Post, exists only when “citizens hav[e] the warranted belief that their government is responsive to their wishes,”⁸⁹ “experience their state as an example of authentic self-determination,”⁹⁰ and “identify [the] government as their own.”⁹¹

How individuals identify themselves as self-determining is the “puzzle” at the heart of Post’s participatory theory.⁹² That puzzle, Post suggests, is how individuals can maintain a sense of self-determination though they will invariably disagree with some outcomes of collective decisionmaking;⁹³ it is how they may feel “included within the process of collective self-determination”⁹⁴ and not “hopelessly alienated” from the collective decisions it produces.⁹⁵ This “reconciliation of individual and collective autonomy” is what Post calls the essential problem of democracy.⁹⁶ Thus, Post concludes, “[d]emocracy requires individual autonomy only to the extent that citizens seek to forge ‘a common will, communicatively shaped and discursively clarified in the political public sphere’”⁹⁷—only, in other

⁸⁶ See POST, CONSTITUTIONAL DOMAINS, *supra* note 3, at 6–7; see also Post, *Reconciling*, *supra* note 31, at 2367 (describing democracy as those processes that permit individuals to “identify a government as their own”); Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 480 (1997) (describing democracy as those processes that allow all individuals to “sense that the decisions and actions of their nation are responsive to their will”).

⁸⁷ Post, *Equality and Autonomy*, *supra* note 22, at 1523. Post’s suggestion that this conviction must be “warranted” suggests that he is not focused on the individual’s subjective understanding of democratic legitimacy only. Indeed, it even seems to suggest that the objective reality of democratic self-determination is a necessary condition for democratic legitimacy. Even so, Post’s participatory theory is strangely dismissive of democratic processes that promote the objective reality of democratic self-determination.

⁸⁸ See, e.g., Post, *Reconciling*, *supra* note 31, at 2368 (“[D]emocracy requires that citizens experience their state as an example of authentic self-determination.”).

⁸⁹ Post, *Commercial Speech*, *supra* note 28, at 7; see also POST, CONSTITUTIONAL DOMAINS, *supra* note 3, at 7 (describing “reconciliation” between individual and collective self-determination to be a necessary condition for democratic legitimacy).

⁹⁰ Post, *Reconciling*, *supra* note 31, at 2368.

⁹¹ *Id.* at 2367.

⁹² *Id.* at 2368 (noting that how “citizens experience their state as an example of authentic self-determination” is a “puzzle” because “citizens can expect to disagree with many of the specific actions of their government”).

⁹³ See *id.* at 2368.

⁹⁴ Post, *Commercial Speech*, *supra* note 28, at 7 (emphasis added).

⁹⁵ Post, *Equality and Autonomy*, *supra* note 22, at 1523 (emphasis added).

⁹⁶ POST, CONSTITUTIONAL DOMAINS, *supra* note 3, at 7 (“The essential problematic of democracy . . . lies in the reconciliation of individual and collective autonomy.”).

⁹⁷ Post, *Viewpoint Discrimination*, *supra* note 13, at 176 (quoting 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 81 (Thomas McCarthy trans., Beacon Press 1987) (1981)).

words, as an incident to participation in the collective process of public discourse.

Having concluded that the vote is assuredly not the exclusive solution to this puzzle,⁹⁸ Post reasons that individuals must derive their sense of democratic legitimacy from some process other than collective decisionmaking itself. This process, Post suggests, is the individual's participation in the formation of democratic public opinion by engagement in public discourse. An individual may attain the sense of inclusion in the process of collective self-government if the individual is free to participate in the "communicative process relevant to the formation of democratic public opinion"—what Post calls "public discourse"—and if the state is subordinated to the public opinion that emerges from this public discourse.⁹⁹ Thus, Post's "participatory" concept of democracy suggests that if individuals can participate in the formation of public opinion, and if the state is ultimately constrained by that public opinion, individuals can recognize their "potential[] . . . authorship" in collective decisionmaking.¹⁰⁰ That recognition, in turn, creates the potential for individuals to recognize themselves as self-determining.¹⁰¹

To summarize, Post's participatory account of democracy makes four sequential points: first, that democracy is defined according to characteristic values rather than procedures; second, that the essential democratic value is self-government; third, that self-government inheres in the individual experiencing herself as included within the process of collective self-government, that is, in the individual's experiencing a sense of democratic legitimacy; and fourth, that in a heterogeneous culture, individuals can attain a sense of democratic legitimacy only through participation in the formation of public opinion. From these four points, Post concludes that the purpose of the First Amendment is to "safeguard[] . . . public discourse from regulations that are inconsistent with democratic legitimacy."¹⁰² As this brief summary suggests, the starting point for Post's First Amendment theory rests entirely on the participatory theory of democracy. Because the faults within that theory are significant, and because they necessarily seep into Post's free speech theory, the next section will elaborate further on

⁹⁸ See *infra* notes 108–11 and accompanying text.

⁹⁹ See Post, *Reconciling*, *supra* note 31, at 2368; see also POST, CONSTITUTIONAL DOMAINS, *supra* note 3, at 7 ("If public discourse is kept free for the autonomous participation of all individual citizens, and if government decisionmaking is subordinated to the public opinion produced by public discourse, there is the possibility that citizens will come to identify with the state as representative of their own collective self-determination.").

¹⁰⁰ Post, *Equality and Autonomy*, *supra* note 22, at 1524.

¹⁰¹ See, e.g., POST, CONSTITUTIONAL DOMAINS, *supra* note 3, at 7.

¹⁰² Post, *Reconciling*, *supra* note 31, at 2368; see also *id.* ("[T]he participatory approach understands the First Amendment . . . as safeguarding the ability of individual citizens to participate in the formation of public opinion.").

Post's participatory concept of democracy and what we consider its flaws before the following section explores Post's free speech theory itself.

B. The Participatory Theory of Democracy

Post's participatory theory fails as a viable theory of democracy for three reasons. First, and most fundamentally, Post's theory reflects a false and artificial dichotomy between autonomy and legitimacy. This distinction is neither obvious nor even logical. If democracy is valuable for the feeling of autonomy that it produces, as Post suggests it is, autonomy itself must be valuable to a greater degree than he recognizes.

Second, accepting Post's assumption that self-government turns on the individual's sense of democratic legitimacy, his theory confusingly prioritizes participation in public discourse as the key means of democratic legitimation even though it is of little democratic consequence standing alone. To be truly legitimating, participation in the public discourse must be free and informed. Moreover, if public discourse is to have any meaningful effect there must exist some mechanism by which government may be required to internalize the public will that emerges from public discourse. Post's theory is vastly truncated, then, to the extent he emphasizes the individual's ability to engage in public discourse over other democratic processes that ensure that this participation is democratically meaningful in real life. Absent the vote, participation is at best of limited value and at worst nothing more than a cynical and deceptive means of obtaining citizen compliance with an authoritarian regime. To be sure, Post does not completely devalue the vote. But he never explains why it is of any less importance as a necessary condition to a viable democratic system than is participation and the feeling of legitimacy that supposedly accompanies it. Finally, even assuming both Post's subjective definition of self-government *and* the diminished importance of other processes by which democratic legitimacy is achieved, Post provides no convincing explanation of exactly how participation in public discourse facilitates democratic legitimacy in a heterogeneous society. Nor does he explain how it does so in a way that voting does not. Indeed, his theory is confusingly contradictory on this point, especially because it fails to elucidate the precise conditions for democratic legitimacy in the first place.

1. The Subjective Concept of Democratic Self-Government.—Post effectively treats democracy as if it were a subjective phenomenon. By “subjective” we do not mean to refer to the fact that democracy is an ambiguous concept, which may connote different things to different theorists. Instead, we refer to the fact that Post considers the essence of self-government to be found within each individual's psyche. That is, Post finds the value of democratic self-determination to lie not in the individual's ability to make autonomous self-governing decisions for himself, nor in the individual's

power to participate equally in processes of collective decisionmaking, but primarily in his mental recognition of himself as self-governing. It is a subjective concept of self-government, then, because it seems quite divorced from whether the individual is, in reality, self-determining. The troubling aspect of a subjective concept of democracy is plain: equating self-government with the individual's ability to "imagine" himself as "included within the process of collective self-determination"¹⁰³ invites autocracy, so long as the individual is not the wiser for it.

To be sure, Post does recognize that democracy cannot be exclusively a product of the individual's imagination. Take his description of democratic legitimacy as depending on individuals' "warranted conviction that they are engaged in the process of deciding their own fate."¹⁰⁴ That the conviction of self-determination must be "warranted" suggests Post does not mean to propose an entirely subjective definition of democratic legitimacy. Likewise, Post often concedes that the opportunity to participate in public discourse—the process that directly facilitates the individual's subjective sense of democratic legitimacy—is not itself a sufficient condition for democracy.¹⁰⁵

Our claim is simply that Post's participatory theory significantly undervalues the objective component of democratic legitimacy, not that it denies it entirely. Thus, in one breath Post recognizes that actual exercises of self-government like voting and actual conditions for self-government like the availability of information have *some* democratic value. In the next breath, however, he suggests their value is "lexically" inferior to the value of public discourse.¹⁰⁶ He justifies this hierarchy by positing that voting does not allow individuals to feel legitimated in the way that participation in public discourse does.¹⁰⁷

To explain his proposed structure, Post hypothesizes a society in which citizens vote on every mundane aspect of daily life—from what to eat to what color clothing to wear—but in which public discussion, political advocacy, and the press are banned.¹⁰⁸ Such a society would be "undemocratic," Post suggests, even though it ensures every individual equal power to vote and to decide the society's collective fate, because collective decisionmaking is "oppressive" absent a connection between the "particular wills of individual citizens and the general will of the collectivity."¹⁰⁹ The "general will" to eat steak for dinner, for instance, will feel oppressive to

¹⁰³ Cf. Post, *Commercial Speech*, *supra* note 28, at 7 (describing the effect the opportunity to participate in public discourse has on an individual's sense of democratic legitimacy).

¹⁰⁴ Post, *Equality and Autonomy*, *supra* note 22, at 1523 (emphasis added).

¹⁰⁵ See, e.g., POST, CONSTITUTIONAL DOMAINS, *supra* note 3, at 7.

¹⁰⁶ See Post, *Reconciling*, *supra* note 31, at 2373–74.

¹⁰⁷ See, e.g., Post, *Meiklejohn's Mistake*, *supra* note 21, at 1114–16.

¹⁰⁸ See Post, *Equality and Autonomy*, *supra* note 22, at 1523–24.

¹⁰⁹ *Id.* at 1524.

the individual who prefers fish, and the equal power to affect that collective decision will apparently provide no solace. Thus, Post concludes that the vote does not further the core value of democracy because it does not allow the individual to experience a sense of democratic legitimacy.¹¹⁰

In reality, this hypothetical only reveals that Post's distinction between objective exercises of autonomy and subjective feelings of legitimacy rests on a false dichotomy. Because this hypothetical society is "undemocratic," Post concludes that democratic legitimacy must derive from processes other than voting. To test this logic, however, Post never considers the exact opposite society, one in which there is an open public discourse and full freedom to participate in the formation of public opinion but absolutely no voting rights. Even if the state acts in good faith to determine the "general will" and to govern accordingly¹¹¹—indeed, even if the state may perfectly determine what the general will is through some psychic process—we are left with a system assuredly closer to a benevolent dictatorship than a democracy. The reasonable and logical conclusion to draw from this scenario is not that open public discourse and democratic legitimacy are distinct, but that an open public discourse, like majoritarianism, is necessary but not sufficient to ensure democratic legitimacy.¹¹² Yet it is the first conclusion that Post comes close to adopting: that majoritarianism is largely unrelated to democratic legitimacy while an open public discourse is its linchpin.¹¹³

In any event, resort to hypothetical societies is unnecessary to establish Post's mistake. Recall Post's statement that "[t]he value of collective self-determination does not inhere in the people's power to decide their own fate, but rather in their warranted conviction that they are engaged in the process of deciding their own fate."¹¹⁴ Post fails to recognize that a feeling is only valuable if its referent is itself normatively valuable: in other words,

¹¹⁰ Post provides no empirical support for the claim that voting does not support democratic legitimacy. He rests this position wholly on the conclusion that he draws from his hypothetical, "undemocratic" society. For the argument that voting, in reality, *does* advance democratic legitimacy as Post defines it, see *infra* Part II.B.3. In any event, voting is itself an *exercise* of self-government regardless of how individuals perceive it.

¹¹¹ Of course, this is an enormous stipulation: part of the point of the vote in the first place is that, without it, we could never expect government to have such honorable motives.

¹¹² In other words, both majoritarianism and public discourse taken alone are necessary but insufficient conditions for democratic legitimacy.

¹¹³ Post seems to suggest as much to the extent that he believes that censorship of "information relevant to the voting of wise decisions" does not "endanger the process of democratic legitimation." Post, *Commercial Speech*, *supra* note 28, at 14–15.

Post might respond that his hypothetical construct is not designed to demonstrate the irrelevance of voting but rather the emptiness of voting absent complementary participation. But while his hypothetical construct conceivably *could* be employed to make this point, it is not the point Post ultimately makes. Rather, as we will demonstrate, Post concludes that the value of voting and the corresponding free speech interest in making the citizen's vote more informed is "lexically inferior" to the free speech value of participation. See *infra* Part II. Thus, we believe our criticism is fully justified.

¹¹⁴ Post, *Equality and Autonomy*, *supra* note 22, at 1523.

the subjective *feeling* of autonomy is valuable only if, and only to the extent that, the objective *reality* of autonomy is deemed valuable. Post cannot have it both ways: if one values democracy for the feeling of autonomy that it produces, one must likewise deem autonomy itself equally valuable—and *valued*. Normally, we would think, it would go without saying that, in the words of the Supreme Court, “the right to vote freely . . . is of the essence of a democratic society.”¹¹⁵ The vote is the most basic exercise of self-determination, the only guarantee that the people remain sovereign over their government, the principal distinction between democracy and autocracy, and the principal (if not the only) means for individuals in an unequal society to have an objectively equal say in their collective government.¹¹⁶ But whether or not one must accept this foundational precept of democratic theory, surely one cannot value the feeling of autonomy *over the autonomy itself*.

Because he separates the feeling of self-government from the actual exercise of self-government, Post mistakes the individual's sense of democratic legitimacy—which should be seen as nothing more than an incidental, derivative effect flowing from the real-life commitment to democracy—for democracy itself. Because he does so, and because he undervalues aspects of self-government that are at least as essential as participation in public discourse, Post proposes a theory of democracy that counterproductively undercuts the core democratic ideal of autonomy. Post values the associated benefit more than he values the foundational activity. From a theoretical perspective, then, he places the cart before the horse. As a result, his theory fails as a democratic theory, however one defines democracy. In the next section we suggest that Post's theory fails as a democratic theory even if one assumes that the feeling of democratic legitimacy, in and of itself, serves as the predominant rationale for democracy.

¹¹⁵ Reynolds v. Sims, 377 U.S. 533, 555 (1964); see also Burson v. Freeman, 504 U.S. 191, 198 (1992) (recognizing the vote as “a right at the heart of our democracy” and upholding under strict scrutiny a state statute that prohibited some forms of public discourse—the solicitation of votes and the display of campaign materials—in the vicinity of polling places because of its potential to interfere with the right to vote); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”).

¹¹⁶ Thus, the emphasis in *The Federalist Papers*, for instance, that the “electors” in the American republic would be “[n]ot the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune.” THE FEDERALIST NO. 57, at 308–09 (James Madison) (J.R. Pole ed., 2005). Indeed, *The Federalist No. 54* emphasizes that the vote facilitates political equality and procedural fairness not simply when the people vote in elections, but also when their representatives vote in Congress: “[E]ach vote whether proceeding from a larger or smaller state, or a state more or less wealthy or powerful, will have an equal weight and efficacy; in the same manner as the votes individually given in a state legislature, by the representatives of unequal counties or other districts, have each a precise equality of value and effect; or if there be any difference in the case, it proceeds from the difference in the personal character of the individual representative, rather than from any regard to the extent of the district from which he comes.” THE FEDERALIST NO. 54, at 298 (James Madison) (J.R. Pole ed., 2005).

