PARTICIPATORY DEMOCRACY AS THE CENTRAL VALUE OF AMERICAN FREE SPEECH DOCTRINE

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IN this discussion I will defend the view that contemporary American free speech doctrine is best explained as assuring the opportunity for individuals to participate in the speech by which we govern ourselves. This democracy-based theory is both descriptively powerful and normatively attractive. Descriptively, no other theory provides nearly as good an explanation of the actual pattern of the Supreme Court's free speech decisions. Normatively, this theory is appealing because it is firmly rooted in a value to which virtually everyone in our society adheres. In addition, it properly confines the most rigorous speech protection to expression necessary to the legitimacy of the entire legal system.

I. DESCRIPTIVE POWER

To demonstrate the descriptive power of this theory, I will first describe the structure of contemporary free speech doctrine. I will then show how a theory based on the individual right to participate in the democratic process provides a remarkably cogent explanation of this structure.

A. Doctrinal Structure

Contrary to a widely held view aptly dubbed the "all-inclusive" approach,[1] it is manifestly not the case that "all speech receives

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[1] Barry P. McDonald, Government Regulation or Other "Abridgments" of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment, 54 Emory L.J. 979, 1009 (2005). For other statements of the all-inclusive approach, or variations of it, see John E. Nowak & Ronald D. Rotunda, Constitutional Law 1226 (6th ed. 2000) ("A content-based restriction of [speech] is valid only if it fits within a category of speech that the First Amendment does not protect, for example, obscenity."); Eugene Volokh, The First Amendment: Problems, Cases, and Policy Arguments 2 (2001) (stating that besides the traditional "exceptions," the settings in which government may regulate the content of speech are confined to those in which it is acting as proprietor or educator, rather than as sovereign).

First Amendment protection unless it falls with[in] certain narrow categories of expression . . . such as incitement of imminent illegal conduct, intentional libel, obscenity, child pornography, fighting words, and true threats."[2] Nor is it true, as is also commonly supposed, that unless speech falls into one of these forlorn categories, any content regulation of this speech will be subject to "strict scrutiny."[3] In addition to the well-known exceptions just mentioned, one need only consider the large range of speech regulated on account of its content, all without a hint of interference from the First Amendment, such as that regulated by securities, antitrust, 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, to quickly realize that there is a multitude of "exceptions" beyond the few recognized by the all-inclusive approach.[4] Indeed, a more accurate snapshot of First Amendment protection is almost the photonegative of the all-inclusive approach: highly protected speech is the exception, with most other speech being regulable because of its content with no discernable First Amendment constraint;[5] or like commercial speech,[6] sexually explicit but non-obscene speech,[7] or speech in a nonpublic forum,[8] expression that receives some, but not the most rigorous, protection from content regulation.

[2] McDonald, supra note 1, at 1009. For recent Supreme Court dicta reciting a version of the all-inclusive approach, see *United States v. Stevens*, 130 S. Ct. 1577, 1584–85 (2010).

[3] See James Weinstein, Hate Speech, Pornography and the Radical Attack on Free Speech Doctrine 40–43 (1999) [hereinafter Weinstein, Hate Speech]; James Weinstein, Institutional Review Boards and the Constitution, 101 Nw. U. L. Rev. 493, 535–36 (2007) [hereinafter Weinstein, Institutional Review Boards].

[4] See Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765, 1768, 1778–84 (2003); see also James Weinstein, Speech Categorization and the Limits of First Amendment Formalism: Lessons from *Nike v. Kasky*, 54 Case W. Res. L. Rev. 1091, 1097–98 (2004) [hereinafter Weinstein, Speech Categorization].

[5] See Schauer, supra note 4, at 1768. To adopt Schauer's useful terminology, this speech is not just devoid of protection, but because its regulation "does not present a First Amendment issue at all," it is outside First Amendment "coverage." Id. at 1769.

[6] See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–63 (1980).

[7] See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48–49 (1986).

[8] See Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 46 (1983).

