

THE TROUBLE WITH “PUBLIC DISCOURSE” AS A LIMITATION ON FREE SPEECH RIGHTS

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OVER the years, many have argued that the Free Speech Clause strongly protects only speech that is on a matter of “public concern” or is part of “public discourse.” I will argue that such a limitation is unsound *even if* one focuses on democratic self-government as the chief free speech value.

I will focus on responding to the arguments offered by Professors Robert Post¹ and James Weinstein,² who are probably today’s leading exponents of the “public discourse” limitation. But I hope that what I say will also serve as a response to others who have made arguments similar to Post’s and Weinstein’s.

I. “PUBLIC DISCOURSE”

A. *What Is “Public Discourse”?*

If “the speech by which public opinion is formed”³ is especially protected and other speech lacks full protection, then we need to define this category’s boundaries with some precision. Yet both the phrase and the label “public discourse” (as well as “speech on matters of public concern”) are inadequate to the task, at least in the absence of a more precise definition.

Let me begin by pointing to some of Post’s and Weinstein’s own examples of speech that is supposedly not part of public discourse, and their own examples of speech restrictions that are permissible because they don’t restrict speech that is part of public discourse.

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¹ Robert Post, Participatory Democracy and Free Speech, 97 Va. L. Rev. 477 (2011) [hereinafter Post, Participatory Democracy].

² James Weinstein, Participatory Democracy as the Central Value of American Free Speech Doctrine, 97 Va. L. Rev. 491 (2011) [hereinafter Weinstein, Participatory Democracy].

³ Id. at 498.

These examples help show both the difficulty of defining the category and the dangers of leaving it ill-defined.

B. Copyright-Infringing Speech

Consider copyright-infringing speech. Weinstein suggests that the “public discourse” approach accounts for the Court’s tolerance of various kinds of restrictions, including copyright law,⁴ better than the “all-inclusive approach” does. Copyright-infringing speech is restrictable, he reasons, because it is not part of “public discourse.”

Yet copyright law covers works on explicitly political, religious, and moral topics, plus entertainment that implicitly conveys ideas about such topics. The Court’s clearest discussion of the relationship between copyright law and the First Amendment came in *Harper & Row, Publishers v. Nation Enterprises*,⁵ which involved an ideological magazine’s publication of an article based on President Ford’s memoirs. Surely this article was “speech by which public opinion is formed,” as are many other copyright-infringing works, whether literal copies or adaptations that fall outside the fair use exception.

This is especially so given Post’s acknowledgment that the “democratic participation” theory of the First Amendment protects “all forms of communication that sociologically we recognize as art” so long as they “form part of the process by which society ponders what it believes and thinks.”⁶ But it remains true even if the theory is limited to speech on more expressly political topics.⁷ If

⁴ See *id.* at 492 (arguing that the lack of protection offered speech “regulated by securities, antitrust, labor, copyright, food and drug, and health and safety laws” stems from the fact that “extremely rigorous [First Amendment] protection applies primarily within the domain of ‘public discourse’—that is, to “speech on matters of public concern . . . in settings dedicated or essential to democratic self-governance”); *id.* at 511 (treating “misleading proxy statements, profanity in the classroom, negligently written instructions on consumer products, and works that infringe copyright” as examples of speech that do not constitute “public discourse”).

⁵ 471 U.S. 539, 555–60 (1985).

⁶ Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 *Va. L. Rev.* 617, 621(2011) [hereinafter Post, Reply].

⁷ Weinstein’s reply asserts that “it is difficult to imagine how prohibiting the public use of someone else’s expression would impair the individual interest in political participation that I have identified as lying at the core of the First Amendment.” James Weinstein, *Participatory Democracy as the Basis of American Free Speech Doctrine*:

“public discourse” were defined as “[expression] on matters of public concern . . . in settings dedicated or essential to democratic

A Reply, 97 Va. L. Rev. 633, 640 (2011) [hereinafter Weinstein, Reply] (footnote omitted).

But using others’ expression is often the best way of conveying one’s point. For instance, another’s photograph of an important event may be the best evidence to support one’s argument. But see *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1120 (9th Cir. 1997) (holding that a videotape of the Reginald Denny beating was protected by copyright, so that others could not use it without the videotaper’s permission; such permission could be freely denied by the videotaper or conditioned on the payment of fees that small users might be unable to pay). Likewise, a literal reproduction of a news story about an alleged government abuse may be more credible to one’s audience than a paraphrase of the story would be. The same is true for a literal reproduction of portions of President Ford’s memoirs, including his discussion of why he pardoned President Nixon. But see *Harper & Row*, 471 U.S. at 569 (finding that literal reproduction of even short snippets from President Ford’s memoirs was copyright infringement).

A cheap abridged translation of *Mein Kampf* may be an effective “Reader’s Digest-like version (showing) the worst of Hitler.” Anthony O. Miller, *Hitler’s Day in Court*, *United Press Int’l*, Feb. 3, 1988 (reporting on how this translation, published in 1939 by Alan Cranston—who would later become a U.S. Senator—was enjoined as copyright infringement); *Houghton Mifflin Co. v. Noram Publ’g Co.*, 28 F. Supp. 676 (S.D.N.Y. 1939) (holding that the translation was a copyright infringement). The publication of secret Scientology documents can be effective at helping criticize Scientology as a cultural force and as a frequent litigator in American courts—not just as a religion. But see *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 923 F. Supp. 1231 (N.D. Cal. 1995) (ordering the deletion of such documents from a Web site, on the grounds that publication of the documents infringed Scientology’s copyright). A familiar song may be the perfect anthem for a political movement. But see *Henley v. DeVore*, No. SACV 09-481, 2010 WL 3304211 (C.D. Cal. June 10, 2010) (holding that the use of such a song in a political campaign was likely an infringement); *Browne v. McCain*, 611 F. Supp. 2d 1062 (C.D. Cal. 2009) (holding that Senator McCain’s campaign for President likely infringed Jackson Browne’s *Running on Empty* when it used portions of the song in mocking then-Senator Obama’s proposed energy policy). (Note that the rationale of the *Browne* decision would equally apply to uses that are even more central to the campaign.) Yet reproducing all of these may well be copyright infringement.

Moreover, as *Cohen v. California*, 403 U.S. 15, 25–26 (1971), correctly points out, each way of expressing a particular idea conveys a different message. Requiring that people express themselves without the word “fuck” will indeed impair their ability to convey the precise message they want to convey. The same is true for requiring people to paraphrase important copyrighted works rather than copying them directly. Perhaps the impairment is not vast, but many impairments of political speech are not vast and yet are of First Amendment concern. See, e.g., *Cohen*; see also *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (striking down a ban on flag burning, even though the ban left open a vast range of alternative means of expressing one’s viewpoint). The impairment of political speech produced by copyright law may be justifiable, for instance for the reasons mentioned in *Harper & Row*, 471 U.S. at 555–60, but the impairment is surely present.

self-governance,” the definition in Weinstein’s opening article,⁸ copyright-infringing speech would often qualify.