2. *The Underinclusive Conditions for “Democratic Legitimacy.”*—Post’s entire participatory model is premised on the “precondition” that the state is responsive and accountable to public opinion. This condition makes perfect sense. If individuals are to sense that their contributions to public opinion affect the direction of the government, the state must be made to internalize public opinion in some fashion. Yet Post provides no explanation of how we assure ourselves that the state will internalize public opinion; he simply assumes it to be the case. Ironically, the very means by which the state is made to internalize public opinion is the same process that Post marginalizes for its purported inability, in his mind, to create democratic legitimacy: majority rule, implemented and assured through the vote.¹¹⁷

This criticism suggests that Post’s participatory model rests on a defectively selective concept of democratic legitimacy. His model asks what structures create democratic legitimacy and it privileges those structures as essential processes of democracy. However, it largely ignores the opposite side of the same coin: it fails to consider what structures are necessary because their *absence* would *destroy* democratic legitimacy.¹¹⁸ This point becomes clearer when Post applies the participatory model to the First Amendment, and the next section will explore it in depth.¹¹⁹ For now it is enough to note that a coherent concept of democratic legitimacy would embrace a condition either if that condition creates democratic legitimacy *or* if its absence would destroy it.

Our point is simple: the opportunity to participate in the public discourse may be a *necessary* condition for democratic legitimacy, but it certainly is not a *sufficient* condition. While Post acknowledges this point himself,¹²⁰ he nevertheless insists on a model of democracy that treats par-

¹¹⁷ See *supra* text accompanying notes 82–101.

¹¹⁸ Post *did* adopt this approach to determine that public discourse, not voting, is necessary for democratic legitimacy. Recall his hypothetical in which he posited a society with full voting rights but no public discourse. There he concluded that the absence of public discourse would destroy democratic legitimacy. See *supra* notes 109–10 and accompanying text. However, after making the negative inference from this hypothetical that public discourse must create democratic legitimacy, he never applies the same logic to recognize the role information and democratic decisionmaking via the vote have for democratic legitimacy.

¹¹⁹ For a full discussion, see *infra* Part II.C.1. Briefly, in the First Amendment context, Post suggests that certain forms of informational speech that admittedly assist individuals in their democratic decisionmaking may not qualify as public discourse if the speech is not spoken as part of an effort to engage public opinion. The speech is not public discourse, the argument goes, because the speech has no effect on the speaker’s sense of democratic legitimacy. Post *never* considers, however, the effect governmental regulation of such speech will have on the *audience’s* sense of democratic legitimacy. In other words, concluding that the existence of certain speech does not create democratic legitimacy for the speaker, Post overlooks the extent to which its governmentally enforced absence will destroy democratic legitimacy for the audience.

¹²⁰ E.g., Post, *Commercial Speech*, *supra* note 28, at 12 (describing public discourse as a “necessary (but not sufficient) precondition for democratic legitimation”); Post, *Equality and Autonomy*, *supra* note 22, at 1528 (“I do not mean to deny, of course, that voting is an important means of participation in a

ticipation in the public discourse as the locus of democratic legitimation. If neither voting nor participation in the public discourse can independently ensure democratic legitimacy, elevating one over the other makes little sense.

3. *The Uncertain Connection Between Public Discourse and Democratic Legitimacy.*—Even forgiving these first two flaws, Post never articulates a satisfying explanation as to how participation or potential participation in the public discourse actually ensures individuals' sense of democratic legitimacy. Part of the problem is that Post never clarifies the essential conditions for democratic legitimacy in the first place. He vaguely suggests that democratic legitimacy requires a “connection between the particular wills of individual citizens and the general will of the collectivity,”¹²¹ or “reconciliation of individual and collective autonomy,”¹²² but this says very little about the intersection between participation and legitimacy. One could argue, for instance, that majoritarian voting itself provides such a “connection” or “reconciliation” to the extent it aggregates all individual decisions to determine the collective will. But, because we know that Post considers voting to be merely a mechanism of democracy rather than a process of democratic legitimation, we at least know that this is not the “connection” Post has in mind.

Post alternately suggests two competing explanations for this asserted connection. The first, which is the stronger of the two—in the sense that it expects public discourse to accomplish more, not in the sense that it is more persuasive—can appropriately be called the “substantive” explanation. The second, which is weaker in that it is designed to accomplish less, can be called the “procedural” explanation. Post suggests both explanations at different points but neither is satisfying. The substantive explanation, while theoretically plausible, is useless as a practical matter because it is divorced from reality. And the procedural explanation, while practically plausible, is theoretically incoherent.

Post's substantive explanation reasons that public discourse facilitates democratic legitimacy because public discourse aspires to “agreement” or the discovery of a “common will.”¹²³ This explanation is substantive be-

democratic polity. I only claim that voting is not by itself sufficient to realize the value of democratic self-governance.”)

¹²¹ *Id.* at 1524.

¹²² POST, CONSTITUTIONAL DOMAINS, *supra* note 3, at 7.

¹²³ See Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 283 (1991) [hereinafter Post, *Racist Speech*] (“[T]he very purpose of [public discourse] is the practice of self-determination. The goal is ‘agreement’ (or the attainment of ‘a common will’) because in such circumstances the individual will is by hypothesis completely reconciled with the general will. . . . [T]his goal is purely aspirational.”). In this regard, Post's participatory concept of democracy most clearly reflects shared assumptions with the political theory of deliberative democracy. That connection, and the underlying theory of deliberative democracy, will be explored further below. See *infra* Part III.C.

cause it values public discourse for its hypothetical result: “‘agreement’ (or the attainment of a ‘common will’)” by which “the individual will is . . . completely reconciled with the general will.”¹²⁴ The reasoning is quite simple: if, through public discourse, individuals come to agree on a particular substantive outcome, each individual will be able to recognize the collective choice as her own. There will be no conflict between the will of the individual and the will of the majority; public discourse has made them identical. Thus, when public discourse creates consensus, it also creates democratic legitimacy as Post defines it: the consensus allows individuals to recognize the government as their own.

If democratic legitimacy depends on achieving something approaching substantive consensus, and if consensus is the realistic outgrowth of public discourse, the participatory theory’s emphasis on public discourse as opposed to voting would make perfect sense. Unlike public discourse, the vote provides no opportunity for consensus-building. Standing alone, the vote is a private and individual act that registers individual preferences, not an act that permits discussion, compromise, and agreement. Indeed, absent the expectation of a unanimous outcome, the very act of voting reflects recognition of the futility of any attempt to attain consensus. The vote presupposes that individuals disagree over the substantive choices that face them, that those differences are often irreconcilable, and that the fairest way to resolve those differences is to ascertain majority will. If democratic legitimacy does depend on individuals reaching agreement on the substantive outcomes of the democratic process, the vote would indeed be an ineffectual means for its attainment, as Post asserts.

The difficulty lies in Post’s concession that public discourse is no better than voting at producing consensus. Consensus, he suggests, is merely the *aspirational* goal of public discourse rather than a probable or even reasonably possible result.¹²⁵ More likely, he concedes, division and disagreement will characterize the public discourse. In those circumstances, Post suggests:

Even if a state were to subordinate lawmaking to public opinion, and even if all citizens were free to participate in the formation of public opinion, a particular group within the state that found itself perpetually outvoted, ignored, and alienated might well question whether the state were an appropriate vehicle for democratic self-governance. The group might even consider seceding from the state and founding its own democratic polity. . . . Persistent and fundamental disagreement with other citizens may preclude the identification with

¹²⁴ Post, *Racist Speech*, *supra* note 123, at 283.

¹²⁵ See, e.g., *id.* (“[A]bsolute agreement can never actually be reached . . .”); Post, *Meiklejohn’s Mistake*, *supra* note 21, at 1115 (noting that the postulate of a “determinate fusion of individual and collective will” is “unconvincing under modern conditions of heterogeneity”).

the state that a system of open democratic participation is precisely established to promote.¹²⁶

If Post is claiming that public discourse creates democratic legitimacy by creating substantive agreement among individuals, this concession—wisely made, given the realities of the situation—shatters that claim. To the extent that public discourse is likely to leave individuals as alienated as voting does, it makes no sense to elevate public discourse as the locus of democratic legitimation on the grounds that it is more likely to bring about collective consensus.

Post's procedural explanation attempts to fashion an alternative rationale for how public discourse uniquely advances democratic legitimacy. It suggests that the outcome and even the goals of public discourse are far less significant to the individual's sense of democratic legitimacy than simply the ability to participate in the process of public debate.¹²⁷ In this posture, for instance, Post suggests that as long as the state is subordinated to public opinion, the ability to participate in the formation of public opinion "authorizes citizens to imagine themselves as included within the process of collective self-determination."¹²⁸ Similarly, Post argues, "[a]lthough citizens may not agree with all legislative enactments, although there may be no determinate fusion of individual and collective will, citizens can nevertheless embrace the government as rightfully 'their own' because of their engagement" in public discourse.¹²⁹

This explanation is unsatisfying in part because it is conclusory. Post provides no empirical or psychological evidence that participation in public discourse actually allows individuals to feel "reconciled" to their government; even he recognizes that at times it may not.¹³⁰ But the explanation is unsatisfying also because its reasoning applies just as easily to voting. One could argue that the individual's ability to vote allows her to imagine herself as included within the process of collective self-determination. In both cases, it could be argued, the individual feels "included" within the process of collective self-determination by the procedures that provide her a say in her government. A procedural explanation does little, then, to support the

¹²⁶ Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CAL. L. REV. 429, 436 (1998).

¹²⁷ See, e.g., *id.* at 436 ("If democratic self-government requires that citizens identify with a system of open participation in the formation of public opinion, democratic legitimacy is correspondingly rendered independent of the particular legislative outcomes of that system. This independence allows democratic legitimacy to fit more or less comfortably with the 'irreparable reasonable disagreement' that characterizes modern heterogeneous states." (quoting JOHN RAWLS, *POLITICAL LIBERALISM* 35 (1993))); Post, *Reconciling*, *supra* note 31, at 2368 (describing public discourse as facilitating democratic legitimacy so long as all citizens are permitted to participate in it and so long as it does not "reflect the values and priorities of some vision of collective identity").

¹²⁸ Post, *Commercial Speech*, *supra* note 28, at 7.

¹²⁹ Post, *Meiklejohn's Mistake*, *supra* note 21, at 1116.

¹³⁰ See *supra* note 124 and accompanying text.

unique status Post gives public discourse among all democratic processes capable of promoting democratic legitimacy. To be sure, public discourse creates a unique opportunity that voting does not: it provides the individual the opportunity to advocate and to influence others so that the general will may more closely resemble her own. By the same token, however, voting provides a unique opportunity that public discourse does not. It provides an assurance, by law, that each individual has equal say in the direction of the government. In other words, *both* public discourse *and* voting provide unique opportunities for individuals to recognize government as their own.

The trouble with the procedural explanation, then, is that it provides no basis for the superior status that Post affords participation in public discourse over other democratic processes. To the extent one recognizes that public discourse will never produce real consensus on substantive issues, it is no more essential than voting in creating substantive democratic legitimacy. And to the extent that public discourse and voting both create unique opportunities for the individual to have a say in government, neither is better than the other in creating procedural democratic legitimacy. Post's entire participatory theory, then, depends on a premise lacking any satisfying explanation. The point underscores the counterproductive impact of Post's puzzlingly artificial separation of the acts of participation in public discourse on the one hand and voting on the other.

C. The Selective Exclusions of Post's Participatory First Amendment

The prior section focused entirely on an effort to understand and critique Post's unique definition of democracy. With that understanding in place, including an understanding of that definition's foundational flaws, we now turn to Post's First Amendment theory. That theory begins with the premise that the democratic purpose of the First Amendment is to "safeguard[] public discourse from regulations that are inconsistent with democratic legitimacy."¹³¹ This follows directly from the participatory concept of democracy that Post adopts and its basic distinction between legitimation and decisionmaking. Because Post's participatory model associates democracy with legitimation rather than democratic decisionmaking and because it disassociates legitimation and decisionmaking from one another, Post's participatory theory of the First Amendment enables legitimation far more than it enables or facilitates actual democratic decisionmaking.¹³²

¹³¹ Post, *Reconciling*, *supra* note 31, at 2368; *see also id.* ("[T]he participatory approach understands the First Amendment . . . as safeguarding the ability of individual citizens to participate in the formation of public opinion.").

¹³² As an example, consider Post's argument that censorship of speech that facilitates informed decisionmaking does not "endanger the process of democratic legitimation." Post, *Commercial Speech*, *supra* note 28, at 14–15.

Again, Post's First Amendment theory is immediately subject to question to the extent it incorporates the flaws of democratic theory described in the prior section. But its shaky foundation in democratic theory is not its only flaw. Post's First Amendment theory suffers from further flaws. First, it depends on an underinclusive definition of "participation" in public discourse and thus systematically marginalizes *listeners'* interests in free speech. Second, it adopts an ambiguous and at times inconsistent definition of the speech that comprises the "public discourse" and, as a practical matter, seems to exclude some speech for reasons of the speaker's identity and presumptive motivation. Finally, it effectively incorporates majoritarian norms to interpret the scope of the inherently countermajoritarian First Amendment. This section will describe Post's participatory theory of the First Amendment and each of these criticisms in turn.

As a threshold matter, though, it is necessary to place Post's participatory theory within the broader context of First Amendment theory. Post argues that his participatory theory is the most "powerful" free speech theory,¹³³ by which he means it is the theory that best explains the Supreme Court's existing First Amendment jurisprudence.¹³⁴ In an important sense, then, Post's First Amendment theory purports to be nothing more than a post hoc rationalization of existing doctrine. Post would likely object to this characterization, as he believes legal scholarship should glean from the doctrine insights about our national commitments and use those insights to formulate more coherent theoretical explanations for the doctrine—a kind of First Amendment anthropology.¹³⁵ In reality, however, such an approach to legal scholarship mistakes judicial opinions for national commitments, precludes the meaningful formulation or discussion of normative first principles in constitutional theory, and discounts the role of the legal academy as the intellectual watchdog of the judiciary. One wonders, for instance, whether this approach would require a scholar writing in the early and mid-twentieth century to develop a free speech theory to rationalize the Supreme Court's highly unprotective decisions at the time.¹³⁶ One can further wonder whether this approach would require the scholar to alter his free speech theory to reflect the Court's subsequent shift to more protective standards.¹³⁷ If so, it seems this approach to constitutional scholarship may offer more in the way of doctrinal description and synthesis than theoretical analysis.

Despite fashioning his own theory and tying it to existing Supreme Court doctrine, however, Post does not deny the legitimacy and applicabil-

¹³³ See Post, *Reconciling*, *supra* note 31, at 2371 ("[W]here the doctrinal implications of different prominent theories of the First Amendment collide, courts will tend to give priority to the participatory theory of democracy.").

¹³⁴ *Id.* at 2373.

¹³⁵ See Post, Rosenthal Lectures, *supra* note 33 (manuscript at 10–11, on file with authors).

¹³⁶ See *Dennis v. United States*, 341 U.S. 494 (1951); *Gitlow v. New York*, 268 U.S. 652 (1925); *Debs v. United States*, 249 U.S. 211 (1919).

