

## PARTICIPATORY DEMOCRACY AS THE BASIS OF AMERICAN FREE SPEECH DOCTRINE: A REPLY

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CREATION of knowledge, as Professor Robert Post observes, requires a culture of “respect, reason, fairness, accuracy, integrity, honesty, logic, and civility.”<sup>1</sup> The responses to my opening statement exemplify these admirable qualities by fairly, accurately, and civilly engaging my argument that the core of contemporary free speech doctrine is best explained in terms of participatory democracy. I cannot in this Reply respond to every point raised against my position in each of these seven powerful critiques. Instead, in the spirit of helpful engagement set by the responses, I will focus on those arguments that most profoundly challenge my position or which reveal the need for clarification.

The responses can be concisely summarized: they deny that participatory democracy is either as powerful an explanation of the case law or as normatively appealing a value as I claim. Because I have not before had the benefit of such an incisive critique of my views (or previously encountered such a powerful challenge to Post’s similar views), I did not fully appreciate some of the problems with explaining the American free speech principle in terms of participatory democracy. At the conclusion of this Reply I will briefly address some of the normative issues raised in the responses. Since my argument hinges on the descriptive power that I assign to participatory democracy, I will focus primarily on the challenges to this claim. But before defending the merits of this claim, I first want to say a few words about why a free speech theory’s ability to explain current free speech doctrine counts in its favor.

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<sup>1</sup> Robert C. Post, *Participatory Democracy and Free Speech*, 97 Va. L. Rev. 477 (2011).

## I. WHY FIT MATTERS

Post and I have both emphasized in our opening statements how well participatory democracy explains contemporary free speech doctrine. But why, it might be asked, should this superior doctrinal fit matter to determining the best free speech theory? The answer depends crucially on precisely what one wants from a free speech theory. If one is especially interested—as I am—in bringing coherence to what otherwise appears on the surface to be largely a jumbled, random assortment of cases, the importance of a theory with good doctrinal fit is manifest. Such coherence will increase doctrine’s clarity, stability, and administrability—benefits that are particularly desirable in this area of the law. In addition, as Professor Vince Blasi aptly observes, “[T]he explanatory project introduces one kind of discipline that can stimulate normative insights and judgments that might not be forthcoming in a zero-based normative inquiry.”<sup>2</sup> Thus, emphasis on doctrinal fit in determining the best overall theory does not require, as Professor C. Edwin Baker suggests, that one be “an apologist for the status quo” or to explain the “legal correctness” of morally repugnant cases.<sup>3</sup> Confirming Blasi’s observation, my view that participation by *individuals* in the political process is the core free speech value because of the legitimacy such participation confers on the legal system provides me with a vantage point from which to explain, for instance, why the Court’s recent decision in *Citizens United v. Federal Election Commission*,<sup>4</sup> which recognized strong participatory rights by ordinary business corporations, was wrongly decided.<sup>5</sup>

The largely descriptive process of determining which theory best fits contemporary doctrine is, of course, not the only consideration for determining which theory should be deemed the best overall theory of American free speech doctrine. Overt normative critique

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<sup>2</sup> Vincent Blasi, *Democratic Participation and the Freedom of Speech: A Response to Post and Weinstein*, 97 Va. L. Rev. 531, 531 (2011).

<sup>3</sup> C. Edwin Baker, *Autonomy and Free Speech*, 27 Const. Comment. (forthcoming 2011); see also C. Edwin Baker, *Is Democracy a Sound Basis for a Free Speech Principle?*, 97 Va. L. Rev. 515, 524 (2011) [hereinafter Baker, *Sound Basis?*].

<sup>4</sup> 130 S. Ct. 876 (2010).

<sup>5</sup> See James Weinstein, *Participatory Democracy as the Central Value of Free Speech Doctrine*, 97 Va. L. Rev. 491, 501 n.53, 510 n.85 (2011) [hereinafter Weinstein, *Participatory Democracy*].

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also has a crucial role to play. A morally repugnant theory, or arguably even a merely unappealing one, should be rejected as the basis of constitutional doctrine no matter how good the theory's doctrinal fit. But what if several contending theories are each normatively appealing? This is the case, I believe, with the values informing all leading free speech theories, particularly theories based in democracy or individual autonomy. If one such theory were demonstrably more normatively appealing than all the others, it should be acclaimed the best theory, even if another theory has superior doctrinal fit. But this raises a problem: unless there is common ground for judging the relative normative appeal of these contending theories, which will rarely be the case, then it will be fruitless to argue which among several normatively attractive theories is the *most* appealing. So if doctrinal coherence and the pragmatic benefits that such coherence brings are to be given any significant weight, then among normatively appealing theories the one with the better doctrinal fit should be judged the best overall theory.

## II. DESCRIPTIVE POWER

In my opening statement, I claimed that although participatory democracy may not explain every nook and cranny of contemporary free speech doctrine, it does explain the basic pattern of the case law, particularly the distinction between rigorously protected and readily regulable expression. Because participatory democracy in my view explains this pattern far better than any other norm, I argued that this value should be viewed as the single core value animating free speech doctrine. Collectively, the responses attempt to rebut this descriptive claim by: (1) citation to cases that supposedly show a lack of solicitude for participatory interests; (2) identification of cases that rigorously protect speech having little connection with participatory interests; and (3) offering alternative explanations for the pattern of decisions.

We are dealing here not with formal logic, mathematics, or the laws of the physical universe, but rather with human-made law that has evolved over nearly a century at the hands of generations of justices, often in sharp disagreement with each other, not just about specific cases but also about the meaning and purpose of the First Amendment. It should therefore not be expected that any one

value could explain all of the cases. Still, more than a few cases that subordinate participation in the political process would undermine the claim that this value lies at the First Amendment's core. Similarly, the existence of a large amount of rigorously protected speech that cannot easily be explained as vindicating democratic participation would suggest that this value is not the exclusive core norm.

In my opening statement I made the rather bold claim that there is not a single case that contradicts democratic participation as a core free speech value. Several responses suggest that there are indeed a number of cases that, in Blasi's phrase, give democratic participation "rather short shrift."<sup>6</sup> Careful consideration of each of these cases will show, however, that none of them contradict the commitment to democratic participation that I describe in my opening statement. The responses make a better case that there are types of speech that either have been, or surely would be, rigorously protected but which seem far afield from participatory democracy. But though the protection afforded this speech may be considerable, in most cases the protection is neither as rigorous nor as consistent as the protection afforded democratic participation. This lack of rigor and consistency of protection suggest that this speech does not, as a descriptive matter, lie at the core of the First Amendment. Before turning to these two crucial substantive criticisms, however, I want first to address the objection that the term "public discourse" is not a particularly good label for speech that is highly protected for democratic reasons. Although primarily semantic, this objection has potential conceptual and doctrinal ramifications and therefore needs to be taken seriously. In responding to this objection, I will also address the related but more substantive criticism of the methodology that I endorse for determining which types of speech should be included within or excluded from the domain of public discourse.

*A. Public Discourse: What's in a Name?*

Professors Eugene Volokh and C. Edwin Baker both challenge the usefulness of the label "public discourse." This is the term that

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<sup>6</sup> Blasi, *supra* note 2, at 534.

I, along with other commentators including, most prominently, Post, use to describe speech protected because of its importance to democratic self-governance, especially individual participation in the formation of public opinion. Citing copyright-infringing speech, Volokh argues that the term is overinclusive in that it would seem naturally to include speech that I have excluded from this realm.<sup>7</sup> Baker attacks from the opposite direction by objecting that the term would not seem to include private speech that most likely would be highly protected precisely because of its importance to the formation of public opinion.<sup>8</sup>

In my opening statement I described public discourse as a highly protected domain consisting of “expression on matters of public concern, or largely irrespective of its subject matter, speech in settings dedicated or essential to democratic self-governance.”<sup>9</sup> Volokh notes that, since copyright covers works on “expressly political, religious, and moral topics, plus entertainment that implicitly conveys such ideas,”<sup>10</sup> copyright-infringing speech would, according to this description, often qualify as public discourse. But, Volokh’s response continues, since I also contend in my opening statement that copyright-infringing speech is not protected by the First Amendment, the label public discourse fails to “advance the coherence of First Amendment law and First Amendment thinking.”<sup>11</sup> It is true that the term “public discourse” does not include all of the expression that could conceivably be embraced by the ordinary use of that phrase. Terms of art, including legal terminology, however, often differ from how that term is used in ordinary language. Nor was the pithy explanation of that term in my opening statement meant to be an exhaustive definition precisely demarcating the boundaries of this highly protected domain, but rather was offered as a general outline of those boundaries.

In an evolving process by which the Court has ever more precisely defined the boundaries of highly-protected speech in service

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<sup>7</sup> Eugene Volokh, *The Trouble with “Public Discourse” as a Limitation on Free Speech Rights*, 97 Va. L. Rev. 567, 568–71 (2011).

<sup>8</sup> Baker, *Sound Basis?*, supra note 3, at 526.

<sup>9</sup> Weinstein, *Participatory Democracy*, supra note 5, at 493.

<sup>10</sup> Volokh, supra note 7, at 568.

<sup>11</sup> *Id.* at 571.

of participatory democracy,<sup>12</sup> the term public discourse has become shorthand for those types of expression that the Court has determined are essential to democratic self-governance but which do not unduly impair important governmental or private interests.<sup>13</sup> As explained in my opening statement, while speech on matters of public concern or within a setting dedicated to democratic self-governance is presumptively deemed public discourse entitled to rigorous First Amendment protection, this presumption is rebuttable. The Court wisely does not exclude speech from the realm of public discourse on an ad hoc basis, but rather does so at the wholesale level, through a process that has been dubbed “defini-

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<sup>12</sup> For example, in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court confirmed that speech on a matter of public concern in a public forum about a private person could not, consistent with the First Amendment, form the basis of an intentional infliction of emotional distress claim. *Id.* at 1216–19. While this result could have been confidently predicted from the Court’s zealous protection over the last forty years of highly inflammatory and uncivil speech on matters of public concern in settings essential to democratic self-governance, the question was technically left open in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), which involved an intentional infliction of emotional distress claim by a public figure.

<sup>13</sup> This statement is itself shorthand for a much more nuanced, variable, and often not fully articulated process by which the Court has, over many decades, constructed a domain of highly-protected speech dedicated to democratic self-governance. Contrary to Volokh’s suggestion, see Volokh, *supra* note 7, at 570, I do not contend—and the Court has not held—that a category of speech can legitimately be excluded from the highly-protected realm of public discourse just because the government can show that this type of speech will impair some important governmental or private interests. Rather, I used the term “unduly” to modify “impair,” rather than using the term “significantly” or even “substantially.” In accord with the term “definitional *balancing*,” see *infra* note 14 and accompanying text, the adverb “unduly” suggests that impairment of the government or private interest is not measured in absolute terms but rather is weighed against the democratic interests promoted by protection of the speech in question. So, for instance, antiwar protests can obviously significantly impair important government objectives. But when balanced against the crucial democratic interests that would be impaired if citizens could be punished for protesting America’s involvement in a war, this expression does not “unduly” impair important government interests and thus would not justify excluding this category of speech from public discourse. See Weinstein, *Participatory Democracy*, *supra* note 5, at 500. In contrast, because the use of copyright-infringing material, distribution or possession of child pornography, or making “true” threats against other individuals even as part of a public discussion is not crucial to the promotion of democratic values, the harms caused by these types of speech “unduly” interfere with important governmental or private interests and thus are justifiably excluded from public discourse. See *infra* note 17.

tional balancing,”<sup>14</sup> by weighing the free speech value of a general category of expression against any legitimate state interests promoted by the suppression of this type of speech. So, despite utilizing a medium essential to democratic self-governance, a particular category of speech can be denied the rigorous protection afforded public discourse if it is both insufficiently connected with democratic self-governance and capable of impairing some legitimate governmental or private interest.<sup>15</sup> Such is the case, for example, with commercial advertising.<sup>16</sup> Similarly, even if addressing a matter of public concern, certain narrow categories of speech have been denied First Amendment coverage because they are deemed both not essential to democratic self-governance or any other free speech value and destructive of some important governmental or private interest.<sup>17</sup>

The Court engaged in a species of such “definitional balancing” in refusing to subject suppression of copyright-infringing speech to any serious First Amendment scrutiny. In *Eldred v. Ashcroft*, the Court concluded that, in light of copyright law’s prohibition against copyrighting ideas or facts as well as its liberal fair use provisions, the prohibition on copyright-infringing speech does not significantly impair any important free speech values.<sup>18</sup> To the contrary, the Court noted that copyright protection was intended to promote these values by creating an “economic incentive to create and dis-

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<sup>14</sup> Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 Cal. L. Rev. 935, 942 n.24 (1968).