Copyright law can be explained under the “public discourse” theory only under the definition set forth in Weinstein’s reply: “public discourse” as “short hand for those types of expression that the Court has determined are essential to democratic self-governance but which do not unduly impair important governmental or private interests.”⁹ Yet the turn to such an interest-balancing justification strips the “public discourse” theory of whatever supposed advantage it might have.

First, this interest-balancing definition takes us far from the supposed goal of determining what constitutes “speech by which public opinion is formed.” At least in Weinstein’s opening statement, “public discourse” was a potentially useful *precondition* for “extremely rigorous protection” (protection that covers even speech that jeopardizes important government interests).¹⁰ Such protection would supposedly apply to expression “on matters of public concern . . . in settings dedicated or essential to democratic self-governance.”¹¹ But under the interest-balancing reformulation, “public discourse” becomes merely a label for the *result* of reconciling private and government interests¹²—a result that would exclude a great deal of “expression on matters of public concern.”

Second, as a result, the interest-balancing reformulation gives no better explanation of why copyright law is constitutional than the explanation offered by the “All Inclusive Approach” Weinstein condemns. After all, that approach—more properly thought of as the presumptive all-inclusive approach—also leaves room for certain kinds of restrictions that, in the Court’s view, “do not unduly impair important governmental or private interests.” (Whether this is done under the rubric of strict scrutiny, categorical balancing, or something else is a different matter.) Indeed, Weinstein’s framework isn’t intended to offer any more precise explanation of what constitutes “unduly impair[ing] important governmental or private interests.”

⁸ Weinstein, Participatory Democracy, *supra* note 2, at 493.

⁹ Weinstein, Reply, *supra* note 7, at 638.

¹⁰ Weinstein, Participatory Democracy, *supra* note 2, at 493.

¹¹ *Id.*

¹² Weinstein, Reply, *supra* note 7, at 639–41.

Rather, the advertised merit of Weinstein’s framework stems from the additional threshold requirement that the speech involve “expression on matters of public concern . . . in settings dedicated or essential to democratic self-government.” Yet this threshold requirement can’t do any of the work needed to explain why copyright law is constitutional, because as noted above, copyright-infringing speech often does satisfy that requirement.

Third, the interest-balancing definition makes the term “public discourse” largely unintelligible to ordinary judges, lawyers, and citizens who have not closely read the definition. Discourse can be as publicly made, public-spirited, and politically salient as anything could be, yet it would somehow stop being “public discourse” if it turned out to infringe someone’s copyright. Would such labeling really advance the coherence of First Amendment law and First Amendment thinking?

It seems to me that the better approach is to recognize that the constitutionality of copyright law must be explained on grounds other than the distinction between public discourse and other speech. And seeing that the distinction is difficult or slippery enough that it can lead people into treating “works that infringe copyright” as a category that is outside “public discourse” should counsel us to be cautious about the distinction.

C. Teacher-Student Speech

Consider Post’s argument that,

Because there are many, many social relationships outside public discourse in which the law properly does not regard persons as autonomous actors, speech in such relationships is frequently outside the scope of the First Amendment. Consider the relationship between manufacturer and consumer, between lawyer and client, or between teacher and student.¹³

Is teacher-student speech really as regulable as manufacturer-consumer speech? Say, for instance, that Congress banned private university professors (or private high school teachers) from teaching their students certain ideas that were seen as harmful or wrong.

¹³ Post, *Participatory Democracy*, supra note 1, at 483.

It's hard to see a good argument for treating such a ban as a restriction on speech that is "outside public discourse."

The government, as a public school teacher's employer, may indeed have much authority—perhaps nearly unlimited authority—to insist that the teacher say certain things but not other things to students in the government-operated classroom. Yet this has little to do with whether the speech or the relationship is within public discourse. Speech by *private* school or university teachers is as much or as little a part of public discourse as speech by *public* teachers,¹⁴ even though it is much less regulable than speech by public teachers. A distinction in how the two kinds of speech are treated by First Amendment law (private teacher speech almost

¹⁴Weinstein disagrees, arguing that the state may insist that private schools teach certain subjects and that the state could even ban elementary school teachers from wearing "Fuck the Draft" jackets to school (in the highly unlikely event that some private elementary school should allow that). See Weinstein, Reply, *supra* note 7, at 662.

But minimum subject coverage requirements are likely permissible not because private schooling is somehow outside "public discourse," but because the state may compel parents to educate children in at least certain subjects. It is in fact the special importance of education to public discourse that helps explain why the state may require teaching of (say) civics and history, even in private schools (though the state would doubtless be constrained in its ability to require private schools to teach a particular viewpoint even as to those subjects).

This becomes clear if we eliminate the compulsory education factor, for instance by considering a private school that specializes in supplementary classes on evenings and weekends. I take it that the government cannot require, for example, that such a school teach evolution alongside creationism. Surely that is not because evening or weekend classes somehow become "public discourse" in a way that regular classes are not. Further, contrary to Weinstein's position, Weinstein, Reply, *supra* note 7, at 662 n.111, I do not think that a state could punish the teaching of "demonstrably erroneous facts or concepts" by such private evening and weekend schools.

Likewise, if restrictions on profanity around elementary school children are allowed, that too would not rest on some judgment that private schooling is somehow outside "public discourse." If such restrictions are constitutional—and it is not clear to me that they are—this must stem from some sense that profanity is somehow harmful to children in particular ways specific to profanity or that profanity is generally low in constitutional value. See *FCC v. Pacifica Found.*, 438 U.S. 726, 744–51 (1978) (Stevens, J., writing for three Justices) (accepting both views). It is no accident, I think, that Weinstein's example involves profanity. I take it that Weinstein would not say, "I would be surprised if a state law that prohibited all elementary school teachers from coming to class with unpatriotic slogans such as 'Down with America' emblazoned on their jackets would be declared unconstitutional as applied to teachers in private schools." That is because what's doing the work in his hypothetical is the possible special status of profanity, especially around children, not the supposed nonpublic discourse status of private education.

entirely not regulable by the government, public teacher speech highly regulable by the government acting as employer) must turn on something other than the “public discourse” status of the speech.¹⁵

D. Speech Among Friends

Consider also how Post’s reply deals with what I think should be an easy question: How much does the First Amendment protect private conversations among friends and acquaintances on political topics?

Such conversations should be as fully protected as street corner advocacy, leaflets, and the like, even if we treat the First Amendment as concerned entirely with democratic self-government to the exclusion of self-expression and other values. People often learn much more from their friends, whom they trust and whom they are willing to hear out, than from strangers in public places.

Of course, the speakers who are talking to their friends are unlikely to affect, by themselves, the entire public or even substantial chunks of the public. But very little speech has much effect by itself, whether it is said to one friend or some dozens of passersby. Nearly all of us (except the very few who have truly mass audiences) can hope to affect public debate only by contributing our speech to the speech of many others who think like us. Yet the aggregate of all these private conversations with friends can indeed have profound public effects.

