THE 24TH HUGO L. BLACK LECTURE
ON FREEDOM OF EXPRESSION

THE FIRST AMENDMENT, KNOWLEDGE, AND ACADEMIC FREEDOM

Delivered by

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Robert C. Post is the Dean of the Yale Law School and the Sol and Lillian Goldman Professor of Law at Yale. An expert in constitutional law and legal history, Dean Post received his PhD from Harvard University and his JD from Yale School before clerking for Judge David Bazelon of the D.C. Circuit Court of Appeals and Justice William J. Brennan Jr., of the United States Supreme Court. Dean Post has had a long career in academia, holding professorships at the UC Berkeley School of Law and Yale Law School. His legal scholarship ranges from the First Amendment to the workings of the Supreme Court under Chief Justice William Howard Taft. He has received fellowships from the John Simon Guggenheim Memorial Foundation and the American Council of Learned Societies, and was honored with the 1998 Hughes-Gossett award for the best article in the *Journal of Supreme Court History*. Dean Post also holds the distinction of being the first Dean of the Yale Law School to successfully persuade Justice Clarence Thomas of the United States Supreme Court—a graduate of Yale Law School, whose relations with Yale have been famously acrimonious—to return to his alma mater.

Given the focus of the annual Hugo L. Black Lecture on freedom of expression, this essay focuses on Dean Post's extensive work on the First Amendment of the United States Constitution. Dean Post's scholarship on the First Amendment has a characteristic shape: he maintains a distinctive focus on the social contextualization of speech, as well as a keen awareness of paradox. Read holistically, his work critiques existing First Amendment doctrine in order to create a particular framework of ideas through which to conceptualize the First Amendment and apply it to specific constitutional problems.

The bulk of this essay therefore focuses on this framework in some detail. The essay closes by examining how Dean Post has applied the framework to a particularly pressing First Amendment problem in contemporary American democracy: namely, the regulation of money spent to influence elections, which the Supreme Court has been held to be a form of political speech—most notoriously in the recent case *Citizens United v. Federal Election Commission*.

The Structure of Dean Post's First Amendment Thought

The Supreme Court's First Amendment jurisprudence is deeply important to American democracy, but it is also deeply confusing. As Dean Post writes,

> The simple and absolute words of the First Amendment sit atop a tumultuous doctrinal sea. The free speech jurisprudence of the First Amendment is notorious for its flagrantly proliferating and contradictory rules, its profoundly chaotic collection of methods and theories.[1]

Elsewhere, Post describes First Amendment doctrine as "a vast Sargasso Sea of drifting and entangled values, theories, rules, exceptions, and predilections."[2] The essential difficulty, according to Post, is that the Court has allowed doctrine to proliferate without ensuring that this doctrine maintains a firm grounding in the meaning and purposes of the First Amendment. To properly understand the First Amendment and to apply it consistently across a wide range of

[1] Robert C. Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence* 88 CALIFORNIA L. REV. 2353, 2355 (2000) [hereinafter Post, *Reconciling Theory*].
[2] Robert C. Post, *Racist Speech, Democracy, and the First Amendment* 32 WM. & MARY L. REV. 267, 278 (1991) [hereinafter Post, *Racist Speech*].

cases, we must be able "explicat[e]… our national dedication to freedom of expression."[3] Only such an overarching, holistic theory can clarify the "doctrinal sea" that is current First Amendment jurisprudence.

Post's project, therefore, is to closely examine both First Amendment doctrine and jurisprudence to reflect on possible "purposes" of the First Amendment and consider how those purposes might be implemented. Essential to this project is Frederick Schauer's distinction between First Amendment *coverage* and First Amendment *protection:* with regard to the First Amendment, coverage denotes the particular areas of life in which government regulation is presumptively subject to First Amendment scrutiny, while protection denotes what regulations of speech are and are not constitutional within those particular areas. Post identifies himself as primarily interested in coverage: "the circumstances in which courts are authorized to deploy the distinctive doctrinal tests and principles of the First Amendment."[4]

Why protect speech?

Throughout his work, Post returns to three alternative interpretations of the "purpose" of the freedom of expression as protected by the First Amendment: namely, the protection of individual autonomy, the maintenance of a "marketplace of ideas," and the value of collective self-government.

Under the autonomy interpretation, Post writes, "the First Amendment regards all ideas as equal because all ideas equally reflect the autonomy of their speakers, and because this autonomy deserves equal respect."[5] That is, the First Amendment "regards all ideas as equal" in that ideas cannot be censored for their content; to do so would be to limit the autonomy of the speaker by failing to respect their right to express what they will. Post, however, understands this vision of the First Amendment to be essentially unconvincing for several reasons. First, we all express our autonomy as human beings not only through our speech, but also through our actions. Yet this would mean that the First Amendment could be interpreted to cover many or all forms of action that express autonomy, which opens up the danger of stretching First Amendment coverage far beyond its constitutional prerogative.[6] Second, the autonomy of a speaker will often come into conflict with the autonomy of a perhaps unwilling audience, creating conflicts of First Amendment rights that would therefore be impossible to solve—yet First Amendment jurisprudence has consistently resolved such conflicts with some degree of success.