¹³⁷ See *Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

ity of other free speech theories.¹³⁸ Indeed, he understands his participatory theory only as a theory of inclusion.¹³⁹ Speech not deserving of protection under his participatory theory may nonetheless deserve protection under another free speech theory,¹⁴⁰ be it a different democratic theory of the First Amendment¹⁴¹ or even a free speech theory that has nothing to do with democracy at all.¹⁴²

That said, Post does not regard all free speech theories as equals. Instead, he arranges them “according to a ‘lexical priority.’”¹⁴³ The participatory theory has top billing; other theories apply to protect speech only to the extent they are “not inconsistent with the requirements of the participatory theory.”¹⁴⁴ Post’s treatment of commercial speech is the prime illustration of how this lexical approach functions. Post concludes that commercial speech—defined largely as commercial advertising—is not “public discourse” and therefore is not protected under his participatory theory. Still, he concludes, it deserves some First Amendment protection for its “Meiklejohnian” value, meaning that it provides information to the listeners that can facilitate exercise of their self-governing choices.¹⁴⁵ Determining which theory protects certain speech, if any, is not purely an academic inquiry. That determination is intended to have significant implications for the na-

¹³⁸ See, e.g., Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1272 (1995) [hereinafter Post, *Recuperating*] (“[T]he search for any general free speech principle is bound to fail. Were the Constitution to recognize and impose a single general value for speech, it would in a Procrustean way force the entire spectrum of state regulation of forms of social interaction into conformity with the particular social practices required by that single value. . . . All of life is not about truth-seeking; nor is it about democracy.”); *id.* at 1275 (criticizing the Court for attempting to “craft a doctrine that would reflect a universal and generic constitutional value for speech”).

¹³⁹ See, e.g., Post, *Reconciling*, *supra* note 31, at 2371–72 (noting the “priority” of the participatory theory over other free speech theories).

¹⁴⁰ See *id.* at 2372 (“First Amendment jurisprudence contains several operational and legitimate theories of freedom of speech, so that it is quite implausible to aspire to clarify First Amendment doctrine by abandoning all but one of these theories.”).

¹⁴¹ See *id.* at 2373 (“[T]he rules of the Meiklejohnian perspective will be imposed when required by that perspective and not incompatible with the participatory theory . . .”).

¹⁴² See *id.* at 2372–73 (recognizing that the First Amendment may also protect speech for its truth-seeking value under the marketplace of ideas theory, or for its self-realization value); Post, *Equality and Autonomy*, *supra* note 22, at 1521 (“[T]o attribute to the First Amendment the purpose of facilitating collective self-determination is not necessarily to deny that the First Amendment can also serve other, distinct purposes.”).

¹⁴³ See *id.* at 2372–73.

¹⁴⁴ See Post, *Reconciling*, *supra* note 31, at 2373.

¹⁴⁵ See Post, *Commercial Speech*, *supra* note 28, at 5 (explaining that commercial speech has “subordinate” constitutional status because it “inform[s] an audience . . . about matters pertinent to democratic decision making” rather than “participat[ion] in the process of self-governance”). Of course, as Post admits and the preceding discussion of Meiklejohn’s theory demonstrates, suggesting that commercial speech is protected under a Meiklejohnian theory is quite ironic, given that Meiklejohn believed commercial speech is not protected under the First Amendment at all. See *id.* at 13 n.55 (recognizing the irony); see also MEIKLEJOHN, *supra* note 2, at 39 (“The constitutional status of a merchant advertising his wares . . . is utterly different from that of a citizen who is planning for the general welfare.”).

ture and scope of protection that the speech enjoys.¹⁴⁶ The exact same regulation may be unconstitutional, for example, when applied to speech protected under the participatory theory and yet entirely constitutional when applied to speech purportedly protected solely under the less highly ranked Meiklejohnian theory valuing the conveyance of information to listeners.¹⁴⁷

Under this logic, Post originally concluded that an overbroad regulation of commercial speech may be perfectly permissible although an overbroad regulation of public discourse would not. The difference, Post reasoned, is that regulation of commercial speech threatens the loss of information—a form of communication that is fungible and can therefore be replaced from other sources—and not the loss of democratic legitimation. But this conclusion rests on a false dichotomy: the regulation of purely informational speech also undermines democratic legitimacy to the extent that it endangers autonomous self-determination on the part of its recipients.¹⁴⁸ More to the point, it also demonstrates that protection under a lexically inferior theory of free speech in Post's framework is a fairly puny consolation prize. According to Post, the state may enforce overbroad regulations of informational speech that is protected for its Meiklejohnian value on the wholly unsupported assumption that other speech will fill the informational void.¹⁴⁹ Not only does this represent a misapprehension of Meiklejohn's theory (Meiklejohn's moderator could silence speech on the basis of what had already been said, not on the basis of what potentially would be said),¹⁵⁰ it also demonstrates a cavalier attitude towards the value of informational speech generally.¹⁵¹ The commercial speaker in many cases has unique ac-

¹⁴⁶ See, e.g., Post, *Commercial Speech*, *supra* note 28, at 26–33 (describing how certain speech regulations that would be prohibited under the participatory theory may be entirely acceptable under the Meiklejohnian theory).

¹⁴⁷ See, e.g., *id.* at 26–32 (explaining why compelled speech, overbroad speech regulation, and prior restraints are unconstitutional under the participatory theory but may not be under the Meiklejohnian theory and arguing, therefore, that such regulations are unconstitutional when applied to public discourse but constitutional when applied to commercial speech).

¹⁴⁸ For full discussion of this point, see *supra* Part II.A.2.

¹⁴⁹ See Post, *Commercial Speech*, *supra* note 28, at 32. Post explains:

To chill commercial speech is to lose information. No other constitutional value is at stake. Information is fungible. The central insight of Meiklejohnian analysis is that it does not matter which speaker provides information, so long as it is provided. If a particular speaker is chilled, therefore, it is quite possible that equivalent information will become available from other sources.

Id.

¹⁵⁰ See MEIKLEJOHN, *supra* note 2, at 25 (“If . . . at a town meeting, twenty like-minded citizens have become a ‘party,’ and if one of them has read to the meeting an argument which they have all approved, it would be ludicrously out of order for each of the others to insist on reading it again. No competent moderator would tolerate that wasting of the time available for free discussion. What is essential is not that everyone shall speak, but that everything worth saying shall be said.”).

¹⁵¹ This attitude, of course, goes back to the premise of the participatory theory that voting is just a “mechanism” of democratic decisionmaking. See *supra* notes 82–91 and accompanying text.

cess to certain information and a unique incentive to share it.¹⁵² As a result, casual regard for her ability to speak represents a casual regard for the value of the information itself and its important democratic benefit to its recipients. If the purposes of free speech protection have any significance at all, one cannot proceed on the empirically unsupported assumption that the information contained in the speech is easily replaceable. Indeed, the Supreme Court has squarely rejected the proposition that speech may be regulated simply because the information it contains is available from another source.¹⁵³

The following analysis criticizes Post's participatory theory of free speech for not protecting certain speech. To be clear, this criticism is not meant to suggest that Post himself leaves the speech *entirely* unprotected, only that his version of the participatory theory does. Our criticism, then, is that the speech deserves protection *under the participatory theory itself*, properly understood. Indeed, because of the consequences of classifying speech as public discourse or not, it is all the more important to understand what speech the participatory theory protects, as well as what regulations of speech it prohibits. We turn to those questions now.

1. Devaluing the Role of Listeners in the System of Democratic Discourse.—Under Post's participatory theory, the First Amendment protects "public discourse" from "regulations that are inconsistent with democratic legitimacy."¹⁵⁴ Post asserts that regulations of the public discourse may undermine democratic legitimacy in two ways: first, they "cut off particular citizens from participation in the public discourse";¹⁵⁵ and second, they "regulate[] public discourse so as to reflect the values and priorities of some vision of collective identity."¹⁵⁶ But despite his expressed concern for un-

¹⁵² See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) (recognizing that commercial solicitation may have "considerable value" because the "seller has a strong financial incentive to educate the market and stimulate demand").

¹⁵³ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976) ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means. . . . Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated."); see also *Schneider v. New Jersey*, 308 U.S. 147, 151–52 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

¹⁵⁴ Post, *Reconciling*, *supra* note 31, at 2368.

¹⁵⁵ See *id.* ("To the extent that the state cuts off particular citizens from participation in public discourse it *pro tanto* negates its claim to democratic legitimacy with respect to such citizens."); see also Post, *Commercial Speech*, *supra* note 28, at 32 ("Democratic legitimation is not fungible; it is earned, speaker by speaker. A person whose participation within public discourse has been chilled has by hypothesis become that much more alienated from the state.").

¹⁵⁶ Post, *Reconciling*, *supra* note 31, at 2368. If the state regulates the public discourse in such a manner, Post correctly argues, "it preempts the very democratic process by which collective identity is to be determined." *Id.*

duly truncating the scope of public discourse, Post himself devalues whole categories of democratic interchange.

Because Post explicitly equates participation in the public discourse with *speaking*, he overlooks the importance of individual *listener* autonomy both to the practice of actual decisionmaking and to the process of democratic legitimation itself. In this sense, Post's mistake is the mirror image of Meiklejohn's: while Meiklejohn improperly truncated the scope of democratic discourse by excluding speakers, Post's truncation results from his considerable undervaluation of the role of listeners. The common ground shared by their respective mistakes, however, is that both are counterproductively underinclusive in their characterization of the universe of democratic discourse.

We have already explored Meiklejohn's numerous mistakes in this regard.¹⁵⁷ Post's mistakes are equally fatal to the viability of his democratic theory of free expression. To the extent that public opinion cannot be formed without the evaluation and ultimate acceptance of certain ideas over others, the listener participates in the formation of public opinion as much as the speaker does.¹⁵⁸ Just as the speaker may benefit by contributing to public discourse, so too may listeners' moral and intellectual horizons be expanded by the receipt of information and opinion. Their ability to function as active participants in a democracy is improved as a result.¹⁵⁹ More importantly, government's decision to insulate citizens from information and opinion because of a paternalistic distrust of their ability to make wise choices is as threatening to core democratic values as the suppression of any speaker.

2. *The Confusing Role of Information in Post's First Amendment Lexicon.*—The fact that Post seemingly ignores the central role of the listener in fostering both public discourse and democratic legitimacy does not automatically imply his total rejection of the First Amendment value of infor-

¹⁵⁷ See *supra* Part II.A.

¹⁵⁸ The point is that the listener derives legitimacy directly from her status as an audience member in the public discourse—and thus that listening should be a valued form of “participation” under the terms of the participatory theory. It is distinct from the separate argument that the listener derives legitimacy from the decisionmaking process and therefore that listeners' rights to access public discourse must be protected as incident to that decisionmaking. This second argument for listeners' rights is based on the contention that the participatory model has an underinclusive understanding of the conditions for democratic legitimacy, which is developed at length above. See *supra* Part II.A.2. The argument for listener autonomy here sets that critique aside, assumes that participation in the public discourse is *the* source of democratic legitimacy, and argues that Post has an unduly narrow idea of “participation.”

¹⁵⁹ We should note that for purposes of the present discussion, we suspend disbelief on the correctness of Post's choice to assume democracy as the normative foundation of free speech analysis, rather than to ask why we choose a democratic system in the first place and, by this process of reverse engineering, glean more foundational normative values underlying the commitment to both democracy and free expression. See generally Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67 (2008).

mation to the listeners who receive it. Even so, Post's treatment of information under the First Amendment is confusing. As previously noted, Post posits that the First Amendment value of information ranks lower than that of public discourse.¹⁶⁰ This lexical ranking is flawed on several grounds. First, for reasons we have explained, it is impossible to separate listener from speaker whether for purposes of facilitating democratic decisionmaking, public discourse, or democratic legitimacy. Second, it is equally impossible to separate information from opinion because the use of information is often a central element in the persuasive nature of opinion. Third, even if one were to assume that the listener-based value of information is somehow conceptually separable from the speaker-based value of public discourse, it is difficult to understand why it is nevertheless not considered at least the equal of public discourse in fostering attainment of First Amendment goals.

The clarity of Post's treatment of information has been further undermined by his recent, and possibly dramatic, shift in his proposed First Amendment treatment of information.¹⁶¹ No longer, it seems, does Post classify information as necessarily of secondary First Amendment value—though at no point has he expressly rejected or modified his prior, well-established stance that the informational value of speech is lexically inferior to its participatory value. Instead, he now seems to consider information to be simply of a *different* nature from public discourse and therefore deserving of a very different form of constitutional protection. Because the constitutional value of public discourse in no way turns on the factual or scientific accuracy of the speech, Post would let nothing turn on factual accuracy of expression in measuring the protection of speaker-based expression. However, because of Post's unduly narrow description of the protected speaker category (for example, excluding commercial advertising),¹⁶² occasions arise where a listener could conceivably benefit from information conveyed by a speaker who is nevertheless unprotected. In these situations, because the *only* First Amendment value, in Post's mind, is the informational interest of the listener, it would be illogical to protect false information. After all, a listener gains no benefit from the receipt of false information; on the contrary, Post reasons, dissemination of such inaccurate information could only undermine the values to be served by informational

¹⁶⁰ See, e.g., Post, *Reconciling*, *supra* note 31, at 2371–72 (noting the “priority” of the participatory theory over other free speech theories); see also Post, *Commercial Speech*, *supra* note 28, at 5 (explaining that commercial speech has “subordinate” constitutional status because it “inform[s] an audience . . . about matters pertinent to democratic decision making” rather than “participat[ion] in the process of self-governance”).

¹⁶¹ See Post, Rosenthal Lectures, *supra* note 33.

¹⁶² For an explanation as to why Post's description of the protected speaker category is unduly narrow, see *supra* Parts II.A & II.B.1.

communication in the first place. This is what Post now describes as his “democratic competence” model.¹⁶³

As superficially appealing as this reasoning may seem, closer analysis reveals serious logical and practical flaws. Most fundamentally, Post's information-discourse dichotomy ignores the practical manner in which the two are usually intertwined: information is often conveyed, not as an end in itself, but rather as part and parcel of an effort to employ the system of public discourse to achieve certain normative and personal goals. Second, even if one were to ignore this serious difficulty, Post is far too willing to permit suppression or regulation of purely informational speech. The inadequate nature of his approach is underscored by his inaccurate reliance on Meiklejohn's theory as support.¹⁶⁴ To be sure, Meiklejohn recognized the central value of the First Amendment to be the dissemination of information and opinion to citizens so that they may govern themselves.¹⁶⁵ But he also was a strong believer in the Supreme Court's logic in *New York Times Co. v. Sullivan* that, in the context of public figure defamation, we must tolerate much false speech (of no positive value in and of itself) in order not to chill true speech.¹⁶⁶ Whether the economic incentive structure of commercial speech justifies an alteration in the assumption of an expressive chill is the subject of reasonable debate.¹⁶⁷ Post's rejection of the protection of false expression, however, is grounded primarily in the all too simplistic assumption that false information is harmful, and therefore unworthy of protection.

Even more problematic is Post's willingness to ignore the ambiguities in any concept of falsity. Particularly in the case of science, reasonable disputes often exist as to what, exactly, is truth. Too often, seemingly well-established scientific assumptions have eventually been altered in light of stubborn insistence by minority voices challenging commonly held views.¹⁶⁸ Yet the democratic competence model seemingly assumes that government can identify “false” speech and properly suppress it. Allowing the government to regulate speech in this manner deprives individuals of the very information that might reasonably cause them to question orthodox ideas of truth and to challenge those in authority who hold such ideas. Indeed, while Post has always maintained that the state can properly regulate “factually

¹⁶³ See Post, Rosenthal Lectures, *supra* note 33 (manuscript at 33).

¹⁶⁴ See, e.g., *id.* (manuscript at 38).

¹⁶⁵ See *supra* Part I.A. As Post recognizes, however, Meiklejohn would not have extended this logic to commercial expression, which Post does. Thus, Post employs Meiklejohn's reasoning purely as an analogy. See Post, Rosenthal Lectures, *supra* note 33 (manuscript at 33–34).

¹⁶⁶ 376 U.S. 254 (1964). Meiklejohn suggested the decision was an occasion for “dancing in the streets.” Harry Kalven, *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 221 n.125.

¹⁶⁷ Compare *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 565 (1991), with Redish, *supra* note 159, at 83–86.

¹⁶⁸ See generally Redish, *supra* note 9.

false” commercial speech, he once argued that it could not regulate factually “*misleading*” commercial speech for this very reason.¹⁶⁹ Of course, this approach involved a separate problem of differentiating the “false” from the “misleading,”¹⁷⁰ but at least it recognized the danger of such content-based regulation.

