

## CULTURAL DEMOCRACY AND THE FIRST AMENDMENT

*Jack M. Balkin*

**ABSTRACT**—Freedom of speech secures cultural democracy as well as political democracy. Just as it is important to make state power accountable to citizens, it is also important to give people a say over the development of forms of cultural power that transcend the state. In a free society, people should have the right to participate in the forms of meaning-making that shape who they are and that help constitute them as individuals.

The digital age shows the advantages of a cultural theory over purely democracy-based theories. First, the cultural account offers a more convincing explanation of why expression that seems to have little to do with political self-government enjoys full First Amendment protection. Second, democracy-based theories value speech because it legitimates state power. But in the digital age, public discourse does not respect national borders. Opinions, ideas, and art circulate internationally, and so does cultural power. Cultural freedom means that people must be able to participate in the circulation of opinions, ideas, and artistic expression throughout the world whether or not this legitimates a particular nation state. Third, democracy-based theories protect speech because this benefits self-government within a single country; hence, their focus is inevitably parochial. By contrast, cultural democracy demands that states consider the value of global exchanges of ideas and opinions and the health of the global system of telecommunications. These issues have become increasingly important as nation-states try to regulate and deform Internet architectures to further national concerns and bolster national political authority.

**AUTHOR**—Knight Professor of Constitutional Law and the First Amendment, Yale Law School. My thanks to Ash Bhagwat, Andrew Kopelman, and Robert Post for their comments on previous drafts.

NORTHWESTERN UNIVERSITY LAW REVIEW

INTRODUCTION ..... 1054

I. THE THEORY OF DEMOCRATIC CULTURE ..... 1055

II. THE IDEA OF PUBLIC DISCOURSE ..... 1062

III. THREE CONCEPTS OF DEMOCRATIC LEGITIMATION ..... 1068

IV. THE JUDGE OF SOCIETY ..... 1072

V. THE NESTED OPPOSITION OF CULTURAL AND POLITICAL DEMOCRACY ..... 1076

VI. COMMERCIAL SPEECH AND PUBLIC DISCOURSE ..... 1080

VII. WHAT CULTURAL DEMOCRACY ADDS TO DEMOCRACY-BASED THEORIES OF  
FREE SPEECH ..... 1088

CONCLUSION ..... 1095

INTRODUCTION

Freedom of speech does more than protect democracy; it also promotes a *democratic culture*.<sup>1</sup> The First Amendment guarantees the right of individuals and groups to participate in culture and to influence each other through participating in culture. Thus, the First Amendment not only helps to secure political democracy, it also helps to secure *cultural democracy*.

Most First Amendment theories justify freedom of expression either in terms of protecting individual liberty<sup>2</sup> or promoting democracy.<sup>3</sup> The theory of democratic culture grounds freedom of expression in *both* liberty and democracy.

The right to participate in culture is a civil as well as a political freedom. Although this right helps to legitimate political self-governance, it transcends that purpose. Cultural democracy, and therefore cultural freedom, is a necessary component of a free society, even in countries that are not fully democratic or democratic at all. Moreover, a cultural theory of free speech offers a much more convincing explanation of why a great deal of expression that seems to have little to do with political self-government enjoys full First Amendment protection.

---

<sup>1</sup> See Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004) [hereinafter Balkin, *Digital Speech and Democratic Culture*]; Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427 (2009).

<sup>2</sup> See, e.g., C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989).

<sup>3</sup> See, e.g., ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960) (consisting in part of the republication of ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)); OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–35 (1971).

Political democracy legitimates the political power exercised within a nation-state. But cultural democracy, like culture itself, does not conform to political boundaries. The ability to participate in culture is the ability to participate in the circulation of opinions, ideas, and artistic expression not only within a single nation-state, but potentially throughout the world.

The significance of cultural democracy—and the right to participate in culture and to exchange ideas and opinions regardless of borders—has become ever more salient and important in the digital age. Protecting the global telecommunications networks and the Internet architectures through which culture and information flow has become crucial to freedom of expression in the twenty-first century. Theories that value freedom of speech because it promotes self-government within a single nation-state will increasingly prove parochial and inadequate to protect a truly global system of communication.

This Article explains the relationship between the theory of democratic culture and more traditional democracy-based theories of the First Amendment. It shows the connections between cultural democracy and Robert Post’s important idea of public discourse.<sup>4</sup> It reinterprets the concept of public discourse to show its roots in the idea of cultural democracy. Finally, it shows why the theory of democratic culture is especially important to the protection of free expression in the digital era.

## I. THE THEORY OF DEMOCRATIC CULTURE

Although the theory of democratic culture includes the word “democratic,” the theory actually arose as a *critique* of democracy-based theories, and in particular, Alexander Meiklejohn’s famous justification of freedom of speech. Meiklejohn argued that free speech is constitutionally valuable because it produces an informed citizenry that makes democracy work better.<sup>5</sup> Protecting freedom of speech secures and improves the ability of people to govern themselves in politics, as opposed to other aspects of their lives.

---

<sup>4</sup> See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990) [hereinafter Post, *The Constitutional Concept of Public Discourse*]; Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993) [hereinafter Post, *Meiklejohn’s Mistake*].

<sup>5</sup> See MEIKLEJOHN, *supra* note 3. Owen Fiss is one of the great modern champions of this approach. See OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 13 (1996) (“We allow people to speak so others can vote. Speech allows people to vote intelligently and freely, aware of all the options and in possession of all the relevant information.”).

In previous work, I have argued that this model is inadequate, and that its inadequacies have become increasingly obvious in the Internet age.<sup>6</sup>

First, Meiklejohn's approach, like most democracy-based theories of free speech, is "politico-centric."<sup>7</sup> It treats culture and cultural products as valuable constitutionally to the extent that they might help educate the public about political questions and promote discussion of "serious" issues of public concern.<sup>8</sup>

Second, if culture is constitutionally valuable because it contributes to informed political discussion, it follows that some parts of culture will be more valuable than others. Meiklejohn's model tends either to ignore or devalue popular culture. It ignores popular culture to the extent that the model celebrates and emphasizes examples of culture that have plausible connections to the discussion of serious public issues. The model devalues popular culture to the extent that popular culture becomes a distraction from the task of self-governance by an informed citizenry. The more people fixate on *American Idol*, the less time they have to spend on American self-government.

These tendencies should hardly be surprising. Meiklejohn's account does not treat culture—or speech, for that matter—as inherently valuable; nor is culture valuable as an aspect of personal freedom, individual deliberation, or individual self-governance. Rather, culture is instrumentally valuable to the extent that it assists political self-governance, by allowing people to understand the issues of the day. This instrumental approach makes it hard to justify wide swaths of popular culture, and forms of nonverbal or nonrepresentational art like instrumental music.<sup>9</sup>

As a result, Meiklejohn and his followers have usually chosen one of three alternatives. One alternative is simply to exclude nonverbal and nonrepresentational art and much of popular culture from constitutional protection (unless, of course the state targets art for political reasons). This was Robert Bork's early view.<sup>10</sup>

---

<sup>6</sup> See Balkin, *Digital Speech and Democratic Culture*, *supra* note 1.

<sup>7</sup> J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1985–86 (1995) (reviewing CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993)).

<sup>8</sup> Balkin, *Digital Speech and Democratic Culture*, *supra* note 1, at 30.

<sup>9</sup> See Joseph Blocher, *Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment*, 63 DUKE L.J. 1423, 1441–48 (2014); Alan K. Chen, *Instrumental Music and the First Amendment*, 66 HASTINGS L.J. 381, 436–38 (2015); Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 176–78 (2012).

<sup>10</sup> Bork, *supra* note 3, at 26–28; *cf.* SUNSTEIN, *supra* note 3, at 153–59 (1993) (suggesting that nonpolitical art should be relegated to a lower tier of First Amendment protection).

Another strategy is to offer strained explanations of why these forms of art and popular culture are relevant to democratic politics. As Meiklejohn put it, people need to read poetry in order to know how to vote.<sup>11</sup> Enriching cultural experiences produce an enriched public discourse. To include popular culture, then, all one need do is substitute Shakira for Shelley. Thus, *American Idol* teaches people about the importance of lobbying, organization, and voting, and many of the songs featured on the program touch on themes that might connect to current debates about the regulation of human sexuality. But because one can learn something about social and political life from engaging in almost every activity, the argument begins to prove too much.

The last, and in my view, the most reasonable approach, is to include nonrepresentational and nonverbal art and popular culture because it is simply too difficult to draw administrable lines that would separate those forms of art and culture that will turn out to be relevant to politics and self-government from those that will not. We have no idea how culture may be appropriated and repurposed in the future; indeed, a characteristic feature of cultural expression is its ability to be mixed, altered, reinscribed, and repurposed. Just as the Lord works in mysterious ways, so too culture may somehow help people engage in political self-governance, even if the connections are not immediately apparent. However sensible this solution may be, it does not cure the theory's politico-centrism.

The third basic problem with Meiklejohn's theory is that although it may have been adequate for a world of mass communication characteristic of the mid-twentieth century, it is not well designed for the Internet age. In the mid-twentieth century, the modes of mass communication—television and radio stations, publishing houses, theaters, and movie production studios—were held by relatively few people.<sup>12</sup> Most citizens were relegated to being an audience for mass communication. First Amendment theorists like Jerome Barron developed theories of access to mass media to compensate for this fact, but even under Barron's theory, only certain representatives of the community would have access.<sup>13</sup>

Meiklejohn's theory of freedom of speech, in other words, assumes a certain political economy of speech production, and it makes a virtue of necessity. Because most people will not own radio or television stations,

---

<sup>11</sup> Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 263 (“[T]he people do need novels and dramas and paintings and poems, ‘because they will be called upon to vote.’”).

<sup>12</sup> See Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1644–45 (1967).

<sup>13</sup> See *id.* at 1667–68, 1677–78.

free speech theory must focus on the public's role as an audience. Hence, as Meiklejohn once put it, it is not necessary that everyone gets to speak, as long as everything worth saying gets said.<sup>14</sup>

Accordingly, we must ensure that citizens have access to every type of speech that might help them become informed voters. And because ownership of mass media is concentrated in the hands of a few, government must ensure that those who own mass media serve the end of producing an informed citizenry. The connections between Meiklejohn's approach and the public trustee theory of *Red Lion Broadcasting Co. v. FCC*<sup>15</sup> are obvious.<sup>16</sup> Although *Red Lion* is nominally justified in terms of spectrum scarcity,<sup>17</sup> its account of free expression is Meiklejohnian. Justice White pointed out that the goal of broadcast regulation is to serve the public. As he explained, "[T]he people as a whole retain . . . their collective right to have the [broadcast] medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."<sup>18</sup> Meiklejohn could not have said it better himself.

But by the end of the twentieth century, the political economy of communication had changed radically. In the age of the Internet, many of the assumptions that grounded Meiklejohn's model have fallen away. Vastly more people can communicate to others: not merely to small groups, but to the general public; and not merely within the United States, but around the globe. Although traditional mass media still exist, they no longer dominate the spread of culture and knowledge as they once did. Increasingly twentieth-century forms of mass media compete with, are reshaped by, and even depend on a vibrant sphere of public discourse that uses digital telecommunications architectures and digital platforms. Now it is possible that everyone gets to speak; the problem is no longer scarcity of access to mass communications, it is scarcity of human attention.<sup>19</sup>

In this world, Meiklejohnians first experience exhilaration, then wariness, then grave disappointment. Initially they are exhilarated by the heretofore unimaginable possibilities for an informed, educated, and politically engaged citizenry. They start to become wary when they notice that the vast majority of people are still not paying attention to public

---

<sup>14</sup> MEIKLEJOHN, *supra* note 3, at 26.

