Free Speech Developments in the US

Professor Robert C. Post, Dean of Yale Law School, is widely regarded as one of the foremost scholars on the First Amendment and US constitutional law, legal history and equal protection. His writings are frequently cited in judgments, including by the Supreme Court, and the books he has authored, including the recent Citizens Divided: A Constitutional Theory of Campaign Finance Reform (2014), have had tremendous impact on free speech discourse in the United States. Dean Post sits down with co-editor, Eli Fisher, to discuss recent developments in free speech, especially in light of a new administration and newly constituted Supreme Court.

ELI FISHER: Dean Post, thank you so much for your time. We, in Australia, have a keen eye on what is happening in the United States – politically and legally. And as media and communications lawyers, we are acutely aware that developments there often precede or set the tone for similar developments here, so we are very grateful for your insights.

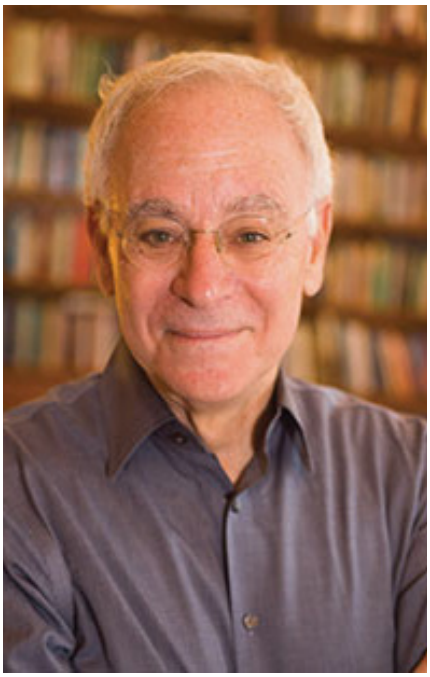
Yale Law School alumni include three current Justices of the Supreme Court (Thomas, Alito and Sotomayor) and a couple of Presidents (Ford and Clinton). Numerous US Attorneys General, Solicitors General, prominent legislators, judges, various heads of foreign states and even fictional favourites (Bruce Wayne, Josh Lyman and Rory Gilmore, if you're playing at home). In fact, the Clintons met in the Yale Law School library.

It does not seem hyperbolic to remark that the Dean of Yale Law School presides over the legal education of young women and men who will, in no small part, help to fashion the future of US civil rights and free speech. Could you tell us a little bit about your role as Dean of such an institution, and the responsibility that comes with it?

ROBERT C. POST: It is a tremendous privilege and responsibility to steward a treasured national institution like the Yale Law School. I should say that it is a little intimidating to lead a School that has been ranked #1 in the past many decades; after all, there is only one way left to move in the rankings. It requires constant attention to innovation and improvement. It requires rooting out all traces of complacency. We are continuously on the search for superb academic talent, and we are always seeking to improve our curriculum and pedagogical atmosphere. The Dean must set the agenda in these matters. As Dean, I am responsible for the fiscal management of the School. We are a self-support school, which means that we must live largely on the income we can pull together. Tuition pays for only about a third of our expenses. A little more than half comes from endowment. And my fund-raising must provide most of the remainder.

FISHER: One of the common threads throughout your scholarship is that the text of the First Amendment must be read in light of the sometimes-unwritten values inhering throughout the constitution, including individualism. Could you elaborate on what you mean by that?

POST: The First Amendment reads: "Congress shall make no law . . . abridging the freedom of speech." These words are hardly self-interpreting. At the time of its ratification, the Amendment was read primarily to prohibit prior restraints – that is, pre-publication licensing regimes imposed by the Federal government. Beginning in the 1930s, however, the Supreme Court began to apply the Amendment to subsequent punishments – that is, to the ordinary criminal law or to civil law penalties like defamation. It also began to apply the First Amendment to the states. The Court uniformly applied the Amendment to what we would now call political speech, what in my writing I have called