Finally, First Amendment analysis often depends on factors external to questions of autonomy. If I slander an individual prominent in the public sphere, my defamatory statement will be covered by the First Amendment. Yet if I do the same for a private individual, my slander will not receive First Amendment coverage, though the same autonomy interests are at stake—that is, my own autonomy in making the statement, and perhaps the autonomy of the person defamed. Post argues that this example shows that autonomy cannot be the chief value behind the First Amendment, for it is ultimately the consideration of the individual as "public" or "private" that determines First Amendment coverage, not autonomy.[7]

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[3] Robert C. Post, *Participatory Democracy and Free Speech* 97 VIRGINIA L. REV. 477, 477 (2011) [hereinafter Post, *Participatory Democracy*].
[4] Robert C. Post, *Democracy, Expertise, and Academic Freedom* 1 (2012) [hereinafter Post, *Academic Freedom*].
[5] Post, *Participatory Democracy* 479.
[6] Post refers to this as "Lochnerism," after the Supreme Court's notorious *Lochner v. New York* decision, which struck down labor laws limiting work hours on the basis of famously weak constitutional reasoning. *Id.* 480.
[7] *Id.*

Post discusses the theory of the "marketplace of ideas" as the second main interpretation of the First Amendment. Tracing the origin of this theory to Justice Oliver Wendell Holmes' opinion in *Abrams v. United States*, Post describes the "marketplace of ideas" as positing that democratic conversation is centrally oriented around truth-seeking. If all are allowed to speak, truth will emerge in the democratic "marketplace" from the interaction of a broad range of ideas.[8] Post suggests that for "truth-seeking" conversation to truly take place, there must exist certain social conditions of "objectivity, disinterest, civility, and mutual respect"; no truth will emerge from the "marketplace" if participants in the conversation simply scream at one another.[9] Yet while such conditions do exist, for example, within the social context of the university, they are absent in many of the social spheres that make up our democracy. The scope of First Amendment coverage under the marketplace theory, therefore, "would be quite narrow"—perhaps unacceptably narrow.[10]

Post gives prevalence to an interpretation of the First Amendment as founded on the value of collective self-determination or self-government. In this telling, the First Amendment's value lies in its ability to allow citizens to "participat[e]… in the formation of public opinion" by voicing their ideas in the public sphere and as part of public discourse.[11] Essentially, to form public opinion is to participate in self-government insofar as American democracy is structured to be responsive to public opinion. This theory therefore bears some relation to the autonomy theory, with the significant difference that the self-government theory understands the value of autonomy to be located exclusively within the public sphere of democratic self-government, rather than across all spheres of life in which autonomy can be exercised.[12]

In Post's understanding, there exist two main approaches to the self-government theory: the approach represented by the work of the philosopher Alexander Meiklejohn, and Post's own approach, which he names the theory of "participatory democracy." As Post describes it, Meiklejohn's model of collective self-government is that of the idealized town meeting, which is convened to facilitate public discussion and yet is also heavily regulated to better "facilitate public decisionmaking."[13] For example, speech at the meeting can be required to stay on the topic at issue and interruptions can be prohibited. Speech is therefore "managed" to make possible the "voting of wise decisions," which is seen as the ultimate goal of collective self-determination.[14]

Given Meiklejohn's desire to create rich and substantive debate at the possible expense of individual autonomy, Post positions Meiklejohn's work as paradigmatic of "collectivist" approaches to the First Amendment. Collectivist approaches privilege the good of the community over the ability of individual speakers to contribute to the discussion; for example, in Meiklejohn's approach, individuals' desires to speak may be frustrated by the town hall's management of speech, but the community will benefit from the "wise decisions" achieved through managed debate. Post, however, faults Meiklejohn's approach as founded on an insufficiently radical conception of self-determination. In Meiklejohn's vision of the town hall, all things are potentially topics for debate except the purpose of the debate itself, whose objective

[8] Post, *Reconciling Theory* 2360.
[9] *Id*. at 2365.
[10] *Id*. at 2366.
[11] Post, *Participatory Democracy* 483.
[12] *Id.*
[13] Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse* 64 U. COLO. L. REV. 1109, 1113 (1993) [hereinafter Post, *Meiklejohn's Mistake*].
[14] *Id.* at 1114.

is simply accepted to be "the voting of wise decisions." Yet Post argues that the decision on the proper "objective" or objectives of public discourse ought *itself* to be a matter for public discourse to decide, as part of the process of self-determination for which public discourse exists. To declare a preexisting objective for public discourse, as Post understands collectivist approaches such as Meiklejohn's to do, is therefore to short-circuit the process of self-determination for which discourse exists.[15]

