

CHAPTER ONE

Introduction: The First Amendment and American Democracy

The assertion that democracy and free expression are inextricably intertwined in a symbiotic relationship should hardly be controversial. Democracy could not exist in any meaningful sense absent a societal commitment to basic notions of free expression, nor could free expression flourish in a society uncommitted to democracy. It is therefore not surprising that among the most prominent and widely accepted theories of the First Amendment are those that explain the Free Speech Clause as either catalyst for or protection of democracy itself.¹ These democratic theories of the First Amendment posit that speech receives constitutional protection because it is essential to a functioning and legitimate democracy. Different democratic theories of the First Amendment suggest competing explanations of exactly how free speech advances or defends democracy. Some suggest that free speech facilitates the informed decision making that self-rule requires.² Others argue that free speech furthers democracy by allowing individuals to recognize themselves as self-governing.³ Still others simply conclude, without elaboration, that democracy would be “meaningless” without the freedom to discuss government and its policies.⁴ Every democratic theory of the First Amendment, though, in one way or another views free speech as a means to a democratic end.

Of course, democracy itself is an amorphous concept, both historically and theoretically.⁵ Despite the concept’s simple translation to “rule by the people,” political theorists since Aristotle have advanced competing theories of democracy that are inconsistent, if not contradictory.⁶ To say that the First Amendment advances “democracy” without more, then, is to say much less than First Amendment scholars often assume.⁷ Still,

“democracy” is not so empty a referent that it is impossible to evaluate whether so-called democratic theories of the First Amendment are indeed democratic.

The goals of this book are threefold: first, to demonstrate that the form of democratic theory that appropriately characterizes the American governmental system—both normatively and descriptively—is adversary democracy; second, to establish the inescapable linkage between that form of democracy and the philosophical foundations of the First Amendment right of free expression; and third, to explore the implications of the framework for specific issues of free expression of current importance. Specifically, doctrinal issues to be examined include the protection of commercial speech, the constitutional right to anonymity, and the validity of the so-called anticorruption principle as a limitation on the constitutional right of free expression in the context of the electoral process.

Any democratic theory must encompass two principles. First, democratic theories must respect the principle of self-rule. They may differ about what it means, precisely, for the people to govern themselves, but they must at least accept the basic premise that democracy requires self-government.⁸ Otherwise, democracy would incoherently collapse into authoritarianism. Democratic theories, as a result, must respect the principle of epistemological humility. In other words, they must assume that no determinate “truth” or “good” exists, apart from what the electorate or those accountable to it determine. Democratic theories must therefore commit such substantive valuations to the people to decide through democratic procedures.⁹ Epistemological humility is a direct outgrowth of the principle of self-rule: The people cannot be self-governing if some external concept of truth or goodness coercively determines their decisions.

Second, democracy must mean that government follows the self-governing decisions of the people—either because the people themselves make and implement their decisions or because the people’s elected representatives are accountable for doing so. Again, democratic theories can differ over how exactly this occurs, particularly in a representative democracy. The point, though, is that democracy must at least assume that authority is “controlled by public opinion, not public opinion by authority.”¹⁰ This second principle overlaps with the first: Public opinion must be autonomous from government to check government. As a result, any democratic theory must prohibit the government from managing public opinion, whether by overt coercion or by the indirect manipulation that comes with forcing a people to be ignorant. In the words of Thomas Jefferson, “If a nation

expects to be ignorant and free . . . it expects what never was and never will be."¹¹

A number of respected free speech theorists have understood democratic autonomy in its collective sense. Alexander Meiklejohn, for example, believed that democracy is simply a "compact" among individuals to govern in pursuit of the common good.¹² Robert Post likewise begins with the premise that "democracy is not about individual self-government, but about collective self-determination"¹³ and ends with the conclusion that "democracy requires individual autonomy only to the extent that citizens seek to forge 'a common will, communicatively shaped and discursively clarified in the political public sphere.'¹⁴ Thus, both theorists ultimately understand democracy largely as a cooperative pursuit in which individuals collectively "plan[] for the general welfare"¹⁵ or "forge a common will."¹⁶ It is therefore appropriate to characterize each theory as positing a "cooperative" ideal of democracy.

Yet, as much as democracy includes this potential for societal cooperation, it must also embrace the inevitability of competition, among both competing ideologies and competing interests. For democracy to reflect both the political realities of a large, heterogenous, and pluralistic society and the normative values that underlie the precept of self-government, it must be grounded in the centrality of diversity and potential competition among the backgrounds, statuses, values, needs, and interests of the citizens. The assumption that all of these competing backgrounds, values, needs, and interests may be forged into a cooperative pursuit of some notion of the common good is quixotic at best and disingenuously manipulative at worst.