Professor Robert C. Post

"public discourse," which refers to efforts to change the nature of public opinion (but which may also include art and literature). Beginning in 1976, the Amendment was applied also to commercial speech, and now the scope of its application has been expanded to include vast stretches of expression, ranging from doctors/patient communication to symbolic acts like cross burning. This has caused something of a crisis in First Amendment doctrine. Communication is everywhere, yet everything cannot be converted into an issue of constitutional law. Every medical malpractice case that occurs through speech cannot be a constitutional question. It is therefore plain that we must determine the purposes we wish the First Amendment to serve, and then determine the scope of the Amendment's proper application

on the basis of those purposes. The most convincing purpose of the Amendment is to allow freedom of speech in order to operationalize democratic self-governance. The basic idea is that if we are free to participate in the formation of public opinion, and if we construct a form of government that is responsive to public opinion, we can believe that government is potentially responsive to us. The value of democratic legitimation applies to individual, natural persons, and so the vast majority of our First Amendment decisions protecting public discourse have expressed a rather deep-seated individualism.

FISHER: As you say, the relevant portion of the First Amendment restricts Congress from making a law abridging the freedom of speech. But that passage does not specify whose freedom. The Courts have, over time, created a hierarchy of First Amendment values that gives stronger protection to the free speech of a human than the free speech of a corporation. But companies are still understood to enjoy the protections of the First Amendment, including because of the value of the informational function of advertising. Does the protection of companies' speech go too far, in your opinion? What developments of late cause you particular concern?

POST: If one accepts that the purpose of First Amendment rights is to protect the communications necessary for democratic self-governance, it follows that there are two fundamentally distinct kinds of First Amendment rights. The first are speakers' rights. These rights protect the ability of individuals to participate in the formation of public opinion. Speakers' rights are deemed supremely precious and are safeguarded even from government actions that might "chill" them. The second are listeners' rights. Because we must vote for our representatives, we have the right to receive the information necessary to perform this democratic obligation. The greatest theorist of listeners' rights was Alexander Meiklejohn. Commercial corporations cannot claim speakers' rights, because they are not natural persons and hence cannot experience the good of democratic legitimation. But they can nevertheless assert the First Amendment rights necessary to transmit information to listeners. There are great doctrinal differences between speakers' rights and listeners' rights. For example, compelled speech is inappropriate with regard to the former, but not the latter. Content discrimination is inappropriate with regard to the former, but not the latter. And so on.

FISHER: Connected to the issue of a company's exercise of First Amendment rights, the regulation of campaign finance seems always to have posed problems from a First Amendment perspective. The Citizens United v Federal Election Commission case before the Supreme Court in 2010 seems to have heightened the concerns of many who are concerned about campaign finance. What is your view, and do you consider there to be a tension between democratic participation and a functioning system of representation?

POST: Self-government in the United States has taken different forms over the past two centuries. At the beginning, we were a representative republic. In the *Federalist Papers* Madison boasts of having designed a form of governance that entirely excludes the people from governmental decision-making. By the beginning of the twentieth century, during the progressive era, we imagined ourselves as a democracy, in which the people participated directly in governance. Campaign finance advocates have almost always couched their arguments for reform in terms that make sense in the context of a *representative* system. They generalize from the equality of voting, for example, to the conclusion that everyone should be able to make only "equal" financial contributions to candidates. They argue that elections should be conducted in a way that doesn't "distort" the will of the electorate. They contend that representatives should not be "corrupt," meaning that voters should exert "undue influence" on their decision-making. The First Amendment, however, does not protect speech in order to insure a representative republic. It instead imagines a democratic government in which all can participate in the formation of a public opinion that is continuously evolving and never fixed. The value of democratic legitimation means that all can participate as much or as little as they wish, because democratic legitimation refers to the subjective beliefs of each person. In ordinary First Amendment doctrine, therefore, the doctrine of equality has no place. I cannot be limited in my speech because I desire to express myself more than you, or more persuasively than you. Similarly, the doctrine of "distortion" has no place, because we know only the processes of making public opinion that are sanctioned by the First Amendment and have no objective measure by which "distortion" can be determined. From the point of view of the First Amendment, the whole point of participation in public discourse is to make government responsive, so the very concept of "undue influence" is alien. For these reasons, the justifications of campaign finance reform advocates were seriously deficient within the context of ordinary and accepted First Amendment doctrine. The Supreme Court therefore used the First Amendment to continuously strike down efforts to enact campaign finance reform. My own work is an effort to argue that the Supreme Court has been far too quick. That campaign finance reform advocates have historically used poor arguments to support their legislation does not mean that better justifications are not available. Roughly speaking, if we protect speech in order to guarantee democratic legitimation, and if democratic legitimation arises because we believe that government is responsive to the public opinion, the purpose of First Amendment rights is undercut if we lose faith that government is indeed acting in response to public opinion. If we believe that our government is

instead responsive to those who can provide campaign contributions, the very rationale for protecting freedom of speech is undermined. My work is an attempt to explicate the constitutional implications of this logic.