As Professor Robert Post's pioneering work has demonstrated, this extremely rigorous protection applies primarily within the domain of "public discourse."[9] Public discourse consists of speech on matters of public concern, or, largely without respect to its subject matter, of expression in settings dedicated or essential to democratic self-governance, such as books, magazines, films, the internet, or in public forums such as the speaker's corner of the park.[10] It is in this realm that the people—the ultimate governors in a democracy—can freely examine and discuss the rules, norms, and conditions that constitute society. Precisely because public discourse in the United States is so strongly protected, however, the realm dedicated to such expression cannot be conceived as covering the entire expanse of human expression. Just as it is imperative in a democracy to have a realm in which any idea, practice, or norm can be questioned as vituperatively as the speaker chooses, there must be other settings in which the government may efficiently carry out the results yielded by the democratic process. Accordingly, in settings dedicated to some purpose other than public discourse—such as those dedicated to effectuating government programs in the government workplace,[11] to the administration of justice in the

[9] Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v. Falwell*, 103 Harv. L. Rev. 603, 604 (1990); Weinstein, Speech Categorization, supra note 4, at 1096. Although my understanding of the structure and underlying values of American free speech doctrine owes much to Post's illuminating work, there are a few significant differences between our approaches. One difference is that, in determining whether an individual instance of speech is part of public discourse, I place somewhat greater emphasis on the content of the speech (that is, whether or not it is on a matter of public concern), while Post focuses more on its context (that is, whether or not the expression occurs in a setting essential to democratic self-governance). See infra note 35.

[10] This brief statement is obviously neither a precise nor exhaustive definition of the domain of public discourse but rather is offered as a quick sketch of that domain and a specification of the two major features that construct it. For further refinement of this statement and the methodology by which the Court has drawn the boundaries of public discourse, see infra note 35 and especially James Weinstein, Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply, 97 Va. L. Rev. 633, 637–39 (2011) [hereinafter Weinstein, Reply]. I am enormously grateful to Eugene Volokh for his incisive criticisms that impelled several of these refinements.

[11] See, e.g., Connick v. Myers, 461 U.S. 138, 147 (1983) (holding that the discharge of assistant district attorney for criticism of her superior did not violate the First Amendment).

courtroom,[12] or to instruction in public schools[13]—the government has far greater leeway to regulate the content of speech.[14]

This pattern of highly protected speech within public discourse and readily regulable speech outside that domain is perhaps most starkly apparent with respect to First Amendment limitations on defamation suits. When allegedly defamatory speech concerns a public official, stringent First Amendment protection applies.[15] Even when the speech concerns a private person, considerable First Amendment protection is available if the speech is on a matter of public concern.[16] But if the speech addresses a purely private concern, then no First Amendment limitations restrain the normal operation of defamation law.[17] This special constitutional immunity for speech on matters of public concern was extended to the criminal law in *Bartnicki v. Vopper*.[18] *Bartnicki* involved a federal law that made it a crime to intercept a cellular telephone conversation or to publish the contents of such a conversation if the publisher had reason to know that the conversation had been illegally intercepted.[19] The Supreme Court held that because the illegally intercepted conversation at issue in that case was "truthful information of public concern," it was unconstitutional to impose either civil or criminal liability on the publisher (who was not involved with the illegal interception).[20] The Court noted, however, that such immunity might not have attached if the conversation had been of purely private concern.[21]

[12] See, e.g., Jackson v. Bailey, 605 A.2d 1350, 1359 (Conn. 1992) (upholding a contempt conviction for using profanity in the courtroom).

[13] See, e.g., Morse v. Frederick, 551 U.S. 393, 403 (2007) (rejecting a First Amendment challenge by a student disciplined for displaying banner at an off-campus school activity bearing the message "BONG HiTS 4 JESUS").

[14] See Robert C. Post, Constitutional Domains: Democracy, Community, Management 200–01 (1995).

[15] See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

[16] See Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

[17] See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760–61 (1985) (plurality opinion); id. at 764 (Burger, C.J., concurring in judgment); id. at 774 (White, J., concurring in judgment).

[18] 532 U.S. 514 (2001).

[19] Id. at 520.

[20] Id. at 533–34.

[21] Id. at 533; see also id. at 535–36 (Breyer, J., concurring) (emphasizing that "the information publicized involved a matter of unusual public concern").