Post's own preferred approach to the question of collective self-determination is more amenable to this expanded understanding of self-government. Whereas Meiklejohn's notion of self-government is linked to the objective of making good decisions, the goal of Post's understanding is more subjective. To Post, collective self-government inheres in the subjective sense, held by each citizen, that they are "engaged in the process of deciding their own fate" and in governing themselves.[16]

Post clarifies his meaning through the example of an imagined society entirely without political parties or public discourse. This society lacks newspapers or any other kind of media, and the citizens have no means of collective political self-expression. Nevertheless, every day, isolated citizens must log on to computers through which they decide on mundane administrative questions. The citizens do have some ability of collective self-determination, yet it would be difficult to call this state a democracy; it seems rather more like a dystopian tyranny.[17] Post argues that this example demonstrates something important about the nature of self-government: participation in collective decision-making on public issues is democratically valuable only insofar as citizens identify themselves in some way with the democratic community of which they are ostensibly a part. The citizens of the dystopian state described above lack this crucial identification with their democratic community, because the lack of media and collective political organization ensures that such a community does not exist.

It is for this reason, Post says, that the presence of the First Amendment is a matter of such deep importance in American democracy. The First Amendment's protection of speech frees individuals to participate in the formation of public opinion—or, at the very least, allows individuals to know that they would be able to help form that opinion if they so wished. That is, what is most important is the people's "warranted conviction that they are engaged in the process of deciding their own fate," rather than their actual desire to do so on any given issue.[18] This creates a crucial link between individuals and the democratic community of which they are a part, allowing them to identify with the collective to some extent and thereby to understand themselves as self-governing insofar as the collective is self-governing. To use the language of political theory, Post understands the First Amendment as precipitating reconciliation, allowing citizens to become fulfilled by their relationships with society and engaged in that society's functioning, rather than alienated and isolated from it.[19, 20] Post's theory of self-government

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[15] *Id.* at 1117-1118.
[16] Robert C. Post, *Equality and Autonomy in First Amendment Jurisprudence* 95 Mich. L. Rev. 1517, 1523 (1997) [hereinafter Post, *Equality and Autonomy*].
[17] *Id.* 1523-1524.
[18] *Id.* 1523.
[19] See, for example, John Rawls, *Justice as Fairness: A Restatement* 3-4 (Erin Kelly ed., 2001).
[20] Indeed, Post describes public discourse as "the medium through which citizens can come to reconcile individual and collective autonomy." Post, *Equality and Autonomy* 1527.

therefore differs crucially from Meiklejohn's: while Meiklejohn locates self-government in the making of decisions, Post locates it in the subjective experience of reconciliation.[21]

This analysis explains why Post rejects Meiklejohn's reasoning as founded on an insufficiently radical conception of self-government. Post writes, "The democratic function of public discourse is inconsistent with government regulations that suppress speech within public discourse for the sake of imposing a specific version of national identity."[22] That is, the structure of Meiklejohn's thinking, which limits the scope of self-determination by establishing an objective for public debate that is external to that debate itself, potentially allows the state to impose a particular "version of national identity" without regard for the importance of collective self-government: the imposed vision of identity is analogous to Meiklejohn's externally enforced objective, with public discourse shaped toward reaffirming the imposed identity. Yet this undermines the First Amendment's reconciliatory power: a collective identity imposed by fiat, rather than an identity that is open to debate and discussion, will limit the autonomous individual's ability to identify themself with that collective identity. Post argues that therefore, "within the sphere of public discourse and with regard to the suppression of speech the state must always regard collective identity as necessarily open-ended."[23] For this reason, the First Amendment protects speech that can seem at odds with particular visions of how many of us would like to establish our democratic community—such as racist or otherwise offensive speech—because collective self-government must allow the meaning of community to be "perennially open to revision."[24, 25]

Post emphasizes that the use of any one theory of the First Amendment's meaning need not entirely erase the validity of all others. Rather, "theories of the First Amendment can be arranged according to a 'lexical priority.'"[26] Post places his theory of self-determination as participatory democracy as "lexically prior" to other theories of the First Amendment, followed by a Meiklejohnian vision of self-government as established in view of an externally imposed objective, then followed by the marketplace of ideas theory, then by the autonomy theory, and so forth. Theories that rank higher on this "list" are, in Post's view, "better" interpretations of the First Amendment because they act as a more complete explanation of First Amendment jurisprudence, while theories that rank lower on the list are less "powerful" in that they "cannot explain many decisions whose outcomes are not also required by lexically prior theories."[27]

By placing his theory of participatory democracy first, Post argues that this vision of the First Amendment as protecting self-government-as-reconciliation is the most "powerful" explanation of First Amendment jurisprudence. Yet in situations where the theory of

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[21] Interestingly, Post writes, "The unsettling implication of this reasoning is that democracy is quite compatible with important forms of status subordination, as long as these forms of subordination are not experienced by citizens as alienating." Robert C. Post, *Democracy and Equality* 603 Annals of the American Academy of Political and Social Science 24, 34 (2006) [hereinafter Post, *Democracy and Equality*].