<sup>15</sup> See Weinstein, *Participatory Democracy*, supra note 5, at 496 n.35.

<sup>16</sup> See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562–63 (1980). See also Weinstein, *Participatory Democracy*, supra note 5, at 503.

<sup>17</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (holding fighting words to be outside of First Amendment protection); *New York v. Ferber*, 458 U.S. 747 (1982) (holding child pornography to be outside of First Amendment protection); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985) (holding defamation on matters of private concern to be outside of First Amendment protection); *Virginia v. Black*, 538 U.S. 343 (2003) (holding true threats to be outside of First Amendment protection). In a mirror image of the highly protected speech that generally can only be suppressed in truly extraordinary situations, speech that is not specially protected is eligible for protection only in unusual circumstances. See James Weinstein, *Database Protection and the First Amendment*, 28 U. Dayton L. Rev. 305, 336–39 (2002) [hereinafter Weinstein, *Database Protection*].

<sup>18</sup> 537 U.S. 186, 218–21 (2003).

seminate ideas.”<sup>19</sup> In accord with the Court’s holding, it is difficult to imagine how prohibiting the public use of someone else’s expression<sup>20</sup> would impair the individual interest in political participation that I have identified as lying at the core of the First Amendment.<sup>21</sup> Nor, except in a very unusual case, would copyright law

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<sup>19</sup> Id. at 219 (quoting *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985)). See also *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539 (1985) (holding that a magazine did not have a First Amendment right to publish verbatim portions of President Gerald Ford’s then soon-to-be published manuscript). For an argument that another species of intellectual property—proposed database protection—does not usually threaten the democratic participatory interests underlying the core of the American free speech principle, see Weinstein, *Database Protection*, *supra* note 17, at 338–40.

<sup>20</sup> See *Eldred*, 537 U.S. at 221 (“The First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.”).

<sup>21</sup> Volokh cites a number of cases in which he believes copyright restrictions impair participatory interests. See Volokh, *supra* note 7, at 568 n.7. While some of these restrictions may unduly impair the *instrumental* interest of citizens in obtaining information needed for collective decision making, and thus arguably should receive First Amendment protection, see *infra* note 22 and accompanying text, none would seem to infringe the individual right of participation essential to the legitimacy that such participation confers on the legal system. In any event, in light of the broad fair use provisions noted in *Eldred*, if participatory rights have actually been impaired by copyright law, I suspect that these occasions have been few and far between. The Court was therefore correct in my view to create free speech doctrine that presumes that copyright restrictions generally comport with the First Amendment, while leaving open the possibility of First Amendment immunity in those rare cases in which participatory interests are strongly implicated—in short, to deem copyright-infringing speech not to be part of public discourse.

Citing *Cohen v. California*, 403 U.S. 15 (1971), Volokh argues that, just as forbidding the use of profanity as part of public discussion can impair speakers’ ability to convey the precise message they want to express, “[t]he same is true for requiring people to paraphrase important copyrighted works rather than copying them directly” because “each way of expressing a particular idea conveys a different message.” Volokh, *supra* note 7, at 568 n.7. The problem with this argument is that the interest mentioned by Volokh is but one of several considerations that led the Court in *Cohen* to uphold the First Amendment right of an antiwar protestor to wear a jacket bearing the message “Fuck the Draft.” Significantly, the Court also relied on government officials’ inability to make “principled distinctions” in deciding which offensive words to prohibit, as well as the importance to the speaker of the “emotive function” of speech, concerns that have little, if any, relevance to copyright restrictions. *Cohen*, 403 U.S. at 25–26. Indeed, in observing that prohibiting the use of certain words runs “a substantial risk of suppressing ideas in the process,” the Court added that the government might seek to prohibit particular words “as a convenient guise for banning the expression of unpopular views,” yet another concern not relevant to copyright restrictions. Id. at 26. In the absence of these other concerns, it is doubtful that the Court in *Cohen* would have found that the restriction on speakers’ ability to convey the precise mes-

significantly impede the important instrumental value of citizens obtaining information needed for collective decision making.<sup>22</sup> It may be true, as some have contended,<sup>23</sup> that copyright restriction can nonetheless impede the vibrant marketplace of ideas needed for cultural development or, as Baker has argued, that such restrictions might impair vital autonomy interests.<sup>24</sup> But this just goes to show that neither a commitment to the marketplace of ideas nor to individual autonomy is a core, or even an important, free speech value.

Volokh contends that this explanation of why copyright-infringing speech was excluded from the domain of highly protected public discourse “strips the ‘public discourse’ theory of whatever supposed advantage it might have.”<sup>25</sup> His various objections all boil down to one complaint: uncertainty.<sup>26</sup> I adamantly endorse Volokh’s concern that the rules and standards that compose

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sage they want to express to have been a significant enough impairment of participatory interests to warrant invalidating the ban on the public use of profanity.

Though I do not agree with the overall thrust of his criticisms, Volokh has persuaded me that copyright restrictions may have somewhat greater potential to impair participatory interests than I had previously thought. So I should have written that “it is difficult to imagine how prohibiting the public use of someone else’s expression would *often significantly* impair the individual interest in political participation.” I am grateful to Volokh for his thoughtful and illuminating criticisms. Finally, I should note that, in the end, he and I may not be very far apart in our position about copyright and free speech, for he admits that the restrictions on participatory interests impaired by copyright are “not vast” and therefore “may be justifiable.” See Volokh, *supra* note 7, at 568 n.7.

<sup>22</sup> In which case First Amendment protection might be available. See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 *UCLA L. Rev.* 1180, 1201 (1970) (arguing that the First Amendment protected the unauthorized copying of frames from the Zapruder film, the only known film of President Kennedy’s assassination); see also *supra* note 17. See generally *Eldred*, 537 U.S. at 221 (noting that the lower court spoke “too broadly” in holding copyright law “categorically immune” from First Amendment challenges).

<sup>23</sup> See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 *N.Y.U. L. Rev.* 354, 358 (1999).

<sup>24</sup> See C. Edwin Baker, *First Amendment Limits on Copyright*, 55 *Vand. L. Rev.* 891, 951 (2002) (arguing that “copyright generally cannot be applied to limit *non-commercial* copying” consistent with the individual autonomy interests he believes the First Amendment protects) (emphasis added).

<sup>25</sup> Volokh, *supra* note 7, at 570.

<sup>26</sup> *Id.* at 567.

free speech doctrine be clear and certain.<sup>27</sup> In our common law constitutional system, however, the boundaries of juridical categories can never be precisely or permanently fixed. The boundaries of the domain of public discourse, which also remain blurry around the edges, are no exception. Still, as I discuss in greater detail below,<sup>28</sup> a system of free speech that recognizes participatory democracy as the sole core free speech value has greater potential than any contending theory for producing doctrinal rules that are clear and susceptible to practical administration. I do not claim that the approach I describe and endorse is a perfect method for determining the type of speech entitled to the most rigorous First Amendment protection. I am confident, however, that this approach is a far superior method for making such a determination than is the all-inclusive approach that Volokh embraces.<sup>29</sup> For that approach too excludes categories of speech from First Amendment protection but does so without any explicit methodology and without even identifying the constitutional values to be consulted in making such a determination.<sup>30</sup>

It is, of course, preferable for a legal term to hew closely to its literal or ordinary meaning, especially if the term is to be helpful in guiding an important normative analysis such as the definitional balancing just described. I do not believe, however, that it is much of a problem that the label “public discourse” does not include certain categories of speech that might seem to be embraced within the literal or ordinary meaning of the term. Admittedly, including *private* conversation as part of *public* discourse creates a more substantial linguistic anomaly. But even this usage does not seem much of a misnomer when the justification for including the speech within public discourse is its alleged contribution to the formation of public opinion, as Baker claims was the case with household discussions about sex, household duties, and dating in the 1960s and 1970s.<sup>31</sup> Later, I will discuss the very interesting question of how

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<sup>27</sup> See James Weinstein, Free Speech, Abortion Access and the Problem of Judicial Viewpoint Discrimination, 29 U.C. Davis L. Rev. 471, 484–85 (1996).

<sup>28</sup> See *infra* notes 152–69 and accompanying text.

<sup>29</sup> Volokh, *supra* note 7, at 584. For a discussion of the all-inclusive approach, see Weinstein, Participatory Democracy, *supra* note 5, at 491, 510. See also *infra* notes 115–32, 156–63 and accompanying text.

<sup>30</sup> See *infra* note 157 and accompanying text.

<sup>31</sup> Baker, Sound Basis?, *supra* note 3, at 523.

free speech doctrine should account for such expression. But for now I want to suggest that the problem of calling such speech public discourse seems to be primarily a question of semantics. Nevertheless, because semantics could affect substance in this area of the law, it might be better to use the term “democratic discourse” to describe all speech protected because of its importance to democratic self-governance, a term that would embrace both public discourse and private speech such as Baker describes.<sup>32</sup>

### B. Consistency

What uniquely qualifies participatory democracy as the core free speech norm is that it is the only contender that the case law does not massively contradict. As detailed in my opening statement, instrumental norms such as assuring the information needed for wise collective decision making or advancing the search for truth in a marketplace of ideas are belied by large swaths of the Court’s free speech jurisprudence. This is also true of any autonomy theory with which I am familiar and, for the reasons discussed in my opening statement, is likely to be the case with any autonomy-based theory.

Given my emphasis on doctrinal fit, I will now consider in detail the claim that participatory democracy has, in Blasi’s words, often been given “rather short shrift” in the case law.<sup>33</sup> To support this view, Blasi begins by citing the campaign finance cases, particularly *Buckley v. Valeo*,<sup>34</sup> which, as he correctly notes, held that “campaign spending limits cannot be imposed to prevent the drowning out of impecunious voices.”<sup>35</sup> *Buckley*’s sharp rebuke that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”<sup>36</sup> may be inconsistent with

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<sup>32</sup> A related but more substantive charge is that, regardless of what label is used, any attempt to distinguish speech entitled to special protection because of its importance to democratic self-governance from speech not entitled to such protection will lead to unacceptable doctrinal uncertainty. I shall address this normative objection *infra* Part III.

<sup>33</sup> Blasi, *supra* note 2, at 534.

<sup>34</sup> 424 U.S. 1 (1976).

<sup>35</sup> *Id.*

<sup>36</sup> 424 U.S. 1, 48–49 (1976).

a thick view of participatory democracy, especially one that emphasizes substantive rather than formal equality. But the participatory norm that I have identified as animating the core of American free speech doctrine is “a thin, procedural commitment” that gives rise to the right of each individual “to formal participation in the political process,” including “the right to be free from coercive laws forbidding speakers to express some particular view on a matter of public concern.”<sup>37</sup> Far from being inconsistent with this thinly-conceived norm, the Court’s invalidation of the provision of a federal campaign finance law prohibiting individuals from spending more than \$1,000 per year on a particular candidate, a limitation that would effectively “exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication,”<sup>38</sup> vindicates the core participatory interest I have identified.<sup>39</sup>

Blasi is on somewhat firmer ground in arguing that the Court’s public forum doctrine gives short shrift to participatory interests.<sup>40</sup> I

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<sup>37</sup> Weinstein, *Participatory Democracy*, supra note 5, at 506. Similarly, Steven Shiffrin correctly observes that:

Institutions like the winner-take-all system in politics, gerrymandering, the United States Senate, and the recent decision in *Citizens United v. FEC* upholding the rights of business corporations to spend unlimited funds to influence the outcome of election campaigns, all conspire to create a system that makes the participation of some citizens count more than the participation of others.

Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 Va. L. Rev. 559, 563 (2011). But, like Blasi’s complaint against *Buckley*, this observation notes inconsistency with substantive equality, not the formal equality that I contend forms the core of the American free speech principle.

<sup>38</sup> *Buckley*, 424 U.S. at 19–20.

<sup>39</sup> For the same reason, if we consider the publisher of a daily newspaper a relevant entity with respect to the legitimation that participation in public discourse confers, so does *Miami Herald Publishing Co. v. Tornillo*, another case cited by Blasi. 418 U.S. 241, 258 (1974). That the First Amendment forbids the government from requiring a privately-owned newspaper to allow those criticized in the newspaper a right of reply might, again, be inconsistent with a thicker, more substantive view of democratic participation; it is not, however, inconsistent with the thin, formal right that I believe underlies the First Amendment.

