Book Review

Democracy, expertise, and academic freedom: a First Amendment jurisprudence for the modern state

Robert C. Post
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In his brief, clear, elegantly written book, Robert Post offers an analysis of the relationship between the values and purposes of the First Amendment of the US Constitution and the practices that create and sustain disciplinary knowledge. Along his work, the author offers us not only a sharp insight into what might be considered a tension between the First Amendment and disciplinary knowledge, he also gives us the analytical tools to understand and, as he claims, to reconcile these two values. Some of the analytical tools are the distinctions between democratic legitimacy and democratic competence, and between constitutional coverage and protection[1]; and the elucidation of key concepts, such as public discourse, academic freedom, and university goals, between others. In order to carry on this endeavor the author proposes us to use the methodology of reflective equilibrium. Using the well-known method advanced by John Rawls, Post analyzes a rich set of US judicial decisions.

The book contains an introduction and three chapters. Each of them is accompanied by a rich and very informative set of notes. In the introduction, the author advances the program of the book and puts forth the main ideas that will be at play during his research. According to the author there is, at first sight, a tension between, on the one hand, the values and purposes of the First Amendment regarding freedom of speech and, on the other hand, the production of disciplinary or expert knowledge. The First Amendment establishes that "Congress shall make no law [...] abridging the freedom of speech". According to what seems to be the US Supreme Court standard

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[1] A distinction the author borrows from F. Schauer. See (Schauer, 1981).

interpretation, the purpose of the First Amendment is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail".[2] Even if the idea of a marketplace of ideas has been criticized[3], the author's interest is to inquire into "the relationship between the marketplace of ideas and the production of expert knowledge". The First Amendment states the egalitarian premise that every person is entitled to communicate his or her own opinion and a marketplace of ideas implies that people's discourse cannot be regulated based upon its content. On the contrary, the creation and maintenance of expert knowledge requires the observation of norms and practices of a discipline[4]. According to Post, these norms and practices regulate the autonomy of individual speakers to communicate. Not all discourses can make their way through academia.

In other words, the intent of the State to regulate within public Universities the speech of an expert would seem illegitimate under the First Amendment. However, disciplinary speech is by definition a regulated speech; regulation is necessary in order to produce reliable knowledge.

Disentangling this puzzle requires to offer a clear analysis of the values behind the First Amendment and expert knowledge. The first step is taken in Chapter one, where the First Amendment is read trough the value of democratic legitimation.

The First Amendment establishes "the doctrinal tests and standards that courts use to evaluate the constitutionality of government regulations" (Post, 2012, p. 1). Within this evaluation we should distinguish, following Schauer (Schauer, 1981, pp. 267-270), between constitutional coverage and protection. In Post's version *coverage* (or *scope*) refers to the kinds of government regulations subjected to the tests whereas *protection* refers to the content of those tests.

There are, according to Post two ways of determining the coverage of the First Amendment. On the one hand, we may observe which natural properties of the world allow us to identify speech, and to distinguish it from other nearer phenomena. On the other hand, we may articulate the purposes of the First Amendment and then we may develop a First Amendment doctrine in ways that

[2] This interpretation follows Holmes' dissent in *Abrams v. United States*.

[3] See (Baker, 1989) and (Schauer, 1982).

[4] Post defines expert or disciplinary knowledge as the "knowledge that is constantly expanding through speculation, observation, analysis and experiment" (Post, 2012, p. ix). Below I say something more about this definition.

serve those purposes.

According to our author the first strategy is flawed. The problem with this strategy is that even if we can identify paradigmatic examples of speech, it is very difficult to abstract from them some systematic principles. For example, Thomas Emerson has claimed that the property that allows us to distinguish speech from action is "communication of ideas". But it won't do the job; there are actions that clearly communicate ideas (like a terrorist act) that are not covered by the First Amendment.

According to the second strategy, Post's favorite, the coverage of the First Amendment must be determined by developing a doctrine that best serves First Amendment's purposes. That is to say, we need first to identify the First Amendment values and purposes and then we must identify those forms of conduct that should be classified as "speech" in order to realize the distinctively First Amendment values and purposes. Besides, the identification of the latter does not depend upon the identification of any natural thing like "ideas" or "speech as such". The construction of the purposes follows John Rawls' reflective equilibrium. In substance it requires to consult in a proactive way the actual shape of entrenched First Amendment jurisprudence.