[22] Post, *Meiklejohn's Mistake* 1111.

[23] *Id.* 1122.

[24] Robert C. Post, *Recuperating First Amendment Doctrine* 47 Stanford L. Rev. 1249, 1276 (1995) [hereinafter Post, *Recuperating*].

[25] See Post, *Racist Speech,* and Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell 103 HARVARD L. REV. 601 (1990) [hereinafter Post, *Constitutional Concept*].

[26] Post, *Reconciling Theory* 2373.

[27] *Id.*

participatory democracy does not apply, a court may turn to the Meiklejohnian theory, or to the marketplace of ideas theory if the Meiklejohnian theory does not apply, and so on.[28]

Social context and "constitutional domains"

Post's theory of "lexical priority," which allows multiple theories of the First Amendment to coexist without presumptively invalidating each other, bears a notable resemblance to his notion of "constitutional domains." These "domains" represent different spheres of constitutional life, each of which interacts with the First Amendment differently.

Post derives the idea of "domains" from his understanding of speech as essentially socially contextualized. Speech does not manifest in our daily lives as abstracted forms of expression, but rather appears within certain "discrete forms of social practice."[29] In cases involving the First Amendment value of films, for example, the Supreme Court has focused not on whether the particular film in question constituted protected speech, but rather on First Amendment coverage of the entire medium of cinema—that is, the "set of social conventions and practices shared by speakers and audiences." The Court

> assumed that if a medium were constitutionally protected by the First Amendment, each instance of the medium would also be protected; courts need not and perhaps should not ask whether any particular film succeeded in communicating its specific message.[30]

Post contrasts the above approach with the First Amendment test offered by the Court in *Spence v. Washington*, which considers the question of whether a particular action constitutes "speech" covered by the First Amendment to be a question of the speaker's "intent to communicate a particularized message" and the potential ability of an audience to comprehend that message.[31] Post critiques the *Spence* test as "abstract and disembodied," ignoring the "social and material forms of interaction" that make up speech.[32] In order to implement the presence of this social context into First Amendment doctrine, he argues that "the unit of First Amendment analysis… ought not to be speech, but rather particular forms of social structure."[33] That is, questions of First Amendment coverage ought to focus primarily on the social context within which the "speech" in question took place. For example, how does that social context relate to the First Amendment? To what extent, and in what way, should the First Amendment cover that particular sphere of social interaction?

Post points to three distinct "domains" as examples of the "particular forms of social structure" on which First Amendment analysis should focus: democracy, community, and management. Describing these different domains, he writes,

> One might say that law creates community when it seeks authoritatively to interpret and enforce shared mores and norms; it is managerial when it organizes social life instrumentally to achieve specific objectives; and it fosters democracy by

[28] *Id.*
[29] Post, *Recuperating* 1273.
[30] *Id.* 1253.
[31] *Spence v. Washington,* 418 U.S. 405, 410-411 (1974).
[32] Post, *Recuperating* 1257.
[33] *Id.* 1273

> establishing the social arrangements that carry for us the meaning of collective self-determination.[34]

The social sphere of democracy maps to Post's discussion of self-government as participatory democracy, meaning that the active theory of the First Amendment in this context is that of the First Amendment as enabling participatory democracy. Within the "constitutional domain" of democracy, speech protected by the First Amendment can be broadly defined as that which is within "public discourse" or enables that discourse. "Public discourse," in this context, denotes "all communicative processes deemed necessary for the formation of public opinion," including not only "art and other forms of noncognitive, nonpolitical speech," but also forms of media that help form the public sphere, such as newspapers.[35]

Within the domain of democracy, Post argues, the First Amendment presumptively prohibits censorship of public discourse for the sake of the individual speaker. To censor an individual, and thus to prohibit them from participating in public discourse, is to alienate that individual from the community by teaching them to understand their role in the formation of public opinion as essentially limited. Similarly, as noted above, censorship in the name of any particular objective or vision of community identity falls prey to what Post identifies as Meiklejohn's false move.

Here, Post points to Justice Harlan's famous majority opinion in the Supreme Court case *Cohen v. California*. During the Vietnam War era, Cohen wore a jacket emblazoned with the words "FUCK THE DRAFT" into a California courthouse, and was subsequently charged under a California statute that prohibited "disturbing the peace" through "offensive conduct."[36] In a decision that Post considers a paradigmatic statement of the type of discursive community created within the democratic domain, the Court overturned the California statute. Justice Harlan famously wrote that public discourse must remain open even to speech that can appear to be "only verbal tumult, discord, and even offensive utterance," because "one man's vulgarity is another's lyric."[37] Post interprets Harlan's opinion as emphasizing the importance of "tolerance" in public discourse, because to "silence speech because of pre-existing assumptions about what is reasonable or appropriate" is inherently to close off certain avenues of discussion.[38]