<sup>15</sup> 395 U.S. 367 (1969).

<sup>16</sup> See LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 42–43 (1987).

<sup>17</sup> See *Red Lion*, 395 U.S. at 400–01.

<sup>18</sup> *Id.* at 390.

<sup>19</sup> See Balkin, *Digital Speech and Democratic Culture*, *supra* note 1, at 6.

issues.<sup>20</sup> And they become gravely disappointed when they realize that digital technologies allow people to escape focusing on matters they find disagreeable, annoying, or dull. Instead, people are free to spend even more of their time on what pleases them—texting with their friends, watching pornography, sharing videos, streaming music, and focusing on their favorite bands, fashions, photographs of cake recipes, and every other conceivable aspect of digital popular culture. Meiklejohn has met LOLcats, and he is not amused.

I developed my model of democratic culture to understand the value of free speech in the context of this new political economy of expression.<sup>21</sup> I sought to explain why free speech is valuable in a world of digital media and mass participation in which everyone could potentially communicate with everyone, not only within a nation-state, but around the world.<sup>22</sup>

People’s ability to speak is no longer dependent on or blocked by the gatekeepers of twentieth-century mass communication. Quite the contrary: many new media companies no longer focus on broadcasting their own content. Instead they facilitate, encourage, and even provoke people to express themselves. Examples are search engines like Google, which lives off of other people’s creation of links and archives; Twitter, which broadcasts people’s brief expressions and links; Instagram, which encourages people to post pictures online for others to enjoy; YouTube, which provides a platform for videos; and above all, Facebook, which depends on people sharing links and photos and discussing their lives, likes, and dislikes.

A theory of free expression for the digital age also has to make sense of—and value—the explosion of popular appropriation, combination, and creativity in popular discussion, art, and culture. Culture, which had often taken a backseat to politics in twentieth-century discussions of the foundations of the First Amendment, came to the forefront in the early twenty-first century. Many of the major legal battles of the first decades of the digital age concerned popular appropriation, remixing, and reuse of

---

<sup>20</sup> For an early version, see MEIKLEJOHN, *supra* note 3, at 87 (attacking commercial radio for “corrupt[ing] both our morals and our intelligence”). Similar themes appear in the works of scholars influenced by Meiklejohn. See, e.g., LEE C. BOLLINGER, IMAGES OF A FREE PRESS 138–41 (1991) (contrasting burdens of education for civic life with pleasantness of entertainment); SUNSTEIN, *supra* note 3, at 84–91 (decrying “low quality” programming that appeals to tastes of uneducated); Owen M. Fiss, Essay, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1413 (1986) (“From the perspective of a free and open debate, the choice between *Love Boat* and *Fantasy Island* is trivial.”); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987) (contrasting reruns of *I Love Lucy* and MTV with “the information [members of the electorate] need to make free and intelligent choices about government policy, the structure of government, or the nature of society”).

<sup>21</sup> See Balkin, *Digital Speech and Democratic Culture*, *supra* note 1, at 2–3.

<sup>22</sup> See *id.* at 4–6.

culture. They were fought over the relationship between freedom of expression and intellectual property.<sup>23</sup>

The digital age, in short, features a different arrangement of cultural power and production, which, even if not fully egalitarian, is nevertheless closer to a cultural democracy, in which a vast number of people can participate in the production and alteration of culture. The concept of a democratic culture emphasizes:

- (a) individual creativity and expression made possible by the digital age;
- (b) participation in culture, and the ability to appropriate culture and use it in ever new ways;
- (c) new methods of organization for cultural production and sharing of cultural products; and
- (d) the democratization of the means of cultural production, and the creation of new telecommunications infrastructures and software tools that have made this democratization of cultural production possible.

A theory of democratic culture, in short, concerns freedom to engage in cultural production as much as democratic self-government. Although I have called my approach a theory of democratic culture, the term “democratic” refers not to representative government but to cultural participation—the freedom and the ability of individuals to participate in culture, and especially a digital culture.<sup>24</sup>

It follows, then, that a theory of democratic culture straddles the traditional division between liberty-based and democracy-based theories of freedom of expression. Nothing in this approach discounts or denies the importance of political self-government as a ground for freedom of expression, or the First Amendment’s role in democratic legitimation. But the theory is concerned with more than this; it does not limit speech’s constitutional value to legitimating the government of particular nation-states.

Like democracy theorists, I believe that freedom of speech concerns power—how to regulate it and hold it accountable. But my conception of power is more expansive than theirs. The term “democracy” comes from

---

<sup>23</sup> *Id.* at 15–17 (describing growing conflict between digital copyright and freedom of speech in the early twenty-first century).

<sup>24</sup> *Id.* at 3–5, 33–34.



two Greek words, “*demos*” meaning people; and “*kratos*” meaning power.<sup>25</sup> In its most literal sense, democracy means power to the people.

The central question of democracy is how people can have power in their own lives and over their own lives. A responsive state accountable to the public is one way to achieve this end, but it is not the only way. There are other forms of power that exist beneath, above, and outside the state. One can also organize or critique private institutions—religions, workplaces, firms, and families—in terms of democratic principles, although the way that democracy operates in each case may differ depending on the nature of the practice.<sup>26</sup>

In particular, culture and public opinion—often embedded in influential private institutions—are among the most important forms of power. They influence everyone on Earth, no matter what nation-state they belong to. By participating in culture, we mutually influence each other and shape each other through the circulation of beliefs and opinions and works of art. The state draws attention to its power over individuals in countless ways, but the power of culture is so great that it may not even be noticeable when it is most effective.<sup>27</sup>

One reason to protect freedom of expression is to make the power of the state accountable to the people who live within it. But another reason is to give people a say over the development of the forms of cultural power that both undergird and transcend the state. In a free society, even in one that is not perfectly democratic in its politics—or even democratic at all—people should have the right to participate in the forms of meaning-making that shape who they are and that help constitute them as individuals.

This activity of meaning-making through cultural participation, artistic expression, and comment, as well as the phenomenon of mutual influence through the circulation of opinions, long predated the rise of modern democracies. And it continues even in countries that are still not democratic. Moreover, in the digital age, cultural participation is not confined to national boundaries and it does not respect national boundaries. Although cultural participation may be necessary to legitimate power within nation-states, it has importance and value that goes well beyond this task.

---

<sup>25</sup> See *Democracy*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989).

<sup>26</sup> See IAN SHAPIRO, *DEMOCRATIC JUSTICE* (1999) (tracing the potential demands of democracy throughout different parts of individuals’ lives).

<sup>27</sup> See J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 271 (1998) (“Because individuals are constituted by [processes of cultural influence], they are continually immersed in forms of hermeneutic power without noticing it.”).

Freedom of speech rests on multiple constitutional values, not a single value. Freedom of speech supports democratic self-government—in more than one way, as we will see in a moment. But freedom of speech also protects the freedom to participate in culture. And by protecting the right to participate in culture, freedom of speech also promotes the growth and spread of mores, opinions, values, art, and knowledge.

Liberty-oriented theories of freedom of speech tend to emphasize individual self-expression, maintaining that speech is crucial to individual autonomy.<sup>28</sup> By contrast, I want to emphasize the potent effects of mutual influence on individuals and the importance of cultural power over individuals.<sup>29</sup> The individual's autonomy over his or her conscience, belief, and expression is the flip side of the individual's heteronomy with respect to cultural power.<sup>30</sup> The individual *as* individual is both the product of multiple cultures and a contributor to these cultures. What we call autonomy, or thinking for one's self, is an unpredictable mixture of reaction to, assimilation of, and reconceptualization of the cultural forces and meanings that surround us and constitute us.

Cultures of belief and opinion—for they are always plural and variegated—have the most serious and pervasive power over us. People influence and reshape each other over time by living and participating in cultures of belief and opinion, and by operating within networks of cultural power and organized knowledge. Moreover, cultures feature powerful institutions and practices—like families, educational organizations, science, and religion—that produce, alter, and reproduce beliefs and opinions. People come to know themselves through their assimilation, alteration, and rejection of the cultures they inhabit and that inevitably inhabit them. Freedom of speech is about power—cultural power. People have a right to participate in the forms of cultural power that reshape and alter them, because what is literally at stake is their own selves.

## II. THE IDEA OF PUBLIC DISCOURSE

In previous work on democratic culture, my primary foil was Meiklejohn, who states and argues for the democratic values of freedom of speech so clearly and powerfully. But Meiklejohn is hardly the last word in democracy-based theories of the First Amendment. One of the most

---

<sup>28</sup> See, e.g., BAKER, *supra* note 2, at 59.

<sup>29</sup> Cf. BALKIN, *supra* note 27, at 270–72 (explaining how internalized tools of understanding exercise power over individuals).

<sup>30</sup> See *id.* at 279–85.

important and sensible modern versions has been developed by my friend and colleague Robert Post.

Post's democracy-based theory, although opposed to liberty-based theories of the First Amendment, has far more affinities with my account than Meiklejohn's model. For example, Post, far more than Meiklejohn, emphasizes the ability of individuals to participate in the formation of public opinion.<sup>31</sup> As a result, his theory connects the constitutional value of free speech to self-government in a different way than Meiklejohn's, as I will describe in a moment.

One of Post's central theoretical concepts is the idea of "public discourse."<sup>32</sup> Public discourse is expression that operates within a public sphere of discussion and circulation of ideas and opinions.<sup>33</sup> In Post's account, public discourse is a legal category that is based on a sociological phenomenon.<sup>34</sup> This is characteristic of much of Post's work, which tries to map legal concepts and doctrines onto a sociological account of how people speak, use information, and produce knowledge in a democracy.<sup>35</sup> Post is therefore especially attentive to the practical and cultural boundaries that separate the public sphere from other uses of speech and communication.

Post's concept of public discourse, as well as his generally sociological approach, should be attractive to anyone who thinks about the First Amendment in cultural terms. His concept of public discourse and his emphasis on the sociological formation of the public sphere have strong connections to my theory of democratic culture. To be sure, Post explains the value of public discourse in terms of political democracy. But I will argue that the concept also serves the constitutional value of cultural democracy.

Every theory of free speech protection is also a theory of free speech regulation. The values that justify a theory of freedom of speech give us a sense of its extension; conversely, the same values also give us a sense of where the theory does not extend, because the underlying constitutional value is not served or otherwise does not apply.

In Post's model, the First Amendment protects public discourse because it serves important constitutional values; speech that does not serve these values, or serves them only in very limited ways, is not public

---

<sup>31</sup> See Post, *Meiklejohn's Mistake*, *supra* note 4, at 1115–17.

<sup>32</sup> See Post, *The Constitutional Concept of Public Discourse*, *supra* note 4, at 604–05.

<sup>33</sup> See *id.* at 629–30, 639–40.

<sup>34</sup> See *id.* at 633–44.