¹⁵ The same criticism applies, I think, to Weinstein’s suggestion that “instruction in public schools” is a “setting[] dedicated to some purpose other than public discourse” in which “the government [therefore] has far greater leeway to regulate the content of speech.” Weinstein, *Participatory Democracy*, supra note 2, at 492. If I am right that the government may not restrict instruction in private schools, then Weinstein’s argument would suggest that instruction in private schools is dedicated to public discourse while instruction in public schools is not dedicated to public discourse. That strikes me as hard to justify.

Likewise, I take it that a law banning private school or college students or teachers from engaging in “profanity in the classroom” would be unconstitutional, because *Cohen v. California*, 403 U.S. 15, 25–26 (1971), correctly teaches that even profanity may have value for “the speech by which public opinion is formed.” See Weinstein, *Participatory Democracy*, supra note 2, at 498. Weinstein’s contention that classroom profanity can be restricted by the government in the public school or college classroom, if and where the contention is accurate, must be justified by some reason other than that such profanity is supposedly not part of public discourse.

Post's approach, though, makes this into a "close case[]." "There are no doubt close cases," Post says, as for example "whether family conversations about presidential politics should be protected as public discourse—but the most constitutional theory can do in such cases is to illuminate the stakes that are raised in choosing one or another constitutional characterization of particular speech acts."¹⁶ How can there be any doubt that speech that is so important in changing minds is indeed protected by the freedom of speech?

E. Solicitation of Legal Clients

Consider Weinstein's view that the distinction between *Ohralik v. Ohio State Bar Ass'n*¹⁷ and *In re Primus*¹⁸ represents an example of the greater protection given public discourse, because "[a] lawyer has a First Amendment right to solicit clients when 'seeking to further political and ideological goals' through litigation, but not for ordinary economic reasons."¹⁹ This is an odd dichotomy: after all, a lawyer may well seek to further political and ideological goals through litigation and at the same time want to serve his economic self-interest, just as writers or filmmakers may seek to advance ideological goals and at the same time make money.

Yet say that a lawyer for a for-profit cause lawyering firm approached an eighteen-year-old hospital patient and tried to pressure her to hire him for a potential blockbuster case that could change the course of civil rights in America. (Those are the facts of *Ohralik* but with the groundbreaking civil rights lawsuit substituted for a routine personal injury lawsuit.) Surely *Ohralik* would still apply, despite the greater ideological valence of the lawsuit: the speech would still be treated as commercial speech and therefore as more regulable.

This result can't be explained by a distinction between "public discourse" and other speech. The lawyer's speech to the client is just as much (or as little) public discourse as the same speech from an ACLU lawyer who—like the lawyer in *Primus*—wouldn't expect payment from the client. And the speech likely to be pro-

¹⁶ Post, Reply, *supra* note 6, at 623.

¹⁷ 436 U.S. 447 (1978).

¹⁸ 436 U.S. 412 (1978).

¹⁹ Weinstein, Participatory Democracy, *supra* note 2, at 495.

duced in the for-profit lawyer’s case is as much (or as little) public discourse as the speech likely to be produced in the ACLU-supported lawsuit. Whether the lawyer has a financial motive or whether the client has a duty to pay has little bearing on the “public discourse” question. So if the financial element is relevant, as it indeed is under current law, it must be for a reason other than a distinction between “public discourse” and other speech.²⁰

F. Speech in Managerial Domains

Consider this passage from Post:

The boundary between public discourse and nonpublic discourse is, as I have argued, ultimately a normative one. If a private in the army writes a letter to his Senator condemning the actions of his commanding officer, the question of whether the letter should be characterized as public discourse, or instead as insubordinate speech within an organization, is a matter of normative constitutional characterization.²¹

Whether the private’s letter is to be protected is indeed a matter of normative constitutional characterization. But it is a matter that is not closely connected to “[t]he boundary between public discourse and nonpublic discourse,” at least if “public discourse” is to be a useful analytical tool rather than a conclusory label for that speech which is most protected.

²⁰ Weinstein replies that “the primary reason for extending immunity from [solicitation] rules to the speech in *Primus* cannot logically be the lack of a commercial transaction in that case.” Weinstein, Reply, supra note 7, at 660–61. Yet in every place where *Primus* distinguished *Ohralik*—eight passages in all—it expressly stressed the commercial nature of the transaction. See *In re Primus*, 436 U.S. at 422, 434, 437–39 (distinguishing *Ohralik* as involving “purely commercial offers of legal assistance,” “solicitation for pecuniary gain,” “an offer predicated on entitlement to a share of any monetary recovery” as opposed to “free assistance,” the lawyer’s seeking “to derive financial gain,” the lawyer’s “conduct of commercial affairs,” the lawyer’s “solicitation for pecuniary gain,” the lawyer’s “simply ‘propos[ing] a commercial transaction,’” and the lawyer’s “solicitation for pecuniary gain”).

The *Primus* Court did also note the constitutional significance of the underlying cause. But nothing in *Primus*, or the cases that follow, suggests that *Ohralik* would have been off the hook if he had been soliciting a paying client for (say) a Fourth Amendment police brutality lawsuit, an Equal Protection Clause government employment discrimination case, or a product liability case that was meant to strike a broader social blow against some supposed corporate misconduct.

²¹ Post, Participatory Democracy, supra note 1, at 485 (footnote call omitted).

After all, much speech that aims to “participate in the speech by which public opinion is formed” would indeed be punishable as prejudicial to morale and discipline (and thus as being “insubordinate speech” in the sense that it violates constitutionally permissible orders not to say certain things). Consider an officer’s advocating to his men that it is proper to commit certain crimes or to refuse certain lawful orders.²² Such speech, if it is not within the narrow *Brandenburg v. Ohio*²³ exception, is generally seen as protected outside the military because even advocacy of illegal behavior can help form public opinion. But within the military, such speech may be punished even though it can help form public opinion, including among citizen soldiers who might use it to help decide how to vote in the next election.

And the same would be true of, for instance, an officer’s wearing a “Fuck the Draft” jacket on base: it would be “public discourse” under any normal sense of the phrase, but it would be constitutionally unprotected. Again, the First Amendment work that needs to be done to explain these results cannot be done by a “public discourse” test, at least so long as the test has any relationship to a commonly understood meaning of the words “public discourse.”

G. The “Public Concern” Cases

Post’s and Weinstein’s arguments are not unusual in their unsound use of the “public discourse” test; Post and Weinstein are right that some of the Court’s cases do conclude that speech on matters of “public concern” is more protected than speech that doesn’t involve such matters. But those cases themselves use the “public concern” test in unpersuasive ways—ways that cast doubt on the test’s utility. Let me focus on the two cases on which Post and Weinstein focus, though elsewhere I have also criticized a third, *Dun & Bradstreet v. Greenmoss Builders*.²⁴

²² See *Parker v. Levy*, 417 U.S. 733, 736–38 (1974).