While the constitutional domain of participatory democracy is founded on a certain image of individuals as essentially "autonomous and independent," Post describes the domain of community as founded on the alternative "principle that persons are socially embedded and dependent."[39] If public discourse within democracy is the medium of collective self-determination, public discourse within community represents "the medium through which the values of a particular [community-sanctioned mode of] life are displayed and enacted."[40]

Post sees the difference between democracy and community as clearly apparent in *Texas v. Johnson*, in which the Supreme Court considered the constitutionality of statutes prohibiting

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[34] Robert C. Post, *Constitutional Domains: Democracy, Community, Management* 2 (1995) [hereinafter Post, *Constitutional Domains*].
[35] Post, *Participatory Democracy* 486.
[36] *Cohen v. California,* 403 U.S. 15, 16 (1971).
[37] *Id.* 24-25.
[38] Post, *Constitutional Concept* 638.
[39] Robert C. Post, *Between Democracy and Community: The Constitution of Social Form*, in Democratic Community: *Nomos* XXXV 163, 164 (John W. Chapman and Ian Shapiro, eds., 1993) [hereinafter Post, *Democracy and Community*].
[40] *Id.* 174.

the burning of the American flag.[41] Following democracy, ought we allow flag burning to ensure the openness of public discourse, or, following community, ought we prohibit flag-burning so as to "sustain the common, socially embedded identities of citizens"?[42] To prevent flag burning, that is, is to protect these "socially embedded identities" by preventing from desecration the particular national values represented by the flag, and around which the community is founded. It is also to establish certain standards of community behavior by delineating particular kinds of offensive speech to be "off limits" and subject to restriction.

While this telling may seem to pit democracy and community against one another, Post argues that in fact "a healthy democracy requires and presupposes the existence of a community."[43] As described, Post sees democracy as founded on the value of collective self-determination. Yet some form of community is necessary to inculcate in us the unique value of democracy's promise of self-determination, as well as the value of the deliberative processes of democracy as reconciliation.[44] Furthermore, public deliberation can only take place if participants maintain some modicum of civility toward one another, and community is necessary to teach these habits of civility.

Yet if Post understands the First Amendment as requiring community to function, he also sees it as "bear[ing] a highly unstable relationship to community."[45] Post writes,

> If a healthy democracy requires and presupposes the existence of a healthy community, if a major purpose of the First Amendment is to provide the basis of democratic legitimacy, and if democratic legitimacy itself requires the First Amendment to suspend the enforcement of community norms within public discourse, the First Amendment can accurately be said to be founded on paradox.[46]

In other words, the First Amendment's principled protection of speech outside community norms (such as the burning of flags) will be perceived by those within the community as degrading those norms. Yet insofar as community makes democracy possible, this degradation of community norms also degrades democracy. Post identifies this as the "paradox of public discourse."

By its very nature, of course, this "paradox" cannot be entirely resolved. Nevertheless, Post identifies particular effects that this paradox might have on how the First Amendment is applied. He points to the famous Supreme Court case *Chaplinsky v. New Hampshire*, which established the doctrine that "fighting words"—that is, language that is liable to provoke violence or confrontation—are not protected by the First Amendment.[47] To Post, *Chaplinsky* represents the idea that particularly important community norms may still be maintained, even in the democratic sphere: the First Amendment will uphold such norms when "the very ability of public discourse to continue to function as a form of public deliberation is seriously undermined

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[41] *Texas v. Johnson,* 491 U.S. 397 (1989).
[42] *Id.* 177.
[43] Robert C. Post, *Community and the First Amendment* 29 ARIZ. ST. L.J. 473, 482 (1997) [hereinafter Post, *Community and the First Amendment*].
[44] Post, *Between Democracy and Communit*y 178.
[45] Post, *Community and the First Amendment* 483.
[46] *Id.* 482.
[47] *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942).

by the loss of civility rules."[48] Post names these important community norms, some of which may be upheld by the First Amendment, "civility rules."

In *Chaplinsky,* the "fighting words" in question threatened public discourse by introducing the threat of violence and disorder. Post also points to *Bethel School District No. 403 v. Fraser* as another example of the First Amendment affirming civility rules in a dire situation: in *Bethel,* the Supreme Court permitted a school to censor "lewd" student speech, on the grounds that schools have a public responsibility to "teach… students the boundaries of socially appropriate behavior."[49] That is, the Court in *Bethel* felt that the First Amendment could allow civility rules to be upheld to inculcate those norms of civility in discourse that are necessary to maintain public deliberation.