<sup>35</sup> See, e.g., ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012).

discourse and does not receive protection *as* public discourse, although it might be protected because of other constitutional values, for example, the production of knowledge and truth, which Post calls the value of “democratic competence.”<sup>36</sup>

What constitutional value justifies constitutional protection of public discourse? Post argues that public discourse serves the value of democratic legitimation. He explains that “[p]ublic discourse is comprised of those processes of communication that must remain open to the participation of citizens if democratic legitimacy is to be maintained.”<sup>37</sup> Public discourse has constitutional value because it supports and maintains the democratic legitimacy of the state. This makes Post a democracy theorist of the First Amendment, but of a very special kind.

We can understand why this model is distinctive if we ask *how* public discourse supports the democratic legitimacy of the state. There is a very familiar and straightforward answer to this question, but it is not Post’s answer. Meiklejohn argued that speech had constitutional value because it provided information that helped citizens make wise decisions either in selecting representatives or in directly participating in political governance.

In Meiklejohn’s model, free speech has constitutional value because it assures the flow of information that is relevant or potentially relevant to the democratic governance of a state. This formulation explains Meiklejohn’s famous comment that it is not important that everyone shall speak, but that everything worth saying be said. The receipt of information to the audience, and not speaker autonomy, is constitutionally valuable, because it allows the people to govern themselves, either directly through public debate and decisionmaking, or indirectly through electing representatives and holding them accountable in elections.

Post gives a very different answer to this question. “[D]emocratic legitimacy,” he explains, “depends upon citizens having the warranted belief that their government is responsive to their wishes.”<sup>38</sup> Therefore citizens must have “unrestricted access” to certain forms of communicative action and certain types of communicative media “if this belief is to be sustained.”<sup>39</sup>

What does Post mean by “warranted belief” that government is responsive to our wishes? In a democracy, public officials often do not do what particular citizens want them to do. Nevertheless, citizens can express

---

<sup>36</sup> *Id.* at 33–34.

<sup>37</sup> Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 7 (2000).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

themselves to their friends and neighbors, or to perfect strangers, using various media of communication. In this way, they help form a sociological phenomenon, which is public opinion. Public opinion is by no means unitary, and it is constantly changing. Nevertheless, over time, in a well-functioning democracy, public opinion should affect how politicians and other public officials do their jobs. Put another way, in a well-functioning democracy, politicians and public officials should respond to public opinion and be guided by its influence.

For a state to be democratically legitimate, therefore, people need to have confidence that public officials are responsive to public opinion, if not in the short run, then in the long run. They also need to have confidence that, if they choose, they can participate in the formation of public opinion by expressing themselves through the various media of communication. “The possibility of participating in the formation of public opinion,” Post explains, “authorizes citizens to imagine themselves as included within the process of collective self-determination.”<sup>40</sup>

Does the constitutional value of free speech depend on the shifting and potentially unreasonable beliefs and expectations of members of the public about the legitimacy of their government? Suppose that the public is convinced that the state is responsive to them without robust free speech protection. Does this make free speech protection superfluous because it no longer serves the relevant constitutional value? Conversely, suppose that the public is convinced that freedom of speech has no effect on government’s responsiveness, because the state is run by self-reproducing elites and corporations. Does this make free speech protection superfluous because, once again, it no longer serves the relevant constitutional value?

Post’s answer to these questions is almost certainly no, and this shows that his theory, and his concept of legitimacy, is normative and regulative, rather than being purely descriptive and sociological. Post believes that free speech underwrites democratic legitimacy because it gives people a *warranted* belief that government is responsive to public opinion. Conversely, if government limits freedom of speech, it justifies a warranted belief that this will undermine democratic legitimacy.

The emphasis on warranted belief, however, suggests that Post’s model of sociological legitimacy is a regulative concept, rather than simply tracking the current state of public belief.<sup>41</sup> It combines the sociological and

---

<sup>40</sup> *Id.*

<sup>41</sup> See Robert Post, *Religion and Freedom of Speech: Portraits of Muhammad*, 14 *CONSTELLATIONS* 72, 85 n.14 (2007) (“[A] subjective conviction of self-government is not a determinative and preclusive condition . . . . The conviction must withstand scrutiny . . . [.] it must always be open to third parties to attempt to convince a citizen that his or her experience of self-

the normative. The test of democratic legitimacy is whether, within a given society, people would have adequate reasons to believe that state power is sufficiently responsive to evolving public opinion. At any point in time, some members of the public will feel alienated from their government no matter what it does, and no matter how well public officials perform; other people will simply have unrealistic views about how democracy works. Some people have unreasonable expectations or beliefs, and even if there are many of them, they do not undermine the kind of legitimacy that Post cares about. Conversely, an overly docile public that happily accepted considerable censorship and interference with communications media would not necessarily legitimate a democratic state, because their beliefs might not be warranted.<sup>42</sup>

It is important to note the difference between Post's account of democratic legitimation and Meiklejohn's. For Post, legitimacy comes from people's warranted belief that they are participating in self-government, even indirectly, because they are able to participate in the formation of public opinion. To vary Meiklejohn's famous dictum, what matters is not that everything important gets said, but that everyone has the opportunity to speak, that is, to participate in the formation of public opinion. It follows that Post's model is especially interested in removing obstacles to participation in public discourse. Even if people don't participate, or participate very much, in electoral politics, what matters is that through their everyday interactions with friends and neighbors, through

---

government is delusory.”).

<sup>42</sup> In his 2014 book *Citizens Divided*, Post argues that government might be justified in regulating campaign finance because it tracks the very reasons why freedom of speech has constitutional value, namely, that regulation would preserve the public's confidence in the accountability of government to public opinion. ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 60 (2014). At one point in the argument, Post suggests that “democratic legitimacy depends upon *actual* beliefs about the responsiveness of elected officials to public opinion,” because “a people cannot experience the value of self-government unless they believe themselves to be self-governing.” *Id.* at 88 (emphasis added). In response, Frank Michelman pointed out that Post cannot possibly mean that legitimacy is merely a question of the citizens' subjective experience of trust in their government. Frank Michelman, *Legitimacy, Strict Scrutiny, and the Case Against the Supreme Court*, in POST, *supra*, at 118–19 (“Construed as a value of experience, democratic legitimation is a matter of the subjective beliefs and imaginings of citizens; it comes and goes as belief in it comes and goes.”). In addition, Pam Karlan pointed out that measurements of public confidence in government seem to have no discernable relationship to how much campaign finance regulation we have, or whether regulation is performing well or poorly. Pamela S. Karlan, *Citizens Deflected: Electoral Integrity and Political Reform*, in POST, *supra*, at 144 (“[L]evels of trust and distrust appear to float independently of what is going on with respect to legal regulation of political spending . . . .”). Post's response was, and must be, that fluctuating levels of trust in government by the public do not undermine the constitutionality of campaign finance regulation as long as the regulation is reasonably designed to secure public trust. Robert C. Post, Response, *Representative Democracy*, in POST, *supra*, at 160 (comparing the question of public confidence to fiduciary law and noting that “[t]he law safeguards fiduciary relationships by using the concept of ‘reasonableness’ to connect subjective individual experience with normalizing intersubjective expectations”).

consuming media, and through making choices about what to read, watch, hear, say, tweet, and post online, they are helping to create public opinion. It is equally important that politicians be responsive to the public's evolving views, understood collectively.

For Meiklejohn, the connection between freedom of speech and democratic legitimacy is much simpler. What is important is that information relevant to public issues circulates among the public, so that they can make wise political decisions.<sup>43</sup> The Constitution mandates that government remove obstacles to participation in public discussion so that the people can be informed. If necessary, government might have authority to take steps to make sure that people are informed and have incentives to participate in self-governance. Once again, this connects Meiklejohn's theory to the public trustee model in *Red Lion*.<sup>44</sup>

What I find especially attractive about Post's model is that he emphasizes the role of participation in forming public opinion, and that he understands, indeed emphasizes, that what we call "public opinion" is not static but constantly mutating, and not unitary but full of multiple and often opposed views and ideas.<sup>45</sup> Post also rejects Meiklejohn's notion that the First Amendment allows government to structure the agenda of public discussion.<sup>46</sup> This follows from the fact that public discourse is a freewheeling, participatory enterprise, and that public opinion is constantly changing both in its content and in its focus. People decide among themselves what is interesting and important to them. Although Post wants to legitimate political democracy, both of these ideas are characteristic of cultural democracy.

For this reason, I believe that Post's democracy-based account does not go far enough. He argues that public discourse is constitutionally valuable because it legitimates political democracy. But protecting people's ability to participate in the circulation of ideas, beliefs, and opinions also protects the characteristic activities of cultural democracy.

Post tells us that "[p]ublic discourse is comprised of those processes of communication that must remain open to the participation of citizens if democratic legitimacy is to be maintained."<sup>47</sup> But we could also just as

---

<sup>43</sup> MEIKLEJOHN, *supra* note 3, at 26.

<sup>44</sup> See *supra* notes 15–18 and accompanying text.

<sup>45</sup> See POST, *supra* note 42, at 36–37 (defining discursive democracy as one in which public opinion is "constantly in flux," and "always in the making"); *id.* at 49 ("Because discursive democracy regards public opinion as constantly evolving, there is never an 'outcome' with respect to which each affected person can be entitled to equal influence.").

<sup>46</sup> See Post, *Meiklejohn's Mistake*, *supra* note 4, at 1112–14, 1118.

<sup>47</sup> Post, *supra* note 37, at 7.

easily say that public discourse is comprised of those processes of communication that must remain open to the public to ensure cultural democracy—the ability to participate in the forms of meaning-making and mutual influence that constitute us as individuals. Thus, the concept of public discourse serves *both* the constitutional value of political democracy and the constitutional value of cultural democracy.

### III. THREE CONCEPTS OF DEMOCRATIC LEGITIMATION

So far, I've argued that the concept of public discourse serves cultural democracy as much as political democracy. Post developed the concept of public discourse to legitimate state power. But protecting cultural democracy is *also* a way of legitimating state power, just in a different way than in Post's or Meiklejohn's models.

There are three different ways that a constitutional freedom might help legitimate state power.

First, the freedom might help the state achieve its constitutional ends more effectively. This is Meiklejohn's answer. Freedom of speech helps citizens and their elected representatives make wise decisions. This serves the constitutional goal of democracy, because democracy maintains that the people should govern themselves; and they can best do this when they are well-informed and have a chance to deliberate about the ends and means of governance.

Second, a constitutional freedom might help maintain the legitimacy of state power because it prevents people from feeling alienated from their government's decisionmaking and helps them identify the government's decisions as their decisions. This is Post's answer. Freedom of speech allows people to engage in public discourse. Engaging in public discourse creates public opinion. Public opinion, in turn, hopes to influence government action. The realistic possibility of this influence gives citizens a warranted belief that public officials will, in the long run, be responsive to their views.

But there is also a third account of how a constitutional freedom helps maintain the legitimacy of state power. Constitutional freedom helps legitimate state power because the guarantee of freedom shows proper concern and respect for the people who live under the state's rule and it treats them appropriately and fairly by respecting their freedom. This theory of legitimacy is well summed up in Ronald Dworkin's famous formulation that in liberal democracies governments should show "equal concern and respect" toward their citizens.<sup>48</sup>

---

<sup>48</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xii, 181, 272–73, 275 (1977) (describing the



These three different accounts of how constitutional guarantees sustain democratic legitimacy correspond roughly to three different justifications of judicial review in constitutional democracies; that is, these justifications not only legitimate democracy, they also legitimate the practice of judicial review within a democracy.