<sup>40</sup> One can reasonably disagree with the balance the Court has struck in recent years between free speech interests and other uses of public property. Still, public forum doctrine and related jurisprudence have long been fairly solicitous of the participatory rights, particularly the interests of ordinary citizens. See, e.g., *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147 (1939); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *Watchtower Bible & Tract Soc’y of N.Y. v. Vill. of Stratton*, 536 U.S. 150 (2002). Even the

do not think, however, that the case he cites as an example, *Arkansas Educational Television Commission v. Forbes*,<sup>41</sup> supports his position. *Forbes* held that a candidate debate televised by a public broadcasting station was not a public forum, and thus the public broadcaster's exclusion of a third party candidate did not violate the First Amendment. Like the ballot access<sup>42</sup> and write-in<sup>43</sup> cases that Blasi also cites, *Forbes* involves the regulation of elections—a domain which, unlike the domain of public discourse, government must have considerable authority to manage if elections are to serve their democratic purpose.<sup>44</sup> Blasi is right that these cases show that the individual participatory interests are not in every context automatically “prioritized” over other democratic interests.<sup>45</sup> In the election context, other democratic interests may well prevail if participatory interests are not severely burdened, as the Court found was the case, for instance, with restriction on write-in

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*ISKCON* cases, which on the surface seem to give participatory interests “short shrift” by refusing to recognize airports as public fora, largely upheld free speech rights in that setting by invalidating a ban on the sale or distribution of literature. See *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1997) (holding that public airports are not public fora); *Lee v. Int'l Soc'y for Krishna Consciousness*, 505 U.S. 830 (1997) (invalidating a ban on the sale or distribution of literature in the airports).

<sup>41</sup> 523 U.S. 666 (1998).

<sup>42</sup> *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

<sup>43</sup> *Burdick v. Takushi*, 504 U.S. 428 (1992).

<sup>44</sup> See James Weinstein, *Campaign Finance Reform and the First Amendment: An Introduction*, 34 *Ariz. St. L.J.* 1057, 1083 (2002). See also *Burdick*, 504 U.S. at 438 (“[T]he function of the election process is ‘to winnow out and finally reject all but the chosen candidates’ . . . . Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.” (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974))). The regulation of campaign finance raises exquisitely difficult First Amendment issues because such regulation often touches an area in which the election domain and the domain of public discourse both have strong claims. Independent expenditures by individuals are placed squarely on the public discourse side of the line, while contributions, which have far less expressive significance, are assigned to the election domain. More dubiously, expenditures by candidates themselves are protected as public discourse, which explains why the addition of the “time protection rationale” was not sufficient to limit this expression. See *Randall v. Sorrell*, 548 U.S. 230, 231 (2006). While Blasi may be correct that *Randall* was wrongly decided, it does not support his claim that the individual participatory interest that I have identified was given short shrift.

<sup>45</sup> Blasi, *supra* note 2, at 535.

votes, despite their frequent use as a form of political protest.<sup>46</sup> While this may be an example of the Court's failing to "prioritize" participatory interests over other democratic values, it is not an example of a lack of prioritization within the domain of public discourse.

In my opening statement, I cited the First Amendment limitations on defamation suits as a prime example of free speech doctrine's special solicitude for participatory interests. I thus compared the First Amendment protection provided speech about public officials, or about private individuals on matters of public concern, with the lack of such protection in suits involving speech about a private individual of no public concern. In a jujitsu-like move, Professor Steven Shiffrin argues that this defamation jurisprudence in fact contradicts my claim about the centrality of democratic participation in two ways: (1) in its extension of the *New York Times Co. v. Sullivan*<sup>47</sup> malice standard to public figures<sup>48</sup> and (2) in its failure to extend that standard to speech on matters of public concern about private figures.<sup>49</sup>

Steven Shiffrin is correct that the extension of the malice standard to speech about public figures "does not fit sensible democratic theory,"<sup>50</sup> especially if there is no further requirement that the speech be related to a matter of public concern rather than mere gossip about the private lives of celebrities. While this may be an example of highly protected speech that is not comfortably explained by participatory democracy, it is not, however, by itself an example of the Court denying the centrality of that value. To make out this claim, Shiffrin further asserts that the chair of the board of General Motors would not automatically be considered a public figure, despite "the powerful role that business corporations play in our government," while the celebrity chef, Wolfgang Puck, probably would be.<sup>51</sup>

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<sup>46</sup> *Burdick*, 504 U.S. at 438–41; accord *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

<sup>47</sup> 376 U.S. 254, 279–90 (1964).

<sup>48</sup> See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 148, 152–54 (1967).

<sup>49</sup> See Steven Shiffrin, *supra* note 37, at 564.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

I agree that it would be nonsensical to give greater protection to speech about a celebrity chef than about a powerful business figure. But so long as the speech is not on a matter of public concern, then the greater protection afforded the speech defaming Puck, while difficult to justify, would still not show subordination or even lack of solicitude towards participatory democracy. Crucially, however, if a defamatory statement about the chair of GM did involve a matter in which GM “play[s a role] in our government” or any other matter of public concern, then the GM chair, though not an “all purpose” public figure, would be considered a “limited” public figure with regard to this speech. Such a finding would, however, trigger the same speech-protective malice standard that probably would apply to any defamatory statement about the celebrity chef.<sup>52</sup>

Next, Steven Shiffrin disagrees with my claim that, reflecting the primary value of democratic participation, speech about a private figure on a matter of public concern is “highly protected.”<sup>53</sup> It is true that such speech is not as highly protected as speech about public officials (and, dubiously, public figures), expression that is protected by the *New York Times* “malice” standard. The Court thus held in *Gertz v. Robert Welch, Inc.* that this speech may be subject to liability upon a finding of fault and actual damages.<sup>54</sup> But this does not mean that this level of protection is not sufficient to protect the participatory interests at stake. Even as part of public discourse, no one has a right in principle to make a false statement injurious to another’s reputation.<sup>55</sup> Rather, the qualified First Amendment immunity applicable to certain types of defamation actions reflects a pragmatic strategy to protect the various free speech values that would be endangered if such suits were not constrained by the First Amendment. As I have previously written, the level of protection applicable to speech about a private figure on a matter of public concern is the level of protection that the Court believed was necessary to protect the right of speakers to participate in public discourse: greater immunity was provided to state-

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<sup>52</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

<sup>53</sup> Steven Shiffrin, *supra* note 37, at 564.

<sup>54</sup> *Gertz*, 418 U.S. at 347, 349.

<sup>55</sup> Consistent with this view, even the immunity provided for false statements about the official conduct of public officials is not absolute.

ments about public officials so as to assure proper information flow about the conduct of government officials.<sup>56</sup>

Although close analysis of case law such as I have just engaged in is necessary for the evaluation of any claim about a theory's doctrinal fit, such focus on detail risks obscuring the bigger doctrinal picture. So let us step back for a moment and, by way of comparison, consider a recent case from the United Kingdom involving an elderly preacher who was arrested for breach of the peace for carrying a sign in a public square "bearing the words 'Stop Immorality,' 'Stop Homosexuality' and 'Stop Lesbianism.'"<sup>57</sup> In Britain, as elsewhere in Europe, the right of free speech is largely thought of as instrumental to democracy, not primarily as a true individual right to participate in democratic self-governance.<sup>58</sup> In light of the countervailing societal interest of showing tolerance towards all segments of society, both the trial court and appellate court found that this speech went "beyond legitimate protest"<sup>59</sup> and was therefore punishable.

In contrast, because the individual right of democratic participation is so well entrenched in U.S. culture and case law, every informed observer, as well as most members of the general public, would intuitively know that a speaker in this country has a right to

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<sup>56</sup> James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 Case W. Res. L. Rev. 1091, 1138 n.160 (2004). Steven Shiffrin claims that the level of protection provided by *Gertz* is inadequate because "once falsity is shown to the satisfaction of the jury, the readiness to find negligence is well known." Steven Shiffrin, *supra* note 37, at 565. I am not knowledgeable enough about the nuts and bolts of defamation litigation to evaluate Steven Shiffrin's claim. But if he is right that *Gertz* does not provide any real protection for those who negligently make false statements of fact, and if such lack of protection unduly chills would-be speakers from expressing opinions on matters of public concern, then the Court should increase the level of immunity to better protect this crucial participatory interest. Still, the *Gertz* standard, far from being inconsistent with a strong commitment to participatory democracy, is a serious attempt to protect precisely that interest.

<sup>57</sup> *Hammond v. DPP*, [2004] EWHC 69 (Admin), 2004 WL 34252, at \*2 (Divisional Court Jan. 13, 2004).

<sup>58</sup> See James Weinstein, *Extreme Speech, Public Order, and Democracy: Lessons from The Masses*, in *Extreme Speech and Democracy* 23, 61 (Ivan Hare & James Weinstein eds., 2009).

<sup>59</sup> *Hammond*, 2004 WL 34252, at \*7.

express this view in this context.<sup>60</sup> So although we might quibble, say, about whether *Gertz* provides enough protection to participatory interests or whether modern public forum doctrine gives those interests sufficient weight, cases like *Hammond*, which is typical of the approach to free speech in most other democracies,<sup>61</sup> show by comparison just how rigorously the individual right to express dissenting views in public discourse is protected in the United States.<sup>62</sup>

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<sup>60</sup> See, e.g., *Snyder v. Phelps*, 131 S. Ct 1207, 1216, 1219 (2011) (holding that highly offensive statements made in a public forum, including a sign reading “God Hates Fags,” is speech on a matter of public concern entitled to “special protection” under the First Amendment).

<sup>61</sup> See James Weinstein, *An Overview of American Free Speech Doctrine*, in *Extreme Speech and Democracy*, supra note 58, at 84–91.

<sup>62</sup> In addition to defamation on matters of public concern, Steven Shiffrin argues that “[p]olitical speech is limited in many contexts including some advocacy of illegal action, . . . protections for intellectual property, the burning of draft cards, and a long line of cases limiting demonstrations on public property in ways that cater to bureaucratic preferences at the expense of political participation.” Steven Shiffrin, supra note 37, at 563. This observation shows, unsurprisingly, that participatory interests are not always maximized to the greatest conceivable extent. As I have explained in my response to Blasi’s similar point about public forum doctrine, see supra note 40 and accompanying text, and to Volokh’s claim about copyright restrictions, see supra note 21 and accompanying text, that the doctrine does not inevitably prioritize participatory rights over competing interests is not inconsistent with a robust commitment to democratic participation. On a specific level, while several individual cases can be fairly criticized as not sufficiently protecting participatory interests, there is no contemporary Supreme Court case even approaching *Hammond*’s disregard for these interests. And on a global level, the Court has constructed an overall doctrine that is very solicitous of the individual’s right to participate in public discourse. Indeed, even *United States v. O’Brien*, 391 U.S. 367 (1968), which upheld a federal law prohibiting draft card destruction, created doctrine that proved protective of the participatory interests. See *Texas v. Johnson*, 491 U.S. 397, 407–10 (1989) (applying test for regulation of expressive conduct established in *O’Brien* to reverse a conviction of a protestor charged under state law for burning an American flag). Finally, Steven Shiffrin’s observation that doctrine permits “some advocacy of illegal action” is hardly evidence of the doctrine’s failure to protect participatory interests. To the contrary, the American rule regarding advocacy of illegal conduct is enormously speech protective and allows punishment of advocacy of illegal action only if the advocacy amounts to incitement of imminent illegal conduct and, in addition, is likely to produce such activity. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). While some have plausibly argued that this rule is *too* speech protective, see, e.g., Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* 123 (2006), it would be most difficult to argue that the *Brandenburg* test unduly crimps the democratic right of speakers to criticize political or social institutions. For a discussion of the much more restrictive limitations on advocacy of illegal conduct in the United Kingdom, see Eric Barendt, *Incitement to, and Glorification of, Terrorism*, in *Extreme Speech and Democracy*, supra note 58, at 445–47.