²³ 395 U.S. 444 (1969).

²⁴ 472 U.S. 749 (1985); see Eugene Volokh, Freedom of Speech and Intellectual Property: Some Thoughts After *Eldred*, 44 *Liquormart*, and *Bartnicki*, 40 *Hous. L. Rev.* 697, 744–45 (2003).

2011]

Trouble with “Public Discourse”

577

1. Connick v. Myers

Consider *Connick v. Myers*,²⁵ which Post and Weinstein cite favorably. Post writes:

The presumption of autonomy within public discourse follows from the primacy of the value of democratic self-governance. This is a common structure in First Amendment jurisprudence, as is evidenced by cases like *Connick*, *Bartnicki*, *Hustler*, and *Snyder*, which explicitly base their holdings on whether the speech act in question should or should not be regarded as part of the formation of democratic public opinion.²⁶

Yet *Connick* involved Assistant District Attorney Myers’s criticisms of the competence, ethics, and trustworthiness of high-level D.A.’s office employees, coupled with requests for further information relevant to such criticisms. Such speech deals with a topic that could be of intense public concern, and such speech is quite relevant to how “democratic public opinion” could be formed. We wouldn’t be surprised, for instance, if a newspaper published an article on that very subject or if the matter came up in a local political campaign.

Myers’s speech was communicated to only a few coworkers, not to thousands of newspaper readers. But, as I note above, much “speech by which public opinion is formed” consists of conversation among acquaintances, coworkers, and friends. Surely a law banning nongovernment employees from engaging in private discussions of government inefficiency or corruption would be a patently unconstitutional interference with “public discourse.”²⁷

²⁵ 461 U.S. 138 (1983).

²⁶ See Post, *Participatory Democracy*, supra note 1, at 484.

²⁷ As Professor Baker points out, even less overtly political speech by private citizens to each other can help mold public debate:

I suspect that the identity of the leading candidates for the Democratic presidential nomination in 2008 reflects not merely current public discourse but also, and maybe even more, the private discourse of the 1960s and 1970s happenings in the kitchen about who does the dishes, in the bedroom about who will be on top, and at the household door about whom the daughter brings home for dinner.

C. Edwin Baker, *Is Democracy a Sound Basis for a Free Speech Principle?*, 97 Va. L. Rev. 515, 523–24 (2011). Or, in the words of Leonard Cohen:

[Democracy is] coming from the sorrow in the street,
The holy places where the races meet;
From the homicidal bitchin’

In fact, speech to one or a few coworkers, even in government offices, is sometimes rightly seen as being on matters of public concern. The Court so held in *Givhan v. Western Line Consolidated School District*²⁸ as to speech to a supervisor about alleged racism in the employer's operations, in *Rankin v. McPherson*²⁹ as to speech to a coworker about the speaker's wish that the President be assassinated, and in *Connick*³⁰ itself as to speech to coworkers asking about allegations of illegal pressure to work on political campaigns.

These three cases also suggest that we cannot simply say that the government workplace is a "setting[] dedicated to some purpose other than public discourse," namely, "to effectuating government programs."³¹ The workplace is the place in which we spend a third of our waking hours³² and in which people often talk about political matters, whether on broad topics (such as in *Rankin* or in many conversations in lunch rooms and at water coolers) or on employer-specific topics (such as in *Givhan*).

One could, of course, focus the test on the speaker's motive—specifically, whether the speaker is being public-spirited or just trying to improve her own work situation. Some post-*Connick* lower court cases have done just that,³³ and it is possible that *Connick* itself was drawing some such rough line. (It seems likely, though, that Myers's speech, which complained of alleged pressure to violate canons of legal ethics, was at least partly public-spirited in the way that *Givhan*'s speech was perceived to be.)

But such a line has little to do with whether the speech is part of the way "public opinion is formed" or, to put the question another way, whether the speech is more generally part of "public dis-

That goes down in every kitchen

To determine who will serve and who will eat.

Leonard Cohen, *Democracy, on The Future* (Sony Music Entertainment 1992). Whether democracy is indeed coming or not, Cohen's insight about the broad sources of democratic change is sound.

²⁸ 439 U.S. 410 (1979).

²⁹ 483 U.S. 378 (1987).

³⁰ 461 U.S. at 149.

³¹ Weinstein, *Participatory Democracy*, *supra* note 2, at 493.

³² See Eugene Volokh, *Comment, Freedom of Speech and Workplace Harassment*, 39 *UCLA L. Rev.* 1791, 1849 (1992).

³³ See, e.g., *Salehpoor v. Shahinpoor*, 358 F.3d 782, 787–88 (10th Cir. 2004); *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 341 (5th Cir. 2003).

course.” Even self-interested speech is part of public discourse and part of the process of forming public opinion—consider, for instance, a political ad such as “Secure your financial future by electing anti-free trade candidates.”

2. *Bartnicki v. Vopper*

Consider likewise *Bartnicki v. Vopper*,³⁴ another of the cases Weinstein and Post favorably cite as turning on the question “whether the speech . . . should or should not be regarded as part of the formation of democratic public opinion.”³⁵ Indeed, the *Bartnicki* majority does draw a distinction between private concern speech and public concern speech: “We need not decide whether that interest [in preserving privacy] is strong enough to justify the application of [the ban on disclosing illegally intercepted conversations] to disclosures of trade secrets or domestic gossip or other information of purely private concern.”³⁶

Yet this too highlights the difficulty of sensibly applying a “public concern” distinction. A trade secret can include a wide range of valuable commercial secrets, including internal product designs, future product plans, and future business plans.³⁷

Such secrets, if leaked to a newspaper and published, could influence public opinion, for instance if the current or future design is seen by some as unsafe, environmentally harmful, unreliable, or uncompetitive with foreign competitors, or if the business plan is seen as invading consumer privacy or costing local jobs. Perhaps

³⁴ 532 U.S. 514 (2001).

³⁵ Post, Participatory Democracy, *supra* note 1, at 484; accord Weinstein, Participatory Democracy, *supra* note 2, at 494.

³⁶ 532 U.S. at 533.

³⁷ A trade secret is “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.” Restatement (Third) of Unfair Competition § 39 (1995). This definition may cover confidential business plans, marketing strategies, and other descriptions of how a business, charity, church, educational institution, or even government agency operates or intends to operate. See, e.g., Ohio Rev. Code Ann. § 1333.61(D) (West 2003) (defining trade secrets as including “any scientific or technical information, design, process, procedure, formula, . . . or improvement, or any business information or plans, [or] financial information” that “derives independent economic value, actual or potential, from not being generally known to . . . persons who can obtain economic value from its disclosure or use” and that “is the subject of efforts . . . to maintain its secrecy”).

there should be some limits on publication of illegally gathered or illegally leaked documents, including some documents containing trade secrets. But even if that's so, any such notion cannot rest on the view that speech disclosing trade secrets is inherently not on matters of "public concern."