Even setting aside the difficulties of the new “democratic competence” wrinkle to Post’s theory of free speech, his participatory theory itself misconceives the significance of information for democratic legitimacy. By only “safeguarding the capacity of *speakers* to participate in the process of self-governance,”¹⁷¹ the participatory theory systematically disregards the listener’s role in the formation of public opinion¹⁷² and in fulfilling the goals of democratic self-government.¹⁷³ Of course, most of the time, the participatory theory’s omission of listener autonomy will have no effect on the listener’s potential legitimation: the speaker’s right to speak under the participatory theory, by proxy, indirectly protects the listener’s right to listen. When the speaker has no right to speak under Post’s grudgingly narrow participatory model, however, the omission of audience autonomy is fatal. The government is free to cut off listeners from information and opinion that would otherwise facilitate their own participation in public discourse as well as their own democratic decisionmaking.

3. *The Complexity of Speaker Motivation: The Case of Commercial Speech.*—Because it provides a concrete example of a situation in which the speaker has no right to speak under Post’s participatory model, commercial speech provides the clearest example of Post’s truncation of a category of protected participants in public discourse. The commercial speaker, according to Post, neither seeks nor derives a legitimizing benefit from her speech.¹⁷⁴ As a result, Post believes that only information, rather than democratic legitimacy, is at stake when the state regulates commercial speech

¹⁶⁹ See Post, *Commercial Speech*, *supra* note 28, at 35–41.

¹⁷⁰ See *id.* Post then suggested that the claim “eggs are healthy” would be an example of *misleading* speech, not factually false speech, and argued against restrictions on commercial advertisements containing the claim as a result. *Id.* at 39–41. One wonders how this claim is very different from the claim that amalgam dental fillings are unsafe, which Post now suggests may be *false* speech permitting content-based regulation under his democratic competence model. See Post, *supra* note 135 (manuscript at 49).

¹⁷¹ Post, *Commercial Speech*, *supra* note 28, at 5 (emphasis in original).

¹⁷² Post’s protection of the audience’s interest in the informational value of speech within a secondary, lexically inferior theory of the First Amendment does not ameliorate this indifference to the legitimacy listeners may gain from their participation in public discourse.

¹⁷³ Of course, to the extent the listener does so ultimately by voting according to her own self-determined choices, Post would consider this participation to be less important than participation in the public discourse. By Post’s unsupported hypothesis, voting does not facilitate democratic legitimacy in the way that participation in public discourse does. See *supra* Part II.A.1–2.

¹⁷⁴ This is simply a categorical judgment on Post’s part, which is assuredly incorrect. For further discussion, see *infra* note 192 and accompanying text.

(ignoring the fact that information to the listener is as important to democracy as discourse). Because democratic legitimacy is not at stake, the speech is not the kind of "public discourse" that the participatory theory protects. Regulation is therefore far more permissible than in the case of public discourse.

Rhetorically, at least, this provides a concise explanation as to why commercial speech deserves a lower quantum of First Amendment protection. According to Post's logic, because commercial advertisers are deemed not to be participants in public discourse, the only conceivable First Amendment benefit of commercial speech is its informational value to listeners, with all of the accompanying qualifications and limitations.¹⁷⁵ Post's failure here is his inability or unwillingness to recognize the potentially complex, multilayered motivations behind most expression. Speakers do not always speak *solely* to contribute to public discourse or *solely* for narrow personal economic gain. A labor lobbyist seeking to engender political support for higher tariffs or the repeal of NAFTA may on one level truly believe in the political wisdom and morality of his cause. Yet at the same time, his expression is inescapably influenced by two levels of economic motivation: (1) his own, since he is being paid for his expressive efforts, and (2) his clients', since they obviously gain economically if his advocacy is successful. Is the lobbyist speaking in order to contribute to public discourse? The answer, of course, is yes—and no. Yet in the case of the lobbyist, Post would focus on the effort to contribute to public discourse, and would provide this expression full protection.

What, then, about the commercial speaker? Here, Post assumes that his speech is not intended to contribute to public discourse, but rather to sell a commercial product or service. Yet why should we categorically assume that the desires to contribute to public discourse on the one hand and to gain economically on the other are mutually exclusive? Moreover, how can Post be certain that even a commercial speaker motivated solely by considerations of economic gain who has been denied the opportunity to advance his interests through expression will not feel delegitimized and alienated due to her exclusion from public discourse? Surely, he cites no supporting empirical or psychological research to support such a categorical judgment about the human psyche.

In any event, Post's use of commercial advertising as an unbending surrogate for disqualifying economic motivation gives rise to the drawing of technical, formalistic distinctions that render his entire conceptual framework highly suspect. The problematic impact of Post's treatment of the commercial speaker can be demonstrated through a group of hypothetical permutations. Imagine that a beekeeper firmly believes that bee pollen possesses scientifically verifiable health benefits. He wishes to publish an op-ed article in a daily newspaper asserting this position and mentioning his

¹⁷⁵ See Post, *Commercial Speech*, *supra* note 28, at 14–15.

own product. Governmental authorities, believing that the beekeeper's assertion is scientifically inaccurate or at least unproven, seek to suppress the article's publication. We assume that in such a situation Post would characterize the expression as a contribution to public discourse and therefore fully protected, regardless of its accuracy. This is so, even though the beekeeper obviously possesses a strong economic motivation for expressing his viewpoint. Yet what if, instead of writing the op-ed article, the beekeeper seeks to take out an advertisement making the exact same argument, and again promotes his own product? Now, the beekeeper's expression, in Post's view, has presumably been transformed into the far less protected commercial speech. Because he deems commercial speech to be of no benefit to public discourse, its only constitutional protection would derive from either the "democratic competence" model (if Post thought this speech relayed false "facts") or the Meiklejohnian model he previously advocated (if he thought this speech relayed potentially "misleading" speech, but not "false" speech).¹⁷⁶ If the former, the speech would remain unprotected if governmental authorities determined the claims to be scientifically inaccurate. And even if the latter, the speech might not be protected if, among other things, the court thought that another speaker might provide the same information. Either way, Post would reach opposite conclusions in these two hypothetical situations even though the *same speaker* with the *same economic motivation* is making *identical claims* to a largely *identical audience*. The only difference in the two situations is that in the former the expression is conveyed in an *article*, while in the latter it is conveyed in the form of an *advertisement*. Such an approach amounts to the height of formalism—leaving us at a complete loss to determine how Post would categorize an infomercial or a self-published promotional book.

4. "*Public Discourse*" Defined and Gerrymandered.—To this point we have demonstrated a number of grossly underinclusive aspects of Post's definition of the public discourse universe, which give rise to frustratingly formalistic distinctions. Even more troubling, however, is the malleability of his classifications. Post's participatory theory is confined to those communications that "regulate[] public discourse so as to reflect the values and priorities of some vision of collective identity."¹⁷⁷ Thus, Post criticizes Meiklejohn's free speech theory for subordinating public discourse to a "framework of managerial authority" that was based on a particular qualitative vision of what public debate should be.¹⁷⁸ In contemplating government regulation of the public discourse to prevent it from turning into a

¹⁷⁶ See *supra* Part II.B.2.

¹⁷⁷ Post, *Reconciling*, *supra* note 31, at 2368. If the state regulates the public discourse in such a manner, Post correctly argues, "it preempts the very democratic process by which collective identity is to be determined." *Id.*

¹⁷⁸ Post, *Meiklejohn's Mistake*, *supra* note 21, at 1120.

“Hyde Park” of “unregulated talkativeness,”¹⁷⁹ Post argues, Meiklejohn mistakenly imposed his own vision of what public discourse should be.¹⁸⁰ Traces of this very mistake, however, appear in Post's theory as well.

Put simply, Post abdicates to the courts the authority to define what speech qualifies as public discourse. Whether through its political or its judicial branches, governmental definition of the scope of public discourse is itself a regulation of public discourse,¹⁸¹ if not the most basic example of the agenda-setting regulations that Post rejects.¹⁸² Of course, it makes perfect sense under the participatory theory that judicial review of speech regulation would give courts some role in determining the boundaries of the public discourse. But because Post's theory provides vague and contradictory guidance about the defining characteristics of public discourse and implicitly invites judges to pick the standard that allows them to reach the result they prefer, what is ultimately classified as public discourse is certain to reflect the “value and priorities” of the judge's own “vision of collective identity.”¹⁸³

Whether speech falls within the boundaries of public discourse is not only “uncertain” and subject to “case-by-case assessment,” as Post openly concedes,¹⁸⁴ it also depends on a mercurial set of defining criteria. Two inconsistencies pervade Post's theory. First, Post vacillates on whether speech's inclusion within public discourse depends on the content of the speech or also—or instead—on the identity or motive of the speaker. Second, Post applies inconsistent units of analysis and levels of generality when considering different forms of speech and their inclusion within the boundaries of public discourse.

One would think, given the basic tenets of Post's participatory theory, that the scope of recognized contributions to public discourse should be relatively clear: If individuals attain democratic legitimacy by participating in

¹⁷⁹ MEIKLEJOHN, *supra* note 2, at 23, 25.

¹⁸⁰ Post, *Meiklejohn's Mistake*, *supra* note 21, at 1120–21.

¹⁸¹ See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 683–84 (1990) [hereinafter Post, *Concept of Public Discourse*] (recognizing that the definition of the boundaries of public discourse is itself a form of speech regulation).

¹⁸² Cf. Post, *Meiklejohn's Mistake*, *supra* note 21, at 1118 (“The state ought not to be empowered to control the agenda of public discourse, or the presentation and characterization of issues within public discourse, because such control would necessarily circumscribe the potential for collective self-determination.”).

¹⁸³ Post, *Reconciling*, *supra* note 31, at 2368. Post admits this, for instance, when he says that the “ultimate fact of ideological regulation” that comes with defining the boundaries of public discourse cannot “be blinked.” Post, *Concept of Public Discourse*, *supra* note 181, at 683. Post suggests that such “ideological regulation of speech is deeply distasteful.” *Id.* Yet, as this section suggests, he only encourages more ideological regulation of speech by devising inconsistent definitions of public discourse and contradictory standards for evaluating speech.

¹⁸⁴ Post, *Racist Speech*, *supra* note 123, at 288–89 (describing the difficulty of defining the boundaries of public discourse).

the formation of public opinion, public discourse should encompass any speech relevant to the formation of public opinion. Indeed, Post appears to adopt this formulation, at least some of the time. At one point he defines “public discourse” as “encompassing the communicative processes necessary for the formation of public opinion.”¹⁸⁵ He asserts that the relevant “public opinion” is not simply the overtly political, but also all opinion relevant to the “process of collective self-definition.”¹⁸⁶ And, perhaps most expansively, he argues that speech must be protected as a contribution to public discourse if it contributes to the “prior construction of a ‘public’” because such a “public” is necessary in order for public discourse to exist.¹⁸⁷ Post applies this standard inconsistently, however. For example, though he applies this definition to bring wordless music and abstract art within the scope of public discourse, he fails to apply it to commercial speech. This is so, even though he acknowledges that commercial speech, like art, shapes a shared national identity and contributes to the construction of a “public.”¹⁸⁸ Notably, this definition characterizes speech as public discourse according to its potential impact on its audience.

Despite the fact that this broad definition of public discourse is the most consonant with his participatory theory of democracy, Post often abandons it for a significantly more restrictive definition. That definition turns not on whether the speech contributes to the formation of public opinion or the construction of a “public” but on whether the speech reflects “a protected effort to shape public opinion”¹⁸⁹ or an “effort to engage public opinion.”¹⁹⁰ Under the restrictive definition of public discourse, then, that the potential speech affects public opinion is a necessary but not a sufficient condition to bring it within the public discourse. Not only must speech be relevant to the formation of public opinion, it must also reflect an *effort* to shape public opinion, a determination that turns, at least in some part, on the speaker’s identity and what it reveals about the speaker’s purpose in speaking.¹⁹¹ Post’s restrictive definition, then, plainly contradicts his broad definition: it will exclude speech despite its salutary impact on its potential audience. Most perniciously, Post applies this restrictive definition only in the context of explaining *commercial speech’s* exclusion from the realm of

¹⁸⁵ *Id.* at 288.

¹⁸⁶ *Id.* (internal quotation marks omitted).

¹⁸⁷ Post, *Equality and Autonomy*, *supra* note 22, at 1521 n.15. In other words, Post is arguing that speech that creates common ground among individuals is protected as public discourse because “wide circulation of ‘similar social stimuli’” allows individuals who otherwise would be “strangers” to share a “public communicative sphere” in which they can “forge” a “common will.” Post, *Recuperating*, *supra* note 138, at 1276.

¹⁸⁸ See Post, *Commercial Speech*, *supra* note 28, at 11–12.

¹⁸⁹ *Id.* at 17.

¹⁹⁰ *Id.* at 18.

¹⁹¹ The restrictive definition, then, follows from Post’s equation of participation in the public discourse with speaking in the public discourse. See *supra* Part II.B.1.

public discourse. When asked about other speech in which the speaker has no clear participatory purpose, he reverts to the broader definition.¹⁹²

This restrictive definition has two striking implications. First, by focusing on the “effort” motivating the speech, Post effectively shifts the constitutional analysis from the potential impact of the speech on its audience to the subjective motive of the speaker.¹⁹³ Second, as a result of the first implication, much speech that admittedly affects public opinion and “collective self-definition”—speech not only at the heart of the broad definition of “public discourse” but speech that is absolutely necessary for *listeners’* capacity to “engage[] . . . in the public life of the nation”¹⁹⁴—may not be protected under the restrictive definition at all.¹⁹⁵

To be fair, Post would likely challenge the claim that his theory defines the boundaries of public discourse on the basis of speaker motive.¹⁹⁶ In the first place, he has recognized, at least at one point, that classifying speech according to speaker motive has the pernicious tendency to invite viewpoint discrimination and the suppression of unpopular speech.¹⁹⁷ In the second place, he contends that classifying speech based on the effort underlying it differentiates speech not on the speaker’s motive but instead on the “social significance” of the speech.¹⁹⁸ For instance, he suggests that commercial speech’s “social significance” is distinct from that of public discourse because “we most naturally understand persons who are advertising products for sale as seeking to advance their commercial interests rather than as participating in the public life of the nation.”¹⁹⁹

Euphemistically labeling this an inquiry into the speech’s “social significance,” however, does not change the nature of the inquiry. In reality,

¹⁹² See, e.g., Post, *Equality and Autonomy*, *supra* note 22, at 1521 n.15 (describing why abstract art and wordless music are public discourse).

¹⁹³ Like analysis of the “effort” behind the speech, analysis of whether the specific speech act “intrinsicly” represents “participation” also shifts the First Amendment focus to the speaker and excludes reference to any possible participatory motive of a listener. See Post, *Commercial Speech*, *supra* note 28, at 20. This is because the listener’s participatory motive is extrinsic to the speech itself.

¹⁹⁴ *Id.* at 20.

¹⁹⁵ See *id.* at 13 (admitting that commercial speech affects the “formation of public opinion . . . as a by-product of the effort to sell goods” but nonetheless concluding that commercial speech is not public discourse). Post concedes, for instance, that commercial advertising “deeply influences our sense of ourselves as a nation” and provides information that is “highly relevant to the formation of democratic public opinion” but still concludes that commercial speech is not public discourse. See *id.* at 11–15.

¹⁹⁶ Others scholars who propose democratic theories of the First Amendment invoke speaker motive as an explicit criterion in classifying speech. See, e.g., Sunstein, *supra* note 69, at 304 (classifying speech as “high value,” “political speech” when “*it is both intended and received as a contribution to public deliberation about some issue*”).

¹⁹⁷ See Post, *Racist Speech*, *supra* note 123, at 324 n.253 (“As a matter of policy . . . it is always dangerous to make the legality of speech depend primarily upon an assessment of speaker’s intent, for there is a powerful tendency to attribute bad motives to those with whom we fundamentally disagree.”).