It seems to me that Post's dismissal of a purpose independent analysis of the concept of "speech" is in need of further argument. The way in which Post distinguishes between the two strategies seems to conflate purpose independence analysis with a definition in terms of necessary and sufficient natural properties. However, a different kind of purpose independent analysis is possible and, in some cases, desirable[5]. For instance, we might seek to analyze speech in terms of a cluster of typical properties[6], none of them either necessary or sufficient. It is true that this kind of analysis would not settle every disputed instance, but even on those cases the discussion will be about typical properties and not about purposes. Given the possibility of this kind of analysis, a strategy that reopens the dispute about purposes should be further justified.

Leaving aside this methodological point, Post discusses three major purposes that have been associated with the First Amendment.

1. Cognitive purpose: Advancing knowledge and discovering truth.
2. Ethical purpose: Assuring individual self-fulfillment, i.e. the realization of

[5] We may add that it is also necessary under Post purpose based strategy.

[6] Along the line of Searle's and Schauer's proposals. See (Searle, 1983, pp. 231-261) and (Schauer, 2015, pp. 23-42).

each person character and potentialities as a human being.
3. Political purpose: Facilitating the communication processes necessary for successful democratic self-governance.

After discussing each of these purposes, Post claims that only the third one is a good interpretation of the First Amendment. In the first place, a marketplace of ideas does not necessarily benefit knowledge[7]. While in the marketplace of ideas every opinion has its place, the production of knowledge[8], on the contrary, is not egalitarian. In order for knowledge to be reliable it must be submitted to rules; that is to say, it must be possible to distinguish between correct and incorrect theories, hypotheses and ideas. This kind of content regulation is incompatible with what seems to be the purpose of a marketplace of ideas. On my view, Post's argument against a cognitive purpose for the First Amendment falls short of its target. The argument seems to be that advancing knowledge cannot be the purpose of the First Amendment because expert knowledge is knowledge regulated by disciplinary norms and that kind of regulation is incompatible with the notion of a marketplace of ideas that characterizes the First Amendment. But in order to show that advancing *knowledge* is not the purpose of the First Amendment it is not sufficient to prove that advancing *expert knowledge* is not (otherwise the argument turns out to be utterly circular). The difficulty is pressing if we take into account deliberative conceptions of democracy. Leaving aside the differences between them and the difficulties of their own, these positions claim that democracy is the best way of advancing *practical knowledge*[9].

In the second place, says Post, even if autonomy has deep roots in American constitutionalism, there is much speech connected to the achievement of individual self-fulfillment (autonomy) that is not protected by the First Amendment (such as private defamatory speech or some professional speech pronounced in private professional relationships)[10]. That is why the purpose cannot be ethical.

[7] Post points out, however, that "the marketplace of ideas theory captures something essential to growth of knowledge", i.e. that "knowledge cannot grow, and truth cannot advance, unless the law allows as to venture our own ideas and reasons". (Post, 2012, p. 6).

[8] Even under Post's pragmatist understanding of knowledge. That is, following Gibbard, knowledge is conceived of, not as justified true belief, but as a judgment on which, under some standard, we can rely on. See (Gibbard, 2003, pp. 226-227).

[9] Authors defending this view are, between many others, (Nino, 1996) and (Martí Mármol, 2006).

[10] Such as the dentist example, proposed by Post. The First Amendment does not protect the speech of a dentist that gives her patient, in a private professional encounter, an advise to remove the patient amalgams because the mercury the are made of can leach out an be absorbed by the body, despite the indication of the American Dental Association that they are not dangerous. If the protection of autonomy were the purpose of the First Amendment, that speech would be, Post claims, protected.

Thus, according to Post, a marketplace of ideas is better understood as serving the political purpose of protecting the free formation of public opinion[11], which is a necessary condition for the realization of democracy.

If we were to reduce democracy to nothing else than the principle of majoritarianism, we would have a narrow understanding of public discourse according to which it is limited to speech that informs voters about matters pertinent to electoral politics. But this is, Post claims, an inadequate understanding of democracy. Democracy should be understood as essentially associated with the value of self-government; which means that those who are subject to law experience themselves as the authors of it; and "to instantiate this value it is necessary to render government decisions responsive to public opinion and by guaranteeing to all the possibility of influencing public opinion" (Post, 2012, p. 17). It requires limiting State's interference in the content of discourses that reach the public arena. The object of the First Amendment reveals clearly now. It protects public discourse because it is indispensable to guarantee the openness of the processes by which public opinion is constantly shaped[12]. Therefore, the distinction between speech and action, and the coverage of the First Amendment are to be determined by a normative inquiry establishing which kinds of behavior are needed in order to guarantee the free formation of public opinion.