Justice Breyer and Justice O'Connor's *Bartnicki* concurrence only makes matters worse.³⁸ Rather than just drawing the line between speech on matters of public concern and other speech, they would draw the line—as to speech based on illegally intercepted communications—between speech on matters of "unusual public concern" (protected) and speech on matters of merely usual public concern (unprotected). It is hard to see where or how such a line would be drawn and how speakers could predict where or how it would be drawn.³⁹

Perhaps the line that the concurrence draws is unsound, and the majority's judgment that trade secrets are not matters of public concern is unsound, but some line between public and private concern (without a reference to trade secrets) is sound. Yet the use of the "public concern" test by the actual majority and concurring opinions helps show how, in practice, the "public concern" test tends to pull Justices into unsound analyses.

H. Autonomy of the Speakers and the Audience

So far, I have explained my concerns about the way the "public discourse" or "public concern" line has been drawn by some of the line's leading advocates. But I'm also skeptical of some of the analytical foundations for such a line.

Consider, for instance, Post's explanation:

Speech is typically categorized as within or as outside of public discourse according to whether it occurs within social relationships that are regarded as requiring autonomy or interdependence. It is this distinction that separates Situation 1 [libel on a matter of private concern] from Situation 2 [libel on a matter of public concern]. In [Situation 2], Speaker *B* [the libeler] is participating in public discourse, which we understand to require

³⁸ 532 U.S. 514, 535–41 (2001).

³⁹ *Id.* at 540.

that speakers be regarded as autonomous. “Public men,” as the Court once observed, “are, as it were, public property.”⁴⁰ Situation 1, by contrast, is outside public discourse, because in the absence of special circumstances, we wish to regard persons as socialized and as interdependent. For this reason we allow the law to be used in Situation 1 to protect private reputation. It follows that Speaker *A* [the libeler in Situation 1] can be held legally accountable: the law subordinates his autonomy to speak.⁴¹

This is a puzzling definition of “autonomy.” Say that Speaker Bill tells Individual Dan’s fiancée not to marry Dan because Dan has cheated on the fiancée. This is a classic example of a Situation 1 private concern libel, if Bill turns out to be mistaken.⁴² But I can’t see how the explanation for that legal conclusion can turn on Bill’s supposedly not being “autonomous”—what’s nonautonomous about him? (I am also not sure exactly what it means for Bill and Dan to be “socialized and . . . interdependent,” at least in a way different from the way all of us are socialized and interdependent.)

On the other hand, say that Bill and Dan are elected to the City Council, and Councilman Bill accuses Councilman Dan of defrauding the city. That’s a classic example of a Situation 2 public concern libel. But again, how can this turn on “autonom[y]”? How is it that Bill and Dan—who are now colleagues—are no longer “properly regard[ed] . . . as socialized and as interdependent” and that Bill is thus more “autonomous” than he was before?

Post’s reply suggests that “[b]ecause the normative point of public discourse is to exercise collective autonomy, the law will ascribe autonomy to persons who are categorized as speaking within public discourse; it will do so in order to protect the capacity of persons collectively and autonomously to determine their own fate.”⁴³ But this is an odd definition of autonomy. Under any normal definition of “autonomous,” two people who are talking wouldn’t stop being autonomous when they switch the topic from politics to their lovers.

⁴⁰ *Beauharnais v. Illinois*, 343 U.S. 250, 263 n.18 (1952).

⁴¹ See Post, *Participatory Democracy*, *supra* note 1, at 483 (footnotes omitted).

⁴² See, e.g., Restatement (Second) of Torts § 622 cmt. a, illus. 3 (1977) (speech to plaintiff’s fiancée accusing plaintiff of having a sexually transmitted disease); Restatement (First) of Torts § 622 cmt. a, illus. 3 (1938) (same).

⁴³ See Post, *Reply*, *supra* note 6, at 623.

The definition that Post seems to be offering turns autonomy into a conclusory label, roughly synonymous with the (still ill-defined) concept of “public discourse.” Whatever autonomy might mean there, it is not a useful tool for deciding what constitutes public discourse.

And this definition of autonomy is so odd that it leads to inconsistent use even by Post himself: later in his reply, he suggests that “[t]he autonomy of a speaker to say what he or she chooses is equally at stake” in six examples he gives, including three examples that he sees as not “public discourse” and one example that tracks the Bill/Dan scenario that Post had earlier said involves the participants being “interdependent” rather than “autonomous.”⁴⁴ Perhaps there are different definitions of “autonomy” in play here. But surely this definitional complexity is likely to make First Amendment law less coherent (if courts accept such a definition) rather than more so.

I. Medium as Proxy for Status as Public Discourse

I am likewise skeptical of the argument that the nature of the medium influences the public discourse question so much that, to quote Post, “[I]t [is] assumed that if a medium [is] constitutionally protected by the First Amendment, each instance of the medium would also be protected.”⁴⁵ After all, both “speech by which public opinion is formed” and other speech are spread throughout a wide range of media.

Consider two of the examples of the restrictions that Weinstein seems to justify using the “not public discourse” argument: securities law and antitrust law. Securities law regulates, among other things, the contents of advertisements published in newspapers and magazines, as well as self-published pamphlets. Yet much obvious “public discourse” is likewise published in newspapers, magazines, advertisements in those newspapers and magazines (consider the advertisement in *New York Times Co. v. Sullivan*⁴⁶), and self-published pamphlets.

⁴⁴ Id. at 628, 623.

⁴⁵ Robert C. Post, *Recuperating First Amendment Doctrine*, 47 *Stan. L. Rev.* 1249, 1253 (1995).

⁴⁶ 376 U.S. 254, 256–58 (1964).

The speech-focused yet constitutionally permissible aspects of antitrust law apply chiefly to personal conversations, carried on either orally or perhaps (if the parties are foolish) by email. As it happens, some of the most interesting occasions I have had for forming my opinions on public issues have been personal conversations and email with my friend, Jim Weinstein. As I discussed earlier, for many people, personal conversations and emails with acquaintances are important parts of their discourse on public issues.

Likewise, Weinstein writes:

The importance of the medium in which a given instance of speech occurs to democratic self-governance is in my view the best explanation of why the Supreme Court rigorously protects nudity in film and cable television—media that are in its view part of the “structural skeleton” of public discourse—but not in live performances by erotic dancers on the stage of a “strip club.”⁴⁷

Yet live theater is also a medium that is part of the “structural skeleton” of public discourse. It’s a less important part than theater was 100 years ago,⁴⁸ but it’s significant and constitutionally protected nonetheless. Consider, as doctrinal illustrations, *Southeastern Promotions, Ltd. v. Conrad*⁴⁹ and *Schacht v. United States*.⁵⁰ Indeed, Weinstein’s own listing of speech in “public forums such as the speaker’s corner of the park” as part of public discourse suggests, a fortiori, that speech on a private theater stage—where more people may be present in the audience, and where they are likely to be more attentive—would be an at least equally protected medium.⁵¹

⁴⁷ Weinstein, *Participatory Democracy*, supra note 2, at 496–97.