¹⁹⁸ Post, *Commercial Speech*, *supra* note 28, at 12 (“[T]his is not ultimately a judgment about the motivations of particular persons, but instead about the social significance of a certain kind of speech.”).

¹⁹⁹ *Id.*

this is not an inquiry into speech's *social* significance at all; it is only an inquiry into its *private* significance to its speaker. A principled evaluation of the social significance of speech would evaluate its impact in the public sphere.²⁰⁰ Post's approach, instead, amounts to an evaluation of speaker motive and nothing more. Thus, Post concludes, commercial speech is not public discourse because commercial speech "should be understood as an effort . . . simply to sell a product" and not an effort "to engage public opinion."²⁰¹ As previously noted, in reaching this conclusion Post both disregards speech's potential to reflect multiple motives and unwisely implies that judges should engage in the futile and ultimately dangerous determination of the speaker's dominant motive—much like Meiklejohn did.²⁰² The commercial speaker necessarily attempts to sell products *by* affecting public opinion and may even wish to affect public opinion about *political* choices. For example, the pharmaceutical manufacturer may advertise its newly developed vaccine with the hope of influencing public opinion about whether the vaccine should be made mandatory.²⁰³ And, to the extent that an inquiry into a speaker's dominant motive necessarily lacks any objective evidentiary basis, it necessarily invites judges to punish speakers they dislike by concluding that the dominant motive underlying their speech is something other than an effort to "engage[] . . . in the public life of the nation."²⁰⁴ Thus, Post suggests, the Supreme Court may rightly conclude that a Scientologist selling copies of *Dianetics* by L. Ron Hubbard door-to-door is not engaged in public discourse, even though it previously concluded that a Jehovah's Witness selling bibles door-to-door was public discourse, because a Scientologist, unlike a Jehovah's Witness, is engaged in a commercial endeavor rather than an effort to shape public opinion.²⁰⁵

Moreover, regardless of whether Post's "social significance" inquiry amounts to an analysis of speaker motive, at the very least Post's restrictive definition classifies speech on the basis of its "significance" for the speaker to the exclusion of its "significance" for the audience. Thus, commercial speech is not to be deemed public discourse under Post's framework because regulation of commercial speech "*merely* jeopardizes the circulation

²⁰⁰ Of course, any evaluation of speech's "significance" invites judges to determine that speech they dislike is "insignificant" and therefore unprotected. Post's concept of "social significance" has the added tendency of inviting judges to discriminate against disfavored speakers, as well as disfavored speech.

²⁰¹ *Id.* at 18.

²⁰² See *supra* Part I.B.

²⁰³ Indeed, in other contexts, Post actually recognizes that a participatory motive and a profit motive are not mutually exclusive, and that they can and do often exist in the same speech. "Many forms of public discourse," he suggests, "are fueled by an intense and hardy search for profits: motion pictures, books, magazines, and newspapers to mention a few." Post, *Commercial Speech*, *supra* note 28, at 31–32.

²⁰⁴ *Id.* at 20 ("To include speech within public discourse is to signify that it is constitutionally valued not merely for the contribution it may make to public discussion, but also, intrinsically, for the engagement it represents in the public life of the nation.")

²⁰⁵ *Id.* at 15–16, 16 n.68.

of information relevant to the ‘voting of wise decisions’” and does not “endanger the process of democratic legitimation.”²⁰⁶ In drawing these distinctions as if informational speech and legitimating speech were mutually exclusive categories, Post either assumes that listeners derive no sense of democratic legitimacy from having access to informational speech or assumes that whatever legitimacy they derive is irrelevant to whether the speech should be defined as “public discourse.”

Under this framework, judges evaluate speech in front of, rather than behind, the veil of ignorance: not only do they have the freedom to select the definition they prefer in a given case, they also have freedom to determine the “social significance” of speech according to their own subconscious, or even conscious biases. Under Post’s definitional approach, judges are given the freedom to classify speech according to their “natural understanding” of the effort underlying it,²⁰⁷ and according to social norms of “when we instinctively perceive speech as ‘public.’”²⁰⁸ They are not required to decide speech’s significance on the basis of evidence of participatory purpose or a lack of participatory purpose.

Even more troublesome is that under Post’s approach courts are given the freedom to evaluate speech according to the analytical mode that allows the result they favor. Post applies two contradictory approaches for determining whether speech reflects a participatory effort, but does so without explanation or even any acknowledgment of the distinction. Sometimes Post would have a court engage in case-by-case evaluation of speech and its speaker to determine whether the speech represents “an effort to engage public opinion,”²⁰⁹ an “engagement [] in the public life of the nation,”²¹⁰ or an individual’s “attempt to render the state responsive to [her] views.”²¹¹ A good deal of speech, not just commercial speech, would be excluded from public discourse if Post were to apply this approach consistently. For example, assume that we had a private, heart-to-heart talk with Professor Post to explain to him exactly what it is about his theory of free expression that we do not like. Assume further that, upon hearing our concerns, Post then explained to us why he believes our concerns are unjustified. Under Post’s “engagement[] in the public life of the nation” or “attempt to render the state responsive” definitions of public discourse, our private discussion about the foundation of free expression would presumably be unprotected by the constitutional guarantee of free expression—a preposterous result. Similarly, a wife’s statement to her husband over the dinner table that the

²⁰⁶ *Id.* at 14–15 (making this distinction in the context of distinguishing commercial speech from public discourse) (emphasis added).

²⁰⁷ *Id.* at 12.

²⁰⁸ Post, *Concept of Public Discourse*, *supra* note 181, at 680.

²⁰⁹ Post, *Commercial Speech*, *supra* note 28, at 18.

²¹⁰ *Id.* at 20.

²¹¹ *Id.* at 27.

President and Congress are both incompetent would presumably be denied protection as well because it is not an attempt to contribute to public discourse as Post defines it. Finally, if an individual wrote a stinging attack on the government in her diary, which was subsequently discovered by authorities, presumably Post could not protect the diary because it, too, does not represent an attempt to make the state more responsive to her views or to engage in the public life of the nation. We cannot seriously imagine that Professor Post would deny full constitutional protection to the expression involved in these hypotheticals. But if that is so, there is little coherence left to his definition of public discourse.

On other occasions, however, Post has suggested that the reviewing court evaluate the speech generally, to determine whether it represents the “*kind[] of communicative action* to which citizens must have unrestricted access” to sustain their warranted belief “that their government is responsive to their wishes.”²¹² Unlike the first approach Post describes, this approach does not focus on the specific speaker or the presumptive purpose that motivated her speech, but instead assumes a hypothetical speaker with a participatory motive and asks whether *that particular* speaker would need to be able to engage in the speech to further her participatory goals. These inconsistencies in the definition of public discourse suggest that Post’s theory endows judges with significant authority to define—and thus to regulate—public discourse according to their particular “vision[s] of collective identity.”²¹³

5. *Community Norms and the Majoritarian First Amendment.*—Post’s participatory theory of the First Amendment reveals one additional, significant flaw, related to the question of how judges define the boundaries of public discourse. The prior section explained how Post expects judges to apply “contextual thinking” to determine the boundaries of public discourse and suggested that such a determination invites bias against speech the judge disfavors. Even more problematically, on occasion Post suggests that the boundaries of “public discourse” should be drawn according to community norms. If so, the danger is not simply judicial bias against certain kinds of speech but also the judicial imposition of a kind of “heckler’s veto” of speech that the community disfavors.

If, as Post has argued, the “boundaries of public discourse . . . define the relative priorities of our national values” and if “in locating these boundaries we . . . exercise ‘our capacity for human self-constituting,’”²¹⁴ defining the public discourse is exactly the kind of issue of national collective identity that Post believes must be determined and continually revised by

²¹² *Id.* at 7 (emphasis added).

²¹³ Post, *Reconciling*, *supra* note 31, at 2368 (arguing that regulations of public discourse based on one “vision of collective identity” are illegitimate).

²¹⁴ Post, *Concept of Public Discourse*, *supra* note 181, at 680.

the public.²¹⁵ Post attempts to resolve this tension by his suggestion that judges' determinations of the "social significance" of speech and the boundaries of the public discourse must depend in part on community social norms.²¹⁶ In suggesting that courts ascertain and apply community norms as part of their definition of public discourse, Post would have them perform the function they are least structured for, namely, the determination and representation of popular will. Courts' lack of institutional capacity to perform such a role enables judges to confuse their own social norms and values for those of the community. More importantly, even if courts could perceive and represent popular will accurately, that the public instinctively disfavors or devalues a certain kind of speech does not mean the First Amendment should do so as well. To have a reviewing court define the First Amendment's protective reach by reference to public will, as Post appears to advocate, would effectively force it to abdicate its role as a countermajoritarian check on the popular will.²¹⁷

This reference to community norms also leads to a curious consequence for Post's general theory. As described above, at certain points Post suggests the line between commercial speech and public discourse should depend on the speaker's participatory purpose, yet at other points he suggests that the reviewing court evaluate the "social significance" of the speech, rather than the actual participatory purpose of the speaker. When he does focus on social significance, Post would have the social significance of the speech turn not on judges' own principled understanding of the

²¹⁵ Post, *Meiklejohn's Mistake*, *supra* note 21, at 1116–19.

²¹⁶ Post has argued that the courts fix the boundaries of the public discourse through reference to community social norms that "form part of our cultural inheritance" and determine "when we instinctively perceive speech as 'public.'" Post, *Concept of Public Discourse*, *supra* note 181, at 680–81. To perceive and apply these social norms effectively, judges must exercise their "moral tact" to recognize the "socially determined variability" of community norms based on their context. *Id.* In a more recent article, Post has argued that the Supreme Court should consider the "constitutional culture" of nonjudicial actors in a variety of contexts, including its determination of the "social significance" of speech. In considering the Court's shift from excluding movies from the First Amendment in 1915 to including movies within the core of the First Amendment in 1952, Post writes:

The social significance of movies may have altered so as to bring film within the ambit of an otherwise "changeless" constitutional protection. . . . At what point in time the communicative significance of movies sufficiently changed as to bring film within the protection of the First Amendment . . . will be an inevitably disputed question. Because culture is always in motion, because its meaning is never entirely stable or fixed, there will always be differences of cultural interpretation.

Robert Post, *The Supreme Court 2002 Term, Foreword: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 81–83 (2003). Thus, rather than suggest that the Court originally erred in not affording movies First Amendment protection, Post suggests "the common sense of the country" and "contemporary cultural practices" supported the conclusion that movies did not implicate First Amendment values so as to warrant their constitutional protection in 1915 but did by 1952. *Id.* at 82.

²¹⁷ Post recognizes this at least in principle, suggesting that a pure fidelity to community norms may "hegemonically establish the dominance of the perspectives of a particular community." Post, *Concept of Public Discourse*, *supra* note 181, at 681.

significance of the speech, but rather on their imperfect understandings of community social norms. Judges, then, decide the protection afforded a speaker not based on the speaker's subjective purpose for speaking, nor on a purely judicial evaluation of the participatory nature of the speech, but on the participatory nature of the speech as determined by reference to highly context-dependent community norms. The theoretical inconsistency of this result is notable: after consistently undervaluing and underprotecting speech by ignoring its possible value to the audience, Post gives the audience's perceived social norms a central role in justifying suppression of speech by allowing community norms to define the boundaries of the public discourse.

The danger of such an approach should be obvious: it invites the audience's bias against certain forms of speech and certain speakers into the judicial process and entangles the court's constitutional judgment with the majority's will—the last factor on which First Amendment protection should turn. Furthermore, this approach contains an inherent regulatory bias. When government enacts a specific speech regulation, it presumably reflects the popular will opposing the regulated speech. Thus, if the court accurately perceives community norms, it is likely to underprotect speech because the very same norms that motivated the regulation are those that the court will consider in setting the boundaries of the public discourse. On the other hand, if the court mistakenly perceives community norms, the error will likely reflect the court's own preferred norms and values, resulting in regulation of the public discourse to reflect “some vision of collective identity” held by the judge.²¹⁸ Neither result is an acceptable mode of First Amendment construction.

III. LINKING POST'S AND MEIKLEJOHN'S MISTAKES: THE FAILURE TO RECOGNIZE THE CENTRALITY OF ADVERSARY DEMOCRACY

A. Post's and Meiklejohn's Common Ground

In many respects Meiklejohn and Post propose almost polar opposite visions of democracy, and as a result, of the First Amendment. To briefly review, Meiklejohn's theory equates democracy with the “voting of wise decisions.” His First Amendment protects the community's thinking process to prepare it to vote. As a result, Meiklejohn's version of the First Amendment focuses entirely on protecting the listener's ability to receive information and opinion. Post's participatory theory, in contrast, rejects equating democracy with voting. For Post, democracy consists primarily of those processes that allow individuals to recognize themselves as self-governing. As a result, Post's participatory theory of the First Amendment focuses, for the most part, on protecting the speaker's autonomy to participate in public discourse and not the listener's autonomy to receive informa-

²¹⁸ Post, *Reconciling*, *supra* note 31, at 2368.

tion. Voting, to Post, takes a back seat to the value of participation and the legitimacy that supposedly flows from it.

Despite these differences, Post's and Meiklejohn's First Amendment theories share common ground. For example, through tortured definitions of "public discourse" and "public" speech, respectively, both exclude from First Amendment protection certain classes of speech deemed to be motivated by private economic self-interest.²¹⁹ Similarly, both underestimate the extent and nature of the individual autonomy that is essential to democratic self-determination.²²⁰ Indeed, running through both theories is the assumption that democracy is merely a process of *collective* self-government in which individuals cooperate to govern themselves as a society. Meiklejohn argues that democracy is simply a "compact" among individuals to govern for the common good.²²¹ Post likewise asserts the premise that "[d]emocracy is not about individual self-government, but about collective self-determination"²²² and ends with the conclusion that "[d]emocracy requires individual autonomy only to the extent that citizens seek to forge 'a common will, communicatively shaped and discursively clarified in the political public sphere.'"²²³ Thus, although Post recognizes the importance of individual autonomy in ways that Meiklejohn does not, he does so only to create the conditions for collective self-determination. Ultimately, both Meiklejohn and Post understand democracy as a cooperative pursuit in which individuals collectively "plan[] for the general welfare"²²⁴ or "forge a common will."²²⁵

Both Meiklejohn and Post thus adopt what can, in varying degrees, appropriately be labeled a "cooperative" theory of democracy. A cooperative theory of democracy does not necessarily presume that a universal common good exists—though such a belief is surely not necessarily inconsistent with cooperative theories of democracy—nor does it deny the possibility of disagreement about what the common good is. Rather, it understands democracy as a shared collective endeavor to pursue a common good or to "forge a common will,"²²⁶ however that concept is defined. Neither theorist seems

²¹⁹ See *supra* Part I (Meiklejohn); *supra* Part II.B.2 (Post). Of course, each is vastly underinclusive in this regard—both seem to exclude self-interested speech only when it is motivated by economic profit, and Post only excludes speech motivated by economic profit when it is commercial speech.

²²⁰ See *supra* Part I (Meiklejohn); *supra* Part II.A.1–2 (Post).

²²¹ See MEIKLEJOHN, *supra* note 2, at 14–15.

²²² See Post, *Viewpoint Regulation*, *supra* note 13, at 175.

²²³ *Id.* at 176 (quoting JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION 81 (Thomas McCarthy trans., Beacon Press 1987) (1981)).

²²⁴ MEIKLEJOHN, *supra* note 2, at 39; see *id.* at 57, 62–63; compare *id.* at 46 (describing the First Amendment as "offer[ing] defense to men who plan and advocate and incite toward corporate action for the common good"); with *id.* at 94 (describing the First Amendment as not protecting "men . . . engaged . . . in argument, or inquiry, or advocacy, or incitement which is directed toward our private interests, private privileges, private possessions").

²²⁵ Post, *Viewpoint Regulation*, *supra* note 13, at 176 (internal quotation omitted).