At this point experts' discourse enters into the picture. Scientists or academics in general use language to communicate and to produce their discoveries, their theories, and their knowledge. The status of reliability that this knowledge had acquired in our societies is mostly due to the fact that its communication and production are highly disciplined. To be disciplined, according to Post, means to be founded upon social conventions. "Conventions concerning how the knowledge is to be produced, about what may be questioned and what may not, about what is normally expected and what counts as an anomaly, [and] about what is to be regarded as evidence and proof"[13].

With this concepts in mind the initial puzzle can now be precisely restated. The First Amendment serves the value of democratic legitimation by preventing government from imposing any conventions, methods, and truths

[11] As in *Thornhill v. Alabama*, 310, U.S. 88, 104 (1940): "Securing of an informed and educated public opinion with respect to a matter which is of public concern".
[12] *Rosenberg v. Univ. of Va.* 515 US 819, 831 (1995).
[13] Post quote from (Shapin & Schaffer, 1985, p. 225).

within public discourse. Yet, the very production of expert knowledge requires laying down and enforcing those conventions, methods and truths.

The enquiry continues in chapter two. Post claims that it is valuable for public opinion to have some cognitive quality. That is to say, even if every opinion must be able to make its way into the public sphere, it would be better to increase the amount of knowledge carried on by those opinions into the public sphere. Here is where the idea of what Post calls "democratic competence" comes into play. Democratic competence relates to the cognitive empowerment of individuals within public discourse. According to Post, cognitive empowerment is necessary both for intelligent self-governance and for the value of democratic legitimation. In order to increase the amount of knowledge at play in the public sphere, it is necessary to give people the possibility of having access to reliable knowledge. Clearly enough, due to the fact that public opinion lacks the indicia of reliability that defines knowledge; the cognitive empowerment depends, at least in part, on citizens' access to disciplinary or expert knowledge.

We have here another way of framing the initial puzzle or tension. While democratic legitimation requires that the speech of all individuals be treated with toleration and equality; democratic competence requires some speech to be subject to a disciplinary authority establishing the conditions of its reliability. In Post words, an authority that "distinguishes good ideas from bad ones" (Post, 2012, p. 34). Only if this kind of reliable speech is available, it is possible to achieve the cognitive empowerment of the public arena. That is to say, democratic legitimation requires that all discourses make their way to the public sphere; the State cannot classify them on the basis of their content. Instead, democratic competence requires that the information that arrives to citizens be of a certain quality. In Post words: "Entrenched First Amendment standards do indeed protect the flow of information so as to enhance the quality of public opinion decision-making. These standards are oriented to the rights of audiences to receive information rather that to the rights of speakers to communicate. They thus display properties that are inconsistent with the First Amendment rules that govern public discourse" (Post, 2012, p. 42 and 43). How are we to reconcile these two requirements?

On this regard, the first step in Post's solution is to insist on the distinction between public and nonpublic spheres of discourse. Thus, the key concept in understanding the coverage of the First Amendment is public discourse, defined by Post as "forms of communication constitutionally deemed necessary

for formation of public opinion" (Post, 2012, p. 15). Within public discourse the value of democratic legitimation trumps that of democratic competence[14]. In the sphere of public opinion speech cannot be disciplined, because the egalitarian requirement wins over the cognitive requirement. However, on the basis of his reading of some US judicial decisions, Post claims that that is not the case outside the sphere of public discourse. There are spheres, such as the commercial one, where the value of speech "lies in the information it carries [so that] the state can engage in content discrimination to regulate and suppress the circulation of 'misleading' information" (Post, 2012, p. 41)[15]. In those non-public spheres, democratic competence requires the State to regulate discourse in order to avoid that wrong information arrives to citizens. This need justifies a further difference: whereas democratic legitimation also forbids compulsory speech, democratic competence permits the States to compel speech in those cases where it is necessary to have correct information.

Post then builds his argument over the analogy between commercial and expert information within non-public spheres of discourse[16]. As in the case of commercial speech, democratic competence requires the state to control that speech presented as expert accomplishes with disciplinary norms and practices. With one difference, while behind the commercial speech doctrine there is the *presupposition* that in most cases speaker and audience are in an equal position, this equality is absent in the case of experts. This difference is manifest in the absence of First Amendment coverage in cases of professional malpractice. The rationale of this is that protecting professional malpractices would allow for the circulation of wrong information.

One further and important difference between commercial and disciplinary speech is the one related to the identification of the disciplinary standards necessary for establishing the reliability of expert knowledge. In order to assess the reliability of a speech presented as expert knowledge the judge must turn to the standards validated within each discipline. That is why, according to Post "judicial efforts to safeguard the value of democratic competence ultimately depend upon a constitutional sociology of knowledge" (Post, 2012, p. 55).