First, judicial review can help democracies function better by preventing interference with democratic processes of deliberation, organization, mobilization, and representation; these processes allow new majorities to displace older ones, and they prevent groups from entrenching themselves in power.

Second, judicial review can protect minority groups by giving them a warranted belief that the government will treat them fairly in the political process and enable them to influence public opinion so that they can be part of tomorrow's majority coalitions. This prevents government from operating as an alien force over their lives over which they have no hope of influence or control.

Third, judicial review can ensure protection of constitutional liberties—whether or not connected to democratic processes of deliberation and representation—which require the state to treat people subject to the state's power with appropriate concern and respect.

You may have noticed that these three justifications of judicial review correspond roughly to the second, third, and first paragraphs of Justice Stone's famous explanation of the purposes of judicial review in footnote 4 of *United States v. Carolene Products Co.*<sup>49</sup> This is no accident. Footnote 4 is not merely—as it is often read—a rough first cut at how to legitimate judicial review in the post-New Deal era.<sup>50</sup> The theory of footnote 4 also concerns the deeper question of how constitutionally protected liberty might legitimate an increasingly powerful state, which exercises largely unchecked democratic control over traditional civil freedoms of property and contract.

Accordingly, the modern conception of civil rights and civil liberties quickly follows the New Deal revolution. And the First Amendment guarantees of speech and press become the paradigmatic examples of civil freedom. In the 1940s, they are even called “preferred freedoms.”<sup>51</sup> One

---

right to equal concern and respect as a basic requirement of liberal political theory).

<sup>49</sup> 304 U.S. 144, 152 n.4 (1938) (suggesting that judicial review is most likely justified when democratic processes are undermined, when prejudice against minorities undercuts democracy, or when fundamental constitutional rights are threatened.)

<sup>50</sup> See, e.g., J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 301–04 (1989); Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1097–99 (1982).

<sup>51</sup> See, e.g., *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (noting “the preferred place given in our

can justify these freedoms in terms of each of the three conceptions of legitimation I have described. They help make democracy function better, they give warranted belief in government's responsiveness to public opinion, and they show appropriate concern and respect for the individual freedom and dignity of people living under the state's rule.<sup>52</sup>

Like the First Amendment guarantees of speech and press, many constitutional civil liberties can be explained in terms of these three accounts of legitimation. They produce better decisions by government officials, they help people feel that the government is responsive and belongs to the people, and they show equal concern and respect for people and treat them fairly.

Consider, as only one example, the Fourth Amendment's constitutional guarantees against unreasonable searches and seizures, and the Fourteenth Amendment's guarantee of equal protection of the laws, as applied to police misconduct against minority communities. Without these constitutional guarantees, democratic legitimacy is undermined in all three ways. If the state allows police officers to instill fear in minority communities through stops, searches, arrests, and acts of violence, governments are likely to make bad decisions about law enforcement and about maintaining social order. They are also likely to cause members of minority communities to feel increasingly alienated from the state and to feel that they are being occupied and harassed by a malign display of state power in which they have no say. Finally, police misconduct shows lack of equal concern and respect for minorities, violates their practical freedom, destroys their peace of mind, places continuous obstacles in the path of their lawful pursuits, and in some cases, takes their lives.

In just the same way, there are three ways that First Amendment freedoms legitimate state power. First, freedom of speech informs the public and produces better state decisionmaking in the long run. This is Meiklejohn's explanation. Second, freedom of speech allows people to feel that the government is responsive to them and is not alien from them. This is Post's explanation. Third, freedom of speech shows appropriate concern and respect for people living under the state's rule. Respecting people's

---

[constitutional] scheme to the great, the indispensable democratic freedoms secured by the First Amendment," and explaining that "[t]hat priority gives these liberties a sanctity and a sanction not permitting dubious intrusions").

<sup>52</sup> Similarly we can explain judicial protection of First Amendment freedoms in terms of each of the three paragraphs of footnote 4 of *Carolene Products*. The freedoms of speech and press prevent antimajoritarian entrenchment; they help minorities combat prejudice and organize politically to form parts of future majorities; and the text of the Constitution specifically mentions these guarantees as protected civil freedoms. See *Carolene Products*, 304 U.S. at 152 n.4. The classic account of the connection between First Amendment freedoms and the protection of minority rights is HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* (1965).

ability to participate in culture and to express their values, emotions, opinions and ideas, even if these do not concern politics or public issues, respects people's freedom to think and discuss what matters to them.

Viewed from this perspective, constitutional protection of art, including instrumental music, conceptual art, and popular art, is especially easy to justify. Art is the most powerful medium of communication about our values, emotions, and opinions, because it can appeal immediately to people and it can create an emotional, as well as an intellectual, connection to others. Protecting freedom to participate in the formation of public opinion and to engage in cultural expression legitimates the state in much the same way that protecting other important rights—like the right against unreasonable searches and seizures—legitimates the state. It is an aspect of what it means to live in a free society.

These three different explanations for how constitutional guarantees maintain state legitimacy help explain why democracy theorists of the First Amendment have never succeeded in completely excluding liberty-based justifications for freedom of speech. No matter how often democracy theorists show us that personal liberty, without more, cannot be a sound justification for freedom of speech, people continue to press the argument. Why is this? It is because civil freedom is also a source of democratic legitimation; it simply legitimates state power in a different way.

Democratic legitimation of state power and civil freedom form what I call a nested opposition. Although nominally opposed to each other, each depends on the other in complicated and unexpected ways. Guarantees of freedom are a central source of legitimacy of state power, especially in democracies. Conversely, as I have argued, the freedom of speech, even when described in purely libertarian terms, is actually a kind of *democratic* freedom. It is the right of individuals to engage in democratic cultural participation and processes of mutual influence. The idea of cultural democracy shows how civil freedom partakes in democratic participation and how democratic participation depends on civil freedom.

To be sure, not all freedoms promote democratic legitimacy in the same way or to the same degree. Democracy allows for the regulation of freedom in the name of the public interest. And, following the New Deal, courts reinterpreted several traditional forms of economic freedom—the right to own one's labor, to contract, and to accumulate and use property—and subjected them to new forms of democratic control. Older forms of civil liberty were displaced by newer ones—what people now generally call “civil liberties”—as the central objects of judicial protection.<sup>53</sup>

---

<sup>53</sup> See generally KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE

So the challenge for liberty theorists has always been to give an account of freedom of speech that explains why it should have special constitutional value that traditional economic freedoms do not enjoy. Moreover, because many speech acts fall into the realm of economic freedom and commercial activity—for example, in making contracts—it cannot be the case that speech is protected simply because it involves personal freedom. The challenge for liberty-based theorists is to give an account of freedom of speech that does not collapse into general freedom for each and every act of communication that is an inevitable part of a modern commercial society.

#### IV. THE JUDGE OF SOCIETY

What makes cultural freedom, in the sense that I am using the term, different from every other freedom to act that the Constitution might protect? What distinguishes participation in public discourse, for example, from market freedoms? We can only answer this question historically and sociologically. What makes an activity part of public discourse depends on the way that societies have evolved and the social functions that public discourse serves. People talk to each other when they make contracts; they communicate when they fill out the forms required by laws regulating the securities markets. Our judgments of what constitutes and does not constitute public discourse cannot rest solely on the fact that one person is speaking or communicating with another. Rather, it rests on a social characterization of human activity.

What distinguishes public discourse from other forms of communication? The short answer is that public discourse refers to those processes of communication that allow public opinion to serve as the judge of society. The long answer requires a bit of history.

Today people understand public opinion as the judge and the guide of state authority. Therefore it seems natural (at least for democracy-based theorists) to imagine that there is a class of communicative acts that are either concerned with or relevant to democratic self-government. But what we now regard as natural or obvious is the result of changes in social life that began with modernity, and that created a social formation called *public opinion*, and a *public sphere* in which public opinion circulates.

Eventually, public opinion and the public sphere became crucial ingredients in supporting and authorizing self-government in modern democracies. As Jürgen Habermas explained in his famous account of the

---

DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW (2004) (describing the rise of the modern conception of civil liberties).

formation of the public sphere, “The public sphere in the political realm evolved from the public sphere in the world of letters; through the vehicle of public opinion it put the state in touch with society.”<sup>54</sup> But when public opinion and the public sphere first emerged, there were few nations that even resembled modern democracies in Europe. Most states were governed by kings and princes. And in many of these countries, political censorship was rampant.<sup>55</sup> In England, for example, seditious libel was a crime.<sup>56</sup>

The formation of public opinion and a public sphere arose first as a civil freedom—or what we would call today a civil liberty—rather than as a political freedom. The public sphere was not justified in terms of a general ability of people to criticize the state, because monarchs and state officials often did not take kindly to such criticisms. Political censorship was by no means absolute. European states might tolerate some kinds of criticisms but not others, and censorship regimes might be inefficient and ineffective.<sup>57</sup> But the more important point is that public opinion and the public sphere did not exist to legitimate democracy originally because there were no democracies (in the modern sense) to legitimate.

Rather, public opinion served as the judge of society, and of the world. We still retain this idea today in the slogan “the court of public opinion.” In the eighteenth century, philosophers began to theorize this new social formation. For Voltaire, for example, public opinion was the opinion of the best people, not of the common masses who, Voltaire believed, were coarse and uneducated.<sup>58</sup> For David Hume—who, as usual, saw much further than

---

<sup>54</sup> JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 30–31 (Thomas Burger trans., 1989).

<sup>55</sup> See Hannah Barker & Simon Burrows, *Introduction to PRESS, POLITICS AND THE PUBLIC SPHERE IN EUROPE AND NORTH AMERICA, 1760–1820*, at 7 (Hannah Barker & Simon Burrows eds., 2004) (“Governments and political elites had many ways to restrict the circulation and content of news. Licensing regulations, prior censorship and restrictive privileges were widespread practices.”).

<sup>56</sup> 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*151 (“[B]lasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by English Law . . . .”); see also generally Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 *STAN. L. REV.* 661, 665–73 (1985) (describing various legal options the English Monarchy used for censorship); Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 *UCLA L. REV.* 177, 182–85 (1984) (describing doctrine of seditious libel in England); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 *COLUM. L. REV.* 91, 98–108 (1984) (describing origins of seditious libel doctrine).

<sup>57</sup> See Hannah Barker & Simon Burrows, *supra* note 55, at 8 (noting that although European states often feared and sought to control the press, “newspapers often enjoyed a greater freedom than other legally printed products, partly because old regime governments tended to lack the machinery to monitor the newspaper press effectively”).