²²⁶ *Id.*

to have recognized, however, that in the rough and tumble of American political life, the supposedly ideal world of cooperative democracy and pursuit of the common good is far more the exception than the rule. Speakers often pursue personal interests that are in direct social, moral, or economic conflict. As political scientist Jane Mansbridge made clear a number of years ago, the ideal of “cooperative” democracy is achievable primarily in a relatively small, homogeneous group with shared goals.²²⁷ It is surely not suited, however, for the diverse and pluralistic American political society as a whole.

This does not mean, of course, that cooperation plays no role in American political society. In actuality, it performs two important functions. First, it is the process by which similarly interested groups and citizens join together to promote their positions and attempt to defeat those advocating contrary positions. Second, cooperation provides both a floor and a ceiling to the adversary political battles that go on constantly in American society. It provides boundaries that the adversary political process cannot exceed: one side wins and one side loses, without bloodshed or civil war. A viable adversary democratic system can only exist, then, within a broader cooperative democratic framework.

It surely does not follow, however, that adverseness is foreign to American political society, or even the exception rather than the rule. For Post and Meiklejohn to focus their theories of free expression on an assumption of a predominantly cooperative and collectively deliberative mode of political decisionmaking that excludes or reduces protection for much self-interested speech is to create a theory that could function successfully only in a fantasy land.

As a global alternative to the collectivist democratic visions of Post and Meiklejohn, we believe that free speech theory must be shaped in accordance with the precepts of adversary democracy. The common linkage in their mistakes is their failure to recognize the central role that adversary democracy both should and does play in the American political and constitutional structures. This theory posits that the purpose of democracy is to guarantee each individual the equal opportunity to affect the outcomes of collective decisionmaking by lawful means, according to her own interests and values as she understands them.²²⁸ The adversary theory of democracy thus emphasizes individual autonomy as theoretically and practically interwoven into the processes of collective self-government. Based on the adversary theory of democracy, we propose a new democratic theory of the First Amendment, one very different from those of both Post and Meiklejohn. Initially, however, we explore the theory and practical implications of adversary democracy and demonstrate that adversary democracy is implicit in the constitutional design of the American political system.

²²⁷ JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1980).

²²⁸ Mansbridge first coined the term “adversary democracy” and elaborated on its meaning. *See id.*

B. *The Theory of Adversary Democracy*

“Adversary democracy” is a democratic theory that acknowledges that disagreement characterizes collective self-government in a heterogeneous society and that values democracy precisely for the autonomy it provides the individual in this setting of conflict.²²⁹ It is adversarial in the descriptive sense because it recognizes that individuals’ conflicting interests will always divide a heterogeneous society and, to varying degrees, affect individuals’ participation in self-government.²³⁰ It is adversarial in the normative sense because it recognizes democracy as a system of collective self-government that manages conflict—and thus protects and facilitates individual autonomy—by institutionalizing it as a normal part of democratic life.

By “conflict,” we mean the competing interests and ideologies that motivate individuals and that may foreclose the existence of, or collective agreement on, a singular vision of a substantive “common good.”²³¹ Cooperative theories of democracy either unrealistically assume individuals will ignore their own self-interest or personal ideology to pursue a common good or assume that democratic processes can resolve conflict by somehow forging a common will. By sublimating conflict, cooperative theories invite it to take a pathological form. In other words, they have the effect of inviting democracy to deteriorate into a “tyranny of the majority” in which conflict is resolved by exclusion, marginalization of minority interests, and ultimately domination.²³²

Adversary democracy institutionalizes and thus tempers conflict in two ways. First, it grants individuals equal power to affect the outcome of col-

²²⁹ See *id.* at 18 (“Because interests often conflict in the modern nation-state, a fundamentally adversary system of electoral representation based on competing interests, equally weighted votes, and majority rule is probably the least dangerous method of managing these conflicting interests.”); see also IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 3 (2003) (“[T]he central task for democracy is to enable people to manage power relations so as to minimize domination.”).

²³⁰ We of course do not mean to suggest that *all* political choices are grounded exclusively in self-interest. Altruistic concerns may be relevant to political motivation as well. We suggest, however, that this is likely the exception rather than the rule. Moreover, even when an individual’s or group’s motivation is purely altruistic, that individual or group will often proceed in a strategically adversarial manner in pursuit of its altruistic goals.

²³¹ Ian Shapiro has proposed a “less demanding” definition of the “common good”—“that which those with an interest in avoiding domination share.” See SHAPIRO, *supra* note 229, at 3. This definition is consistent with adversary democracy because it rejects any definition of the “common good” that excludes particular individual or group interests. In this regard it seems to be more of a procedural definition of the common good rather than a substantive one.

²³² See MANSBRIDGE, *supra* note 227, at 18 (“Because interests often conflict in the modern nation-state, a fundamentally adversary system of electoral representation based on competing interests, equally weighted votes, and majority rule is probably the least dangerous method of managing these conflicting interests.”); CHANTAL MOUFFE, *ON THE POLITICAL* 2 (2005) (“[E]nvisaging the aim of democratic politics in terms of consensus and reconciliation is not only completely mistaken, it is also fraught with political dangers.”).

lective decisionmaking by virtue of their power to vote.²³³ In this sense, adversary democracy understands democracy as an *ex ante* agreement among potential opponents to resolve disputes as adversaries, rather than mortal enemies.²³⁴ The value of democracy from this perspective is individuals' equal power to implement their preferences and their security from domination even when they are in the minority. As such, adversary democracy is a theory of democratic equality: "The central egalitarian ideal in an adversary democracy becomes the equal protection of interests, guaranteed by the equal distribution of power through the vote."²³⁵

In this sense, the theory is "adversarial" because it recognizes democratic decisionmaking to involve a contest between individuals who each possess power to affect its outcome. The individual's power to vote, in and of itself, does not automatically constitute the power to institutionalize and enforce his preferences. Nevertheless he possesses the ability to join with others with shared interests and ideologies in order to influence public opinion and shape the outcome of collective decisions by influencing the votes of other individuals. The relationship is *adversarial*, rather than *cooperative*, because it acknowledges that collective decisionmaking will inevitably produce winners and losers.

Although adversary democracy requires the losers to consent to majority rule, it does not force losers to adopt majority preferences as their own.²³⁶ In this sense, the theory is *adversarial* because it rejects Aristotelian harmony as the normative goal of politics, instead accepting ongoing adversarial conflict and dissent as normal—indeed, expected—aspects of political life. The value of democracy under this principle is the individual's abiding liberty to engage in an adversarial critique of the existing po-

²³³ See MANSBRIDGE, *supra* note 227, at 17.

²³⁴ Chantal Mouffe describes this as the distinction between "agonism" and "antagonism." See MOUFFE, *supra* note 232, at 9. She argues that democracy must manage conflict so that it does not "destroy the political association," but that managing conflict, in turn, requires the recognition of the "the permanence of the antagonistic dimension of conflict." See *id.* at 20. As a result, she rejects theories of democracy that suggest that conflict can be "reconciled through deliberation" because they ignore the permanence of conflict. *Id.* As an alternative, she suggests a theory of democracy based on "agonism":

While antagonism is a *we/they* relation in which the two sides are enemies who do not share any common ground, agonism is a *we/they* relation where the conflicting parties, although acknowledging that there is no rational solution to their conflict, nevertheless recognize the legitimacy of their opponents. They are "adversaries" not enemies. This means that, while in conflict, they see themselves as belonging to the same political association, as sharing a common symbolic space within which the conflict takes place. We could say that the task of democracy is to transform antagonism into agonism.

This is why "the adversary" is a crucial category for democratic politics. . . . [I]t allows democratic politics to transform antagonism into agonism.

Id.

²³⁵ MANSBRIDGE, *supra* note 227, at 17.

²³⁶ Cf. ELIAS CANETTI, *CROWDS AND POWER* 189 (Carol Stewart trans., 1962) ("The member of an outvoted party accepts the majority decision, not because he has ceased to believe in his own case, but simply because he admits defeat.").

litical order itself, and in doing so, to convince others to join her. As philosopher Stuart Hampshire has argued, because individuality depends on the individual's ability to "resist the invasion and dominance of the active things around it," diversity and conflict are "not a superficial but an essential and deep feature of human nature—both unavoidable and desirable."²³⁷ The associative value of democracy under this principle, then, is its respect for individual autonomy.²³⁸

The normative principle of adversary democracy recognizes that the individual's ability to further her own interests—by identifying them, by voting according to them, and by advocating that others vote with her—creates the possibility of individual self-rule even within the context of collective decisionmaking. In this sense adversary democracy realizes the core democratic notion of autonomy in a way that cooperative democracy does not: It values and protects *individual* autonomy. In this manner, adversary democracy reflects the Kantian notion that the individual is an integral unit worthy of respect, not a means to an end. Adversary theory thus contrasts sharply with Post's participatory theory, because Post systematically marginalizes pure exercises of individual autonomy, believing individual autonomy to be relevant to democracy only to the extent it facilitates collective autonomy.²³⁹ And it contrasts with Meiklejohn's theory of democracy because Meiklejohn completely ignored individual worth and integrity to the extent he assumed that democracy is simply a compact among citizens to govern for the common good.²⁴⁰

C. Constitutional Adversary Democracy

Not only does adversary democracy provide the most normatively appealing and theoretically coherent explanation of American democracy, it is the only theory of democracy that is *descriptively* consistent with the democracy we have and have always had. The democratic theory of the Constitution largely reflects an adversarial, rather than a cooperative, theory of democracy. It does so in both normative and descriptive senses. It does so normatively by embracing the liberal ideal of individualism and the notion that the government of many should not overpower the rights of the individual. It does so descriptively in that its separation-of-powers structure reflects an awareness that conflict and competing interests inevitably divide society and punctuate politics. Indeed, according to historian Gordon

²³⁷ STUART HAMPSHIRE, *JUSTICE IS CONFLICT* 37–38 (2000).

²³⁸ Cf. GEORGE H. SABINE, *A HISTORY OF POLITICAL THEORY* 579 (3d ed. 1961) (arguing that democracy based on the "morality of rational self-interest . . . presumes freedom of private judgment" and therefore furthers personal liberty, while a democracy that stresses common "sentiments . . . equally native to all men" implies "very little personal autonomy because it attaches only slight importance to individual preeminence").

²³⁹ See *supra* Part II.A (describing how Post's participatory theory privileges "participation" over other, more individual democratic processes).

²⁴⁰ See *supra* notes 75–77 and accompanying text.

Wood, by the 1780s the Framers had discarded as “altogether fictitious” the conventional wisdom that a homogeneity of interests could exist in a sufficiently small republic such that the “the interest of the majority would be the interest of the minority also.”²⁴¹ To the contrary, the Framers were acutely aware of the divisions that inevitably existed within society and the factions they produced.²⁴² In addition, the Constitution dispensed with the classical republican notion that collective self-government requires pursuit of the common good rather than self-interest. Writing in 1785, Noah Webster argued, for instance, that “self-interest was all there ever was” but that “[u]nder a democracy . . . a self-interested man must court the people, thus tending to make self-love coincide with the people’s interest.”²⁴³ And, according to Gordon Wood, Madison considered “the really great danger to liberty . . . in America . . . [to be] that each individual may become insignificant in his own eyes—hitherto the very foundation of republican government.”²⁴⁴

To say that the Framers grounded the Constitution in an assumption of adversary democracy is not to deny their enormous concern for the pathological and tyrannical potential of factions. James Madison’s *The Federalist No. 10*, for instance, famously describes the danger of the faction and describes “secur[ing] the public good, and private rights against the danger of [the] faction” as a “great desideratum” of government.²⁴⁵ But, rather than deny the persistence of conflict and self-interest and propose a system of government that would purport to eradicate both, the Framers created a constitutional solution that actually *encourages*, and seeks to manage, ongoing conflict. Their solution—representative government in a large republic—Madison argued, would control the danger of the faction by “extend[ing] the sphere” to include even more interests.²⁴⁶ By breaking society into “so many parts, interests, and classes of citizens . . . the rights of individuals or of the minority, will be in little danger from interested combinations of the majority.”²⁴⁷ As one political theorist writes:

Large scale factiousness, together with a “multiplicity” of interests and sects, mitigate the deleterious effects of factions in two ways. First, “extending the sphere”—that is, releasing voracious self-interested behavior in the vast terri-

²⁴¹ GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 502 (1969) (quoting letter from Madison to Jefferson, Oct. 24, 1787) (internal quotation marks omitted).

²⁴² “Faction” is defined in *The Federalist No. 10* as “a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens or to the permanent and aggregate interest of the community.” *THE FEDERALIST NO. 10* (James Madison), *supra* note 116, at 48.

²⁴³ WOOD, *supra* note 241, at 610 (citing NOAH WEBSTER, *SKETCHES OF AMERICAN POLICY* 25 (1785)).

²⁴⁴ *Id.* at 612.

²⁴⁵ *THE FEDERALIST NO. 10* (James Madison), *supra* note 116, at 51.

²⁴⁶ *Id.* at 53.

²⁴⁷ *THE FEDERALIST NO. 51* (James Madison), *supra* note 116, at 283.

torial frontier of the United States—might splinter existing groups rather than make them larger. Second, widespread factional behavior might encourage the formation of cross-cutting cleavages—that is, heterogeneous and overlapping memberships that tend to moderate the politics of large groups and prevent social stratification.²⁴⁸

In other words, Madison thought the solution was to fight fire with fire. The more that “each representative pursues the factious interests of his constituency,” the more likely the “various factious interests in the nation [would] balance each other off in the government” and “be rendered harmless.”²⁴⁹ The solution Madison envisioned to the problems created by the pathological dark side of adversary democracy was *more* conflict and competition, not less.

According to Mansbridge, “the framers of the American Constitution explicitly espoused a philosophy of adversary democracy built on self-interest,”²⁵⁰ which shaped the Constitution in several ways. First, by putting certain individual rights beyond the reach of majoritarian enactments, the Bill of Rights actually *enshrines* and protects conflict. The Establishment and Free Exercise Clauses of the First Amendment, for instance, protect religious diversity and the divergent ideas of the “good life” that result from different religious beliefs. The Free Speech Clause likewise protects the liberty of the individual to speak pursuant to her own will, even though her speech conflicts with the existing order and ideas of the “common good” that the majority accepts. The Constitution’s countermajoritarian protections, in other words, reject the ideal of widespread societal consensus. To the contrary, out of respect for individual autonomy, they constitutionalize individual interest and the conflict it may produce.

The Constitution further manifests the theory of adversary democracy through its structural provisions for the federal government, most notably checks and balances and the separation of powers: the separation of the Congress into two houses, the presidential veto, and the institution of judicial review. Each of these constitutional structures reflects a fundamental assumption that disagreement between competing interests will punctuate American politics, and an attempt to set out certain “rules of the game” to manage this conflict. In this sense, they represent the descriptive principle of adversary democracy: conflict is inevitable. More importantly, these institutions also represent the normative principle of adversary democracy: they institutionalize opposing interests in the government itself on the premise that conflict advances, rather than impedes, democracy. Take the separation of powers. By splitting the executive, legislative, and judicial powers into three separate branches of government, the Constitution gives

²⁴⁸ MICHAEL S. GROSS, *ETHICS AND ACTIVISM: THE THEORY AND PRACTICE OF POLITICAL MORALITY* 24 (1997).

²⁴⁹ HANNAH FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 196 (1967).

²⁵⁰ MANSBRIDGE, *supra* note 227, at 16.

each branch the “necessary constitutional means and *personal motives* to resist encroachments of the others”²⁵¹ in order to “utilize the inherent conflicts ‘sown in the nature of man’ as a means of preserving freedom.”²⁵²

The Constitution also reflects adversary democracy in what it intentionally chose *not* to do: emulate the Athenian governmental form, the paradigm of cooperative democracy.²⁵³ Athenian democracy was, quite literally, rule by the people. Citizens exercised the legislative power by participating in the Assembly, a body comprised of all Athenian citizens, who numbered as many as forty or fifty thousand.²⁵⁴ Consistent with the cooperative ideal of democracy, deliberation in the Athenian Assembly was to produce a consensus on the common good,²⁵⁵ and citizens were to subordinate their private interests to that goal.²⁵⁶

The Framers so equated democracy with Athenian democracy that they considered the form of government they created quite distinct from democracy all together. For instance, in *The Federalist No. 14*, James Madison wrote that “in a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents.”²⁵⁷ Aristotle would have agreed. With its separate executive, courts, and representative legislative bodies, the United States

²⁵¹ THE FEDERALIST NO. 10 (James Madison), *supra* note 116, at 281 (emphasis added).