⁴⁸ One of the earliest cases holding on constitutional grounds in favor of a free speech claimant was *Dailey v. Superior Court*, 44 P. 458 (Cal. 1896), which struck down an injunction against performances of a play; the play was based on a crime that was the subject of an ongoing criminal trial.

⁴⁹ 420 U.S. 546 (1975).

⁵⁰ 398 U.S. 58 (1970). See also *California v. LaRue*, 409 U.S. 109, 116–17 (1972) (“[B]oth motion pictures and theatrical productions are within the protection of the First and Fourteenth Amendments.”), overruled on other grounds by *44 Liquormart v. Rhode Island*, 517 U.S. 484, 515–16 (1996).

⁵¹ Weinstein, *Participatory Democracy*, supra note 2, at 493.

So I don't think that the nude dancing cases are premised on the notion that "live performances" are not "media" that are "part of the 'structural skeleton' of public discourse." They may well be premised on the notion that *stripping* is not fully constitutionally protected; but that has to do with either conduct or content, however one may categorize the restriction, and not the medium as such.

Nor can one avoid this, I think, by defining the medium more narrowly as "strip club." First, that would be defining the medium by what is shown in it (the difference between strip club and dinner theater is precisely that the former shows stripping instead of a plot), thus eliminating the utility of medium as a proxy for the public discourse status of "each instance" of the medium. Second, one could then similarly define the comparison medium as "cable channels that habitually show nudity," which would eliminate the "explanation of why the Supreme Court rigorously protects nudity" in this narrowly defined and seemingly not very public-discourse-focused medium.

II. THE (PRESUMPTIVE) ALL-INCLUSIVE APPROACH

Weinstein and Post are correct that the usual alternative to a "public discourse" limitation for free speech protection is the "all-inclusive approach"—the view that all speech is presumptively protected against content-based restrictions imposed by the government, unless the speech falls within an exception to protection. Yet it seems to me that their criticisms of the "all-inclusive approach" do not do that approach justice.

A. Existing Doctrine

First, the "all-inclusive approach" (or, more precisely, the "presumptive all-inclusive approach") is the approach that the Court has generally set forth, though with some exceptions. Consider, for instance, *United States v. Stevens*, which struck down a ban on certain depictions of violence towards animals.⁵² The statute had a specific exception for "any depiction that has serious religious, po-

⁵² 130 S. Ct. 1577 (2010). *Stevens* was decided after Post's and Weinstein's initial drafts were written.

litical, scientific, educational, journalistic, historical, or artistic value,” and the government stressed that exception in defending the statute. But the Court concluded that the exception did not save the statute.

“Most of what we say to one another lacks ‘religious, political, scientific, educational, journalistic, historical, or artistic value’ (let alone serious value),” the Court held, “but it is still sheltered from government regulation.”⁵³ “Even ‘[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats’ poems or Donne’s sermons.”⁵⁴ The Court was thus not willing to limit constitutional protection to that speech which is of “value” to public discourse.

And the examples to which the Court pointed in reasoning that the statute was overbroad were indeed not much connected to public discourse. “[T]he constitutionality of [the statute] hinges on how broadly it is construed,” the Court began, and went on to say, “[w]e read [the statute] to create a criminal prohibition of alarming breadth.”⁵⁵ What alarmed the Court was the statute’s coverage of, among other things, videos and photographs of hunting, depictions of certain livestock management and slaughter practices, and videos of cockfighting taken in places (such as Puerto Rico) where cockfighting is legal.

I think the Court was right to hold that such images were protected by the First Amendment and that the statute was overbroad because it tried to restrict such images. But this simply reflects the Justices’ view that the First Amendment protects more than just speech that relates to “public discourse.”

Snyder v. Phelps, decided just a year after *Stevens*, did appear to contradict *Stevens* on this.⁵⁶ *Snyder* held that the intentional infliction of emotional distress tort may not be used to impose liability based on the distress caused by the content of speech on matters of public concern.⁵⁷ But *Snyder* also said that speech on matters of private concern is “often” less protected:

⁵³ Id. at 1591.

⁵⁴ *Cohen v. California*, 403 U.S. 15, 25 (1971) (quoting *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting)).

⁵⁵ *Stevens*, 130 S. Ct. at 1587–88.

⁵⁶ 131 S. Ct. 1207 (2011).

⁵⁷ Id. at 1212.

Whether the First Amendment prohibits holding [defendant] liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. . . . “[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”

“[N]ot all speech is of equal First Amendment importance,” however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: “[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas”; and the “threat of liability” does not pose the risk of “a reaction of self-censorship” on matters of public import.

We noted a short time ago, in considering whether public employee speech addressed a matter of public concern, that “the boundaries of the public concern test are not well defined.” Although that remains true today, we have articulated some guiding principles, principles that accord broad protection to speech to ensure that courts themselves do not become inadvertent censors.

Speech deals with matters of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public. . . .”

[For] example, we concluded in *San Diego v. Roe* that, in the context of a government employer regulating the speech of its employees, videos of an employee engaging in sexually explicit acts did not address a public concern; the videos “did nothing to inform the public about any aspect of the [employing agency’s] functioning or operation.”⁵⁸

⁵⁸ Id. at 1215–16 (citations omitted).

The Court did not explain how this could be reconciled with *Stevens*'s statement that “[e]ven ‘[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats’ poems or Donne’s sermons.’” (Oddly, *Stevens* and *Snyder* were both written by Chief Justice Roberts, and both joined by all the other Justices except Justice Alito.) Depictions of the killing or mistreatment of animals distributed to the public, *Stevens* held, were “fully” protected. Depictions of people having sex distributed to the public, *Snyder* held, constituted less protected speech on matters “of only private concern,” at least when it comes to “a government employer regulating” off-duty speech by employees.⁵⁹ Why the difference in characterization? The Court didn’t say.

Presumably the *Snyder* rule will come to apply to intentional infliction of emotional distress tort cases, thus essentially carving out an unprotected zone for statements “of only private concern” that are outrageous and that inflict severe emotional distress on a particular person. But how *Snyder* would affect other cases—where the line between the influence of *Snyder* and the influence of *Stevens* will be drawn—is hard to know at this point.⁶⁰

Fortunately, though, *Snyder* at least made clear that the “public concern” category is “broad,” and includes speech that is not just political. Speech is treated as being on a matter of public concern if it can “be fairly considered as relating to any matter of political,

⁵⁹ *City of San Diego v. Roe* involved off-duty speech by a police officer, who distributed pornographic movies in which he was dressed in a generic police uniform. 543 U.S. 77 (2004).