*C. Completeness*

American free speech doctrine is far too complex to explain in terms of a single norm. Rather, a multiplicity of underlying values is needed to account for the entire expanse of this doctrine. These multifarious norms, however, do not all possess equal explanatory power but instead range from a core value that alone goes a long way toward explaining the pattern of decided cases to peripheral values needed to fill out the picture. There appears to be considerable agreement among the participants in this symposium that participatory democracy “undoubtedly captur[es] a central concern of the First Amendment.”<sup>63</sup> So a key point of disagreement among many of us is whether a commitment to participatory democracy is the sole core value, as Post and I contend, or whether,

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<sup>63</sup> Susan H. Williams, *Democracy, Freedom of Speech, and Feminist Theory: A Response to Post and Weinstein*, 97 Va. L. Rev. 603, 603 (2011); accord T.M. Scanlon, *Why Not Base Free Speech on Autonomy or Democracy?*, 97 Va. L. Rev. 541, 543–44 (2011) (including among the values that “figure centrally in our actual First Amendment jurisprudence” interests as “participants in expression in having access to means of expression . . . to criticize public officials, influence public policy and legislation, participate in electoral politics, and communicate with others who share our political values[,]” as well as interests in expressing values about “art, religion, science, philosophy, sex, and other important aspects of personal life[]” to those who may not share those values “in hopes of influencing them and thereby shaping the mores of our society.”); Eugene Volokh, *In Defense of the Marketplace of Ideas / Search for Truth as a Theory of Free Speech Protection*, 97 Va. L. Rev. 595, 595 (2011) [hereinafter Volokh, *Marketplace of Ideas*] (“[A] broad vision of democratic self-government is one important justification for free speech[.]”); Volokh, *supra* note 7 at 594 (agreeing that “protection of speech on public issues is a central concern of First Amendment doctrine”) (quoting Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 Geo. Wash. L. Rev. 1, 2–3 (1990)).

Though Baker contends that autonomy should be recognized as the central First Amendment value, he writes that democracy “is arguably the best that can be done, given the impossibility (or at least, lack of pragmatic appeal) of anarchic or completely voluntaristic social life, for justifying the legitimacy of the social order.” Baker, *supra* note 3. Similarly, though Steven Shiffrin contends that protection and promotion of dissent is a more promising center for the First Amendment, see Steven Shiffrin, *supra* note 37, at 562, his explication of his dissent-centered vision of free speech reveals a close resemblance to my view of participatory democracy. See *id.* at 563 (“[N]o system of democracy or free speech is worth its salt if it does not protect and promote . . . speech which criticizes existing customs, habits, institutions, and authorities. Of course, other speech should be protected, and judges should rarely be authorized to make ad hoc judgments in individual cases about what qualifies as dissenting speech (but instead should make such judgments about categories of speech and recognize dissent’s important value).”).

as Professor T.M. Scanlon argues, it is doubtful that the values that “figure centrally in our actual First Amendment jurisprudence[] can be helpfully subsumed under any single label.”<sup>64</sup>

Seemingly belying the exclusivity of participatory democracy as the core of free speech are instances of highly protected speech that cannot be explained in terms of participatory democracy. But fortunately for doctrinal coherence,<sup>65</sup> participatory democracy explains much of this highly protected speech, though some of it is only instrumental to, rather than constitutive of, such participation. Most of the remaining examples of highly protected speech can be explained as promoting privacy and other autonomy interests more appropriately protected as fundamental liberty under substantive due process.

Because ordinary business corporations are not entities in need of the legitimation engendered by participation in the political process, political expenditures by such entities are perhaps the prime example of protected speech that is difficult, if not impossible, to explain in terms of participatory democracy grounded in political legitimacy. As I explained in my opening statement<sup>66</sup> and in more detail elsewhere,<sup>67</sup> consistent with its status as protected yet non-core expression, corporate expenditures for political speech can promote the instrumental democratic value of assuring information needed for collective decision making. Similarly, though commercial advertising can arguably supply valuable information on matters of public concern,<sup>68</sup> those engaged in selling products and services are not ordinarily participating in democratic self-

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<sup>64</sup> Scanlon, *supra* note 63, at 543.

<sup>65</sup> The existence of highly protected speech whose explanatory principle is contradicted by numerous other cases, as I believe is demonstrably the case with any value other than participatory democracy, would threaten to render doctrine an incomprehensible muddle.

<sup>66</sup> Weinstein, *Participatory Democracy*, *supra* note 5, at 500–01.

<sup>67</sup> James Weinstein, *Fools, Knaves, and the Protection of Commercial Speech: A Response to Professor Redish*, 41 *Loy. L.A. L. Rev.* 133, 147–48 (2007) [hereinafter Weinstein, *Commercial Speech*].

<sup>68</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976) (referring to the “general public interest” in the “free flow of commercial information”); see also Robert Post, *The Constitutional Status of Commercial Speech*, 48 *UCLA L. Rev.* 1, 25 (2000) (arguing that the constitutional value of commercial speech is that it conveys “information of relevance to democratic decision making”).

governance, and therefore, their expression is not deemed core First Amendment activity.<sup>69</sup> Thus, contrary to Blasi's view, the campaign finance cases<sup>70</sup> and commercial speech doctrine (as well as the press access cases<sup>71</sup>) do "prioritiz[e] participation over the other benefits of an independent public opinion."<sup>72</sup>

Baker, too, cites examples of highly protected speech that he believes are not easily explained in terms of political participation, including two compelled speech cases: *West Virginia State Board of Education v. Barnette*<sup>73</sup> and *Wooley v. Maynard*.<sup>74</sup> He argues that vindication of individual autonomy better explains *Barnette*'s holding that forcing public school children to salute the American flag violates the First Amendment. And while acknowledging that the Court in *Wooley* offered a participatory democracy rationale for protecting a motorist covering up an ideological statement on his license plate with which he disagreed, Baker emphasizes that the Court rested its holding on "the broader concept of individual freedom of the mind."<sup>75</sup>

Unlike Baker, I do not find it difficult to explain *Barnette* and *Wooley* in terms of participatory democracy, nor do I agree that individual autonomy provides a better explanation of these cases. Significantly, both cases involve ideological expression. Forcing people to voice publicly an ideological view with which they do not agree, and which may even be directly antithetical to the view they hold, would burden core participatory interests in at least three ways. First, the compelled speech may dilute the effectiveness of any personal message the speaker may want to publicly express. Similarly, and more fundamentally, forcing people to proclaim

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<sup>69</sup> See, e.g., *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) ("We have always been careful to distinguish commercial speech from speech at the First Amendment's core.").

<sup>70</sup> This was true at least until *Citizens United v. FEC*, 130 S. Ct. 876 (2010), which in failing to recognize the crucial difference between free speech rights of individuals and those of ordinary business corporations, not only reached the wrong result but also disserved the general coherence of free speech doctrine. See Weinstein, Participatory Democracy, *supra* note 5, at 500–01 & n.53, 510 n.85.

<sup>71</sup> See Weinstein, Commercial Speech, *supra* note 67, at 147 n.59.

<sup>72</sup> Blasi, *supra* note 2, at 534.

<sup>73</sup> 319 U.S. 624 (1943).

<sup>74</sup> 430 U.S. 705 (1977).

<sup>75</sup> Baker, Sound Basis?, *supra* note 3, at 528 (quoting *Wooley*, 430 U.S. at 714 (internal quotation marks and citation omitted)).

publicly views they do not hold undermines the legitimating function of democratic participation. Finally, and more generally, such compelled speech is anathema to the basic democratic premise that government decision making is to be influenced by public opinion representing the uncoerced views of the people, not the government using citizens as its mouthpiece.

So the Court got it right when it observed in *Wooley* that “[a] system which secures the right to proselytize *religious, political, and ideological* causes must also guarantee the concomitant right to decline to foster such concepts.”<sup>76</sup> As an abstract, theoretical matter, the Court may also be correct that the right to speak and the right to refrain from speaking are “complementary components of the broader concept of ‘individual freedom of mind.’”<sup>77</sup> But given the ideological speech at issue in *Wooley* (and in *Barnette*), there was no need to appeal to such a “broader concept.” And when the Court did extend protection against compelled speech to non-ideological expression in *United States v. United Foods*, this extension threatened the coherence of both the compelled speech and commercial speech doctrines.<sup>78</sup> As a result, the Court was forced to effectively overrule this decision a mere four years later.<sup>79</sup>

If *Barnette* had prohibited compelled speech of a non-ideological nature, for instance, a requirement that students address their teachers as “sir” or “ma’am” or if *Wooley* had involved an aesthetic objection, say to the color of the license plate rather than to a license plate motto that the challenger found repugnant to his “moral, religious, and political beliefs,” then Baker’s claim that these cases are better explained in autonomy terms would be persuasive. Despite the dicta in *Wooley* about some vague “broader concept” of “freedom of mind,” however, it is highly unlikely the Court would sustain a challenge to requirements about how students address their teachers or the color of license plates that motorists must display.

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<sup>76</sup> *Wooley*, 430 U.S. at 714 (emphasis added).

<sup>77</sup> *Id.* (quoting *Barnette*, 319 U.S. at 633–34).

<sup>78</sup> 533 U.S. 405 (2001).

<sup>79</sup> See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005); see also Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 Sup. Ct. Rev. 195, 196–97 (2005).

Similarly, it is the ideological content of what Baker refers to as the “friendly banter” between clerical employees in a county constable’s office that explains the protection afforded speech in *Rankin v. McPherson*.<sup>80</sup> In holding that the remark “if they go for him again, I hope they get him,” uttered after hearing about the attempted assassination of President Reagan, was on a “matter of public concern” and thus eligible for protection, the Court emphasized that this comment “was made in the course of a conversation addressing the policies of the President’s administration.”<sup>81</sup> In arguing that a commitment to individual autonomy better explains this case, Baker points out that “it is difficult to see that public discourse includes the friendly banter . . . even political banter but of a sort that the speaker would likely be unwilling to express in a public context.”<sup>82</sup> Baker insists that such speech can, in contrast, “easily be protected as an autonomous act that did not interfere with job performance.”<sup>83</sup> While perhaps impeaching the descriptive power of the term “*public* discourse,”<sup>84</sup> this semantic objection does not undermine the descriptive power of the democratic participation rationale. It is precisely because the speech in *Rankin* was on a matter of public concern, and thus had the potential to influence public opinion, that it was protected. Confirming this point, the Court in *Connick v. Myers* held that employee speech that lacked this nexus to the formation of public opinion was not entitled to First Amendment protection.<sup>85</sup>

A similar analysis is applicable to Volokh’s discussion of speech among friends on political topics that help form one’s “opinions on public issues,”<sup>86</sup> as well Baker’s example of “private discourse” within the family in the 1960s and 1970s about sex, household duties, and interracial dating.<sup>87</sup> As Baker correctly observes, such interfamilial conversations no doubt had considerable influence on the identity of the two leading contenders for the Democratic

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<sup>80</sup> 483 U.S. 378 (1987).

<sup>81</sup> *Id.* at 386.

<sup>82</sup> Baker, Sound Basis?, *supra* note 3, at 525.

<sup>83</sup> *Id.*

<sup>84</sup> See *supra* Section II.A.

<sup>85</sup> 461 U.S. 138, 146 (1983).

<sup>86</sup> Volokh, *supra* note 7, at 583.

<sup>87</sup> Baker, Sound Basis?, *supra* note 3, at 523.

nominee for President in the 2008 election<sup>88</sup> (as well as the Republican candidate for Vice President<sup>89</sup>). Though perhaps such expression should be labeled “democratic discourse” rather than “public discourse,”<sup>90</sup> it is precisely because such speech has a close connection with the formation of public opinion that it would, despite its intimate nature, be eligible for protection as speech essential to democratic self-governance. Consequently, in the absence of some extremely weighty reason for suppressing particular instances of such private conversation, this type of speech would and should be protected.

A somewhat more difficult question is whether this speech should be protected as part of the core individual right to participate in the political process, or rather primarily for its instrumental value in supplying the public with ideas and information essential to collective decision making. This difficulty arises because it is uncertain whether the participants in these intimate discussions—especially household discussions with family members—typically perceive themselves as involved in the process of forming public opinion. Consequently, the extent to which suppression of this speech would impair democratic legitimacy is not clear.<sup>91</sup>

Note, however, that totally apart from its capacity to profoundly influence public opinion, Volokh’s example of conversations and emails with friends—and even more so the intrafamilial speech that Baker describes—also involves exceedingly strong privacy and associational interests. I am here heeding Scanlon’s advice and eschewing the more general but also uncertain term “autonomy,”<sup>92</sup> though that term is commonly used both in judicial opinions and by commentators to describe these interests. Indeed, the activity that Baker describes falls squarely within the “liberty” long protected

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<sup>88</sup> Barack Obama and Hillary Clinton.

<sup>89</sup> Sarah Palin.

<sup>90</sup> See supra note 32 and accompanying text.

<sup>91</sup> I want to distinguish here Scanlon’s example of those who want to express “non-political values having to do with art, religion, science, philosophy, sex, and other important aspects of personal life” to others who may not share these values “in hopes of influencing them and thereby shaping the mores of our society.” Scanlon, supra note 63, at 544. In light of the speaker’s purpose to shape society’s mores, governmental suppression of this speech would, despite the lack of express political content of the speech, much more likely interfere with political legitimation.

