

REPLY TO BENDER

Robert C. Post

Paul Bender has interesting and telling points to make, but a good many of them do not concern the paper I have actually published in this volume (or my work generally).

Bender cogently argues, for example, that because democratic self-governance is not “the *only* reason for protecting speech in a democracy,”¹ “public discourse . . . is clearly not the *entire* realm of constitutionally protected free expression, nor should it be.”² I quite agree with Bender on this point, and I have never anywhere argued anything to the contrary. Indeed, I explicitly observe in my contribution to this volume that the theory of the “marketplace of ideas,” which is limited to neither public discourse nor democracy, “does constitute a significant presence in First Amendment jurisprudence.”³

The position that I actually defend is quite different from that attributed to me by Bender. It is that the value of democratic self-governance is the most powerful explanation of the general pattern of First Amendment decisions (and most particularly of its nationally idiosyncratic aspects), and that democratic self-governance is the only value that can convincingly account for the specific set of decisions protecting the abusive, outrageous and indecent speech that are of most concern in this Symposium.

Bender also attacks the claim that the First Amendment does or should require “absolute protection for speech within ‘public discourse.’”⁴ Of course Bender is completely correct to reject such a silly claim. I would only observe that this claim has nothing whatever to do with anything I have written, here or anywhere else. I argue instead that the First Amendment

1. Paul Bender, *Comment on Robert C. Post's "Community and the First Amendment,"* 29 ARIZ. ST. L.J. 485, 488 (1997).

2. *Id.* at 492.

3. Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 479 (1997).

4. Bender, *supra* note 1, at 486.

suspends the enforcement within public discourse of civility rules,⁵ which I have defined as legally enforced community norms that constitute individual and collective identity.⁶

I appreciate that the distinction between regulations that enforce civility rules and other kinds of regulations is not obvious. That is why I warned at the outset of my comment that in a short presentation directed to a partly lay audience, I would not be able to spell out the full implications of my argument. By way of compensation, however, I invited readers who were interested to review several articles where I had the space to work out these ideas with some care.⁷ Bender apparently did not accept this invitation, for in these articles I explicitly discuss some of the very kinds of regulations that he now taxes me with overlooking. For example I argue at length that the regulation of false facts within public discourse does not constitute the enforcement of a civility rule.⁸

Had Bender accepted my invitation, he also would have seen that I attempt to answer many of the other (good) questions that he asks. For example I try to define the nature and boundaries of public discourse.⁹ I argue, for instance, that public discourse cannot possibly include student speech within schools, because such expression occurs within a "managerial domain" and hence is confined by the instrumental necessity of achieving given educational objectives.¹⁰ Of course Bender might reject any or all of

5. My argument includes the proviso that the First Amendment will permit the enforcement of civility rules if such enforcement is necessary to preserve "the very ability of public discourse to continue to function as a form of public deliberation." Post, *supra* note 3, at 483. Since I explicitly argue for this proviso and attempt to theorize its necessity, I am puzzled by Bender's seizing upon it as an apparent example of inadvertent internal inconsistency.

6. *Id.* at 475-76.

7. *Id.* at 474.

8. See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 649-66 (1990) [hereinafter Post, *Public Discourse*]. Some of the counter-examples proposed by Bender raise the important distinction between regulation to enforce civility rules, where harm is understood to result from the very fact of the violation of the rule, and regulation to prevent harms that are only contingently related to liability standards. On this distinction, see *id.* at 616-24; see also Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 693-721, 726-31 (1986); Robert C. Post, *Blasphemy, The First Amendment and the Concept of Intrinsic Harm*, 8 TEL AVIV U. STUD. IN L. 293, 320-24 (1988).

9. Post, *Public Discourse*, *supra* note 8, at 667-84.

10. See Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164-67 (1996); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 317-25 (1990); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1765-97 (1987) [hereinafter Post, *Governance and Management*]. The same might be said of Bender's inquiries concerning speech that occurs within town meetings and legislative bodies. I have explicitly argued that speech in such settings should not be regarded as public discourse. See *id.* at 1799-80; Robert Post, *Meiklejohn's Mistake:*

these ideas, but at least he would then have some idea of the general contours of the actual position he is concerned to dismiss.

Bender is correct to characterize my essay as advocating the position that constitutional protections for speech depend upon the social domain in which speech occurs. Bender rejects this position on the basis of three arguments. The first evokes the text of the First Amendment, which Bender reads as a "broad injunction that Congress make no law 'abridging the freedom of speech, or of the press.'"¹¹ This injunction, says Bender, is uniform; it contains no limitations or exceptions, such as my position would require.

Everyone agrees, however, that the First Amendment will permit some regulations of speech, while it will forbid others. This means that any plausible theory of the First Amendment will narrow the "broad injunction" of the constitutional text. Bender himself apparently advocates a First Amendment jurisprudence that focuses on the concept of harm, but such a jurisprudence would itself be inconsistent with Bender's textual argument. To paraphrase Bender's own language, the First Amendment does not read: "Speech that is not very harmful being constitutionally necessary, Congress shall make no law abridging the freedom of such speech." The larger point, of course, is that the constitutional text is so general, elusive and delphic that it is not of much use in any serious effort to construe First Amendment jurisprudence.