<sup>58</sup> See IAN DAVIDSON, *VOLTAIRE IN EXILE: THE LAST YEARS, 1753–78*, at 101 (2004) (noting that Voltaire denied that popular opinion was “that of the population at large, which is almost always absurd,” but “the collective voice of decent people who think, and who, over time, reach an infallible judgment”).

his contemporaries—everyone participated in the formation of public opinion. Opinion, Hume believed, was the basis of all forms of authority, in politics, in law, and in social life generally.<sup>59</sup> Without the support of public opinion, any form of authority, including monarchies and dictatorships, would eventually collapse.<sup>60</sup> Regardless of who participated in it, it was generally agreed that public opinion acted as a judge of social life. Public opinion was analogized to a tribunal in which the affairs of the day would be evaluated.<sup>61</sup>

In Habermas's famous account, the public sphere emerged as a distinctive sociological formation in monarchical societies, not democracies.<sup>62</sup> It was public in the sense that it was open to many different kinds of people, who shared in using and developing it. It featured a circulation of ideas and views that came to be known as public opinion. In the early development of the public sphere, people gathered in salons, coffeehouses, and other areas to discuss matters of mutual interest.<sup>63</sup> These included, among other things, commerce, news of business and foreign affairs, mores, gossip, and art. The interest in business also brought with it an interest in news of events that might affect business, as well as interesting stories from abroad.<sup>64</sup> Discussion of business, art, and social gossip allowed people to engage in a kind of cultural politics. Through the everyday practice of stating, repeating, and responding to opinions, people expressed their values and judgments about what was happening around

---

<sup>59</sup> See DAVID HUME, *Of the First Principles of Government*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 32, 32 (Eugene F. Miller ed., LibertyClassics rev. ed. 1989) (1777) (“It is therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as to the most free and most popular.”).

<sup>60</sup> See *id.* at 32–33.

<sup>61</sup> Jeremy Bentham's 1791 *An Essay on Political Tactics* made the comparison in these terms:

The public compose a tribunal, which is more powerful than all the other tribunals together. An individual may pretend to disregard its decrees—to represent them as formed of fluctuating and opposite opinions, which destroy one another; but every one feels, that though this tribunal may err, it is incorruptible; that it continually tends to become enlightened; that it unites all the wisdom and all the justice of the nation; that it always decides the destiny of public men; and that the punishments which pronounces are inevitable. Those who complain of its judgments, only appeal to itself; and the man of virtue, in resisting the opinion of to-day—in rising above general clamour, counts and weighs in secret the suffrages of those who resemble himself.

Jeremy Bentham, “Of Publicity,” in *An Essay on Political Tactics*, in 2 *THE WORKS OF JEREMY BENTHAM* 198, ch. II, § 1, at 310 (John Bowring ed. 1843); see also generally Fred Cutler, *Jeremy Bentham and the Public Opinion Tribunal*, 63 *PUB. OPINION Q.* 321 (1999) (explaining Bentham's theory of public opinion).

<sup>62</sup> HABERMAS, *supra* note 54, at 27–28 (noting emergence of public reason within monarchical states).

<sup>63</sup> Craig Calhoun, *Introduction: Habermas and the Public Sphere*, in *HABERMAS AND THE PUBLIC SPHERE* 1, 8, 12 (Craig Calhoun ed. 1992)

<sup>64</sup> See HABERMAS, *supra* note 54, at 16 (noting role of commerce in stimulating interest in news of distant events).

them, including the actions of others in business, in social life, and especially in the world of arts and letters.

Significant political censorship coexisted with discussion of these matters.<sup>65</sup> A society could have a domain of civil freedom, and a sphere of mutual influence which could affect both private actors and state officials, but it would not yet be a democracy in the modern sense. The society would have, however, a form of cultural democracy, to the extent that there was relatively free and open access to an emerging public sphere.

Cultural democracy thus precedes political democracy both ontologically and historically. Even before there was full-fledged democracy in our modern sense—with regular elections of representatives, general access to the vote, and protections for speech overtly critical of the government—there was public discourse, public opinion, gossip, and art. The circulation of public discourse about mores, customs, manners, news, and art, and the emergence of the sociological phenomenon of public opinion as a judge of the social world, precede modern notions of representative democracy and democratic legitimacy. These same phenomena exist today, both in democratic and nondemocratic nations, as the basis of cultural democracy and cultural freedom.

The same institutions and practices that served as the judge of society, however, also allowed people to discuss and criticize the actions of public officials and the structure of governance. Voltaire, for example, sought to inflame and provoke public opinion (in his sense) against the unjust decisions of courts.<sup>66</sup> In this way, public opinion, as the judge of the social world, naturally developed into the judge of public actors. And because, as Hume argued, public opinion was the basis of all social authority, it also, inevitably, became the basis of all political authority. Hume's assessment of the power of public opinion was borne out repeatedly in political revolutions, including the American Revolution.

The public sphere and the development of public opinion prepare the way for modern democracy, because they create a cultural infrastructure for the circulation of public opinions necessary for democracy to thrive and to be legitimate. The development of public opinion and a public sphere gave rise to media, institutions, and practices adaptable to an emerging form of democratic politics. People could use these media, institutions, and practices to delegitimize arbitrary and nondemocratic governance and to legitimate democratic exercises of political power. The same social arrangements, technologies, and institutions that developed to share

---

<sup>65</sup> See *supra* notes 55–57 and accompanying text.

<sup>66</sup> See, e.g., IAN DAVIDSON, *VOLTAIRE: A LIFE* 367–71 (2010).

opinions on diverse subjects could also be harnessed to discuss politics and public policy. The growth of rhetorical practices for religious preaching, artistic expression, and cultural exchange among the public enabled their later development and use in democratic politics.

But we should not confuse the fact that public opinion prepares the way for political democracy, and creates an infrastructure or substrate for it, with the very different idea that public discourse is merely a handmaiden for political democracy, or that its constitutional value today consists only in the fact that it eventually came to support democracy. Public opinion does not shed its earlier functions because it takes on new ones. This monopolization of the constitutional purpose of the public sphere is the error of politico-centrism. It would be like saying that fish have value today only because earlier fish evolved into mammals, and mammals have value today only because earlier mammals evolved into human beings.

The public sphere and the circulation of public opinion, as well as the freedom to create, discuss, and distribute artistic works, have independent value. They are important elements of a free society, and they enable people, even in countries that are not fully democratic—or democratic at all—to comment on and respond to cultural forces that shape them and affect their lives in countless ways. In China, where the state is controlled by a single party and there is systematic censorship of political opinions criticizing the government, people still use social media to discuss issues of culture, mores, ethics, and corruption.<sup>67</sup> We should remember, too, that for most of its history, the United States itself was not fully democratic by contemporary standards, and practiced various forms of political censorship,<sup>68</sup> yet it maintained an area of civil freedom for public discussion. Regardless of the form of government, public opinion may still operate as a judge of society and of the world around it.

## V. THE NESTED OPPOSITION OF CULTURAL AND POLITICAL DEMOCRACY

My argument does not discard political democracy as a ground of freedom of speech in favor of cultural democracy. It does not deny or disparage the forms of legitimation that democracy theorists like Post and

---

<sup>67</sup> See Thomas Crampton, *Social Media in China: The Same, but Different*, CHINA BUS. REV. (Jan. 1, 2011), <http://www.chinabusinessreview.com/social-media-in-china-the-same-but-different/> [<https://perma.cc/A2P8-MZ99>]; *Social Media Encouraging Corruption Whistleblowing*, CHINA DAILY (May 9, 2015, 7:44), [http://www.chinadaily.com.cn/china/2015-05/09/content\\_20665420.htm](http://www.chinadaily.com.cn/china/2015-05/09/content_20665420.htm) [<https://perma.cc/L8ND-4CCT>]; Yilu Zuo, *The People's Right to Cultural Construction: A Breakthrough of China's Free Speech* (Feb. 2016) (unpublished J.S.D. dissertation, Yale Law School) (on file with author).

<sup>68</sup> See generally STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY* (2008) (tracing history of free speech protection and suppression in the United States).



Meiklejohn have argued for. My point, rather, is to articulate a basic constitutional value for freedom of speech that has deep historical and conceptual connections to the rise of democratic self-government but is not identical to it. Democratic self-governance and cultural freedom form a nested opposition. Although nominally opposed, political democracy arises out of the conditions made possible by cultural freedom, and cultural democracy continues to support political democracy to this day.

Consider the multiple functions of participation in public discourse and in the formation of public opinion in a free society:

1. Public opinion provides a ground of approval and authority for behavior, actions, and events. It expresses social judgments.
2. Conversely, public discourse offers a space for challenging accepted forms of authority and contesting standards of social approval.
3. Public discourse causes shifts in opinions, customs, fashions, mores, and ways of living. It affects the development of art and business.
4. Public opinion exposes corruption, wrongdoing, and violations of social norms. It provides a vehicle for satire, parody, and ridicule.
5. Participation in public discourse encourages freedom of thought and conscience and the development of intellectual and artistic abilities.
6. Participation in public discourse promotes the development of skills of reasoning, argument, and rhetoric.
7. Participation in public discourse creates audiences for and interest in artistic and scientific production.
8. Participation in public discourse facilitates the circulation of information that is valuable for business, religion, community life, and for individual decisions about the direction and meaning of a person's life.

Each of these examples shows the important values served by cultural freedom. But it is not difficult to see how each of these examples might also be useful to democratic politics, to informed discussion of public issues, and to democratic legitimacy. That is hardly surprising; as I have argued, cultural freedom supports and enables political freedom, throughout history and in the present. Yet one can understand this support without engaging in politico-centrism—that is, valuing public discourse about commerce, art, and mores solely as a support or adjunct to the role of public discourse in legitimating democracy. One does not have to treat political discussion as the highest, most valuable, or most characteristic form of public discourse, and one does not have to assume that public discourse that has little discernable connection to the discussion of public

affairs is either exceptional, debased, or a distraction from core examples of public discourse.

Post has made an analogous claim about Meiklejohn's conception of democratic legitimacy. Post argues that the formation of public opinion surely assists the right of people to vote and to choose their representatives—which is Meiklejohn's primary concern—but that it is valuable in its own right as a source of democratic legitimation. He points out that if we only gave people the right to vote but denied them the right to discuss public issues among themselves, our democracy would be not very democratic at all.<sup>69</sup> Even so, Post argues the capacity to participate in public opinion does not exist solely for the purpose of an informed public. It has independent constitutional significance as a ground of legitimacy.

We can take Post's reasoning one step further. If public opinion makes electoral democracy more truly democratic, cultural democracy makes *both* opinion-based and electoral conceptions of democracy more truly democratic. Just as the public sphere is important to the integrity of the right to vote, cultural freedom is important to the integrity of the sphere of opinion formation in a democracy. Art, and in particular, popular art, allows discussion of mores, values, customs, meanings, and emotions even if people do not want to talk about politics or public policy in a narrower sense. Without freedom of cultural participation, political democracy would be impoverished.

Cultural democracy underwrites public discourse, and in the process, underwrites political freedom. The edifice of political democracy rests on the foundations of cultural democracy. But once again, it does not follow that cultural democracy has constitutional value merely as a support or adjunct of political democracy. The fact that *A* supports *B* does not mean that *A* exists for the purpose of supporting *B*. Although the Earth supports highways, the Earth does not exist for the purpose of highway construction, any more than the human nose exists to hold glasses.

Culture operates through forms of power deeper than the state. It is exercised in different ways and features different forms of accountability. People do not change their culture by having elections about what their culture will be like. Nor do they change culture by voting new politicians into office. Laws and cultures are mutually constitutive. Yet laws, even successful laws, often only alter or reshape features of culture at the margins. Cultural change is often far more powerful at altering laws or reshaping their understanding and enforcement than changing laws are at reshaping culture.

---

<sup>69</sup> Post, *supra* note 41, at 74–75.