To decide the flag-burning case, therefore, we must first decide whether the burning of the American flag is best adjudicated within the realm of democracy or of community. If it is a matter for the democratic sphere, we must then decide whether symbolically upholding the flag's sanctity is a "civility rule" important enough to be upheld even within democratic life. While Post does not give an explicit answer to this question, he suggests that (first) flag-burning ought to be conceptualized as within the public discourse of democratic life, and (second) that prohibitions on flag-burning are not so absolutely crucial to the maintenance of community as to require enforcement of such prohibitions. The burning of the American flag does not constitute a dire threat to public conversation as "fighting words" do, nor does it destroy the possibility of reproducing the norms necessary for democratic and community life, as in *Bethel.*[50]

Post's last constitutional domain of First Amendment analysis is that of management. He defines the managerial sphere as one in which the government acts with Weberian "instrumental rationality," "managing" and arranging resources in order to achieve a particular, established objective.[51] Management thus bears a strong resemblance to Meiklejohn's theory of self-government, in which public conversation is restricted in service of a given objective. As examples of the managerial sphere, Post points to the school system, whose objective is education, and the justice system, whose objective is "the just and efficient adjudication of cases."[52]

Within the sphere of management, the First Amendment will allow the government to restrict speech in service of the institutional objective at stake. In *Brown v. Glines*, "the Court upheld a military regulation prohibiting Air Force members from circulating petitions on military bases without prior approval of their commanders," on the basis that judicial review of military decisions could potentially damage military authority, thus jeopardizing the institutional purpose of the military base.[53, 54] Post contrasts *Glines* to the famous *Tinker* case, in which the Court struck down a school's prohibition of the black armbands that some students had worn to protest the Vietnam War.[55] In *Tinker,* the Court judged that the attainment of the institutional objectives of education did not merit this censorship of political speech.

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[48] *Id.* 483.
[49] *Bethel School District No. 403 v. Fraser,* 478 U.S. 675 (1986).
[50] Post, *Racist Speech* 315-316.
[51] Post, *Constitutional Domains* 12.
[52] Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum* 34 UCLA L. Rev. 1713, 1769 (1986-1987) [hereinafter Post, *Governance and Management*].
[53] *Id.* 1772.
[54] *Brown v. Glines,* 444 U.S. 348 (1980).
[55] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Post suggests that the particular logic of the managerial domain is not limited to government-established and -run institutions such as public schools and the military, but can also extend to other areas of our common life that involve instrumental rationality and in which the government is somehow engaged in regulating or protecting speech. Post points to "expert speech" as one such example: that is, speech by a trusted professional, such as a doctor speaking to a patient in their capacity as a member of the medical profession. He writes,

> If your doctor offers you incompetent advice X, you may sue the doctor for malpractice, and the doctor may not invoke the First Amendment as a defense. Your doctor will be held to applicable standards of professional care. But if your doctor goes on the Jay Leno show and advises X to the general public, and if in reliance on the doctor some member of the public P decides to follow X and is consequently injured, the doctor will be entitled to a First Amendment defense in a suit by P for malpractice.[56]

The speech of the doctor on television is protected because, in this context, the doctor is participating in democratic public discourse as an autonomous individual. Hence, regulation of the doctor's speech is limited under the strict standards of the First Amendment within the democratic sphere. The doctor advising you personally is engaged in the practice of medicine, and therefore can be held to "the standards of knowledge of the medical professional."[57]

As an example, Post analyzes at length a South Dakota statute requiring doctors to give false information on abortion's potential psychological dangers to patients desiring an abortion.[58] In Post's view, such a statute should be held unconstitutional under the First Amendment because it "jeopardizes the capacity of the medical profession to serve as a reservoir of public knowledge that can reliably be communicated to the public through physician-patient disclosures."[59] That is, the First Amendment will not protect a doctor who has given a patient "incompetent advice" during a physician-patient consultation, because the doctor in that situation is not exercising the First Amendment interest of participation in collective self-determination. Yet the First Amendment should also prevent the state from forcing doctors to make untrue statements, because this damages the integrity of professional speech and of the professional mission of medicine.

Why, then, is protecting the professional mission of medicine, or the integrity of any other "reservoir of expert knowledge," an issue that merits First Amendment coverage?[60] Post links the presence of expert knowledge in a democracy to citizens' collective ability to make wise decisions while self-governing. He terms this ability "democratic competence": "the cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge."[61] People cannot make wise decisions unless they are

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[56] Robert C. Post, *Discipline and Freedom in the Academy* 65 Ark. L. Rev. 203, 212 (2012) [hereinafter Post, *Discipline and Freedom*].
[57] Post, *Discipline and Freedom* 213.
[58] The statute was upheld by the Eighth Circuit Court of Appeals in 2012. See Case Comment, *First Amendment—Compelled Speech—Eighth Circuit Applies* Planned Parenthood of Southeastern Pennsylvania v. Casey *to South Dakota "Suicide Advisory."*—Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, *686 F.3d 889 (8th Cir. 2012) (en banc),* 126 Harvard L. Rev. 1438 (2013).
[59] Robert C. Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech* U. ILL. L. REV. 939, 980 (2007).
[60] *Id.*
[61] Post, *Academic Freedom* 34.

informed, and they cannot be informed if they are cut off from expert knowledge, or if the findings of that expert knowledge are somehow distorted—a situation created by the South Dakota statute, which forces doctors to disseminate false information under the cloak of medical expertise.