²⁵² THOMAS SOWELL, KNOWLEDGE AND DECISIONS 317 (1980) (quoting THE FEDERALIST NO. 10 (James Madison)).

²⁵³ Indeed, the subtle irony of democratic theories of the First Amendment—and perhaps the clearest example of the contingency of the term “democracy”—is that the Framers of the American Constitution equated “democracy” with the system of government in ancient Athens, a system they thought neither practicable nor desirable for imitation on American soil. *See, e.g.*, THE FEDERALIST NO. 14 (James Madison), *supra* note 116, at 69 (“A democracy . . . must be confined to a small spot. A republic may be extended over a large region.”); THE FEDERALIST NO. 48 (James Madison), *supra* note 116, at 269 (“In a democracy, where a multitude of people exercise in person the legislative functions, and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter.”).

²⁵⁴ DAHL, *supra* note 6, at 16–17. Citizens were not required to attend the Assembly’s approximately forty annual meetings. *Id.* Indeed, some have noted the unlikelihood that all citizens *could* attend, as the Assembly’s gathering place held only 6000 people. *See* Nadia Urbinati, *Representation as Advocacy: A Study of Democratic Deliberation*, 28 POL. THEORY 758, 763 (2000) (citing MOGENS HERMAN HANSEN, THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES 130–32 (J.A. Crook trans., 1993)); *see also* DAHL, *supra* note 6, at 21 & 345 n.11 (noting the uncertainty of historical estimates of attendance at the Assembly but conjecturing that the number may at times have been more than 6000). Nonetheless, civic participation was considered an absolute duty. In the words of Pericles, a prominent Athenian citizen, “[W]e do not say that a man who takes no interest in politics is a man who minds his own business; we say that he has no business here at all.” HELD, *supra* note 5, at 17 (internal quotation marks omitted).

²⁵⁵ *See id.* at 18, 21.

²⁵⁶ MANSBRIDGE, *supra* note 227, at 13–14; *see also id.* at 336 n.14 (“Popular morality as well as political philosophy in ancient Greece maintained that the good citizen was bound to put public above private interest.”).

²⁵⁷ THE FEDERALIST NO. 14 (James Madison), *supra* note 116, at 69.

government more closely resembled the “mixed government” of Sparta, which Aristotle considered an “oligarchy,” rather than the democracy of Athens.²⁵⁸ Notably, the Framers did not reject Athenian democracy solely because it was impractical. Rather, they considered “pure democracy”—“a society consisting of a small number of citizens, who assemble and administer the government in person,”²⁵⁹ such as Athens—to be an inherently unstable form of government that invited “popular despotism.”²⁶⁰ In Madison’s words:

[A] pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.²⁶¹

Madison was suggesting that the cooperative ideal is an illusion, and a dangerous one at that. This was certainly an accurate assessment of Athens, as critical analysis suggests that the cooperative ideal of Athenian democracy is simply an historical myth. First, the principle of *isegoria* (the citizen’s equal right to speak) neither ensured that every individual did speak, nor that certain individuals would not emerge as more vocal and powerful elites within the Assembly.²⁶² Second, political elites in the Assembly²⁶³ advanced their own interests by couching them in notions of the common good.²⁶⁴ Likewise, citizens organized political clubs—based on existing familial relationships and friendships, not issues²⁶⁵—to further their own advantage in

²⁵⁸ See Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 716 (2001).

²⁵⁹ THE FEDERALIST NO. 10 (James Madison), *supra* note 116, at 51.

²⁶⁰ Wood, *supra* note 241, at 409–10 (describing state legislatures’ tendency during the 1780’s toward “popular despotism”); *id.* at 595 (describing the Framers’ awareness that the democracy they established was unique from “pure” democracies of the past because of its system of electoral representation and accountability).

²⁶¹ THE FEDERALIST NO. 10 (James Madison), *supra* note 116, at 51–52.

²⁶² See Urbinati, *supra* note 254, at 762–64.

²⁶³ HELD, *supra* note 5, at 27 (noting that elite politicians came “from wealthy and well-established families, who had ample time to cultivate their contacts and pursue their interests”).

²⁶⁴ MANSBRIDGE, *supra* note 227, at 13 (noting that Athenian citizens “used the rhetoric of the common good to further their own interests”).

²⁶⁵ See DAHL, *supra* note 6, at 21.

the discussion.²⁶⁶ Third, consensus based on the force of the better argument, while the ideal, was rarely the reality;²⁶⁷ when the Assembly could not reach consensus, it resolved disagreement by majority vote.²⁶⁸

Not only did Madison recognize the inevitability of conflict in collective self-government, he also recognized the threat of the cooperative ideal in a society without a singular interest: the danger that a majority united behind a “common passion or interest” will “sacrifice the weaker party or an obnoxious individual” to its will.²⁶⁹ Indeed, even assuming only the wisest citizens participated in this direct form of democracy, Madison still believed the result would be the trampling of minority interests. “[H]ad every Athenian citizen been a Socrates,” he wrote, “every Athenian assembly would still have been a mob.”²⁷⁰ Athenian democracy was not only impractical, it risked the “democratic despotism” that the Founders feared.²⁷¹ Of course the irony, as Thomas Sowell notes, is that America during the Founding era *itself* demonstrated the tyrannical danger of a majority united behind a common interest: “[T]he one area in which a united national majority was easily identified in colonial America was race, and it was here that the loss of freedom was carried to its extreme in slavery.”²⁷² But this only further demonstrates adversary democracy’s key principle that all individuals and groups must be free to represent their own self-interests lest they be marginalized by others.

Modern political theorists have further illuminated the core principles of adversary democracy that animated Madison’s argument in *The Federalist No. 10*.²⁷³ They have argued that by recognizing and institutionalizing competition among conflicting interests, a democracy paradoxically *diminishes* ideological conflict and the domination of majority interests over mi-

²⁶⁶ See MANSBRIDGE, *supra* note 227, at 13 & 335–36 n.13. Those clubs met before Assembly meetings to “test and select” the most effective speakers to deliver a particular message, and sought to influence other citizens’ votes by persuasion, bribery, and even threats. See *id.* at 335–36 n.13; see also PETER RIESENBERG, *CITIZENSHIP IN THE WESTERN TRADITION: PLATO TO ROUSSEAU* 21 (1992) (arguing that, even after reforms to create more political equality between ancient and new citizens, “[i]nequalities persisted” and were an “accepted” part of Athenian citizenship). Thus, “[d]espite the contemporary myth of the polis as the place of a disinterested and dialogic exercise of public reason, private and class interests” did in fact influence Athenian democracy. Urbinati, *supra* note 254, at 764.

²⁶⁷ See JOSIAH OBER, *MASS AND ELITE IN DEMOCRATIC ATHENS: RHETORIC, IDEOLOGY, AND THE POWER OF THE PEOPLE* 168 (1989) (describing “universal consensus” as an ideal “that seldom could be achieved in practice”).

²⁶⁸ See HELD, *supra* note 5, at 21.

²⁶⁹ THE FEDERALIST NO. 10 (James Madison), *supra* note 116, at 52.

²⁷⁰ THE FEDERALIST NO. 55 (James Madison), *supra* note 116, at 301.

²⁷¹ See Letter from Madison to Jefferson (Oct. 17, 1788) (suggesting that “[i]t is much more to be dreaded that the few will be unnecessarily sacrificed to the many” rather than the many to the few), quoted in WOOD, *supra* note 241, at 413.

²⁷² SOWELL, *supra* note 252, at 317.

²⁷³ THE FEDERALIST NO. 10 (James Madison) (describing the potential of democracy to deteriorate into a tyranny of the majority).

nority interests. For instance, Joseph Schumpeter developed the insight that competition between political parties for votes disciplines elected officials by forcing them to be more responsive to voters' preferences.²⁷⁴ Ian Shapiro has similarly argued that "genuine competition by decision-makers for the votes of those who are actually affected by their decisions" provides the principal means for preventing "domination."²⁷⁵ Likewise, Chantal Mouffe has suggested that unless democracy recognizes competition and creates "legitimate political channels for dissenting voices [to] exist," conflict will take "violent forms" that ultimately destroy democracy.²⁷⁶

By suggesting that the Framers rejected the cooperative ideal that democracy pursues the common good or forges a common will, we do not argue that they rejected the possibility or desirability of compromise. Nor do we suggest that adversary democracy in its modern form does so. We suggest instead that such compromise, to the extent it does in fact take place, is appropriately viewed not necessarily as a reflection of a generalized consensus but often as a pragmatic reconciliation of diverse and competing viewpoints, through mutual recognition of the political strength of the opposing position.

D. *The Practical Benefits of Adversary Democracy*

Beyond the salutary theoretical implications of adversary democracy, the concept's practical impact is to promote a variety of values that in turn advance individual and collective self-government. First, competition among individual interests invariably leads to increased dissemination of information relevant to democratic decisionmaking. An individual interest, be it economically, socially, or ideologically motivated, creates a positive incentive for the accumulation and dissemination of relevant information that supports the position of the speaker and thereby helps persuade the public. The more information the individual marshals to support his position, the more likely it is that others will accept his position and vote (or pressure their representatives to vote) accordingly. Thus, acting out of his own individual interest in enacting his private preferences, the individual has the incentive to spend the time and resources necessary to inform others of his position and the factual predicates for it. And, to be sure, another individual will do the same for the opposing viewpoint. As in the economy, the effect of competition in the realm of public opinion is to create more and cheaper information for the individual decisionmaker.

The beneficial impact of this increased dissemination is not reduced by the existence of the speaker's personal or economic motivation. Thus, a producer of wind energy who lobbies for a tax policy favoring renewable

²⁷⁴ See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269–73 (5th ed. 1976) (describing the interaction between political competition and public opinion).

²⁷⁵ See SHAPIRO, *supra* note 229, at 6–7.

²⁷⁶ See MOUFFE, *supra* note 232, at 20–21.

energy sources provides relevant information about the feasibility and desirability of renewable energy, despite—indeed, quite probably because of—her pecuniary interest in the matter. To the extent the information she provides is selective or slanted by her own self-interest, the competitive posture of adversary democracy alerts the listener to discount the information accordingly. Indeed, one of the benefits of adversary democracy is that it strips away the rhetoric of impartiality and bares self-interest to the public in a way that permits the public to discount it.

This reasoning should sound familiar to any American lawyer. As one commentator has suggested, “[a] fundamental premise of the adversary system of jurisprudence is that a competitive rather than cooperative presentation and analysis of the facts underlying a dispute will produce a greater number of correct results.”²⁷⁷ Another commentator has suggested that placing control of the presentation of evidence in the hands of self-interested parties—rather than in the hands of the adjudicator, as an inquisitorial system would—“improve[s] the overall quality of the evidence upon which adjudication [is] based.”²⁷⁸ Indeed, the commitment to adverse interests between the parties is so profound that the federal courts’ jurisdiction under Article III of the Constitution depends on the existence of a “case or controversy,” and the justiciability doctrines further ensure the existence of “concrete adverseness” between the parties.²⁷⁹

The standing doctrine is most conspicuous in this regard. A plaintiff may sue only if she has “*personally* suffered some actual or threatened injury,” which is traceable to, and redressible by, the defendant—in other words, only if the plaintiff has something to gain and the defendant something to lose.²⁸⁰ “[S]uch a personal stake in the outcome of the controversy,” the Supreme Court has explained, “assures[s] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends on for illumination of difficult constitutional questions”²⁸¹ Indeed, to the extent that a personal economic injury is the prototypical form of injury-in-fact, standing doctrine suggests those with a personal, economic self-interest are most certain to “sharpen[] the presentation of issues” to the benefit of the decisionmaker.²⁸²

Of course, an analogy to the legal system is not seamless. First, the judge or the jury is at least presumed to be neutral and disinterested, while the public decisionmaker under the adversarial model is neither. This dis-

²⁷⁷ Robert J. Kutak, *The Adversary System and the Practice of Law*, in *THE GOOD LAWYER* 172, 174 (David Luban ed., 1983).

²⁷⁸ STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 45 (1984).

²⁷⁹ *Baker v. Carr*, 369 U.S. 186, 204 (1962).

²⁸⁰ *Valley Forge Christian Coll. v. Am. United for the Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (emphasis added) (quoting *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979)).

²⁸¹ *Baker*, 369 U.S. at 204.

²⁸² *See id.*

tion, however, goes to the neutrality of the *listener*, not the incentives of the potential *speakers* to provide information. So long as the listener may conceivably be persuaded, the speaker has an incentive to provide information. Indeed, to the extent the listener is self-interested, the speaker has an even greater incentive to present the best possible support for her position.

Another critique may be that in court the Rules of Evidence and the Rules of Professional Conduct moderate the adverse incentives of self-interest, which otherwise might entice a litigant to deceive or mislead the court, whereas there is little formally to constrain the adverse incentives of the self-interested speaker in public debate. The public decisionmaker, however, need not rely on the information presented to her by any single party the way a court must. She can affirmatively seek out additional information and verify the information provided by the self-interested speaker in a way that a court or jury cannot. In public, more speech can remedy the adverse incentives of self-interest in a way it cannot in court. In any event, the Rules of Evidence and of Professional Conduct are exceptions to the general principle that no one may deny the attorney the general latitude to shape arguments to influence the factfinder.

The second practical value that adversary democracy engenders is individual, *private* deliberation. We use “deliberation” to refer to the process of internal self-examination and thought to resolve a conflict. This deliberation is quite different from the *public* deliberation that modern cooperative theories of democracy presume to be the essence of democratic self-government. These democratic theories, which collectively are called “deliberative democracy,” claim that democracy is defined by decisionmaking on the basis of public deliberation: free, impartial, and rational public discussion among individuals who speak with the purpose both to persuade and to be persuaded, and with the ultimate goal of reaching mutual agreement, or “rational consensus,” on the common good.²⁸³ Because the ultimate goal of public deliberation is rational consensus about the common good, participants must refrain from arguments grounded in private self-interest.²⁸⁴ Instead, public deliberation requires “reciprocity”—arguments

²⁸³ See José Luis Martí, *The Epistemic Conception of Deliberative Democracy Defended: Reasons, Rightness and Equal Political Autonomy*, in *DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS* 27, 27–29 (Samantha Besson & José Luis Martí eds., 2006). In reality, there are numerous theories of deliberative democracy; the summary here emphasizes what those theories share in common. See *id.* at 27 (describing deliberative democracy as “a family of views according to which the public deliberation of free and equal citizens is the core of legitimate political decision making and self-government” (quoting James Bohman, *Survey Article: The Coming Age of Deliberative Democracy*, 6 *J. POL. PHIL.* 400, 401 (1998) (internal quotation marks omitted))). Thus, the goal of deliberation is “neither toleration nor reaching coherent, binding, and stable decisions in the face of disagreement, but rather ‘collective moral progress.’” Andrew Sabl, *Deliberation in Its Place*, 4 *ELECTION L.J.* 147, 147 (2005) (citing AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 62 (1996)) (critiquing deliberative democracy).

²⁸⁴ Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 3, 12 (James Bohman & William Rehg eds., 1997)

based on “accessible” reasons (i.e., those which all participants can equally understand), and on “moral” reasons (i.e., those which “apply to everyone who is similarly situated in morally relevant respects”).²⁸⁵ Deliberation in deliberative democracy, then, is a collective and cooperative process aimed at agreement on shared interests, rather than an individual process aimed at determining and understanding one’s own interests and how they are affected by competing interests.

