

IN DEFENSE OF THE MARKETPLACE OF IDEAS /
SEARCH FOR TRUTH AS A THEORY OF FREE SPEECH
PROTECTION

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I agree with Professors Post and Weinstein that a broad vision of democratic self-government is one important justification for free speech, though I wouldn't limit First Amendment protection to speech that is part of "public discourse."¹ But I think we should not dismiss the search-for-truth rationale—which is in practice similar to the marketplace-of-ideas rationale—as an additional important justification.²

Perhaps not much turns on this additional justification, given that nearly all speech restrictions that interfere with the search for truth also interfere with the right to "participate in the formation of public opinion."³ Restricting certain statements about scientific questions will also interfere with the speaker's right to help form public opinion about the policy implications of those questions. The same applies to restrictions on religious, moral, and historical debates. And the few situations in which the search for truth is furthest from democracy (for example, literary scholars' debates about why some author used one phrase rather than another) are also the ones in which governmental restrictions are least likely.

Still, it might matter whether scientific, religious, moral, and historical debate is seen as directly linked to a major purpose of the Free Speech Clause (which it might be if the search for truth is recognized as a major purpose) or only indirectly and instrumentally linked to such a purpose (if only democratic self-government is

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¹ See Eugene Volokh, *The Trouble with "Public Discourse" as a Limitation on Free Speech Rights*, 97 Va. L. Rev. 567, 567 (2011).

² James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 Va. L. Rev. 491, 502 (2011) [hereinafter Weinstein, *Participatory Democracy*].

³ Robert Post, *Participatory Democracy and Free Speech*, 97 Va. L. Rev. 477, 482 (2011).

recognized as a major purpose): judges and other officials who apply a free speech theory may apply it less strongly as extra steps are added to the chain of causation. So let me say a few words about Post's and Weinstein's criticism of the search-for-truth rationale.

I. GOVERNMENT-IMPOSED SPEECH RESTRICTIONS AND THE SEARCH FOR TRUTH

It is surely true that “[t]he creation of knowledge . . . depends upon practices that continually separate the true from the false, the better from the worse.”⁴ But it hardly follows that “First Amendment doctrine is [therefore] unsuited for the promotion of [the search for truth or the creation of knowledge]”⁵ or that “[o]ne serious problem with the marketplace-of-ideas rationale is that the entire premise that a completely unregulated market of ideas will lead to discovery of truth is highly contestable.”⁶

Someone must indeed “continually separate the true from the false [claims of knowledge], the better from the worse.”⁷ The “market of ideas” must indeed be “[r]egulated” in some sense.⁸ But this doesn't mean that the government should impose such regulations through its coercive power.

Rather, ample regulation and separation of truth and falsehood already goes on without legal coercion. University professors, think tank researchers, informed citizens, and others are constantly engaging in a process through which truth and falsehood are separated. The government should leave those actors free to engage in this noncoercive “[r]egulat[ion]” of the “market of ideas.”⁹ And modern First Amendment doctrine is consistent with this vision.

Consider, for instance, the claim that there tend to be race-linked or sex-linked biological differences in people's mental processes. The search-for-truth theory would suggest that banning advocacy of this claim will improperly interfere with the search for truth, because it is dangerous for a legislature to itself decide what is true (and therefore legal to say) and what is false (and therefore

⁴ Id. at 479.

⁵ Id.

⁶ Weinstein, *Participatory Democracy*, supra note 2, at 502.

⁷ Post, supra note 3, at 479.

⁸ Weinstein, *Participatory Democracy*, supra note 2, at 502.

⁹ Id.

illegal to say). Yet this would be so even though scientists—both mainstream and outsider—must “continually separate the true from the false” by the standard processes of scientific inquiry and debate, processes that include the “social practices” and “social structures” that Post describes (such as scholars’ professional norms and the decision-making processes of learned journals).¹⁰

Both the academy and public debate have their flaws, which may allow falsehood to persist despite convincing proof that it is indeed false. But coercive regulation of scientific and historical debate by legislatures and other government actors is also flawed.

First, such coercive government regulation is likely to be more a product of interest group biases (whether financial or ideological) than of an impartial judgment about the truth.

Second, even if such regulation reflects the state of learned opinion at the time it is enacted, it will tend to set that opinion in stone by blocking future questioning in light of newly discovered evidence and arguments. Yet the constant process of questioning, testing, updating, and sometimes replacing received wisdom is the hallmark of good science and good history.

Justice Holmes’s observation that “time has upset many fighting faiths”¹¹ is at least as true in science as it is elsewhere. And this link between the search for scientific truth and freedom of speech has been recognized for centuries. In the words of French philosopher Helvetius (who was well known to the Framing generation¹²), “It is to contradiction, and consequently to the liberty of the press, that physics owes its improvements. Had this liberty never subsisted, how many errors, consecrated by time, would be cited as incontestable axioms! What is here said of physics is applicable to morality and politics.”¹³

Third, by blocking challenges to certain accepted ideas, the coercive government action will undermine our confidence in those

¹⁰ Post, *supra* note 3, at 479.

¹¹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹² See, e.g., Letter to Colonel William Duane (Sept. 16, 1810), *in* 5 *The Writings of Thomas Jefferson* 538, 539 (H.A. Washington ed., Washington, Taylor & Maury 1853); *Columbian Patriot* [Mercy Otis Warren], *Observations on the New Constitution, and on the Federal and State Conventions* 4 & n.* (Boston, n. pub. 1788).