Post therefore connects democratic competence and the regulation of speech in the managerial sphere to the value of collective self-government. Yet unlike the democratic sphere, in which the First Amendment's importance lies in its ability to protect the individual speaker's potential ability to influence the collective, the First Amendment in the managerial sphere is primarily concerned with the protection of the listening audience. Here, what is important is that the democratic public hears that which is informative. Post sees this application of the First Amendment as drawing on Meiklejohn's model of collective self-determination, which similarly "stresses the cognitive contribution of speech to democratic decision-making, rather than the legitimation-producing effects of speech understood as a vehicle of participation."[62] Expert speech within the managerial sphere is therefore an example of "lexical prioritizing": since the theory of the First Amendment as enabling participatory democracy does not hold within the realm of management, the Meiklejohnian theory of self-government applies.

Yet this analysis leads us into another paradox, as the requirements of participatory democracy begin to collide with the value of democratic competence. As Post puts it,

> Democratic legitimation requires that the speech of all persons be treated with toleration and equality. Democratic competence, by contrast, requires that speech be subject to a disciplinary authority that distinguishes good ideas from bad ones. Yet democratic competence is necessary for democratic legitimation. Democratic competence is thus both incompatible with democratic legitimation and required by it.[63]

Post therefore identifies the domains of democracy and of management as both interdependent and inevitably in tension with one another, a description that echoes the similarly complicated relationship of democracy and community.

Applying Dean Post's Framework: The First Amendment and *Citizens United*

In his book *Citizens Divided,* Dean Post applies his thinking on the First Amendment to the problem of campaign finance reform. Post's in-depth reasoning in *Citizens Divided* is a representative example of how he applies his thought on the First Amendment to particular constitutional problems, and is therefore worth examining in detail. However, as the issue of campaign finance reform is somewhat complicated, a very brief review of constitutional law on the subject is necessary.

Post identifies *Buckley v. Valeo* as the Supreme Court's "first major campaign finance decision of the modern era."[64] In *Buckley,* the Court held that money spent to influence elections is protected speech under the First Amendment. *Buckley* is therefore the origin of the much-maligned notion that "money is speech." Nevertheless, the *Buckley* Court upheld limitations on the amount of money that a given individual can directly contribute to a campaign, on the grounds that such restrictions were necessary to "preserve the integrity of representative

[62] Post, *Reconciling Theory* 2372.
[63] Post, *Academic Freedom* 34.
[64] Robert C. Post, *Citizens Divided: Campaign Finance and the Constitution* 45 (2014) [hereinafter Post, *Citizens Divided*].

government."[65] Yet the Court also reserved a higher level of First Amendment protection for "independent expenditures," in which an individual spends money to support a campaign without directly giving to that campaign, perhaps by producing and airing independent advertisements in support of a candidate.[66]

In the recent case *Citizens United v. Federal Election Commission*, the Court held that corporate speech—that is, spending on elections by corporations, rather than by individuals—implicated the First Amendment, just as *Buckley* had held for individual spending. Therefore, the Court ruled, corporations have a First Amendment right to unlimited independent expenditures within an election cycle.[67] *SpeechNow.org v. Federal Election Commission*, a follow-up case to *Citizens United* in the D.C. Circuit Court of Appeals, soon precipitated the creation of "super PACS": nominally independent committees free to spend an unlimited amount of money in support of a political campaign, though formally barred from "coordinating" their activities with that campaign.[68]

Post critiques the Supreme Court's decision in *Citizens United* on two main counts. First, he argues that corporate speech cannot merit the same degree of First Amendment protection as individual speech, because corporate speech does not take place within the legitimating structure of public discourse as self-government. A corporation, unlike an individual person, cannot experience participation in public discourse as self-government.[69] Corporate speech, therefore, does not fit within the constitutional domain of democracy and cannot be treated as such by the First Amendment. Rather, if corporate speech has a democratic value under the First Amendment, it is the value of democratic competence: corporations ought to inform the public so as to facilitate the making of wise decisions. This adheres to the Meiklejohnian theory of self-government and best fits within the managerial sphere, meaning that the government would be justified under the First Amendment in restricting corporate speech to ensure a better-informed public.[70]

Post's second critique focuses on the Court's particular understanding of the meaning of democracy in *Citizens United,* which Post believes to be misguided. In a sentence, Post argues that the Court overvalues the "discursive" component of democracy and undervalues democracy's "representative" component, with the effect of badly misjudging the effect of unlimited corporate expenditures on the legitimacy of elections. "Discursive democracy" represents "self-government as a process of citizens communicating among themselves," whereas "representative democracy" refers to "self-government as a structure of representation": democracy as expressed through the principle of public representation by elected officials.[71]