If culture is a deeper form of social power, reproduced through art and expression, how do people have a say in what it becomes and how it affects them? They have a say through expression, including discussion, cultural dissent, and especially through artistic expression. Artistic expression is often connected to cultural dissent and the promotion of new cultural ideals. One reason is that art is a powerful carrier of emotion, which, in turn, is a powerful carrier and shaper of values, mores, and attitudes.

Cultural democracy gives individuals freedom to participate in the forms of mutual influence that constitute various cultures and subcultures within a society. Cultures are contested and agonistic as much as they are constitutive and regulative. Through cultural participation we get contest, evolution, and alteration, as well as conformity and reproduction.

In a cultural democracy, people can use their freedom of speech to talk back to, comment on, parody, appropriate, remix, and alter the cultural forms, values, and mores of the world in which they live. In fact, freedom of expression may be the only remedy that most people have for living within forms of cultural power that they find oppressive or unjust. Freedom of speech offers the opportunity, although not the certainty, of reshaping culture, which, in turn, reshapes us and others.

The Earth supports roads, but its expanse is much greater than the roads it supports. So it is with cultural and political democracy. When we look at how people actually exercise their freedom of expression in democracies, the exercise of cultural freedom greatly outstrips the exercise of political freedom. Most public discussion is not about politics in the narrow sense, or even about broader issues of public policy. It is about mores, manners, customs, celebrity, and especially popular art. Meiklejohnians may object to the continued dominance of this kind of exchange, arguing that it distracts people from focusing on the discussion of serious public issues. The irony of this complaint is it that these “distractions” supported the development of the public sphere in the first place, and made possible the kind of democratic legitimation that democracy-based theorists celebrate. Even to this day, cultural expression, gossip, and discussion about personal interests, celebrities, and sports continue to serve as a substrate for democratic politics, and provide a platform for the media of communication that make political discussion possible. The public’s desire to discuss matters that have little to do with serious public issues have driven the explosion of telecommunications infrastructures, new media technologies, and applications. In the digital age, culture, and not politics, is the killer app.

## VI. COMMERCIAL SPEECH AND PUBLIC DISCOURSE

A theory of free speech protection organized around the constitutional value of public discourse neither assumes nor requires that all forms of communication are part of public discourse. In fact, a vast amount of communication in everyday life is not public discourse and therefore is not protected speech.<sup>70</sup> For Post, this follows because public discourse is closely linked to democratic legitimation. Because I explain the value of public discourse in terms of cultural participation as well as democratic legitimation, there are likely to be a few differences between our approaches. One of them concerns the constitutional treatment of commercial speech.

Post argues that commercial speech is not part of public discourse, because it is not designed or intended as a potential contribution to democratic legitimation.<sup>71</sup> The question is a bit more complicated under a theory of cultural democracy. Commercial speech contributes a great deal to contemporary culture; in fact, it is difficult to imagine contemporary culture without advertising. I agree with Post that we should treat commercial speech differently from public discourse, but my reasons are somewhat different from his. At the end of the day, however, we both agree that what makes commercial speech distinctive—and therefore justifies its special constitutional treatment—is not its *content*, but its *social function*.

Post offers three reasons why commercial speech is not a contribution to public discourse. First, “we most naturally understand persons who are advertising products for sale as seeking to advance their commercial interests rather than as participating in the public life of the nation.”<sup>72</sup> Second, commercial advertisers do not “invit[e] reciprocal dialogue or discussion.”<sup>73</sup> Third, commercial advertisers are not attempting “to make the state responsive to them” through advertisements; rather, they are “attempting to sell products.”<sup>74</sup> For Post, the issue is not the specific intentions of commercial advertisers, but the “social significance” of what they are doing.<sup>75</sup>

My argument, however, has been that public discourse serves a constitutional value of freedom of cultural participation beyond merely legitimating the democratic exercise of political power. Suppose that I am

---

<sup>70</sup> See Post, *supra* note 37, at 20–21.

<sup>71</sup> See *id.* at 22.

<sup>72</sup> *Id.* at 12.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

correct and that public discourse serves two constitutional values, rather than just one. How does this affect Post's arguments about commercial speech?

Once we look at public discourse from a cultural perspective, several of Post's explanations for why commercial speech is not part of public discourse become less compelling. First, there is no clear distinction between people "seeking to advance their commercial interests" and "participating in the public life of the nation."<sup>76</sup> Many people try to make money by contributing to public discourse; conversely, many advertisers seek to shape the cultural life of the nation through advancing their commercial interests and selling products. The most famous advertising campaigns are also contributions to the tropes of public culture, and businesspeople like Henry Ford and Steve Jobs famously sought to change culture both through selling their goods and through shaping what those products meant to the general public.

Second, Post argues that commercial advertisers do not "invit[e] reciprocal dialogue or discussion."<sup>77</sup> But selling goods and services is dialogic, not monologic. The best salespeople have always understood that they must make a connection to their customers, and that connection comes from a cycle of listening and responding to consumer values and interests, and reshaping the salesperson's message accordingly. The successful salesperson's message is designed to explain how the good or service will improve a person's life, often less in terms of efficiency and efficacy than in terms of symbolic values or social meanings. It is true that salespeople do not enter into a dialogue with their customers willing to be convinced that their product is not right for the consumer, but sometimes this actually happens, and good salespeople often learn from these encounters. Moreover, a speaker's lack of interest in dialogue generally does not remove expression from public discourse; outside of advertising, many people engage in public discourse without any interest in changing their minds through the give and take of dialogue.

The digital age has made the dialogic nature of salesmanship even more salient. Company websites and the websites of places where goods are advertised and sold—like Amazon.com and Walmart.com—invite end-user comments. Companies attempt to measure consumer response to their products, and consumers are not shy about complaining and suggesting improvements.

---

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

Post's third argument is that the social meaning of commercial advertisements is not an attempt "to make the state responsive to" the advertiser, but an "attempt[] to sell products."<sup>78</sup> Many, if not most contributions to public discourse, however, cannot reasonably be understood as an attempt to make the state responsive to us. When we engage in art or gossip, when we exchange the latest tricks for engaging in our favorite hobbies, or when we decry the lack of piety, idealism, ethics, or positive attitudes in the public, or in the world at large, we are not necessarily best understood as trying to make the state responsive to us. We may even regard the state as irrelevant to our concerns. But we could well be understood as trying to affect the culture of the world around us, and in that sense we are engaged in public discourse.

Moreover, what about the commercial advertiser? Isn't the advertiser also trying to reshape the culture to make a better world for selling its products? So shouldn't the social meaning of its expression be indistinguishable from the work of the artist or preacher? All three, one might argue, are trying to affect culture by participating in culture.

These and other difficulties emerge when we consider commercial speech in light of the definitions of public discourse I've offered in this Article. First, I said that public discourse is comprised of those processes of communication that must remain open to the public to ensure cultural democracy—the ability to participate in the forms of meaning-making and mutual influence that constitute us as individuals. Later, I added that public discourse refers to those processes of communication that allow public opinion to serve as the judge of society.

It should be clear enough that commercial speech is a form of meaning-making and influence that attempts to reconstitute individuals as consumers. It hopes to make people into the kind of people who will buy products, and it hopes to remake their desires into commercial desires. It should be equally clear that commercial speech seeks to judge social life. It hopes to persuade people that their values can be judged by their purchases and possessions. From the standpoint of cultural power and cultural influence, commercial speech is clearly an important part of contemporary culture. It is one of the most powerful forms of culture circulating in our world—as powerful, in its own way, as religion in shaping how people understand themselves and their actions.

But Post makes another point about commercial speech, which, from a cultural perspective, is far more relevant in explaining the special status of commercial speech in First Amendment doctrine. Post says that the effect

---

<sup>78</sup> *Id.*

of commercial speech on public opinion is a “by-product” of the attempt to sell goods and services.<sup>79</sup> The (perhaps unintended) play on words in this formulation is revealing. Cultural change is the *by-product* of the attempt to get people to *buy products*. The social function of the advertisement is the attempt to get people to purchase goods and services; the advertisement often achieves this goal by intervening in existing culture and changing it in a targeted way. Advertising seeks to diagnose its cultural milieu, to alter existing culture, and to reshape it in a commercial image.

Post tells us that commercial speech affects public discourse by providing “information”<sup>80</sup> that might benefit the public, and it receives constitutional protection because it helps circulate information to the public.<sup>81</sup> But the most important message that advertisers sell is not factual information; it is image, emotion, reinterpretations of social norms, and assertions of value.<sup>82</sup> The most successful advertisers are also among the most successful rhetoricians and the most powerful cultural reprogrammers. They hope to associate their products with emotions, pictures, values, and lifestyles. They seek to connect their products to images of fun, friendship, family, success, and sexual attractiveness. In the process, advertisers recreate desire in terms of desire for products, value in terms of the value of products, and social experience in terms of the social experience that comes when one uses the product or replaces an older product with a newer one.

The constitutional justification for treating commercial speech differently than speech that is part of public discourse cannot be that commercial speech does not concern itself with culture or with public opinion—for it often concerns itself with both most directly and purposefully. Commercial speech often aims at influencing and reshaping both individuals and the cultures in which they live.

Rather, the constitutional justification for treating commercial speech differently is that commercial speech has a special social function; it is an attempt to *do* something through intervening in culture. Commercial speech attempts to solicit business, attract customers, and sell goods and services. It is an extension of the exercise of market freedoms. Commercial speech

---

<sup>79</sup> *Id.* at 13.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 14. Post therefore concludes that “commercial speech doctrine is best explained as resting on the constitutional value of democratic competence”—the value of an informed public. POST, *supra* note 35, at 35.

<sup>82</sup> See RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE 72–74, 108 (2d ed. 2005) (arguing that First Amendment doctrine does not reflect the realities of commercial speech because, in modern advertising, “image is all”).

participates in markets by adapting to and altering the culture in which market transactions occur. Instead of simply responding to the forces of supply and demand, advertising attempts to alter demand by altering the people who have demands, and by altering the culture that constitutes people's understandings of their wants, hopes, and desires.

When government aims at commercial speech's distinctive social function—by regulating attempts to sell goods and services and to influence people to purchase goods and services—government may treat commercial speech differently from public discourse. To be sure, if the government regulates advertising because of disagreement with its ideology or values, it is treating the advertising as a contribution to public discourse, not as commercial speech, and courts should apply the same rules they apply to regulations of public discourse generally. But this is also true whenever government treats conduct or otherwise unprotected speech as a contribution to public discourse.<sup>83</sup>

The structure of constitutional doctrine reflects the fact that commercial speech has a different social function from public discourse. Commercial speech doctrine protects the ability of listeners to receive information, rather than the autonomy of advertisers to express themselves.<sup>84</sup> The Supreme Court has explained that “[t]he First Amendment’s concern for commercial speech is based on the informational function of advertising”<sup>85</sup> and that “the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.”<sup>86</sup>

Thus, First Amendment law does not protect commercial speech to vindicate advertisers’ rights to participate in the formation of culture on equal terms with everyone else. Instead, the First Amendment protects commercial speech because it adds truthful, nonmisleading information that might be valuable to people who *are* participating in public discourse.<sup>87</sup> In other words, the First Amendment protects advertisers because, as a by-product of their market behavior, they provide valuable information.

---

<sup>83</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388–89 (1992) (“[A] State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.”).