At this point, it seems to me that sociology of knowledge would also require

[14] Even if, as Post notes, democratic competence does not remain completely out of the picture within public discourse. (Post, 2012, p. 37).

[15] Following the doctrine of the US Supreme Court in *Va. State Bd. of Pharmacy*, 425 U.S.

[16] Within public discourse democratic legitimation shield the expert who whish to participate in the formation of public opinion, even in matter related to her area of expertise. See (Post, 2012, pp. 43-44).

introducing important distinctions inside what Post calls "disciplinary or expert knowledge". Post has defined it as "knowledge that is constantly expanding through speculation, observation, analysis, and experiment" and he has defined "knowledge" in a pragmatist vein as judgment on which we can rely on (Post, 2012, p. 7). We may conclude that the reliability of the judgment depends on the fact that it is based on speculation, observation, analysis and experiment. Furthermore, this base justifies the claim according to which this kind of knowledge cognitively empowers public opinion. This argumentative path seems to me at odds with what happens in the legal domain. Why should we include legal discourse within expert knowledge so conceived? On the one hand, legal scholars do not carry on the kind of activities that according to Post define expert knowledge. Even if in Law Schools we may found offices with names like "laboratory" or researches claiming to have "observed" some legal phenomena, it is clear that the status of these activities is very different from what scientists frequently do. I am not making here an argument about the definition of expert knowledge or science. The relevant point is that legal discourse, even within academia, is political in nature. Post's book is a clear example of that, in the sense that he advances an interpretation of the First Amendment based on a view about constitutional purposes, precedent interpretation and democratic values that are highly controversial and political in nature. Notice that the political nature of legal discourse is not a trivial problem. It touches the core point of distinguishing between democratic legitimation and democratic competence.

To put it differently, I am not claiming that legal scholars are not experts; my point is that their expertise falls on political matters and is not based on conventionally agreed methods. These circumstances seem to render the communication (and production) of their expertise a matter of democratic legitimation and not democratic competence.

In the third and last chapter Post addresses the issue of the extension of First Amendment coverage to the *creation* of expert knowledge. This question is clearly linked to the analysis of academic freedom. Against what seems to be the common view within US jurisprudence, Post claims that it is democratic competence, and not democratic legitimation, that requires protecting academic freedom. The existing US jurisprudence has sought to base the protection of academic freedom in democratic legitimation claiming that university classrooms are the best example of a marketplace of ideas. On the contrary, Post claims that once we notice that discrimination between good and

bad ideas is essential to the university's goals we have to deal with the fact that it is incompatible with the purpose of a marketplace of ideas. Academic freedom protects scholarly speech only when it complies with "professional norms", and democratic legitimation protects speech regardless of its compliance with any norm.

Post is interested here in classroom lectures. Remember that we are here outside the sphere of public discourse where the First Amendment applies on the basis of democratic legitimation. In classrooms, the speech of the professor is not a public discourse, it is the expression of a professional relationship between professor and students; analogous, according to Post, to the relationship between lawyers and clients.

Notwithstanding these similarities Post calls attention to some differences between lectures and professional speech.

a) Doctors and lawyers do not possess academic freedom, they are required to transmit existing pertinent expert knowledge to patients and clients. Their job is more about conservation of existing expert knowledge. Academic freedom, on the contrary, provides ample room for experimentation and speculation. Scholars are required to create and to breed expert knowledge.

b) Academic freedom refers not only to the freedom of faculty members, but also to the freedom of universities as institutions. This institutional focus is absent in the case of doctors and lawyers. Universities are defined as institutions that foster knowledge for the public good. They define, nourish and reproduce disciplines and, therefore, they are the sources of reliable disciplinary knowledge. These institutions facilitate the application and improvement of professional scholarly standards to advance knowledge for the public good. In Post's words, they are not "proprietary institutions" that is to say, institutions that subsidize the promotion of the opinion of their owners.

The last issue under analysis is the relationship between individuals and institutions regarding academic freedom. Is there a tension between the individual freedom of the scholar and the institutional freedom of universities? According to Post, once we understand correctly the value of academic freedom we will be able to see that there is no real tension. Both freedoms can be reconciled if we note that academic freedom is there to realize democratic competence based on disciplinary standards. That being the case, universities must defer to peer judgment of faculty when making decisions about academic competence. That is why proper professional scholarly standards determine the boundaries of academic freedom.

This closing argument is quite promising. It opens a further line of research about the collective dimension of expert knowledge. A dimension hinted at in the book but left underexplored.

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