Beginning from a misunderstanding of corporate speech as within the sphere of democratic self-government, the Court then argued that to curtail corporate expenditures in elections would be to crimp discursive democracy by limiting citizens' speech. Yet this argument ignores the importance of representative democracy and of "representative integrity," a value that Post defines as the "trust and confidence between representative and constituents, such that the latter believe that they are indeed 'identified' by the former."[72] Post links representative

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[65] Post, *Citizens Divided* 56.
[66] See *Buckley v. Valeo,* 424 U.S. 1 (1976).
[67] See *Citizens United v. Federal Election Commission,* 130 US 876 (2010).
[68] Richard Briffault, *Super PACs* 96 MINN. L. REV. 1644 (2012).
[69] Post, *Citizens Divided* 69.
[70] *Id.* 76-80.
[71] *Id.* 5.
[72] *Id.* 16.

integrity to "electoral integrity," meaning the presence of "elections that have the property of choosing candidates [with] whom the people trust to possess… [a] sympathy and connection".[73] Here, he once again draws on his understanding of democratic legitimacy as tied to the subjective feeling of connection between the individual and community.

Though the First Amendment's protection of speech links it to discursive democracy, Post sees an important connection between the First Amendment and representative democracy as well:

> Without electoral integrity, First Amendment rights necessarily fail to achieve their constitutional purpose. If the people do not believe that elected officials listen to public opinion, participation in public discourse, no matter how free, cannot create the experience of self-government.[74]

Essentially, Post views *Citizens United* as undermining electoral integrity. The Court gave its imprimatur to a flood of election spending that has granted disproportionate influence to those with deeper pockets. In turn, this appearance of disproportionate influence has undermined public trust in the ability of elections to select candidates who will be responsive to the democratic will.

In contrast to the Court's approach, Post argues that the mechanics of elections should be conceptualized as within the managerial sphere, and that election speech can therefore be constitutionally regulated without violating the First Amendment. Like any other government institution, elections have a particular purpose: "to transform public opinion into legitimate public will… [They] must be organized and managed in order to accomplish their distinctive mission."[75] Restrictions on speech in the service of this goal are therefore subject to a less exacting standard than restrictions on speech in the democratic sphere.[76]

Unlimited corporate expenditures therefore *should* be regulated in order to preserve electoral integrity and self-government, and *can* be regulated for two reasons: first, they are within the managerial sphere of the election, and second, as corporate speech they are outside of public discourse, and so can be managed according to the Meiklejohnian approach to self-government. For these reasons, Post not only disagrees with the Court on *Citizens United,* but argues that it "should have been a relatively easy case," given that the corporate speech at issue was so clearly within the domain of management, and thus its regulation did not present the serious First Amendment issues that the Court imagines.[77] To Post, the Court fundamentally misunderstood the matter at hand in *Citizens United:* rather than weakening First Amendment values by limiting speech, restrictions on corporate election expenditures actually strengthen the First Amendment by bolstering electoral integrity and the public sense of collective self-determination.

A thornier question, however, is that of independent expenditures made by individuals, to which the Court granted a high degree of First Amendment protection in *Buckley.* Unlike corporate expenditures, this type of spending implicates the democratic domain, since the expenditures-as-speech of an individual citizen engage that citizen in the process of collective

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[73] *Id.* 60.
[74] *Id.*
[75] *Id.* 81.
[76] *Id.* 84.
[77] *Id.* 91.

self-determination. This issue is therefore not as clearly situated within the managerial sphere as the expenditures in *Citizens United* were. As Post identifies, a serious difficulty arises:

> If we prevent government control over independent expenditures, we diminish the very democratic legitimation that uncontrolled independent expenditures are meant to enable. But if we permit government control over independent expenditures, if we prohibit persons from expressing themselves in the manner they believe best, we also circumscribe the possibility of democratic legitimation.[78]

Post suggests that his description of the managerial sphere could offer a means by which to conceptualize the regulation of independent individual expenditures under the First Amendment. If need be, the managerial sphere could be extended to cover such expenditures, though the mechanics of this endeavor would clearly require further examination. Nevertheless, there would still remain the important paradox that Post has identified between electoral and representative integrity versus the individual's ability to express their opinions.

This passage is representative of many of the key characteristics of Post's thinking on the First Amendment. Post once again embraces the difficulties, confusions, and paradoxes of First Amendment analysis, as with his examination of the coexisting but conflicting domains of constitutional life. Rather than offering simple solutions, Post is primarily interested in crafting the "doctrinal tools" necessary to seriously engage with the difficult questions raised by the First Amendment.[79] Through closely examining First Amendment doctrine and jurisprudence, Dean Post has crafted an intricate, holistic framework on which to base further analysis of First Amendment questions. As he writes in *Citizens Divided,* his project is not exactly to offer us answers, but rather to guide us toward "ask[ing] the right constitutional question[s]" about the important issues raised by the freedom of expression.[80]

[78] *Id.*
[79] *Id.*
[80] *Id.* 66.