This pattern repeats throughout free speech doctrine: A lawyer has a First Amendment right to solicit clients when "seeking to further political and ideological goals" through litigation, but not for ordinary economic reasons.[22] Politically motivated economic boycotts receive rigorous First Amendment protection, while ordinary economic boycotts do not.[23] The First Amendment prevents government from punishing misleading or deceptive political speech but allows it to strictly forbid deceptive or misleading speech addressed to consumers by commercial advertisers or to patients by physicians.[24]

In *Snyder v. Phelps*,[25] a recent Supreme Court decision setting First Amendment limitations on the tort of intentional infliction of emotional distress, the distinction between matters of public and private concern once again proved crucial. In this case, members of a church protested near the funeral of a soldier killed in the line of duty in Iraq, expressing in highly offensive terms the view that the soldier was killed by God because the United States tolerated sin, especially homosexuality.[26] Noting that "[s]peech on matters of public concern . . . is at the heart of the First Amendment's protection,"[27] Chief Justice Roberts, writing for a nearly unanimous Court,[28] explained that whether "the First Amendment prohibits holding [the church] liable for its speech in this case turns largely

[22] Compare In re Primus, 436 U.S. 412, 414, 434 (1978) (holding that First Amendment prohibits discipline of a lawyer for soliciting a client for public interest litigation), with Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978) (finding no First Amendment obstacle to discipline of lawyer for in-person solicitation of clients in ordinary personal injury case).

[23] Compare NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911–12 (1982) (holding that the First Amendment protects speech related to boycott seeking to bring about racial integration), with FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 426–28 (1990) (holding the First Amendment does not protect boycott by lawyers aimed at increasing their own compensation).

[24] See Weinstein, Speech Categorization, supra note 4, at 1106. In addition, as Post has shown, government may compel speech without, but not within, public discourse. Robert Post, Compelled Subsidization of Speech: *Johanns v. Livestock Marketing Association*, 2005 Sup. Ct. Rev. 195, 197.

[25] 131 S. Ct. 1207 (2011).

[26] Included among the signs that the protestors carried were ones that read: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Thank God for IEDs," "Thank God for Dead Soldiers," and "God Hates Fags." Id. at 1213.

[27] Id. at 1215 (internal quotation marks omitted).

[28] Justice Alito was the lone dissenter. Id. at 1222–29. Justice Breyer, who joined the Chief Justice's majority opinion, filed a concurring opinion. Id. at 1221–22.

on whether that speech is of public or private concern."[29] He added that "[n]ot all speech is of equal First Amendment importance" and that "where matters of purely private significance are at issue, First Amendment protections are often less rigorous."[30] Finding that the speech in question "plainly relates to broad issues of interest to society at large," such as homosexuality in the military and the moral conduct of the United States, "rather than matters of purely private concern," the Court held that the speech was "entitled to 'special protection' under the First Amendment."[31] As such, it could not constitutionally form the basis of an intentional infliction of emotional distress claim brought by the dead soldier's father.[32]

It is not just the content of the speech that determines whether the expression will be highly protected as public discourse, but also the setting or medium in which the expression occurs.[33] In modern democratic societies, certain modes of communication form "a structural skeleton that is necessary, although not sufficient, for public discourse to serve the constitutional value of democracy."[34] For this reason, "it [is] assumed that if a medium [is] constitutionally protected by the First Amendment, each instance of the medium would also be protected."[35] The importance of the medium in

[29] Id. at 1215.

[30] Id. (internal quotation marks omitted).

[31] Id. at 1216, 1219 (internal quotation marks omitted). The Court further found that the First Amendment prohibited a finding of liability for intrusion upon seclusion and civil conspiracy based upon this speech. Id. at 1219.

[32] Id.

[33] See supra text accompanying note 10. Thus in addition to focusing on whether the speech was on a matter of public concern, the Court in *Snyder* emphasized that the protest occurred at a "public place adjacent to a public street," a "space [that] occupies a 'special position in terms of First Amendment protection.'" Id. at 1218 (quoting United States v. Grace, 461 U.S. 171, 180 (1983)).

[34] Robert C. Post, Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249, 1276 (1995).