<sup>84</sup> Post, *supra* note 37, at 14–15 (noting that the Supreme Court’s analysis has been “audience oriented”); Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 172 (2015) (noting that the Supreme Court “explicitly created commercial speech doctrine to protect the rights of *listeners* rather than the autonomy of *speakers*”).

<sup>85</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980).

<sup>86</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

<sup>87</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (noting society’s interest in the “free flow of commercial information” to ensure “intelligent and well informed” economic decisions and political opinions about market regulation).



If advertising were part of public discourse, these distinctions would be unjustified, because the purpose of protecting public discourse is to allow people to participate in culture democratically and on equal terms. In a cultural democracy, the ability to express one's self is every bit as important as the right to receive and evaluate the expression of others.<sup>88</sup> Moreover, a speaker's right to participate in public discourse does not turn on whether the government thinks that the speaker is providing truthful and valuable information to the public.

One might object: it may be true that current doctrine does not protect the autonomy rights of commercial speakers, but perhaps that is because the doctrine is wrong. Yet the doctrine's focus on the rights of audiences reflects a deeper logic that helps us understand why advertising is not participation in public discourse.

The First Amendment normally protects public discourse even when it is false or misleading. For example, we generally do not prosecute politicians for misleading audiences and shading the truth in an attempt to win votes.<sup>89</sup> (If we did, the jails would be filled to overflowing.) Government cannot make it a crime to publish books and articles that deny established scientific truths or historical facts. Even false and defamatory content receives considerable First Amendment protection.<sup>90</sup>

Because commercial speech doctrine is audience-centered, however, the rules for false and misleading commercial speech are quite different. Commercial speech has constitutional value only because audiences have an interest in receiving valuable information. Advertising information is valuable to the extent that it is truthful and not misleading. Therefore advertisers generally have a right to make truthful and nonmisleading claims. But they receive no constitutional protection for false and misleading statements,<sup>91</sup> and governments may also require advertisers to

---

<sup>88</sup> As noted previously, Meiklejohn's theory of free speech is unsatisfying precisely because it deemphasizes everyone's right to express themselves and views speaker autonomy only as a means to achieving an informed public. *See supra* text accompanying notes 13–18.

<sup>89</sup> *Cf.* *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (applying strict scrutiny to strike down federal law that criminalized falsely claiming to have been awarded military honors).

<sup>90</sup> *See, e.g.,* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (holding that defamation against public officials is protected unless made with actual malice); *see also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (holding that statements of opinion are constitutionally protected and that the *New York Times Co. v. Sullivan* privilege applies to defamation against public officials and public figures but not to defamation against private figures).

<sup>91</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980) (“[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.”).

alter or supplement their advertisements to inform consumers or to avoid misleading them.<sup>92</sup>

These differences in treatment go to the heart of why the Constitution protects public discourse. In order to protect the equal right to participate in culture and in the formation of public opinion, the First Amendment forbids paternalistic restrictions on the dissemination of ideas and opinions. It presumes that people who engage in public discourse can make up their own minds about what to believe. In fact, it is entirely foreseeable that many people will be confused, misled, or deceived by what goes on in public discourse. But in order to protect the right to participate in public discourse, the law treats both speakers and audiences as free, independent, and autonomous; it regards them as equally competent and equally able to fend for themselves in public discussion, even when this is clearly not the case.<sup>93</sup> Therefore, even if public discourse misleads or harms people, the First Amendment normally protects it.<sup>94</sup>

But when people engage in speech that is not characterized as part of public discourse, the First Amendment drops these artificial assumptions. It allows government to recognize that people are often dependent, vulnerable, and not equally able to fend for themselves.<sup>95</sup> These assumptions apply in the realm of commercial speech, and they provide an additional reason to conclude that commercial speech is not part of public discourse. Even though advertisers try to persuade people and reshape public opinion and public culture, the First Amendment allows governments to assume that consumers may not be able to assess market information and market risks without compelled disclosures and prohibitions on misleading advertisements. If courts applied the usual tests

---

<sup>92</sup> See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (“Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant’s constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.” (citation omitted)). In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), the Supreme Court held that commercial advertisers have rights not to be forced to subsidize certain forms of ideological speech with which they disagree, as opposed to speech designed to prevent consumer deception, *id.* at 416 (“There is no suggestion . . . that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers.”).

<sup>93</sup> See Robert C. Post, *Reply to Bender*, 29 ARIZ. ST. L.J. 495, 499 (1997) (“False ideas are not constitutionally recognized as causing harm within public discourse because persons within that discourse are presumed to be autonomous and independent . . .”).

<sup>94</sup> See *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (“As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”).

<sup>95</sup> POST, *supra* note 35, at 23 (“Whereas within public discourse the political imperatives of democracy require that persons be regarded as equal and as autonomous, outside public discourse the law commonly regards persons as dependent, vulnerable, and hence unequal.” (endnote omitted)).

for regulations of public discourse to regulations of commercial speech, many, if not most, would not survive the gauntlet of strict scrutiny.

Nevertheless, although commercial speech is not part of public discourse, it receives First Amendment protection that is not afforded to the speech involved in making commercial contracts and many other kinds of commercial communications.<sup>96</sup> The process of making a commercial contract is not an attempt to influence society generally, whereas commercial speech often sets out to persuade many people to buy goods and services. Moreover, as a by-product of its attempt to get people to buy products, commercial speech generates knowledge and information. Some of this knowledge and information consists of assertions of fact, which might be true, false, or misleading, but much advertising appeals to emotions and seeks a change in attitudes, values, and social meanings.

Post calls the knowledge and information that advertising adds a contribution to democratic competence, because he argues that it assists citizens in political self-government.<sup>97</sup> He connects the constitutional value of democratic competence to Meiklejohn's vision of an informed public and to Justice White's theory of broadcasting regulation in *Red Lion v. FCC*.<sup>98</sup> In Post's model, commercial speech has constitutional value because it helps inform citizens about how to govern.<sup>99</sup>

Nevertheless, "democratic competence" does not seem to be the most accurate explanation of the First Amendment value of commercial speech. The features and prices of goods and services, and the effects of advertising jingles, graphics, narratives, and images may have only the most attenuated relationship to the public issues of a democracy. They may, however, alter people's understanding of themselves and their culture, especially when we reflect that much advertising is not aimed at conveying facts. It conveys values, judgments, and emotions, and it alters and plays off of existing cultural values and social understandings. The advertisement for adult diapers is about avoiding embarrassment and maintaining autonomy in old age; the advertisement for the sports car is about the meaning of masculinity, as is the advertisement for drugs to cure erectile dysfunction.

Therefore, I would say that much commercial speech is better described as a contribution to *cultural competence*. Cultural competence is the ability to understand, navigate, and participate in cultural meanings and cultural discourse. Advertising contributes to cultural competence because

---

<sup>96</sup> Post, *supra* note 37, at 20–21.

<sup>97</sup> POST, *supra* note 35, at 33–35.

<sup>98</sup> *Id.* at 35–36, 124 n.36.

<sup>99</sup> *Id.* at 34–35.

it reflects on and reshapes the meaning of social life; it adds images, music, narratives, and cultural associations to culture in order to sell products and services. No doubt many examples of advertising might be understood as contributions to both democratic and cultural competence. But it is likely that advertising adds far more to what I call cultural competence than to what Post calls democratic competence. The ideas and information that may be most valuable to the public may not be facts that assist them in governing, but cultural narratives, social meanings, images, and symbols.

The shift from democratic to cultural competence, however, does not affect the permissible grounds of government regulation. Under either account, government may require that commercial speech contain truthful and nonmisleading information, and it may require advertisers to make disclosures about their products that would constitute unconstitutional compelled speech if the government demanded them of politicians and artists.<sup>100</sup>

To be sure, statements of factual information may be the least effective features of advertising, which often seeks to convey emotions, social judgments, and social meanings. Powerful images, narratives, and emotional appeals in advertisements may have significant effects on culture and cultural development. But government is much less competent and trustworthy in deciding what emotions are true or false, or which social meanings are good or bad, than it is in assessing factual questions. Therefore commercial speech doctrine appropriately focuses on policing what can be proven to be false and misleading. The emotional and cultural content of commercial advertising, powerful as it may be, is subject to government regulation only to the extent that it helps to mislead, obfuscates facts, or manipulates consumers into believing and acting on falsehoods and half-truths.

#### VII. WHAT CULTURAL DEMOCRACY ADDS TO DEMOCRACY-BASED THEORIES OF FREE SPEECH

Why is it important to recognize the constitutional value of cultural participation independent from the value of democratic legitimation? What does a cultural account of public discourse add to democracy-based theories of free speech? The theory of cultural democracy is designed to explain how freedom of speech operates in the Internet age. There are three reasons why democracy-based theories are insufficient, and each involves digital speech in digital networks. The first reason concerns the constitutional protection of art and the freedom to engage in artistic

---

<sup>100</sup> See *supra* text accompanying notes 91–92.

expression in digital media. The second reason concerns the structure of global public discourse, which transcends the nation-state. The third reason concerns the global nature of the Internet, which can be undermined or threatened by national regulation of telecommunications media.

First, as I noted earlier, a cultural account of public discourse gives a much better account of why lots of expression that seems to have little to do with popular self-government, including art and instrumental music, enjoys full First Amendment protection. That is important because art and music, more than politics, have been the battleground of the great legal conflicts over digital architectures, which concern the right to use and appropriate cultural materials.<sup>101</sup> The continuing struggles over intellectual property on digital networks have largely concerned the use, appropriation, and remixing of popular music, fashion, and popular culture. One result of opening up the right to speak to vast numbers of people is the discovery that what people most want to talk about, and therefore reappropriate, remix, and distribute, has little to do with core political speech and much to do with fashion, celebrity gossip, popular music, hobbies, sports, and personal news.

To give only one example of how questions of cultural freedom repeatedly arise in the context of policing digital networks, consider the recent decision in *Lenz v. Universal Music Corp.*,<sup>102</sup> which resolved an important and longstanding issue. The Ninth Circuit decided that copyright owners must engage in good faith investigation of whether people who use their content online are protected by fair use before they demand that online service providers take down videos that remix or reappropriate their content.<sup>103</sup> This prevents copyright owners from systematically demanding suppression of cultural expression by ordinary individuals. The particular video at issue was a doting mother's movie of her young children dancing to Prince's *Let's Go Crazy*.<sup>104</sup> The ability to make and display such a video is central to the idea of cultural democracy, but far less central—perhaps even marginal—to political democracy.

Second, democracy-based theories tether the constitutional value of freedom of speech to legitimating state power. But in the age of the Internet, public discourse easily overflows national borders. Cultural democracy transcends nation-states because culture itself does not respect national boundaries. Opinions, ideas, and art circulate internationally.

---

<sup>101</sup> See, e.g., LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004).

<sup>102</sup> 801 F.3d 1126 (9th Cir. 2015).

<sup>103</sup> *Id.* at 1132–33.

<sup>104</sup> *Id.* at 1129.

These days, the most important boundaries that segregate communication are not national but linguistic. Even linguistic boundaries may be porous to the extent that people speak multiple languages and appropriate from other languages. Popular art, and especially popular music and graphics, can travel freely and influence people around the world even when people do not share a common language.