<sup>92</sup> *Id.* at 546.

by the Court's substantive due process jurisprudence.<sup>93</sup> Accordingly, any attempt to suppress this activity would not only violate the First Amendment right of free speech, but also rights of privacy and intimate association protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. Given the uncertain connection between this type of speech and democratic legitimacy, as well as the uncertainty about the degree of protection available for speech instrumental to democracy, it might be better to protect intimate speech as part of a more general fundamental liberty interest under substantive due process.<sup>94</sup>

When it comes to speech that implicates core privacy or associational interests, such as intrafamilial speech or conversations among friends having little or no connection with the formation of public opinion, there is an even stronger argument for protecting this expression as a fundamental liberty interest under the Due Process Clauses rather than as free speech under the First Amendment.<sup>95</sup> In observing that this activity is more properly pro-

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<sup>93</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (holding that a law preventing the teaching of languages other than English to a child who has not passed the eighth grade infringes on, inter alia, the right of parents to control the education of their children in violation of the Due Process Clause of the Fourteenth Amendment); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (holding that a law requiring children to attend public school unreasonably interferes with the liberty of parents to direct the upbringing and education of their children in violation of the Due Process Clause of the Fourteenth Amendment); *Troxel v. Granville*, 530 U.S. 57, 72 (2000) (plurality opinion) (holding that a state law permitting judges to grant visiting rights to grandparents over the parents' objection unconstitutionally interferes with the fundamental rights of parents to rear their children guaranteed by the Due Process Clause of the Fourteenth Amendment); see also *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>94</sup> In suggesting that substantive due process provides an additional and, arguably, better source of protection for intimate conversations on matters of public concern, I do not contend that the First Amendment is an inadequate source of constitutional authority for such protection. Cf. Weinstein, *Participatory Democracy*, supra note 5, at 503 n.61 (noting that although substantive due process is a better source for protecting ordinary commercial speech, the First Amendment is also an acceptable source of constitutional protection for such expression). Indeed, viewing intimate conversation on matters of public concern as lying at the intersection of protection provided by both the First Amendment and the liberty specially protected by the Due Process Clauses of the Fifth and Fourteenth Amendments may well explain why this speech is so highly protected and, consequently, why attempts in this country by the state to regulate it rarely even arise.

<sup>95</sup> Also perhaps more properly accounted for as such a liberty interest is the speaker's interest, noted by Scanlon, in expressing "nonpolitical values having to do

tected as a fundamental liberty interest than as free speech, I am not so much concerned with which constitutional provision is actually employed to protect this expression as I am in demonstrating that such protection does not serve any obvious free speech value. Proponents of autonomy as the basis of free speech will, of course, reply that autonomy is such a free speech value. As I argued, however, for many reasons, both descriptive and normative, autonomy is a particularly poor candidate for a core or even an important free speech value. Specifically, while the autonomy interests at issue in the regulation of speech on matters of private concern among friends and family can easily be conceptualized as part of the liberty protected by substantive due process, I do not see how these interests can be incorporated into a free speech theory without both massively contradicting current doctrine and likely diluting the rigorous protection currently afforded core political speech.<sup>96</sup> If I am correct in this assessment, then for the sake of doctrinal coherence and the adequate protection of dissent, it is crucial to recognize that even if the First Amendment is formally invoked to protect intimate speech having no substantial connection with the formation of public opinion, it is a commitment to constitutional liberty rather than some core free speech interest that is being vindicated.

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with art, religion, science, philosophy, sex, and other important aspects of personal life” to others, not to shape society’s mores but “just to bear witness to these values by giving them public expression.” Scanlon, *supra* note 63, at 544. *Stanley v. Georgia*, 394 U.S. 557 (1969), which laid the ground work for the overruling of obscenity doctrine—a development that never materialized—is perhaps also better understood as protecting privacy and other aspects of autonomy rather than free speech. And as I have explained, the same is true of commercial speech to the extent that its constitutional value lies in informing people where to find products and services and at the lowest price. Weinstein, *Commercial Speech*, *supra* note 67, at 150 n.71. A similar argument could be made about a film to the extent that it provides information for “deciding for ourselves how to conduct our private lives.” Scanlon, *supra* note 63, at 545. Because, however, commercial advertising usually occurs in media that are part of the “structural skeleton . . . necessary . . . for public discourse to serve the constitutional value of democracy,” see Robert C. Post, *Recuperating First Amendment Doctrine*, 47 *Stan. L. Rev.* 1249, 1276 (1995), and film itself is such a medium, the First Amendment is also an appropriate source for protection of these interests.

<sup>96</sup> See Weinstein, *Participatory Democracy*, *supra* note 5, at 510–13; see also James Weinstein, Seana Shiffrin’s Thinker-Based Theory of Free Speech: Elegant and Insightful, but Will it Work in Practice?, 27 *Const. Comment.* (forthcoming 2011) [hereinafter Weinstein, *Thinker-Based Theory*].

In summary, a fairly complete picture of contemporary free speech doctrine can be rendered by positing the individual interest in democratic participation grounded in political legitimacy as the one core value, with other democratic norms as important secondary norms. Most doctrinally salient among these important secondary norms is assuring the availability of various perspectives and other information needed for citizens to be well-informed on matters of public concern. It is vindication of this important instrumental democratic interest that best explains the protection afforded corporate political speech and, by some accounts, the protection of commercial advertising.<sup>97</sup> The protection that would undoubtedly extend to private speech on matters of public concern could either be accounted for as part of the core right of democratic participation or as instrumental to the formation of public opinion. In light of the privacy issues involved in such communication, private speech on matters of public concern could also be explained as a fundamental liberty interest protected by substantive due process. In the absence, however, of any actual cases, or even realistic hypothetical suggestions of situations in which government might seek to suppress private conversations on matters of public concern, it is difficult to be more definite about the basis of such protection.

For completeness, it also might be necessary to postulate another important secondary norm, this one sounding even more distinctly in autonomy, to explain the protection that would undoubtedly be afforded private conversation among family and friends having no substantial connection with the formation of public opinion. But precisely because suppression of such speech would implicate core autonomy interests, often including exceedingly strong privacy interests, it is analytically more accurate, and hence better for doctrinal coherence, to protect these interests as part of the liberty specially protected by due process. Finally, to round out the picture, we might need to posit truly peripheral norms, such as a

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<sup>97</sup> See *supra* notes 66–72 and accompanying text. Also included among this instrumental democratic norm would be the “checking function” of free speech that Blasi long ago identified. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 *Am. B. Found. Res. J.* 521 (1977).

commitment to the search for truth in the marketplace of ideas<sup>98</sup> or perhaps even some general but weakly protected liberty interest.<sup>99</sup>

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<sup>98</sup> In his brief defense of the marketplace-of-ideas rationale, Volokh remarks that he is not sure why, as I argue in my opening statement, the instrumental nature of this norm should disqualify it from consideration as a core free speech norm. Volokh, *Marketplace of Ideas*, supra note 63, at 599. The problem with justifying free speech instrumentally, even as instrumental to the democratic interest in wise collective decision making, is that such expression is then subject to suppression based on other instrumental rationales. See supra notes 58–62 and accompanying text. Worse yet, if the core rationale for free speech is not just instrumental to democracy but to some more general collective good such as the search for scientific and mathematical truth, the “right” of free speech would become even less robust and secure. For then speech could be suppressed even more readily in service of competing general welfare goals thought to be more important, or at least more urgent, than the search for truth. For instance, antiwar protests could be banned to keep them from interfering with a nation’s war effort, or racist speech could be outlawed to prevent it from inflicting psychic injury on minorities. This is why it is important to ground free speech not in some general welfare consideration but as a true individual right with a strong moral valence such as is provided by a commitment to participation by individuals in the democratic process and the political legitimacy that such participation engenders.

Volokh’s objection that my theory, too, allows speech essential to democratic self-governance to be restricted under instrumental rationales, see Volokh, *Marketplace of Ideas*, supra note 63, at 600, overlooks an important feature of this theory. It is true that I believe that instrumental considerations are properly taken into account as part of the “definitional balancing” by which the boundaries of the highly protected realm of public discourse are defined. See supra note 13 and accompanying text. Indeed, it is difficult to imagine how instrumental considerations could not be considered at this stage of doctrinal construction. Crucially, however, once it is determined that because of its legitimating function a category or type of speech must be rigorously protected as part of public discourse, it is precisely this concern for legitimacy lying at the heart of a commitment to participatory democracy that would, except perhaps in extraordinary circumstances, make instrumental rationales insufficient grounds for restricting such expression. In contrast, lacking any such deep normative essence with a distinct moral valence, speech valued for its contribution to the search for truth in the marketplace of ideas could readily be restricted to vindicate some perceived greater or more urgent instrumental concern.

Relatedly, Volokh asks why free speech would be less secure if it were valued *both* as a means of searching for truth and as constitutive of democratic self-governance. Volokh, *Marketplace of Ideas*, supra note 63, at 600 n.20. So long as the search for truth is not deemed *the* core rationale for free speech, but is considered only a core value, I agree that recognizing this rationale would not make free speech less secure. Indeed, I have no problem with the marketplace-of-ideas rationale being recognized as a peripheral free speech value. See Weinstein, *Participatory Democracy*, supra note 5, at 502. I do, however, believe that recognizing this rationale as a core or even as an important free speech value is descriptively inaccurate. Thus, in the absence of an argument that this value possesses considerable normative appeal not captured by a commitment to participatory democracy, deeming the search for truth a core free speech value would gratuitously undermine the coherence of free speech doctrine. Finally, as I explain below, recognition of multiple core values also threatens the coherence of free speech doctrine. See *infra* page 678.

<sup>99</sup> Consistent with my view that some aspects of protected speech are arguably better accounted for as fundamental liberty interests specially protected by due process,

*D. Alternative Explanations of Particular Cases and Doctrinal Patterns*

Volokh notes several areas of disagreement with my (and Post's) claim that participatory democracy explains the pattern of decided cases. For one, he does not believe that the distinction between the highly protected speech in *In re Primus*<sup>100</sup> and the readily regulable expression in *Ohralik v. Ohio State Bar Ass'n*<sup>101</sup> turns on the ideological content of the solicitation in the former case, as I suggest, but rather on the commercial nature of the solicitation in the latter case.<sup>102</sup> Volokh is correct, of course, that the lawyer's "financial motive" and the client's "duty to pay" are "relevant" to the very different levels of protection afforded the types of expression at issue in each case.<sup>103</sup> Indeed, that solicitations by lawyers ordinarily "propos[e] a commercial transaction" is why such activity is generally considered "commercial speech" afforded "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."<sup>104</sup> Crucially, however, the state bar in *Primus* defended its anti-solicitation rule as a prophylactic measure for combating "undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, lay interference, and other evils" that can be present not just in fee paying cases but "whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman."<sup>105</sup> In light of these potential harms, which the Court agreed can exist even in nonpaying ideological cases,<sup>106</sup> the primary reason for extending immunity from these rules to the speech in *Primus* cannot logically be the lack of a

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the suppression of speech outside the coverage of the First Amendment should trigger the rational basis test applicable to infringements of nonfundamental liberty interests. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

<sup>100</sup> 436 U.S. 412, 432 (1978).

<sup>101</sup> 436 U.S. 447, 449 (1978).

<sup>102</sup> See Volokh, *supra* note 7, at 575.

<sup>103</sup> *Id.*

<sup>104</sup> *Ohralik*, 436 U.S. at 456.

<sup>105</sup> *Primus*, 436 U.S. at 432, 437.

<sup>106</sup> *Id.* at 436 ("Admittedly, there is some potential for such conflict or interference whenever a lay organization supports any litigation.").

commercial transaction in that case.<sup>107</sup> Rather, as the Court emphasizes, the crucial distinction between ordinary in-person solicitation, which “a State may regulate in a prophylactic fashion” and the speech involved in *Primus*, which must be regulated “with significantly greater precision,” is the “political expression and association” involved in that case.<sup>108</sup>

Volokh also challenges my explanation of why speech of both teachers and students in public schools, like that of lawyers in the courtroom or employees in a government workplace, is far more regulable than the speech of a protestor in the speakers’ corner of a public park and other forms of public discourse. In my view, the First Amendment allows government considerable leeway to regulate speech in the public classroom (and other nonpublic fora) because, unlike a speakers’ corner of a park or other public fora, the classroom is a place dedicated to some purpose other than democratic self-governance, specifically, to pedagogy. Volokh suggests that a better explanation of why government has wide authority “to insist that the teacher say certain things but not other things to

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<sup>107</sup> If Volokh were correct that the distinction between *Primus* and *Ohralik* turns not on the ideological nature of the case but on the lawyer’s lack of “financial motive” and the client’s “duty to pay,” a neophyte lawyer trying to gain experience by representing clients free of charge would have a First Amendment right to “ambulance chase,” which seems most unlikely.