⁶⁰ Weinstein points out that an amicus brief that I wrote in *Snyder* argued that First Amendment protection against the intentional infliction of emotional distress tort should extend to all speech on matters of public concern (except speech that falls within a First Amendment exception) but did not argue that it should extend to speech on matters of private concern. See Weinstein, Reply, *supra* note 7, at 675 n.159. The brief did not take a position as to what the law should be with regard to speech on matters of private concern. But in writing the brief, as Weinstein notes, I was acting as an advocate; and given that the speech in *Snyder* dealt with war, gay rights, and divine judgment, I thought it would be more effective to focus on the clearly public-concern character of the speech at issue there, rather than to make the more sweeping arguments that I would make as a writer of law review articles. Moreover, the then-recent decision in *Stevens* lead me to think (wrongly, as it turns out) that a decision protecting the speech in *Snyder* would probably not include language that would seem to more broadly support restrictions of private-concern speech outside the narrow context of the emotional distress tort.

social, or other concern to the community,” or when it is “a subject of general interest and of value and concern to the public.” Speech about art, science, entertainment, and other matters would presumably be fully included.

And this would include much speech that Weinstein and Post would treat as not related to “public discourse.”⁶¹ Speech that infringes copyright; teacher-student speech; speech among friends on political, scientific, and moral topics; political speech in nonpublic forums; and similar speech would be treated as being of “public concern” even under the *Snyder* approach.

Moreover, other Supreme Court cases make clear that speech on matters that are not “of public concern” is at least strongly protected, and often apparently fully protected. The weight of authority, when it comes to speech that is not otherwise seen as of low value (for example, because it consists of false statements of fact) and that is not within the government’s role as manager (especially as employer), supports *Stevens* more than it does *Snyder*.

Consider, for instance, *Sable Communications v. FCC*, which struck down a ban on dial-a-porn.⁶² Dial-a-porn, even non-obscene dial-a-porn, seems pretty far removed from “public discourse.” We know of great novels that help form public opinion but have a sexual component. We know of art and photography that is sexually explicit but has artistic value (and, according to Post, “[a]rt and other forms of noncognitive, nonpolitical speech fit comfortably within the scope of public discourse”).⁶³ But I don’t know of any great artists or subtle political commentators of dial-a-porn. If dial-a-porn is public discourse, then a rule that “protect[s] speech that is part of public discourse” is so broad that it becomes equivalent to the “all-inclusive approach,” not an alternative to it.

Yet the *Sable* Court—which on this point was unanimous—did not reject protection for dial-a-porn on the grounds that it is “not public discourse.” Rather, the Court said: “Sexual expression which is indecent but not obscene is protected by the First Amendment The Government may, however, regulate the content of constitutionally protected speech in order to promote a

⁶¹ See *supra* Part I.

⁶² 492 U.S. 115 (1989).

⁶³ Post, Participatory Democracy, *supra* note 1, at 486.

compelling interest if it chooses the least restrictive means to further the articulated interest.”⁶⁴

That is a pretty clear statement of the presumptive “all-inclusive approach.” If speech doesn’t fall outside one of the exceptions to protection (here, obscenity), a content-based restriction on such speech must pass strict scrutiny. And while the Court left some room for regulations (rather than prohibitions) of dial-a-porn, it did so on the grounds that the regulation passed strict scrutiny—a standard that the Court has applied in clearly “public discourse” cases, such as *Austin v. Michigan State Chamber of Commerce*.⁶⁵ And *United States v. Playboy Entertainment Group*⁶⁶ and *Ashcroft v. ACLU*⁶⁷ likewise applied strict scrutiny to content-based restrictions on pornography.

⁶⁴ *Sable*, 492 U.S. at 126.

⁶⁵ 494 U.S. 652, 657 (1990). Weinstein’s reply suggests that:

Despite this verbal formulation, however, the level of protection actually afforded the speech in [*Sable*] and any number of other cases dealing with sexually explicit but nonobscene expression is something less than the fierce protection it would have afforded, for instance, to a pre-recorded message decrying the war in Afghanistan or health care reform. Rather, its regulation triggers a form of intermediate scrutiny similar to that applicable to content-based regulations of commercial speech.

Weinstein, Reply, supra note 7, at 666. I don’t think this indeed happened in *Sable* or in *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000), *Ashcroft v. ACLU*, 542 U.S. 656 (2004), or other cases that applied strict scrutiny to strike down regulations of sexually themed speech.

Even if we look more broadly to include some of the “erogenous zoning” cases, such as *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986), which did apply weaker scrutiny to zoning laws dealing with adult entertainment, the overall pattern shows far more protection for sexually themed expression than for solicitation, price-fixing agreements, and the other categories that Weinstein’s reply points to as evidence against the “presumptive all-inclusive approach.” Weinstein, Reply, supra note 7 at 660–67. I think this distinction between sexually themed speech and offers, agreements, and the like further supports my point: what makes offers and agreements (and some other speech) unprotected is not that the speech is outside “public discourse”—dial-a-porn is outside “public discourse” under Weinstein’s test and yet is still strongly protected—but the fact that the Court implicitly treats offers and agreements as unstated First Amendment exceptions. Cf. *United States v. Williams*, 553 U.S. 285 (2008) (treating solicitation, at least of illegal conduct, as an exception to First Amendment protection).

⁶⁶ 529 U.S. 803 (2000).

⁶⁷ 542 U.S. 656 (2004).

Consider also *Connick v. Myers*, one of the cases Post and Weinstein generally endorse.⁶⁸ In the course of adopting a “public concern” limit to protection against *the government as employer*, the Court wrote:

We do not suggest, however, that Myers’ speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. “The First Amendment does not protect speech and assembly only to the extent it can be characterized as political” We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.⁶⁹

When the government is acting as sovereign, the test is not “Is the speech on a matter of public concern?” Rather, the speech is presumptively protected against “prohibit[ion] and punish[ment],” whether the speech is of public concern or of private concern, unless it falls within an exception to protection.

Or consider the obscenity test. True, under this test speech that lacks “serious literary, artistic, political, or scientific value” may be unprotected—but only if it’s also sexually themed. The Court didn’t simply say “speech is protected only when it is speech by which public opinion is formed.” Even speech that lacks serious value remains constitutionally protected so long as it appeals only to a healthy, normal interest in sex, isn’t patently offensive by community standards, or doesn’t depict or describe specified sexual or excretory activities. And this is so even when such speech is far from “public discourse.”

⁶⁸ 461 U.S. 138 (1983).

⁶⁹ *Id.* at 147 (internal citations omitted).

The obscenity exception thus reflects only an acknowledgment that *in recognizing exceptions*—or semi-exceptions, such as for commercial advertising—the Court might consider the value of the speech to the formation of public opinion, alongside other factors such as long-standing American legal tradition and the judgments of harm (controversial as they may be) that the tradition embodies. And the obscenity case law contradicts the view that speech is protected only when it is part of “public discourse.”

B. Overcounting the Exceptions

What, though, about all the counterexamples that are often given to show why “presumptive protection with exceptions” is the wrong model? On closer viewing, they prove to be not so plentiful or so telling.