The cultural account of public discourse therefore harmonizes well with Article 19 of the Universal Declaration of Human Rights, which speaks in terms of the right “to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>105</sup> A similar formulation appears in Article 19 of the International Covenant on Civil and Political Rights.<sup>106</sup> Although the First Amendment need not line up perfectly with international conceptions of human rights, in this case the cultural account makes better sense of an international perspective on the value of freedom of speech.

It is important not to confuse the argument I am making here—that public discourse goes beyond the nation-state and has value beyond legitimating nation-states—with a different claim. This is the argument that, because of its global reach, the Internet creates a global public sphere that is analogous to the public sphere within a nation-state and that similarly legitimates international legal norms or international political institutions.

The free flow of public discourse made possible by digital technologies has allowed ideas and opinions to circulate internationally in ways that would have been far more difficult in the past. Thus, digital technologies make possible new global institutions, practices, and forms of mutual influence. But one does not need to assume that this has resulted in or will inevitably result in a single or unitary global public sphere.

Merely because of differences in language, it is possible that we may never have a unitary global public sphere. Moreover, the circulation of ideas and opinions does not correspond to any particular government unit, much less to any *demos* or public who understands itself as living under a single government or a single set of laws. Global public discourse does not correspond to any particular political configuration.<sup>107</sup>

---

<sup>105</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 19 (Dec. 10, 1948).

<sup>106</sup> International Covenant on Civil and Political Rights art. 19, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (recognizing “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”).

<sup>107</sup> For a discussion of some of the problems of translating Habermas’s idea of the public sphere to the international context, see Nancy Fraser, *Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World*, EIPCP (Mar. 2007),

If one insists that the terms “public discourse” or “public sphere” must be reserved for a discursive phenomenon that legitimates national or international political power, then we do not have global public discourse, and we do not have a global public sphere, and we will not for a very long time. But if public discourse refers to the circulation of ideas and opinions globally, then we already have global public discourse, just not one that effectively legitimates nation-states or even supra-national entities like the European Union.

To be sure, people are now experimenting with new forms of international and transnational organization and legitimation, but these efforts are still in their early stages and we do not know how they will operate in the long run.<sup>108</sup> And it is certainly possible that the circulation of global public discourse will eventually underwrite democratic decisionmaking at an international or transnational level, analogous to how the development of a public sphere eventually paved the way for democratic self-government within nation-states. But in the here and now, we already have circulation of art, ideas, and opinions around the world. The freedom to participate in this circulation of ideas and opinions has independent value, regardless of how international political configurations eventually turn out.

Third, a cultural account has consequences for how governments design and regulate telecommunications architectures. Global public discourse presupposes a certain kind of communications architecture, one that facilitates the growth, spread, and circulation of public discourse, not merely within the borders of a country, but beyond it. Cultural democracy requires that state regulation of communications media must consider the value of *global* exchanges of ideas and opinions and the health of the *global* system of telecommunications as opposed to communications with and among members of a single nation-state.

To be sure, democracy-based theories of free speech may also be deeply concerned with how nation-states regulate telecommunications architectures to limit discourse from abroad. It follows from Meiklejohn’s model, for example, that the public must have free access to ideas and opinions from outside the country in order to be well-informed about issues of governance; public issues inevitably concern the world beyond the nation’s borders. It follows from Post’s model that the public must be able to participate in an exchange of ideas and opinions with people in other

---

<http://eipcp.net/transversal/0605/fraser/en> [perma.cc/WME2-69C3].

<sup>108</sup> See generally NEIL WALKER, INTIMATIONS OF GLOBAL LAW (2014) (describing the emerging idea and practice of global law).

countries in order to develop public opinion within a single nation. If the state deliberately restricted information from abroad, this would interfere with the processes of communication that produce national public opinion.

Nevertheless, a state might have reasons to regulate communications architectures in ways that do not seriously undermine its democratic legitimacy but nevertheless impose burdens on public discourse in other countries, and on global public discourse generally. Assuming that people within the nation-state still can communicate freely with each other, and still have access to information and ideas from abroad, democracy-based accounts of free expression might have relatively little to say about these forms of regulation.

Why is this? Democracy-based accounts of free expression worry about how freedom of speech might ensure the success or the legitimacy of democracy in a single nation-state, not in the world as a whole. Democracy-based accounts may value global public discourse, but only instrumentally, in terms of how it benefits self-government within a single country. Hence their focus is inevitably parochial.

Working to promote the free flow of information *outside* the United States might assist an informed public in the United States. It might help give people within the United States a warranted belief that American officials will be responsive to their concerns. But then again, it might not. Perhaps more important, the beneficial effects on American public discourse gained from forswearing regulation that affects *other* countries might be relatively small. They might be sufficiently small that it makes sense for the state to pursue other valuable goals that also promote self-governance and democratic legitimacy within the United States.

The structure of digital communications is a global public good. It includes universal standards for the transmission of information: a global domain name system that makes it possible for people to locate and communicate with different sites (like Google.com); servers located throughout the world that copy and retransmit content to promote the smooth flow of information and avoid bottlenecks; and an international network of telecommunications conduits through which information flows. The Internet also facilitates the creation of new software platforms (like Facebook or YouTube) operating systems (like iOS or Android) and applications that allow businesses, civil society organizations, and end-users to innovate freely as long as they can build on top of the Internet's existing hardware and protocol layers. Finally, the Internet allows for (but does not require) systems of secure communications (for example, through encryption) that protect privacy and security within nations and across borders.



Democratic nation-states might want to regulate or alter this structure in ways that promote their own authority and legitimacy—including their own *democratic* authority and legitimacy—at the expense of the global public good of cultural exchange through the Internet. Here are five examples of how this might occur, all of which are happening today:

1. Countries may be worried about surveillance from other countries, (For example, European countries are worried about spying by the United States, and vice versa.) Therefore they might try to reconfigure telecommunications architecture to try to keep Internet communications within their country and data storage localized so that information flows do not cross into other countries where they might be captured or collected. Even when data localization succeeds, it can undermine the flow of Internet traffic in other countries.<sup>109</sup>
2. Countries might try to alter the global domain name system as it operates within their country in order to promote national security and prevent theft of intellectual property. This may undermine the operation of the domain name system not only in their own country, but in other countries as well.<sup>110</sup>
3. Countries might impose obligations on local telecommunications companies, search engines, and online service providers to filter or block information that is illegal within their country. Examples are laws that require infrastructure owners to search for and block content alleged to violate local intellectual property or privacy laws.<sup>111</sup> (A recent example is the recognition within the European Union of a “right to be forgotten” directed against and administered by search engine companies.)<sup>112</sup> In the process, countries may make it more difficult to share and access information, not only for people

---

<sup>109</sup> See Anupam Chander & Uyên P. Lê, *Data Nationalism*, 64 EMORY L.J. 677, 680 (2015) (“By creating national barriers to data, data localization measures break up the World Wide Web, which was designed to share information across the globe.”).

<sup>110</sup> See Mark Lemley, David S. Levine & David G. Post, *Don’t Break the Internet*, 64 STAN. L. REV. ONLINE 34, 34–35 (2011) (discussing the effects of proposed legislation that would allow government to alter the domain name system to protect intellectual property rights).

<sup>111</sup> See Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2309–11 (2014) (discussing the phenomenon of collateral censorship).

<sup>112</sup> Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, ¶¶ 88, 99 (May 13, 2014) [http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=152065&occ=first&dir=&cid=667631](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=152065&occ=first&dir=&cid=667631) [perma.cc/A6RL-9BRJ] (ordering Google to establish procedures for delisting of articles).

within the country but also people in other countries to whom the country's laws do not apply.<sup>113</sup>

4. Countries might require privately owned telecommunications companies to assist in government surveillance of people in other countries and to maintain strict confidentiality about this cooperation.<sup>114</sup>
5. Countries might seek to build backdoors into telecommunications facilities and software encryption programs to facilitate otherwise lawful foreign intelligence surveillance or criminal investigations.<sup>115</sup>

A recent example is the FBI's attempt to require Apple to create new software tools that will allow law enforcement officials to gain access to information on Apple iPhones.<sup>116</sup> These changes will affect information security not only within the United States, but in any place around the globe where Apple's products are used and sold.<sup>117</sup>

In other work, I have described these techniques for controlling Internet infrastructure as “new-school” speech regulation, as opposed to the “old-school” model of direct civil fines, criminal penalties, and prior restraints directed against individual speakers.<sup>118</sup> Many aspects of “new-school” speech regulation should offend democracy-based theories of freedom of speech. But the theory of democratic culture helps us focus on features of “new-school” speech regulation that undermine the global public goods of Internet freedom. In democracy-based theories, one has to show that a nation's Internet regulation harms self-government within that nation-state. In a theory of cultural democracy, by contrast, one need only

---

<sup>113</sup> See Balkin, *supra* note 111, at 2314 (explaining that notice and takedown rules affect people in other countries).

<sup>114</sup> See *id.* at 2329–35 (describing the example of gag orders accompanying national security letters).

<sup>115</sup> See David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶¶ 42–43, 60, U.N. Doc. A/HRC/29/32 (May 22, 2015), [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A.HRC.29.32\\_AEV.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A.HRC.29.32_AEV.doc) [perma.cc/XHB8-7GX2] (criticizing government-mandated backdoors for their effects on freedom of speech).

<sup>116</sup> Alina Selyukh & Camila Domonoske, *Apple, The FBI and iPhone Encryption: A Look at What's at Stake*, NPR (Feb. 19, 2016), <http://www.npr.org/sections/thetwo-way/2016/02/17/467096705/apple-the-fbi-and-iphone-encryption-a-look-at-whats-at-stake> [https://perma.cc/8UKU-A9QN].

<sup>117</sup> Julian Sanchez, *This Is the Real Reason Apple Is Fighting the FBI*, TIME (Feb. 18, 2016), <http://time.com/4229601/real-reason-apple-is-fighting-the-fbi/> [https://perma.cc/T9VK-VQBL] (“[I]t's a fight over the future of high-tech surveillance[ and] the trust infrastructure undergirding the global software ecosystem . . .”).

<sup>118</sup> Balkin, *supra* note 111.

show that Internet regulation harms the global exchange of information, art, opinion, and ideas.

#### CONCLUSION

The point of free speech theory, or indeed, any theory of constitutional rights, is to help us better understand our constitutional commitments in changing circumstances. In the past thirty years, the political economy of speech has been utterly transformed, from systems of mass communication in which few can speak, to networks of digital communication in which many can participate. Yet free speech theory has changed surprisingly little.

At the same time, some of the most pressing questions of free speech theory have changed. They no longer concern communist sedition, dirty movies, and civil rights picketing. Instead, they concern attempts by governments to control and spy on the infrastructure of digital communication, and attempts by private parties to bestow constitutional protection on market conduct, and turn the First Amendment into a general-purpose shield against government regulation.

Thus, two key problems of free speech today are (1) “new-school” speech regulation of digital infrastructures; and (2) the complicated relationship between freedom of speech and the regulation of businesses which deal, in one way or another, with information production and information infrastructures, in fields ranging from food and drug law to professional conduct to telecommunications policy to securities regulation.

In this world, the concepts of democratic culture and public discourse may prove especially valuable as intellectual tools. The concept of democratic culture helps us understand the “new-school” speech regulation of the digital infrastructure. The concept of public discourse helps us understand the proper relationship between market activity and First Amendment protection. Together, these ideas can help us navigate the free speech issues of the present age.