<sup>108</sup> *Primus*, 436 U.S. at 437–38. I agree with Volokh that First Amendment immunity from anti-solicitation rules would likely not be available if a lawyer from a for-profit law firm with an ideological agenda solicited a fee-paying client for a civil rights case. See Volokh, *supra* note 7, at 575. But this does not support Volokh’s contention that the ideological nature of the activity in *Primus* was not the impetus for the First Amendment immunity in that case. Rather, it shows only that extending the immunity beyond the “pure” and easily identifiable ideological cases, such as those involved in *Primus*, to hybrid and difficult to classify cases, such as the one described by Volokh, would make the distinction between ideological and ordinary litigation that the Court attempted to draw in that case extremely difficult to administer. Relatedly, it is true, as Volokh points out, that the Court in *Primus* seems to have conceived of ideological cases and those pursued for a lawyer’s own financial gain as mutually exclusive categories. See Volokh, *supra* note 7, at 575 n.20. But oversimplistic as this dichotomy may be, it similarly does not support Volokh’s contention that the First Amendment immunity in *Primus* does not turn on the political expression and association involved in that case. Finally, further proof that the First Amendment immunity in *Primus* turned on the ideological nature of the litigation is the special First Amendment protection in many other areas of the law afforded “political expression and association” or speech on “matter[s] of public concern.” See Weinstein, *Participatory Democracy*, *supra* note 5, at 493.

students in the government-operated classroom” is that the government is the teacher’s employer.<sup>109</sup> In support of this explanation, he argues that speech by a teacher in a private school would not be regulable by the state in this way.<sup>110</sup>

There are two serious problems with Volokh’s explanation. First, it fails to explain why *student* speech in a public classroom is also highly regulable. In addition, Volokh is mistaken in his assumption that speech by a teacher in a private school classroom is as highly protected as that of a protestor in a public forum. As to compelled speech, in light of its power to insist that certain subjects be taught in all primary and secondary schools within its jurisdiction, whether public or private, the state has considerable authority “to insist that the teacher say certain things.”<sup>111</sup> As to government insisting that teachers not say certain things, I would be surprised if a state law that prohibited all elementary school teachers from coming to class with profane slogans such as “Fuck the Draft” emblazoned on their jackets would be declared unconstitutional as applied to teachers in private schools.

This is not to say, of course, that the state’s managerial authority over the public classroom is irrelevant to the level of protection of speech in that setting as compared to the private classroom. Since by definition a state does not possess the same managerial authority over a private school as it does over a public school, govern-

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<sup>109</sup> See Volokh, *supra* note 7, at 572.

<sup>110</sup> See *id.* at 662–63.

<sup>111</sup> Volokh contends that the government could not constitutionally impose these curriculum-coverage regulations on private schools not engaged in fulfilling the state’s compulsory education requirements, for instance a school specializing in supplemental education in the evening or on weekends. Volokh, *supra* note 7, at 572 n.14. But this shows only that in the absence of what Volokh calls the “compulsory education factor,” these particular regulations would be difficult, if not impossible, to justify. *Id.* It does not prove that the classroom is a forum for public discourse, as Volokh apparently thinks it does. For even with respect to these “supplemental” schools, the government would have much greater authority to regulate the content of speech than it does with respect to public discourse. For instance, the state could probably constitutionally insist on a minimal degree of competence in the instruction, at least as to those organizations holding themselves out as providing secular, non-ideological education to children, including that demonstrably erroneous facts or concepts not be taught (for example, that India is the most populous nation on earth or that the square root of two is a rational number). In contrast, such content-based restrictions would be patently unconstitutional if imposed on a speaker in a traditional public forum.

ment has fewer legitimate interests in regulating speech in a private school. Moreover, private schools in this country have a constitutional right, based in the First Amendment right to expressive association,<sup>112</sup> to permit, or even to require, teachers to engage in a considerable amount of political, ideological, and religious indoctrination of students that would be inappropriate, and in many instances unconstitutional, in a public school.<sup>113</sup> Even these significant differences, however, would not render the most ideological or religious private school classroom a setting dedicated to public discourse. Such unconstrained conversation would be incompatible with the learning necessary for the school to retain accreditation<sup>114</sup> or even to be considered a “school” rather than a juvenile version of Hyde Park corner.

Finally, Volokh argues that both Post and I too easily dismiss the “all-inclusive approach.” In its usual formulation, this view holds that, except for a few narrow and well-defined exceptions, content-based regulation of all speech is subject to strict scrutiny. This view, however, can, has, and should be rejected as an inaccurate snapshot of free speech doctrine.<sup>115</sup> In his response, Volokh offers a more refined and therefore a more plausible formulation of this approach by positing that “all speech is *presumptively* protected against content-based restrictions imposed by the government, unless the speech falls within an exception to protection.”<sup>116</sup> Volokh’s formulation does not limit the number of “exceptions” and

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<sup>112</sup> See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

<sup>113</sup> In light of these associational rights I would agree, as Volokh correctly surmises, that a law banning teachers from coming to class with unpatriotic slogans such as “Down with America” emblazoned on their jackets would be unconstitutional as applied to teachers in private schools. See Volokh, *supra* note 7, at 572 n.14. That private schools possess associational rights does not transform the private school classroom into a forum dedicated to public discourse. As I emphasized in my opening statement, the realm of public discourse does not encompass the entire universe of protected speech, not even speech protected for democratic reasons. See Weinstein, *Participatory Democracy*, *supra* note 5, at 493. Another example of this phenomenon is speech on matters of public concern in the government workplace. Because of its connection to democratic self-governance, such expression is eligible for First Amendment protection despite the fact that the government workplace is manifestly not a public forum or otherwise a setting dedicated to public discourse. See *Connick v. Myers*, 461 U.S. 138, 146 (1983).

<sup>114</sup> Or, for that matter, effective political, ideological, or religious indoctrination.

<sup>115</sup> See Weinstein, *Participatory Democracy*, *supra* note 5, at 492.

<sup>116</sup> Volokh, *supra* note 7, at 584 (emphasis added).

incorporates a huge one (regulation by government in all its non-sovereign capacities, such as educator, proprietor, or patron) as part of the basic statement of the rule. And significantly, Volokh's formulation does not claim that all content-based regulation of speech not falling within an exception is subject to "strict scrutiny," but rather states only that such speech is "presumptively protected" against content-based regulation. This unspecified level of protection allows for a hierarchy of protected speech and thus for the view that there is a core of protected speech.<sup>117</sup> Unlike the classic statements of the all-inclusive approach, Volokh's version cannot be easily dismissed, and I will therefore have more to say about it.<sup>118</sup> But first, and with Volokh's version rather than the classic formulation in mind, I will reply to some of his specific objections to my criticism of the all-inclusive approach.

In my opening statement I claimed that, in addition to the "well-known exceptions" acknowledged by proponents of the all-inclusive approach such as "incitement of imminent illegal conduct, intentional libel, obscenity, child pornography, fighting words, and true threats," there is a multitude of other forms of expression that may be regulated on account of its content without a "hint of interference" from the First Amendment.<sup>119</sup> I included "securities, anti-trust, labor, copyright, food and drug, and health and safety laws, together with the array of speech regulated by the common law of contract, negligence[,] and fraud."<sup>120</sup> With respect to a couple items on my list, Volokh shows that there is indeed a "hint" of First Amendment protection. He cites a lower court dissenting opinion suggesting that certain applications of proxy solicitation rules might violate the First Amendment.<sup>121</sup> In addition, he refers to "substantial . . . dissent" about the unprotected status of secondary picketing and notes that restrictions on employer speech imposed

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<sup>117</sup> This possibility, however, seems to be at odds with the view that it is inappropriate for government to make value judgments about the importance of speech, a view I had thought was the primary normative underpinning of the all-inclusive approach. See, e.g., Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 595 (1982).

<sup>118</sup> See *infra* notes 156–62 and accompanying text.

<sup>119</sup> Weinstein, *Participatory Democracy*, *supra* note 5, at 492.

<sup>120</sup> *Id.*

<sup>121</sup> Volokh, *supra* note 7, at 592 & n.73 and accompanying text.

by labor laws have been “subjected to serious First Amendment scrutiny.”<sup>122</sup>

I am grateful to Volokh for pointing out that I overstated matters somewhat in claiming that there is no hint of First Amendment protection with respect to proxy solicitations and labor law restrictions. Significantly, however, Volokh does not seem to quarrel with the proposition that great swaths of expression are indeed, at least under current doctrine, beyond the purview of the First Amendment. Rather, he suggests that speech by which the antitrust laws are violated or contracts are formed falls within “uncharted zones” of First Amendment law.<sup>123</sup> But Volokh’s “uncharted zones” would seem to be “speech without First Amendment coverage” by another name. He believes that the Court should fully explain “why exactly speech that solicits or expresses agreement or a promise (legally enforceable or not) is punishable.”<sup>124</sup> I too wish that the Court would be more explicit about the reasons why this and vast other areas of expression are beyond First Amendment coverage, and more fully explain, as I have argued in this Symposium, that the reason for this lack of coverage is because such speech has little or no connection with democratic self-governance. In any event, American free speech doctrine and the antitrust laws have both existed for about a century. In all these years the Court has never indicated that it will extend First Amendment coverage to price-fixing agreements or to most other types of speech subject to the vast web of statutory and common law regulation that pervades modern American society.

The enormous amount of expression within these “uncharted zones,” combined with expression that the Court has explicitly declared beyond the scope of the First Amendment, suggests that what Volokh calls the “exception” is really the rule: lack of First Amendment coverage. This to me seems to be a more accurate picture, even if we do not count as part of the “exception” all of the speech that government readily regulates in its non-sovereign capacity as educator, proprietor, subsidizer, and the like.<sup>125</sup>

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<sup>122</sup> Id. at 593.

<sup>123</sup> Id. (internal quotations omitted).

<sup>124</sup> Id.

<sup>125</sup> Or perhaps a more refined picture reveals that the bulk of human expression is not within First Amendment coverage, but rather constitutes non-fundamental liberty

Moreover, even if it were accurate to view the bulk of human expression as in fact “presumptively protected” from content regulation, this still would not undercut my claim that participatory democracy is the sole core free speech value. For whether or not doctrine could fairly be characterized as presumptively protecting all speech with certain exceptions, an accurate picture of the First Amendment landscape would still reveal that speech essential to democratic participation, such as an antiwar protest in a public forum, is afforded a much stronger presumption of protection than most other forms of expression. This crucial point is borne out by *Sable Communications v. FCC*<sup>126</sup> and *Connick v. Myers*,<sup>127</sup> the two cases that Volokh relies on in support of the all-inclusive approach.

*Sable Communications* can be read as assuming the all-inclusive approach in its classic formulation: having found the pre-recorded sexually explicit phone messages to be not obscene, and thus within the protection of the First Amendment, the Court purports to subject the ban on such “dial-a-porn” recordings to the “compelling interest/narrowly tailored” test that strict scrutiny entails.<sup>128</sup> Despite this verbal formulation, however, the level of protection actually afforded the speech in this and any number of other cases dealing with sexually explicit but nonobscene expression is something less than the fierce protection it would have afforded, for instance, to a pre-recorded message decrying the war in Afghanistan or health care reform. Rather, its regulation triggers a form of intermediate scrutiny similar to that applicable to content-based regulations of commercial speech.<sup>129</sup>

*Connick* also contains dicta that support the view that all speech is entitled to some degree of protection unless it falls into one of

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interests under the Due Process Clause of the Fifth and Fourteenth Amendments subject to suppression under the “minimum scrutiny/rational basis” test. See *supra* note 99.

<sup>126</sup> 492 U.S. 115 (1989).

<sup>127</sup> 461 U.S. 138 (1983).

<sup>128</sup> 492 U.S. at 131.