The second argument advanced by Bender turns on an empirical assertion. Bender charges that First Amendment jurisprudence does not in fact have the shape that my theory would predict. Indeed Bender claims to "have a difficult time thinking of *any* examples of speech that is protected when it is part of 'public discourse' but is not at least equally well (indeed, probably better) protected when it appears in a non-public communication on non-public subjects that have nothing to do with the 'formation of public opinion.'"¹²

This empirical argument is simply wrong. Bender himself discusses an example of speech that is better protected within public discourse than outside of it, for he acknowledges, as he must, that within public discourse defamatory statements receive "*extra* protection."¹³ As Bender undoubtedly also knows, the same could be said of speech that violates the other

Individual Autonomy and the Reform of Public Discourse, 64 U. COLO. L. REV. 1109, 1111-19 (1993) [hereinafter Post, *Meiklejohn's Mistake*]. The courts have evidently agreed. *White v. City of Norwalk*, 900 F.2d 1421, 1425-26 (9th Cir. 1990).

11. Bender, *supra* note 1, at 488.

12. *Id.* at 487.

13. *Id.* at 491.

“dignitary” torts that enforce civility rules. The tort of intentional infliction of emotional distress, for instance, is subject to strict constitutional restrictions within public discourse, but not within nonpublic discourse.¹⁴ Even in his short text, Bender indicates awareness of other examples of this phenomenon, as for instance that “lewd” speech cannot be prohibited within public discourse,¹⁵ but that it can be forbidden within the nonpublic discourse of a school.¹⁶

If Bender had given the issue a little more thought, he could have come up with innumerable other examples. Content and viewpoint discrimination, prior restraints, and administrative discretion are all strongly discouraged within public discourse, but not within managerial domains.¹⁷ The state may not set the agenda of public discourse,¹⁸ but it routinely does so for speech within managerial domains.¹⁹ Within public discourse “there is no such thing as a false idea,”²⁰ but within nonpublic discourse we do penalize false ideas (characterizing them as, for example, medical or legal malpractice). And so forth.

The third argument advanced by Bender is that because the First Amendment protects expression generally, constitutional safeguards should not depend upon the social domain of speech.²¹ Bender acknowledges, of course, that some regulations of speech are constitutionally permissible, while others are not. But he believes that these distinctions can best be captured by a First Amendment jurisprudence that focuses on harm. “It is thus the harmful *result* of speech and the culpability of the speaker in relation to that harm—not the topic of the speech or its lack of a general audience—that is the primary reason why the Constitution does not protect some speech.”²²

While this approach to First Amendment jurisprudence certainly deserves respectful attention, and while harm certainly must be an important factor in any understanding of the First Amendment, I do not believe that Bender’s approach can carry us very far. States only seek to regulate speech

14. *Compare* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), *with* *Contreras v. Crown Zellerbach Corp.*, 565 P.2d 1173 (Wash. 1977).

15. *See* *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

16. *See* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

17. *See* Post, *Subsidized Speech*, *supra* note 10, at 164-67; Post, *Governance and Management*, *supra* note 10, at 1767-809.

18. *See* *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 538 (1980).

19. *See* Post, *Meiklejohn’s Mistake*, *supra* note 10, at 1114-23.

20. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

21. For a detailed argument against this position, *see* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995).

22. Bender, *supra* note 1, at 489.

that they deem to be harmful. To be useful, therefore, a harm-based approach to the First Amendment must distinguish between harms that can constitutionally be regulated and those that cannot. A crude spectrum of harms from “greater” to “lesser” will not help much, for the concept of harm is not continuous and quantifiable in this way. We need instead some way of qualitatively distinguishing among kinds of harms.

Some efforts to supply such distinctions are simply circular, as for example when it is said that speech causing crimes can be prohibited. It is precisely the task of the First Amendment to determine which crimes can constitutionally be enforced. Other efforts to explain these distinctions are merely fatuous, as for example when Bender remarks that if certain harms were permitted to justify regulation “the ‘freedom’ of expression would become largely illusory.”²³ It is precisely the task of First Amendment theory to explain what “the freedom of expression” is and why the regulation of certain harms (but not others) is constitutionally impermissible. Obviously a theory narrowly focused on harm cannot itself do this. What is needed instead is a theory of “the freedom of expression.”

The task of any theory of freedom of expression is to explain why we protect speech. Any such explanation will have implications for what social consequences can constitutionally be recognized as harmful. False ideas are not constitutionally recognized as causing harm within public discourse because persons within that discourse are presumed to be autonomous and independent; but false ideas are deemed capable of causing compensable harms within doctor-patient relationships because persons in that context are presumed to be trusting and dependent. This difference is also why, contrary to Bender’s assertion, negligent speech “that proximately causes personal injury”²⁴ is often protected within public discourse, although it is typically regulated outside of public discourse.²⁵ The point of these examples is that any notion of harm must be at least in part theory-dependent.

It follows that harm-based accounts of the First Amendment are inherently incomplete. Without an explanation of the constitutional values served by freedom of expression, such accounts cannot comprehend the theory-dependent aspects of the concept of harm. But purely harm-based accounts of the First Amendment are also inadequate for another and more far-reaching reason. Even those harms (like murder) that may plausibly be regarded as theory-independent require assessment in light of their potential

23. *Id.* at 490.

24. *Id.* at 489.

25. *See, e.g.,* *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1037-38 (9th Cir. 1991).

impairment of relevant constitutional values. We need to weigh such harms against the effect of their suppression on constitutional purposes. We cannot conduct such an evaluation based on a purely harm-based account of the First Amendment.

At best, therefore, focusing on harm can provide only half a story. The other half must come from a fully developed theory of the purposes of the First Amendment and of the Constitution generally. I have argued elsewhere, and will not repeat those arguments here, that any such theory cannot apply uniformly over the social field.²⁶ Particular constitutional values will carry distinctive force in some dimensions of social life, but not in others. And this, fundamentally, is why First Amendment protections for speech depend upon the social domain in which speech occurs.

26. See generally Post, *supra* note 21.