Private deliberation under adversary democracy is valuable in two respects: first, in the Millian sense, because the process of deliberation helps the individual to develop his human faculties;²⁸⁶ and second, because the process of deliberation causes the individual to consider and give due regard to opposing viewpoints. Adversary democracy promotes deliberation in the Millian sense because it requires the individual to know his individual interest, in order to advance it against competing interests.²⁸⁷

Not only does adversary democracy prompt the individual to define his own self-interest, it also prompts the individual to consider opposing arguments and the interests they represent, if only to compete against adverse positions more effectively. This may sound similar to the “reciprocal justification” tenet of deliberative democracy,²⁸⁸ but there is a fundamental distinction. Deliberative democracy assumes all individuals share (or can ultimately share) a common interest; adversary democracy does not. Thus, when one makes a valid argument under deliberative democracy, one argues that a certain position promotes the “common good”; one does not argue that it promotes *the speaker’s own good*. The premise of a common good permits “the assumption that the other fellow wants what we want, or that he will want the same thing when his perception has developed to the level of our own.”²⁸⁹ As a result, it does not require thorough consideration of opposing interests. The adversarial premise, on the other hand, causes every individual to “understand as fully as he possibly can what the other party is like and what his wants are.”²⁹⁰ In a relationship where there is no assumption of a common good,

we must know, if we are to obtain what we want, what the other fellow wants.
It is true that, like Tom Sawyer when he got himself out of a fence-painting

(arguing that it is “conceptual[ly] impossib[le]” to express self-interested arguments in “a debate about the public good” and that purging “private and idiosyncratic wants” from public discussion about the common good allows “uniquely determined rational desires [to] emerge”).

²⁸⁵ AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 144–50 (2004).

²⁸⁶ See generally MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 9–86 (1984).

²⁸⁷ See Jane Mansbridge, *Conflict and Self-Interest in Deliberation*, in DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS, *supra* note 283, at 108, 117 (recognizing the necessity of deliberation for understanding one’s own interest, especially for minorities).

²⁸⁸ See *supra* note 285 and accompanying text.

²⁸⁹ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 361–62 (1978).

²⁹⁰ *Id.* at 361.

job, we may persuade the other fellow he wants something that he really does not, or like the modern advertiser we may elevate this persuasion to the level of a skillful manipulation of mass opinion. But even in this manipulation there is latent a certain regard for human dignity; we at least try to make the fellow over so that he will want what we have to give him. We do not merely thrust something on him and say, "Here it is."²⁹¹

Thus, while reciprocal justification masks (or at least blurs) difference, adversary democracy forces the individual to confront difference, and in doing so, to give due regard to the individual dignity of his opponent.

Ironically, adversary democracy's third practical value is its potential to encourage active democratic participation. The irony is that we are positing adversary democracy as a preferable alternative to Post's participatory theory. In many ways, the system of adversary democracy we advocate will encourage participation as much or more than theories that label themselves as participatory. Political scientists have long remarked on the low levels of participation in American democracy. Some, like Joseph Schumpeter, have suggested that ordinary citizens have little role to play in democracy, other than to periodically vote for their elected officials.²⁹² Others have argued that the lack of participation is not normatively problematic, to the extent it is merely a consequence of "rational ignorance" and abstention.²⁹³ Still, presuming that some degree of participation and activity in democracy—through voting, campaigning, demonstrating, letter-writing, or other activity—is normatively valuable, adversary democracy is most likely to achieve it.

While self-interest does not explain all political participation, it certainly explains a good deal of it.²⁹⁴ A 1993 study, for instance, found relatively low rates of political participation among the economically disadvantaged, but also found that 71% of the time that the economically disadvantaged did communicate to public officials about the issue of basic human needs, they were addressing an issue that had "an immediate impact upon themselves or their families."²⁹⁵ "Not only do [issues of basic human

²⁹¹ *Id.* at 362.

²⁹² *See, e.g.*, SCHUMPETER, *supra* note 274, at 269.

²⁹³ *See, e.g.*, ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 297–300 (1957). Data indicate this thesis accurately captures the explanation for low participation: people desire their elected officials to solve political problems for them so they can tend to other matters. *See* Sabl, *supra* note 283, at 148 (citing JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 114–21 (2002)).

²⁹⁴ *See* Andrea Louise Campbell, *Self-Interest, Social Security, and the Distinctive Participation Patterns of Senior Citizens*, 96 AM. POL. SCI. REV. 565, 571 (2002) (noting that "[r]esearchers often have difficulty detecting self-interested behavior" when studying political participation); Carolyn L. Funk, *The Dual Influence of Self-Interest and Societal Interest in Public Opinion*, 53 POL. RES. Q. 37, 53 (2000) ("[T]hose with a direct self-interest in a policy can be mobilized to support or oppose a policy on the basis of that self-interest.").

²⁹⁵ Sidney Verba, Kay Lehman Schlozman, Henry Brady & Norman H. Nie, *Citizen Activity: Who Participates? What Do They Say?*, 87 AM. POL. SCI. REV. 303, 312 (1993).

needs] weigh more heavily in their list of concerns,” the authors conclude, “but when they communicate about these matters to public officials, they are more likely to be discussing issues that touch their own lives”²⁹⁶ Likewise, a 2002 study found that participation among senior citizens with regard to Social Security is “an instance in which self-interest is highly influential: Those who are more dependent are more active.”²⁹⁷ A model of democracy that accepts the pursuit of self-interest as a legitimate goal of political participation at least permits that degree of participation directly motivated by that goal.

It is important to recall that adversary democracy is not confined to the pursuit of self-interest. Social action groups motivated by altruistic concerns are also likely to encourage participation in an effort to achieve their social and political goals. Under adversary democracy, individuals with similar interests and opinions are induced to organize together in order to compete with those who hold opposing interests and opinions.²⁹⁸ And social and political organization established around common interests goes “hand in hand” with “high levels of [political] participation.”²⁹⁹ Indeed, after researching the effect of homogeneous and heterogeneous networks on political participation in a diverse society, one political scientist concluded that “[h]omogeneous environments are ideal for purposes of encouraging political mobilization. Like-minded people can encourage one another in their viewpoints, promote recognition of common problems, and spur one another on to collective action.”³⁰⁰

E. Adversary Democracy and the First Amendment

Acceptance of the premises of adversary democracy has important implications for the scope of the theory of free expression. Post and Meiklejohn were both correct in positing a symbiotic intersection between democracy and free expression. Recognition of both the normative and empirical superiority of the adversary model of democracy, however, suggests that the First Amendment’s domain extends significantly farther than either Post or Meiklejohn’s theories would permit.

Adversary democracy, it should be recalled, posits that democracy invariably involves an adversarial competition among competing personal, social, or economic interests. Individuals are able to protect their own interests or to achieve their ideological goals by (1) participating in the proc-

²⁹⁶ *Id.* at 314.

²⁹⁷ Campbell, *supra* note 294, at 565.

²⁹⁸ Indeed, it was precisely for its potential to promote this kind of political mobilization that James Madison defended the form of government the Constitution created. *See supra* notes 250–62 and accompanying text.

²⁹⁹ *See* Diana C. Mutz, *The Consequences of Cross-Cutting Networks for Political Participation*, 46 AM. J. POL. SCI. 838, 849–50 (2002).

³⁰⁰ *Id.* at 852.

ess of governing by exercise of the vote, and (2) attempting, through exercise of their expressive powers, to persuade others to accept their positions. The First Amendment, therefore, must protect (1) all speech that facilitates the individual's democratic decisionmaking; (2) all lawful advocacy;³⁰¹ (3) all speech that facilitates the individual's awareness of her self-interest; and (4) all speech that facilitates the individual's ability to maintain and develop her individuality in spite of collective life. Notably, this does not mean that the government is absolutely barred from regulating speech that falls in these four categories. It simply means that it can do so only when the regulation survives strict scrutiny.

While the adversary theory of the First Amendment would protect all of the speech that Meiklejohn's and Post's theories would protect, it would also protect much of the expression these theories exclude. As previously noted, both Meiklejohn and Post strained their theories' claims to being *democratic* in order to exclude certain forms of self-interested speech. Meiklejohn not only violated the core principle of epistemological humility to justify his exclusion of economically self-interested speech from the First Amendment, he also excluded such self-interested speech despite its potential to inform democratic decisionmaking, which he believed to be the sole constitutional purpose for protecting speech in the first place. Post likewise casts off or at least devalues core aspects of democratic autonomy, such as the vote and the information that makes it more informed, despite the fact that doing so concomitantly undermines his theory's ability to secure democratic legitimacy, the value it purportedly protects.

Perhaps it is inevitable that cooperative theories of democracy would struggle to articulate a coherent theory of free speech, precisely because of their inherent rejection of the adversary premise and its centrality to core notions of democracy. Based on their theoretical premise that democracy is an exercise of collective self-determination in pursuit of shared objectives, cooperative theories of the First Amendment might always be faced with something of a difficult choice. They could remain true to their First Amendment premises for protecting speech—listener autonomy in Meiklejohn's model, for instance. But to the extent they do so, they might necessarily violate a theoretical premise of the underlying cooperative democratic theory, such as Meiklejohn's premise that self-government should pursue the common good rather than private self-interest. Put differently, cooperative theories of democracy are fundamentally inconsistent with the core principle of epistemological humility that the First Amendment embodies because, either implicitly or explicitly, they reflect predetermined conclusions about how autonomy should be exercised. In this

³⁰¹ The level of First Amendment protection to be given to unlawful advocacy is beyond the scope of this Article. For a detailed exploration of the issue, see MARTIN H. REDISH, *THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA* 63–131 (2005).

manner, both theories suffer from the oxymoronic concept of externally determined autonomy.

Adversary democracy does not suffer from the same problem because it contains no underlying premise as to how or why autonomy should be exercised.³⁰² Instead, it commits these choices to the individual. Thus, if an individual wishes to vote and advocate in order to pursue the course of action he thinks is in the best interests of the community or the nation, adversary democracy authorizes him to do so. On the other hand, if an individual wishes to vote and advocate in order to pursue what he thinks is in his own private self-interest, adversary democracy says he may do so. Because adversary democracy is consistent with these process-based autonomy decisions, one employing the adversary theory of the First Amendment is never tempted to exclude speech otherwise logically included within the amendment's scope simply because its speaker is not acting in accordance with some predetermined ideal of political behavior.

More importantly, the adversary theory of free expression is preferable to Meiklejohn's and Post's theories because it equally protects all aspects of democratic autonomy, rather than selectively privileging some aspects over others. Assuming that the purpose of a democratic theory of the First Amendment is, indeed, to facilitate democracy, which in turn necessarily implies the notions of epistemological humility and true voter autonomy, such comprehensive protection for all aspects of process-based autonomy is crucial to a theory's success. Unlike Meiklejohn's theory, which categorically excludes speaker autonomy and all forms of individual autonomy, and unlike Post's theory, which systematically underprotects listener autonomy and all forms of individual autonomy that do not facilitate the emergence of a common will, the adversary theory of free expression provides complete protection to democratic autonomy in all its manifestations.

Turning to the four categories of speech that the adversary theory of the First Amendment protects, the first two categories should sound familiar. The first aligns, to a certain degree, with Meiklejohn's protection for speech that facilitates the "voting of wise decisions"; the second aligns with Post's protection of speech that involves participation in the formation of public opinion. Setting aside the fact that each of these theories actually *excludes* some speech that should logically fall in each category, the point is that the adversary theory of democracy confirms that Meiklejohn and Post are both correct to some extent. Individuals must have access to speech that helps them to make decisions as voters, and they also must be free to influence the opinions of others by participating in public discourse. In other

³⁰² We must emphasize that the form of autonomy we refer to is confined to process-based, or what one of us has called "meta" autonomy, meaning autonomy over decisions as to how to participate in the broader decisionmaking process. See Redish & Berlow, *supra* note 79, at 778. Thus, we in no way intend to adopt wholesale the views of libertarian theorists who extend individual autonomy to include much substantive decisionmaking, thereby insulating it from collective control.

words, the First Amendment must encompass both the listener autonomy that Meiklejohn protects and the speaker autonomy that Post protects. But the adversary theory of the First Amendment explains why neither Meiklejohn nor Post goes far enough in his protection of free speech. Given its descriptive principle—the recognition that different and often competing interests and ideologies will generally divide collective decisionmaking—adversary democracy suggests first that it is necessary for every individual to have the equal ability to influence the outcomes of collective decisionmaking. This is why Meiklejohn is assuredly correct to focus on the vote as central to democracy, and why Post is assuredly mistaken to marginalize it. In such a setting, however, it is also necessary that every individual have the equal opportunity to influence others around her. Otherwise the majority becomes the majority forever, and the promise of democratic self-determination would benefit only those in that static majority. This is why Post is clearly correct to focus on the individual's right to advocate as a means of shaping public opinion, and why Meiklejohn is clearly mistaken to deny it.

Merely combining Meiklejohn and Post's theories, however, does not result in the creation of a satisfactory free speech theory. Such a synthesis would still exclude the last two categories of speech that adversary democracy dictates must be protected: speech that facilitates individuals' awareness of their self-interest and speech that allows individuals to maintain their individuality in spite of the collectivizing pressures of modern life. Doing so would still exclude speech that is an exercise of individual autonomy—the very speech that the adversary theory dictates deserves protection.

Consider again Meiklejohn's stance concerning First Amendment protection for radio broadcasts. He suggested that because the radio is run by individuals who pursue profits rather than the common good of the nation, it should be denied First Amendment protection. Now consider how Post's participatory theory would evaluate constitutional protection for radio broadcasts. Presumably, they are entitled to the presumption of qualifying as "public discourse" because radio is a form of media. But consider the analysis a court would have to engage in absent this presumption. The judge would have to decide whether the most natural understanding of the radio is that it constitutes an effort to shape public opinion or an effort to make money. Of course this is a misguided inquiry in the first place, but indulging it for the moment, it is difficult to imagine how Ryan Seacrest attempts to "engage in the public life of the nation" by broadcasting the Top 40 any more than General Electric does by advertising its "Ecomagination" philosophy. Under either theory, a speaker's self-interest could potentially, if not certainly, exclude her speech from First Amendment protection.

The adversary theory of free expression, on the other hand, protects and even values the promotion of self-interest. It does so for the practical reason that self-interest creates an incentive for speech that facilitates de-

mocratic decisionmaking. And, it does so based on the recognition that the collective decisionmaking process may ignore the interest entirely unless the individual represents it. But more fundamentally, it does so for the theoretical reason that autonomy requires that the individual have the freedom to decide how she wants to govern herself and how she wants to engage in the process of collective decisionmaking.

CONCLUSION

The viability of any democratic theory of the First Amendment necessarily hinges on two considerations: (1) the validity of the vision of democracy that underlies it, and (2) the consistency with which First Amendment theory is fashioned in order to best implement that vision. Alexander Meiklejohn's and Robert Post's democratic theories of the First Amendment fail on both counts. Neither grasps the true nature of autonomy that is central to any viable form of democracy. Moreover, even if one were to assume the correctness of their democratic visions, neither fashions a First Amendment theory that implements their respective visions in a logically consistent and coherent manner.

If one were forced to point to the single most fundamental flaw in both of their democratic theories of the First Amendment, however, it would be their failure either to recognize the centrality of the adversary element in democracy, or, at the very least, to understand its logical implications. In any working democracy in a nation as large and diverse as ours, different personal or ideological interests will inevitably clash. On occasion, these competing interests will compromise. On other occasions, one side will defeat the other politically. In all instances, however, the adversarial nature of the political battlefield is tempered by a cooperative ether—one that permits the peaceful resolution of disputes and a continuation of the commitment to the democratic process.

A purely collectivist or communitarian vision of democracy ignores both the political realities of self-interested political combat and the normative foundational commitment of any democratic society to the ultimate integrity of its individual citizens. Any theory of free expression that ignores the insights of adversary democracy must therefore ultimately falter, much as the theories of both Post and Meiklejohn do.