<sup>129</sup> E.g., *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002) (plurality opinion); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986). The failure of the Court to candidly acknowledge that it provides less than rigorous protection to “medium” core pornography not graphic enough to be suppressed under its obscenity standard has notoriously led it to adopt a dubious and dangerous “secondary effects” jurisprudence. See *Renton*, 475 U.S. at 47.

the narrow categories of unprotected expression. As Volokh notes, the Court explained that even if the speech of a government employee was not eligible for the special First Amendment protection afforded speech on matters of public concern, this does not mean that the speech was “totally beyond the protection of the First Amendment” as are those “narrow and well-defined classes of expression . . . such as obscenity . . . .”<sup>130</sup> The Court noted, “For example, an employee’s false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street.”<sup>131</sup> But the gravamen of the decision confirms democratic participation as the core free speech value: in holding that only speech on matters of public concern is eligible for protection against job-related consequences, the Court expressly grounds this immunity in “the right of citizens to discussion of political affairs” and describes such speech as “the essence of self-government,” expression that “occupies the highest rung of the hierarchy of First Amendment values.”<sup>132</sup>

### III. NORMATIVE APPEAL

As I mentioned in Part I of this Reply, I do not contend that a commitment to participatory democracy is in some overall sense more appealing than other norms that could plausibly be seen as informing this doctrine, such as other democratic values or various visions of individual autonomy. Indeed, such a claim is precisely the kind of highly contentious, largely subjective and probably unprovable “my dog is better than your dog” assertion that is unlikely to lead to useful discussion. Rather, my claim is that a thin, procedural commitment to free and equal participation in the democratic process is a very appealing norm generally, and a particularly

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<sup>130</sup> Volokh, *supra* note 7, at 590 (quoting *Connick*, 461 U.S. at 147).

<sup>131</sup> *Connick*, 461 U.S. at 147. It is worth noting that the Court’s example of a libel action is largely a red herring. Unless the defamatory statement was about the official conduct of a public official—a statement which would then usually be a matter of public concern—there would be no First Amendment protection available to either the public employee or “the man on the street” for a statement not of public concern. See *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761–62 (1985) (plurality opinion); *id.* at 764 (Burger, C.J., concurring in judgment); *id.* at 774 (White, J., concurring in judgment).

<sup>132</sup> *Connick*, 461 U.S. at 145 (internal quotations omitted).

appealing core free speech value because such a commitment is virtually uncontested in contemporary American society, especially among judges, lawyers, and law enforcement officials. Blasi may be correct that “participation has not been the dominant concern at the level of public understanding” as compared to “the role of public opinion in helping to ensure that the objectives pursued by officials are consonant with the objectives that ordinary citizens value the most” or “checking the most serious abuses of political authority.”<sup>133</sup> This observation does not, however, as he suggests, undermine my claim that a “consensus extends to the particular conception of [participatory] democracy that drives” my argument.<sup>134</sup>

It is not unusual for a disparity to exist between what people care about in their everyday lives and what they agree is their and everyone else’s fundamental right. Though Blasi may be right that “low voter turnout rates” show that people do not “prioritize” participation over more instrumental benefits of democracy,<sup>135</sup> this does not mean that Americans do not believe that everyone has a right to an equal vote. Imagine, for instance, the outrage that would ensue even among non-voters if citizens in this country were formally disenfranchised for lack of property ownership or insufficient income. Similarly, it may be true, as Blasi contends, that because “opportunities to hear one’s distinctive voice reflected in public opinion are, to put it mildly, rare,” most Americans do not value “their opportunity to be heard as distinctive persons with individualized messages rather than as members of voting blocs.”<sup>136</sup> But, again, just because many Americans may not value their opportunities to personally participate in public discourse, it does not follow that they do not passionately believe that they and their fellow citizens have a right to raise their voices in protest of government policies or about contentious social issues. So even if most Americans never intend to exercise this right to protest, they would be incensed if the government tried to take this right away from them.

Though I do believe there are indeed very few other free speech values that garner as widespread of a consensus as does this thin

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<sup>133</sup> Blasi, *supra* note 2, at 533.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

version of participatory democracy, I do not claim this is the only norm that could attract such a consensus.<sup>137</sup> Nor is such a claim essential to the conclusion that participatory democracy is the only core free speech value. As I have emphasized, it is participatory democracy's superior fit with existing doctrine that among all other normatively appealing theories uniquely qualifies it for this position. I do doubt, however, that there is an autonomy-based norm that both garners such a consensus and is sufficiently robust to provide strong speech protection.<sup>138</sup> This is shown by the profound disagreement in our society, as well as among judges and legal scholars, about such autonomy-infringing measures as obscenity laws and bans on cigarette advertising.<sup>139</sup>

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<sup>137</sup> While, as Blasi suggests, there may well be other democratic values that are widely accepted as the version of participatory democracy I describe, it is not apparent to me that any of them are as uncontentious as a judicially-enforceable free speech value. For instance, while we all may accept the importance of adequate information flow as necessary to democratic decision making, many, including me, think that it is problematic for courts to vindicate this norm because of the quantitative judgments such an assessment would require. See Weinstein, *Participatory Democracy*, supra note 5, at 504 n.64; infra note 163 and accompanying text.

<sup>138</sup> As discussed in my opening statement, the values underlying Seana Shiffrin's thinker-based autonomy theory may well gather such a consensus; but unlike the version of participatory democracy that I have described, it would not likely yield free speech protection robust enough to protect speech that challenges the status quo. See Weinstein, *Participatory Democracy*, supra note 5, at 506–07 n.72 and accompanying text; Weinstein, *Thinker-Based Theory*, supra note 96.

<sup>139</sup> To demonstrate that there is a far greater consensus that government must treat people as autonomous agents when acting in their capacity as ultimate governors of society, rather than when acting in other capacities such as a consumer, I juxtaposed in my opening statement a hypothetical ban on advocacy in favor of repealing laws forbidding smoking with one banning cigarette advertising. See Weinstein, *Participatory Democracy*, supra note 5, at 508. Both measures were justified on the paternalistic ground that the speech would lead people to make unwise choices that will damage their health. Baker claims that the comparison is not apt because no regulation of commercial speech, including bans on cigarette advertising, “has ever attempted paternalistically to keep people from hearing a particular message” but instead “have . . . attempted to restrict the speech of certain self-interested speakers (commercial entities) whose autonomy is due no moral or constitutional respect.” See Baker, *Sound Basis?*, supra note 3, at 526. I am puzzled by this response. It is true that for a host of reasons, both practical and constitutional, government has never tried to completely suppress *all* messages from every conceivable source urging people to engage in a certain commercial transaction. But surely a major justification for bans on advertisement of dangerous products, such as cigarettes or alcohol, or problematic activities such as gambling, is—to the extent practically and constitutionally feasible—paternalistically to keep people from being persuaded to want to use these products or engage in these activities.

According to Professors Seana Shiffrin, Baker, and Susan Williams, a severe defect in the appeal of participatory democracy as a core free speech norm is that it cannot be sensibly confined to the political realm. Seana Shiffrin correctly observes that “the non-pragmatic justifications for democracy will implicitly depend upon some picture of the value of individual autonomy—at least some sort of individual mental autonomy.”<sup>140</sup> But if this is so, then why, she asks, is it:

[F]oundationally important to have unconstrained thoughts, and the ability to externalize them and share them, when those thoughts are about our form of social organization and its projects, yet it is not as foundationally important for an agent to have unconstrained thoughts that she may communicate about herself, her mortality, her metaphysical status, her personal relations with friends and strangers, or her aesthetic sense?<sup>141</sup>

The answer to Seana Shiffrin’s incisive question is that the picture of individual autonomy implicit in the conception of participatory democracy that I defend is very different from the picture of autonomy underlying the private speech she eloquently describes. Most crucially, the view that when engaging in democratic self-governance, including democratic discourse, citizens are rational and autonomous is not a description but an *ascription* in service of the *prescription* that when we are engaged in democratic self-governance, government must treat us as rational and autonomous agents. This prescription and related ascription flow from the basic precept that in a democracy it is the people, both individually and collectively, not the government, that possess the ultimate sovereignty.<sup>142</sup> If the government were able to suppress speech on the grounds that the people are either too foolish or too dependent to be trusted to hear information relevant to some collective decision on matters of public concern, then the government would, contrary

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<sup>140</sup> Seana Valentine Shiffrin, *Methodology in Free Speech Theory*, 97 Va. L. Rev. 549, 557 (2011).

<sup>141</sup> *Id.* at 557–58.

<sup>142</sup> See James Madison, *Virginia Resolutions*, in 4 Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 569–70 (Washington, n. pub. 1836) (stating that “[t]he people, not the government, possess[s] the absolute sovereignty”).

to this basic precept, become the ultimate sovereign with respect to that decision. When, however, we are acting in some capacity other than as the ultimate governors of society, government can treat us as not fully rational or fully autonomous without violating this core democratic precept.

It might have been preferable, however, if in accord with Scanlon's suggestion<sup>143</sup> I had eschewed the term "autonomy" and just said that it is inconsistent with the people's ultimate sovereignty for the government to suppress speech because it does not trust the people to make the right decision on a matter within their sovereign authority. In any event, this is all that I mean by the claim that people engaged in public discourse must be treated as rational and autonomous agents. This clarification should, I believe, answer Williams's objection that the division between a realm in which people are deemed autonomous and others in which they are not is "based on an inadequate model of autonomy."<sup>144</sup> For purposes of instantiating the right of the people, both collectively and individually, to govern, this model is perfectly adequate. And viewing the autonomy of people in their capacity as the ultimate governors of society "in a more relational way" is not only unnecessary to this task but also likely inimical to it.

Understanding the limited but essential purpose of the ascription of autonomy to people in their capacity as society's ultimate sovereign also answers Williams's objection that the division between public discourse and the rest of life is "false as a matter of experience because we experience a need for both social constitution and autonomy within all of the different domains in our lives."<sup>145</sup> Though vindicating the felt need for social constitution may be a worthy goal, it is not nearly weighty enough to justify the imposition of speech restrictions that would violate the core democratic precept that the people, not the government, are the ultimate decision makers on public issues.

Baker agrees that the view that those involved in public discourse are autonomous is an ascription, but argues that the value underlying democracy requires this ascription to be extended be-

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<sup>143</sup> See Scanlon, *supra* note 63, at 546–48.

<sup>144</sup> Williams, *supra* note 63, at 611.

<sup>145</sup> *Id.*

yond the political sphere to speech in the “lifeworld.”<sup>146</sup> In his view, “the ultimate value of democracy lies in respecting the autonomy that a legal order, in order to maintain its claim to legitimacy, must attribute to the people it asks to obey its laws.”<sup>147</sup> If, however, “governmental interventions” to structure public discourse must respect this autonomy, he can “see no reason” why these limitations on regulation of speech are “not equally required when the democratic legal order attempts to structure the lifeworld as [they are] when it structures the political sphere.”<sup>148</sup> The reason is to be found in the special relationship between public discourse and political legitimacy. Baker agrees with Post and me that the concern for legitimacy is the deepest value underlying the commitment to participatory democracy. And I agree with Baker that in asking the people to obey the laws, the legal order must be attributing a certain degree of autonomy to them. Still, while failure to respect autonomy outside of the political realm may in some circumstances implicate political legitimacy, the legitimacy concerns raised by denying people the opportunity to participate in the process which produces the laws that bind them are much more acute and far reaching.<sup>149</sup>

The combination of Baker’s and Seana Shiffrin’s arguments does, however, implicitly raise the following challenge to confining the vision of autonomous agents to those engaged in democratic self-governance: doesn’t the very concern about legitimacy presuppose agents with at least some degree of autonomy and rationality?<sup>150</sup> Otherwise why would we worry about whether imposing the laws upon people is legitimate? We do not, after all, worry about whether it is legitimate to order the dog to get off the couch. Moreover, unlike the autonomy ascribed to those engaged in public discourse on account of their sovereign status, the sense of autonomy underlying the concern for legitimacy is a general presupposition about individuals in society with a considerable de-

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<sup>146</sup> Baker, *Sound Basis?*, supra note 3, at 522–23.

<sup>147</sup> *Id.* at 522.

<sup>148</sup> *Id.* at 522–23.

<sup>149</sup> For an extended discussion of this crucial point, see James Weinstein, *Free Speech and Political Legitimacy: A Response to Professor Baker*, 27 *Const. Comment.* (forthcoming 2011).

<sup>150</sup> This is a very difficult problem that I have discussed over the years with Seana Shiffrin, Baker, and Post.

scriptive cast. Accordingly, this minimal, descriptive sense of autonomy would seem to extend to people in every capacity, not just when acting as ultimate sovereign in democratic society.