[35] Id. at 1253. Differing slightly from Post's formulation of this important structural insight, I have written that it is "presumed" rather than "assumed" that each instance of speech in a constitutionally protected medium is protected. See James Weinstein, Democracy, Sex and the First Amendment, 31 N.Y.U. Rev. L. & Soc. Change 865, 874 (2007); Weinstein, Speech Categorization, supra note 4, at 1121. Although this presumption is a strong one, it is rebuttable. For example, though film is undoubtedly a medium of democratic communication, the presumption of protection it provides has been rebutted in the specific case of obscenity. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973) (upholding the banning of legally obscene films as consis-

which a given instance of speech occurs to democratic self-governance is, in my view, the best explanation of why the Supreme Court rigorously protects nudity in film and cable television—media that are in its view part of the "structural skeleton" of public discourse—but not in live performances by erotic dancers on the stage of a "strip club."[36]

B. Explanatory Values

As the reservation of rigorous First Amendment protection primarily for public discourse suggests, the value that best explains the pattern of free speech decisions is a commitment to democratic self-governance. While vigorous disagreement persists about what other values might also be central to the First Amendment, there is "practically universal agreement" that at least one such core norm is democracy.[37] In its narrowest but most powerful conception, this core precept recognizes the right of every individual to participate freely and equally in the speech by which we govern ourselves. As Judge Learned Hand long ago observed, "public opinion . . . is the

tent with the First Amendment). The Court has also indicated that obscenity is entitled to no First Amendment protection even in the highly protected "democratic forums of the Internet." Reno v. ACLU, 521 U.S. 844, 868 (1997). And though commercial advertising often makes use of radio and television, media that are essential to democratic self-governance, such expression is not within the highly-protected realm of public discourse. See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–63 (1980). Parallel to the rebuttable presumption that expression in a democratic medium is part of public discourse, the equally strong presumption that speech concerning matters of public concern is part of public discourse is also not conclusive. See Weinstein, Reply, supra note 10, at 638.

[36] Compare Playboy Entm't Group v. United States, 529 U.S. 803, 811 (2000) (finding that a federal statute requiring cable television operators to fully scramble or otherwise limit sexually oriented programming violated the First Amendment), with City of Erie v. Pap's A.M., 529 U.S. 277, 301–02 (2000) (finding that the application of a city ordinance banning public nudity to a nude dancing establishment did not violate the First Amendment). It is also why in my view the Supreme Court, though certain that dog fighting was not an activity entitled to First Amendment protection, seemed unsure whether videos depicting this activity were similarly unprotected, and thus invoked the overbreadth doctrine to avoid the issue. See United States v. Stevens, 130 S. Ct. 1577, 1584–85 (2010).

[37] See Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

final source of government in a democratic state."[38] The opportunity for each citizen to participate in the speech by which public opinion is formed is therefore vital to the legitimacy of the entire legal system.[39]

If an individual is excluded from participating in public discourse because the government disagrees with the speaker's views or because it finds the ideas expressed too disturbing or offensive, any decision taken as a result of that discussion would, as to such an excluded citizen, lack legitimacy. So, if someone is barred from expressing a view on a proposed tax increase; or about whether the nation goes to war; or on the country's immigration policy; or about pending civil rights legislation; then to that extent and with respect to that citizen, the government is no democracy, but rather an illegitimate autocracy. This explains free speech doctrine's fierce opposition to viewpoint-discriminatory restrictions on public discourse.[40] This concern for legitimacy also explains why the right to participate in public discourse free of government-imposed content restriction is not just a collective interest inherent in popular sovereignty, but also a fundamental individual right that government may legitimately infringe, if at all, only in truly extraordinary circumstances.[41]

While American free speech doctrine is thus heavily speaker oriented, audience interests are a core concern as well, but only in the space created by a crucial limitation on the justifications that government may offer for speech regulation. Government may not restrict speech because it fears that the expression of certain viewpoints will generate public opinion that will lead to misguided or even disastrous social policy decisions.[42] Such a justification for suppressing speech is contrary to the fundamental premise of a

[38] Masses Publ'g Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917).

[39] See Robert C. Post, Racist Speech, Democracy, and the First Amendment, 32 Wm. & Mary L. Rev. 267, 282 (1991).

[40] See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

[41] For a detailed discussion of legitimacy as the normative essence of American free speech doctrine, see James Weinstein, Free Speech and Political Legitimacy: A Response to Professor Baker, 27 Const. Comment. (forthcoming 2011) [hereinafter Weinstein, Free Speech].