Let us consider, for instance, the counterexamples Weinstein gives. Some seem to me double counting: “[T]he array of speech regulated by the common law of . . . fraud” consists of falsehoods, chiefly knowing falsehoods.⁷⁰ It is true that if we treat each kind of punishable false statement of fact—fraud, libel, false light, invasion of privacy, perjury, false statements to government—as defining a separate exception, then exceptions multiply. But things look much simpler if we recognize one exception for false statements of fact.

Such an exception has often been suggested by the Court, in statements such as “There is no constitutional value in false statements of fact.”⁷¹ True, the Court has nonetheless protected some falsehoods in order to avoid unduly deterring true statements and opinions. Yet the general articulation of the exception remains, and libel, fraud, and other kinds of falsehood fit comfortably within this articulation.⁷²

Likewise, the great bulk of “speech regulated on account of its content by securities . . . law” falls comfortably within the exception for unprotected “commercial speech,” either because the speech is actually misleading or because it is potentially misleading

⁷⁰ Weinstein, *Participatory Democracy*, supra note 2, at 492.

⁷¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

⁷² See generally Eugene Volokh, *Amicus Curiae Brief: Boundaries of the First Amendment’s “False Statements of Fact” Exception*, 6 *Stan. J. C.R. & C.L.* 343, 348–52 (2010).

and certain disclosures are useful to prevent would-be buyers from being misled. (To the extent securities law covers noncommercial speech, such as letters to voters in proxy contests, there is indeed some “interference from the First Amendment,” as there should be.⁷³) The same is likely true of most speech regulated under “food and drug, and health and safety laws.”

Other counterexamples reflect exceptions that must be created under any theory; the “public discourse” approach doesn’t help with them. I have mentioned, for instance, copyright law, which restricts much speech that is well within any sensible definition of “public discourse.”

“Speech in a nonpublic forum” (for example, a political ad on a bus, an ideological flyer distributed through a school district’s internal mail system, or a leaflet handed out in an airport) may be as much a part of “public discourse”—as much a potential contribution to the formation of public opinion—as speech on the street corner would be. The government’s extra power to regulate such speech, like the government’s extra power to regulate the speech of its employees, must stem from the government’s special role as proprietor, not from the supposed status of the speech as not being part of public discourse.

Similarly, to the extent that labor law restrictions on secondary picketing are constitutional, they have not escaped without “interference from the First Amendment,” and they can’t lightly be dismissed as unrelated to the formation of public opinion. Appeals to a moral principle of solidarity with one’s fellow workers are significant aspects of the development of public opinion, opinion both about the practices of leading corporate institutions and about the merits of the labor movement more broadly. And this is so whether the appeals fall into the category of secondary picketing (currently constitutionally unprotected, though over substantial First Amendment dissent⁷⁴), primary picketing (constitutionally pro-

⁷³ See *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 798–99 (2d Cir. 1985) (Winter, J., dissenting) (suggesting that proxy solicitation rules cannot constitutionally be applied to certain kinds of speech); Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 *Brook. L. Rev.* 5, 40–63 (1989) (outlining some principles for analyzing securities laws under the First Amendment).

⁷⁴ See, e.g., *NLRB v. Retail Store Employees, Local 1001*, 447 U.S. 607, 619 (1980) (Brennan, J., joined by White & Marshall, JJ., dissenting) (arguing that secondary picketing should be constitutionally protected).

tected in considerable measure⁷⁵), or secondary leafletting (likely constitutionally protected⁷⁶). Labor law restrictions of speech by employers have likewise been subjected to serious First Amendment scrutiny.⁷⁷

Finally, some examples do reflect what I have called the “uncharted zones” of First Amendment law;⁷⁸ I would include here antitrust and “the common law of contract,” though one could also add the law of conspiracy, solicitation, and the like. The Court has never fully explained why exactly speech that solicits or expresses agreement or a promise (legally enforceable or not) is punishable.⁷⁹ Perhaps the explanation is that the agreement itself is punishable, but the Court hasn’t explained how one can distinguish the agreement from the speech.

Nor has the Court explained when precisely such solicitations or promises are constitutionally protected, though the answer is clearly “sometimes” rather than “never.” Some promises (such as a candidate’s campaign promises) are protected, as are solicitations of money for charitable causes, contracts for the production of protected speech, and so on.⁸⁰

I suspect that the lines within any such agreement/solicitation exception should indeed be drawn with an eye towards whether the speech is valuable to discussion on political, social, scientific, moral, or religious issues. But the proper approach would be to recognize that there is an exception and to use some of Post’s and Weinstein’s thinking in developing its boundaries. It would not be

⁷⁵ See, e.g., *Thornhill v. Alabama*, 310 U.S. 88 (1940).

⁷⁶ *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) (suggesting that leafletting urging a secondary boycott, in the absence of picketing, is fully protected by the First Amendment).

⁷⁷ See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617, 618 (1969); *Roper Corp. v. NLRB*, 712 F.2d 306, 311 (7th Cir. 1983); *NLRB v. Proler Int’l Corp.*, 635 F.2d 351, 355–56 (5th Cir. Unit A Jan. 1981); *Dow Chem. Co. v. NLRB*, 660 F.2d 637, 644–45 (5th Cir. Unit A Nov. 1981); *Fla. Steel Corp. v. NLRB*, 587 F.2d 735, 750–53 (5th Cir. 1979); *NLRB v. Douglas Div.*, 570 F.2d 742, 747 (8th Cir. 1978); *J.P. Stevens & Co. v. NLRB*, 449 F.2d 595, 597 (4th Cir. 1971).

⁷⁸ See Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 *Cornell L. Rev.* 1277, 1336–46 (2005).

⁷⁹ See *United States v. Williams*, 553 U.S. 285 (2008) (recognizing a solicitation exception without a great deal of theoretical explanation).

⁸⁰ See Volokh, *supra* note 78, at 1340–41; see also *id.* at 1340–41 & n.329 (pointing to some possible First Amendment problems with antitrust law).

proper to conclude that only “public discourse” speech (even far outside any exception) ought to be protected, and other speech ought to be restrictable.

CONCLUSION

Nearly twenty years ago, Cynthia Estlund put it well:

I, too, take as my point of departure in this Article the view that protection of speech on public issues is a central concern of First Amendment doctrine. That premise, however, leads me to the perhaps paradoxical conclusion that the creation of an explicit constitutional category consisting of speech on matters of public concern is a perilous enterprise that should be avoided. It is my contention that the public concern test, in spite of, and in part because of, its illustrious pedigree, inevitably undermines the protection of speech that is important to public discourse.⁸¹

Professor Post’s and Professor Weinstein’s essays, it seems to me, illustrate this danger. If I am right that their application of the “public discourse” approach is mistaken, then their eminently deserved stature as leading First Amendment scholars highlights this danger still further. If the “public discourse” test ends up being unsoundly applied even by top free speech specialists, we should not expect it to be applied well by generalist judges and Justices, either.

⁸¹ Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 *Geo. Wash. L. Rev.* 1, 2–3 (1990).