FISHER: Your book, *Citizens Divided*, was published in 2014. Has the recent Presidential campaign changed any aspect of your view on that matter?

POST: The 2016 election was strange, because Trump managed to gather public attention without large campaign donations. He did so because he was already a celebrity and because he combined entertainment with politics more completely than any previous politician. I hope that the Trump phenomenon is a one-off.

FISHER: While on the topic of President Trump, you published a piece earlier this year with Martha Minow, Dean of Harvard Law School, in the Boston Globe, in response to the President's tweeted attack on a judge. The tweet followed that judge staying the President's executive order banning travel for individuals from seven predominantly Muslim countries. What is different about this Administration's relationship with the legal system that prompted your and Dean Minow's concern?

POST: I have the strong sense that President Trump has little or no respect for the independence of the federal judiciary or for the rule of law. He is used to the world of business, in which managers can control those within the firm in ways that are largely unimpeded by such annoying restraints. His tendency to lash out at courts and legality is very worrisome to me.

FISHER: Speaking of Twitter, has the disintermediation between speaker and audience been positive for participatory democracy and free speech, or does an audience fundamentally require media to make sense of, or fact-check, what is said by the speaker? And is the First Amendment, now more than 225 years old, equipped to deal with such a change?

POST: You raise one of the most profound questions to arise out of the 2016 election. Democracy has always been associated with metaphors like deliberation and dialogue. But the direct relationship between electorate and candidate created by the Twitter culture undercuts these metaphors, and it seems more appropriate to populism than to democracy. Ultimately democracy depends upon a respect for difference. The value of freedom of speech also depends upon this respect. But the present culture of extreme partisanship and polarization, which seems to have consumed our public life, is antithetical to such respect. I do not know if the loss of pluralism is caused by the new Twitter culture, but it is certainly a question I would like to investigate.

FISHER: One of the features of social or digital media, and the attendant global reach of a person who wants to communicate on such platforms, is that a message can be broadcast globally to people with local sensitivities. Some particularly catastrophic incidents in recent years include the reaction by some to Innocence of Muslims and the pictorial depiction of the Prophet Muhammad in publications including Charlie Hebdo. Are certain types of speech so intrinsically harmful as to fall within a First Amendment exception?

POST: There are two kinds of harm that speech might cause. The first is contingent harm, which is harm that may or may not occur. Speech might cause a contingent harm by inciting to violence or by releasing the formula for chemical weapons. In its very earliest cases in 1919, the Supreme Court held that speech could be suppressed if it merely had the tendency to create a harm that might otherwise be forbidden. On this ground it approved the censorship of political speech opposed to the conduct of World War I. It became quickly evident that such a lax connection between speech and harm could easily be abused, and so the Court created the clear and present danger test, which requires a very tight nexus between speech and contingent harm. The second kind of harm is what you seem to allude to, "intrinsic" harm. The Court has defined "fighting words," for example, as words which "by their very utterance inflict injury." It is a puzzle how the mere utterance of words can cause harm, but the best possible explanation is that human beings are socialized by norms, the violation of which can damage personality. Speech that violates essential norms can thus by its very utterance inflict harm. All such social norms, however, are relative to specific communities. In the United States, First Amendment jurisprudence is generally understood to distinguish between the public and any particular community. Our First Amendment jurisprudence consistently forbids the enforcement in public discourse of the norms of any particular community, because to do so would be hegemonically to impose the norms of that community on a very culturally heterogeneous population. If we do not permit offensive or outrageous speech to be regulated in the United States, I very much doubt that we would or should allow the regulation of such speech to protect the sensibilities of those abroad.

FISHER: Thank you so much for your time, Dean Post. I can say with complete certainty that your comments will be valued greatly by our readers. On their behalf, thank you, and we wish you all the best.