In contrast to these collectivist theories of democracy, the theory of adversary democracy both acknowledges the inevitable existence of conflict among competing interests as a descriptive matter and embraces its pluralism and diversity as a normative matter. This does not necessarily mean that adversary democracy categorically rejects the value of cooperation. The key cooperative element inherent in adversary democracy recognizes the need for peaceful and orderly processes by which these often competing needs, values, and interests may be resolved. Indeed, to deny or ignore these individual needs, interests, and values would be to deny the individuality and integrity of the citizens, thereby rendering the democratic process a counterproductive exercise. At its core, then, American democracy involves an ordered form of adversary process, in which citizens must be allowed to determine for themselves what governmental choices will

improve their lives or implement values they hold dear and then to seek to persuade others to accept their views.

Contrary to the cooperative ideal of democracy, this book adopts a notion of representative government built on the concept of adversary democracy, drawn from modern political theory. Based on the premise that democracy at its core involves a competition among adverse interests, this book argues that the purpose of democracy is to guarantee individuals the opportunity to seek to affect the outcomes of collective decision making according to their own values and interests as they understand them. The book therefore concludes that a valid democratic theory of the First Amendment must be construed to reach all speech that allows individuals to discover their personal needs, interests, and goals—in government and in society at large—and to advocate and vote accordingly.¹⁷ Individuals' free speech rights may therefore not be limited or excluded from the scope of the constitutional guarantee either because the speaker seeks to advance her own personal interests rather than those of the public at large or because the speaker seeks to exercise her right in a competitive, rather than a cooperative, manner. It is true, of course, that no First Amendment theorist would actually exclude from the constitutional guarantee *all* expression that fits this description. Many scholars who would exclude from the First Amendment's reach certain expression because of its selfish motivation readily extend protection to equally self-promoting expression in other contexts.¹⁸ But that fact is itself a symptom of the pathology that inescapably flows from theorists' failure to recognize the universality of adversary democracy as the foundation of the constitutional protection for free expression.¹⁹ It is the *selective* exclusion of categories of expression because of their adversary or self-promotional nature that underscores the inherently irrational (or on occasion, ideologically manipulative) nature of the more communitarian or cooperative theories of free expression.²⁰

Those free speech scholars who have shaped democratic theories of free expression have almost universally viewed democracy in the cooperative or collectivist sense. In contrast, this book seeks to provide a global alternative to the collectivist democratic visions of these scholars. The position taken here is that to provide expression with the necessary level of protection, free speech theory must be shaped in accordance with the precepts of adversary democracy. The common linkage in the mistakes of prior theorists of democratic free speech is their failure to recognize the central role that adversary democracy both should and does play in the American political and constitutional structures. The adversary theory of democracy

emphasizes individual autonomy as theoretically and practically interwoven into the processes of collective self-government. Based on the adversary theory of democracy, this book proposes a new democratic theory of the First Amendment—one very different from those proposed to date by leading free speech theorists.

In the chapter that follows, the book explores the theoretical underpinnings of the concept of adversary democracy, explains its centrality to American democratic theory, and asserts the inherent symbiotic intersection of adversary democracy and the theory of free expression.²¹ Chapter Three critically examines the free speech theories of the two leading cooperative democratic theorists of free expression, Robert Post and Alexander Meiklejohn. The chapter explores the significant flaws in both of their theories flowing from their failure to recognize the centrality of adversary democracy in the modern theory of free expression.²² In Chapter Four the book applies the First Amendment theory of adversary democracy to commercial speech. The chapter argues that free speech theorists' opposition to the extension of full First Amendment protection to commercial speech because of its inherently selfish motivation improperly ignores the inherently adversary and self-promotional nature of much noncommercial expression, which has traditionally been extended full constitutional protection.²³ Chapter Five critically examines the so-called anticorruption principle, which seeks to rationalize wide-ranging restrictions on self-interested political activities. The chapter argues that the core premises underlying the anticorruption principle are fundamentally inconsistent with both the normative foundations of the American democratic system and well-accepted political practice. Chapter Six recognizes the need for qualifications on the First Amendment right in an effort to avoid the potential pathologies that potentially flow from a commitment to adversary democracy as the political foundation of free expression. The chapter proposes imposition of strict limitations on any First Amendment-based right of speaker anonymity, so that recipients of the expression will be able to discount appropriately for speaker bias or interest.²⁴ All of the chapters are linked by their ultimate reliance on the concept of adversary democracy and the democratic theory of free expression that grows out of it.²⁵