¹³ 2 Helvetius, *A Treatise on Man, His Intellectual Faculties and His Education* 319 (London, n. pub. 1777).

ideas' accuracy, even if it turns out that those ideas are indeed accurate. The chief evidence that a scientific or historical theory is sound is its ability to withstand generations of challenges. If scientists come to a consensus that there are no significant race- or sex-based differences in intelligence, cognition, or temperament, after repeatedly considering arguments to the contrary, we can have some reason to believe that the scientific consensus is likely correct. But if they reach this consensus in an environment in which contrary views are banned, the consensus would not be trustworthy.¹⁴

Regulation—without legal coercion—through the practices of social institutions is, I think, more likely to lead to continuing discovery and refinement of the truth when the coercive power of the government is absent. And the Court's references to the marketplace of ideas and search for truth as core First Amendment values support this view.

II. THE UNAVOIDABLE NEED FOR A SPECIAL DOCTRINE WHEN GOVERNMENT ACTS IN NON-SOVEREIGN ROLES

As Post suggests, the government acting not as sovereign but as subsidizer, employer, educator, and the like necessarily and properly makes judgments about what is true and what is false.¹⁵

But if that's inconsistent with the search-for-truth theory, it's also inconsistent with the democratic self-government theory. After all, a lecture series put on by a public university law school may embody content-based and even viewpoint-based judgments that exclude certain speakers. Yet such an exclusion would affect the speakers' ability to "participate in the speech by which public opinion is formed"¹⁶—something the democratic self-government theory would rightly condemn when the government is acting as sovereign.

¹⁴ Eugene Volokh, Post, *The Volokh Conspiracy*, *The Practical Costs of Condemning Openness to Distressing Answers on Factual Questions* (Apr. 30, 2010, 4:26 pm), <http://volokh.com/2010/04/30/the-practical-costs-of-condemning-openness-to-distressing-answers-on-factual-questions/>.

¹⁵ See, e.g., Post, *supra* note 3, at 487 (noting that university departments must evaluate the truth of speech in deciding tenure cases).

¹⁶ *Id.* at 482.

Curriculum decisions in public high schools and universities likewise affect speakers' ability to "participate in the formation of public opinion." So do public university professors' practices that control which students' ideas are discussed and which are cut off as supposedly irrelevant. So do government decisions to help fund the National Endowment for Democracy and celebrations of Martin Luther King, Jr.'s Birthday but not the National Endowment for Fascism and celebrations of Orval Faubus's Birthday. All these decisions involve the government trying to shape speech that is "public discourse" under any reasonable definition of the term, as well as the government making judgments about truth.

That these decisions are permissible simply reflects the premise that all Free Speech Clause theories must operate differently when the government is acting in these special capacities than when the government is using its sovereign power over every citizen. There may be many explanations for this, on which I don't want to dwell here (but some of which Post has explained in his work on managerial domains¹⁷). The important point for my argument is simply that the government's authority to restrict what is said in its schools, through its workplaces, or using its money—even when those restrictions interfere both with the search for truth and with some citizens' ability to influence public opinion—cannot determine which theories operate when the government acts as sovereign.

III. FREE SPEECH AS A TRUE INDIVIDUAL RIGHT AND THE SEARCH FOR TRUTH

Weinstein also argues against the marketplace-of-ideas/search-for-truth rationale by suggesting that it is merely instrumental: "A more profound problem with characterizing the marketplace-of-ideas rationale as a core free speech norm is that it justifies free speech in terms of the good it will produce for society as a whole, not as a true individual right."¹⁸

I'm not sure that an instrumental nature is inherently a "fundamental problem" with a "core free speech norm." Nor am I sure

¹⁷ Robert Post, *Constitutional Domains: Democracy, Community, Management* 13–15 (1995).

¹⁸ Weinstein, *Participatory Democracy*, *supra* note 2, at 502.

why instrumental rationales can't generate a "true individual right."

Weinstein reasons that "[t]he problem with justifying free speech instrumentally, even as instrumental to the democratic interest in wise collective decision making, is that such expression is then subject to suppression based on other instrumental rationales."¹⁹ Yet he himself would allow the restriction of speech "based on other instrumental rationales" under his self-government theory, though he would call them "important governmental or private interests." His own proposal would strongly protect only speech that is part of "public discourse," defined by him as "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.*"²⁰

And more generally, I don't see why the marketplace-of-ideas or search-for-truth rationale is any less inherently individualistic than the democratic self-government rationale. After all, Post's and Weinstein's democratic self-government theories read the Free Speech Clause as protecting a good that we think democracy tends to bring to society as a whole but also rest on the "individual right [to] participate in democratic self-governance."²¹ One can equally assert "the right of every individual to participate freely and equally [at least with respect to governmental restrictions] in the speech by which [the truth is debated]"—both as the right to un-

¹⁹ James Weinstein, Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply, 97 Va. L. Rev. 633, 659 n.98 (2011).

²⁰ Id. at 638 (emphasis added). Weinstein also reasons that

[I]f the core rationale for free speech is not just instrumental to democracy but to some more general collective good such as the search for scientific and mathematical truth, the "right" of free speech would become even less robust and secure. For then speech could be suppressed even more readily in service of competing general welfare goals thought to be more important or at least more urgent than the search for truth. For instance, anti-war protests could be banned to keep them from interfering with a nation's war effort, or racist speech could be outlawed to prevent it inflicting psychic injury on minorities.

Id. at 659 n.98. But why would free speech become less secure if the Court recognized that speech is valuable *both* inherently and instrumentally, *both* as a means of searching for truth (which itself is both an inherent and instrumental value) and as a means of self-government (which likewise has both inherent and instrumental value)?

²¹ Id. at 648.

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cover the truth for oneself and as the right to participate in the continuing development of human knowledge.

Surely these two connected rights to search for truth are not among the least of people's interests. They may even be among the greatest. They are fully entitled to be seen as true individual rights. And the First Amendment seems like an eminently suitable basis for their constitutional protection.

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