I agree that the autonomy presupposed by our concern with political legitimacy is not confined to the political realm. This observation does not, however, support the argument that the autonomy ascribed to people engaging in public discourse logically extends to the private realm. Though I am not sure about the precise extent of the minimal, descriptive autonomy presupposed by the concern for legitimacy, I am certain that it is something far less robust than the full-bodied autonomy (and rationality) that must be ascribed to people in their capacity as ultimate governors of society. More significantly, the minimal autonomy necessary to make sense out of the concern for legitimacy is not properly a *value* underlying the free speech principle. Rather, it is better conceptualized as an *evaluative presupposition* with no doctrinally generative force.<sup>151</sup>

I want to address what is an often overlooked consideration in normative discussion about constitutional rights: the necessity of developing doctrine that is capable of practical administration. This pragmatic concern is ultimately normative because unworkable free speech rules can easily undermine the very values these rules are meant to promote. It is concern for workable doctrine that leads Volokh to endorse Professor Cynthia Estlund's view that although "speech on public issues is a central concern" of First Amendment doctrine, "the creation of an explicit constitutional category consisting of speech on matters of public concern . . . should be avoided" because, paradoxically, creation of such a category "inevitably undermines the protection of speech that is important to public discourse."<sup>152</sup> Volokh believes that cases like *Connick* and *Bartnicki v. Vopper*<sup>153</sup> highlight "the difficulty of sensibly applying 'a public concern' distinction" as well as the

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<sup>151</sup> I thank Joseph Raz for pointing out to me the distinction between values and evaluative presuppositions. For further discussion of this evaluative presupposition and its proper role in doctrinal analysis, see Weinstein, *Commercial Speech*, supra note 67, at 164–66.

<sup>152</sup> Volokh, supra note 7, at 594 (quoting Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 *Geo. Wash. L. Rev.* 1, 2–3 (1990)) (internal quotation marks omitted).

<sup>153</sup> 532 U.S. 514 (2001).

“tend[ency] to pull Justices into unsound analyses.”<sup>154</sup> Volokh, however, offers scant evidence that this distinction has proven unworkable or has led to mischievous results.<sup>155</sup>

Moreover, unless *all* speech in the categories to which this test has been employed<sup>156</sup> is to be protected, a position that is most implausible, or *none* of the speech in these categories is to be eligible for protection, a result that would most definitely “undermine the protection of speech that is important to public discourse,” then there must be *some* standard for separating protected from unprotected speech in these contexts. Whatever problems that “speech on matters of public concern” standard may have, they pale in comparison to those that would result from applying the “presumptive all-inclusive approach” that Volokh favors. To begin with, in many of these contexts it is doubtful that this presumption would be applied in any meaningful way. For instance, it is highly unlikely, to say the least, that courts would hold that public em-

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<sup>154</sup> Volokh, *supra* note 7, at 580.

<sup>155</sup> I disagree with Volokh that, because trade secrets obtained by an illegally intercepted conversation sometimes might be of public interest, *Bartnicki*'s distinction between speech on matters of public and private concern is unworkable or leads Justices analytically astray. *Id.* at 580. Contrary to Volokh, I think that courts should be able to formulate a workable standard for identifying those rare cases where the public interest in disclosure of the trade secret is so strong that First Amendment immunity for the disclosure is justified despite the privacy and economic interests compromised by such disclosure. Understandably, the Court did not, in the very first case recognizing constitutional immunity for disclosure of illegally intercepted conversations, attempt to work out detailed solutions to the myriad questions that might (or might not) arise in subsequent cases. This does not show, however, that the distinction between matters of public and private concern it drew in that case is unworkable. Nor do I agree with Volokh that the concurring Justices' view that First Amendment protection should apply only to illegally intercepted conversation on matters of “unusual public concern,” *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring), “makes matters worse.” Volokh, *supra* note 7, at 580. If anything, a rule that there is no First Amendment right to disclose a conversation that one knows has been illegally intercepted, except if some particularly important public interest would be vindicated by the disclosure, is a more certain standard than the unmodified public/private distinction.

Volokh's criticism of the public concern standard adopted in *Connick*, 461 U.S. at 146, similarly lacks bite. See Volokh, *supra* note 7, at 576. To be sure, there may be cases in which it will be difficult to determine on which side of the public/private concern line public employee speech falls, as was arguably the case in *Connick*. The occasional hard case does not, however, render the distinction unworkable.

<sup>156</sup> Including defamation of private persons, government workplace speech, disclosure of illegally intercepted conversations, speech that causes intentional infliction of emotional distress, and economic boycotts.

employees generally have a right to speak disrespectfully to their superiors, to argue with them to the point of insubordination, or to use profanity when addressing their co-workers or when dealing with members of the public. So the application of the “presumptive all-inclusive” approach in this context would be misleading and invite fruitless litigation. Similar problems would likely arise if such a standard were applied across the board to all speech constituting disclosure of illegally intercepted conversations, intentional infliction of emotional distress, and defamation of private persons.

In addition, unlike the public concern standard, which attempts to distinguish between speech essential to democratic self-governance and speech not essential to this practice, it is not evident what constitutional values the “presumptive all-inclusive approach” is meant to vindicate.<sup>157</sup> For this reason, this approach would likely result in an even more uncertain standard for distinguishing protected from unprotected speech than does the public/private concern standard.<sup>158</sup> Relatedly, if the goal in rejecting the public concern standard is to prevent the undermining of “the protection of speech that is important to public discourse,” then replacing this standard with one that does not even point courts and other legal actors in the direction of democratic self-governance seems questionable, to put it mildly.<sup>159</sup>

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<sup>157</sup> Volokh never explicitly states what constitutional values he believes underlie his vision of the all-inclusive approach. His endorsement of the truth seeking/marketplace-of-ideas rationale, see Volokh, *Marketplace of Ideas*, supra note 63, however, suggests that this is at least one of the values that informs this view.

<sup>158</sup> In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court acknowledged that “the boundaries of the public concern test [remain] not well defined.” *Id.* at 1216 (internal citation omitted). The Court added, however, that it has “articulated some guiding principles.” *Id.* It proceeded to review various formulations and statements of the public concern standard, which it then applied to hold that the speech at issue was a matter of public concern. *Id.* at 1216–19. Because *Snyder* was decided as this issue was about to go to press, I will not have an opportunity in this Reply to critique the Court’s efforts to give greater certainty to this standard. Suffice it to say, it is reassuring that the Court is well aware of the continuing need to make such an effort.

<sup>159</sup> In an amicus brief that he filed in *Snyder* urging First Amendment protection for the speech involved in that case, Volokh relied on the distinction between speech on matters of public and private concern that he criticizes in this Symposium. See Brief of The Foundation for Individual Rights in Education et al. as Amici Curiae Supporting Respondents, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751) 3, 17, 19–21; cf. Volokh, supra note 7, at 576 (criticizing public concern standard). There is, of course, nothing wrong with an advocate making an argument inconsistent with his scholarly

Volokh's pragmatic objection (following Estlund), however, seems to go beyond the specific use of the public concern standard to the more general project of building free speech doctrine on an express foundational commitment to participatory democracy as a core free speech value. Constructing free speech doctrine that is sound both in theory and practice is a daunting task. But contrary to Volokh, I believe that participatory democracy is a value particularly suited to produce doctrinal rules, standards, and formulas that are, in Judge Learned Hand's words, "hard, conventional, difficult to evade."<sup>160</sup> The bare bones commitment to participatory democracy that I have described is itself a more "conventional" concept than truth-seeking through the marketplace of ideas, which may be one of the values that underlie Volokh's vision of the all-inclusive approach.<sup>161</sup> A theory based on participatory democracy is thus likely to yield doctrine that is more conventional than one produced by a commitment to truth seeking. Even more certainly, this thin view of participatory democracy is capable of yielding the type of "qualitative formula" that Judge Hand recognized as essential to judicially administrable rules,<sup>162</sup> rather than the quantitative analysis inherent in operationalizing values such as assuring adequate information flow for collective decision making or in assessing the extent to which various laws challenged under the First Amendment actually interfere with the marketplace of ideas.<sup>163</sup>

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writing. Still, having successfully urged the Court to provide special protection to speech on matters of public concern, Volokh might perhaps want to reconsider whether the public concern standard has both somewhat greater currency in Supreme Court doctrine and usefulness as an analytical tool than he had previously supposed. In any event, I am glad that the Court chose to follow Volokh-the-advocate rather than Volokh-the-commentator.

<sup>160</sup> Letter from Judge Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921), in Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 *Stan. L. Rev.* 719, 769-72 (1975) [hereinafter Hand Letter].

<sup>161</sup> See supra note 157.

<sup>162</sup> See Hand Letter, supra note 160, at 770. Thus it is not surprising that Hand preferred to ground free speech in a speaker-based commitment to democracy rather than in a commitment to the search for truth or individual autonomy. See *Masses Publ'g Co. v. Patten*, 244 F. 535, 539-40 (S.D.N.Y. 1917).

<sup>163</sup> See Weinstein, Database Protection, supra note 17, at 331.

Scanlon and Volokh object that the distinction between highly protected public discourse and other, less protected speech is uncertain.<sup>164</sup> Though there will always be some uncertainty at the edges, the continued accretion of rules through a process of “definitional balancing”<sup>165</sup> to which participatory democracy lends itself will reduce this uncertainty over time. In contrast, because there will often be autonomy interests of the same type on both sides of a free speech case, an autonomy-based theory will tend to produce ad hoc balancing anathema to protection of speech that harshly challenges the status quo. More generally, I fear that a sophisticated, multi-dimensional autonomy theory such as Seana Shiffrin’s, which posits a “robust, intimate, and complex relation between individual autonomy, interpersonal relations, and democratic self-rule,”<sup>166</sup> will be exceedingly difficult to translate into workable doctrine.

I agree with Steven Shiffrin that doctrine should show particular solicitude for “dissent”<sup>167</sup> but not because people have a greater right to express dissenting opinions than conventional ones, or even because dissenting views are more valuable to social progress, though one could certainly argue that they are. Rather, in accord with Scanlon’s general observation about moral rights claims,<sup>168</sup> it is because unpopular opinions are particularly “vulnerable” to suppression at the hands of the majority. To prevent the suppression of opinion that challenges society’s sacred cows, expression on matters of public concern should be protected by a system of relatively rigid, brightline rules rather than by, as Williams suggests, “finely grained contextual analyses of [the] particular case,”<sup>169</sup> a formula that would invite judges, juries, and law enforcement officials to smuggle majoritarian sentiments into the mix.

To assure protection of the expression that vehemently challenges the status quo, I favor some significant degree of speech

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<sup>164</sup> See Scanlon, *supra* note 63, at 545; Volokh, *supra* note 7, at 571.

<sup>165</sup> See *supra* notes 14–19 and accompanying text.

<sup>166</sup> Seana Shiffrin, *supra* note 140, at 553. For a fuller discussion of the problem with uncertainty in the doctrine likely to be produced by Seana Shiffrin’s theory, see Weinstein, *Thinker-Based Theory*, *supra* note 96.

<sup>167</sup> See Steven Shiffrin, *supra* note 37, at 559.

<sup>168</sup> See Scanlon, *supra* note 63, at 541–42.

<sup>169</sup> Williams, *supra* note 63, at 614.

overprotection as prophylaxis against breaches of the core individual right of democratic participation. I take it that such a strategy is at least one of the reasons that Volokh embraces a presumptive all-inclusive approach. The massive overprotection of speech entailed in his approach would, however, empower judges to invalidate democratically-enacted laws that offend their ideological predispositions or their views about good public policy, but which do not actually imperil any free speech norm, core or otherwise. Of course, this potential to use the Free Speech Clause to “*Lochnerize*” could be mitigated by making the presumption that is afforded all speech a weak one. But in the absence of the special protection of speech constitutive of democratic participation that Volokh opposes, such an approach would dilute the rigorous protection currently afforded expression that sharply challenges society’s most passionately held views.

Finally, I want to address the serious pragmatic problem inherent in the recognition of a multi-value core, a view espoused by Volokh, Steven Shiffrin, Blasi, and Scanlon. Though any accurate description of current doctrine must acknowledge norms in addition to participatory democracy, pragmatic concerns dictate that there be a limited number of hierarchically arranged values. Otherwise, like a painter using just three primary colors, judges in any given case will be able to paint pretty much any picture of First Amendment protection they desire, a state of affairs which will lead to similar uncertainty and subjectivity as would ad hoc balancing. Since a theory based in participatory democracy has the best fit with current doctrine and, in addition, has considerable normative appeal, speech constitutive of democratic self-governance should, as the Court has often declared,<sup>170</sup> be placed at the top of the free speech hierarchy.

As the powerful responses to my opening statement show, there are indeed problems with viewing participatory democracy as the sole core free speech norm. But to slightly alter Winston Chur-

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<sup>170</sup> See *Connick*, 461 U.S. at 145 (“Speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy [sic] of First Amendment values, and is entitled to special protection.”) (internal quotation marks and citations omitted); *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (repeating the above quotation with minor deletions).

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chill's famous observation, participatory democracy is the worst theory of free speech, except for all the others.

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