[42] See Weinstein, Institutional Review Boards, supra note 3, at 514–15.

democratic society that the people are the ultimate sovereign and have a right to govern.[43]

For two reasons, this right to participate in democratic self-governance, both as speaker and audience, is properly referred to as the core free speech norm.[44] First, this norm explains the pattern of decisions far better than does any other contender. While it may not explain every case,[45] it explains the great majority, and, significantly, is contradicted by none. Second, befitting a core constitutional norm, these participatory interests constitute a right in the strong sense of that term: an interest possessed by an individual that cannot be overridden on the ground that general social utility would be increased by doing so.[46] Regulations that infringe the right of free and equal participation in public discourse are invariably held unconstitutional even if the government can show

[43] See First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791–92 (1978) ("[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.").

[44] See Morse v. Frederick, 551 U.S. 393, 403 (2007) ("Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'" (quoting Virginia v. Black, 538 U.S. 343, 365 (2003))); see also Snyder v. Phelps, 131 S. Ct. 1207, 1215 ("'[S]peech on matters of public concern . . . is at the heart of the First Amendment's protection.'" (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985))); *Snyder*, 131 S. Ct. at 1215 ("'[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'" (quoting Connick v. Myers, 461 U.S. 138, 145 (1983))).

[45] See infra text accompanying notes 49–63. Perhaps its greatest explanatory shortcoming is that a theory based in participatory democracy cannot easily explain the rigorous protection that current doctrine affords non-ideational art such as abstract paintings or symphonic music. A plausible democracy-based explanation for such rigorous protection is that because art in general can be a particularly effective means of political persuasion, rigorous protection has been extended across the board even to art that has no political purpose. In addition, as shown by totalitarian governments' hostility to certain forms of abstract art and symphonic music, any attempt by government to suppress non-ideational art raises the suspicion of illegitimate political motivation for the regulation, such as the fear that the art will lead the audience to question authority. See Weinstein, Hate Speech, supra note 3, at 15. Still, I am not sure that these arguments adequately explain the rigorous protection afforded non-ideational art.

[46] See Ronald Dworkin, Taking Rights Seriously xi (1977). Unlike in most other democracies, which conceive of free speech as an interest to be balanced against various other societal interests, see infra note 88 and accompanying text, in the United States the First Amendment restrains government from prohibiting the expression of racist ideas in public discourse even if society as a whole would be better off if hateful ideas about minorities were excised from public discussion. See infra note 47 and accompanying text.

that substantial harm might result if the speech is left unregulated. For instance, the First Amendment forbids government from prohibiting the expression of racist ideas in public discourse so as to prevent the psychic injury such speech undoubtedly causes members of minority groups and would do so even if the government could show that the public expression of these ideas might lead others to discriminate against minorities.[47] Similarly, even if the government could have persuasively demonstrated that protests in the United States against the war in Iraq both dispirited our troops and encouraged the insurgents to continue fighting, such antiwar protests still could not have been forbidden on these grounds.[48]

While I do believe that the individual right to participate in the speech by which we govern ourselves is the only core norm, I do not contend that this is the only value that informs free speech doctrine. Indeed, the core participatory interests that I have just described do not even exhaust the democracy-based interests served by the First Amendment. Even if a regulation does not infringe a speaker's right of democratic participation or violate core democratic audience interests by restricting speech for some illegitimate reason, a regulation may still violate the First Amendment because it unduly interferes with the audience's interest in receiving information needed to develop informed views on public policy matters.[49] For instance, emphasizing the interests of the audience apart from any rights of the corporate speaker, a sharply divided Court invalidated a Massachusetts law closely confining the circumstances in which corporations could make political contributions or expenditures to influence questions submitted to the voters.[50] More recently, the Court in *Citizens United v. FEC*, another 5-4 decision, invalidated restrictions on corporate campaign expenditures im-

[47] See Virginia v. Black, 538 U.S. 343, 365–67 (2003); see also Weinstein, Hate Speech, supra note 3, at 52–59.

[48] See infra text accompanying notes 93–96.

[49] This view was famously expounded by Alexander Meiklejohn in Free Speech And Its Relation To Self-Government 25 (1948).

[50] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). In responding to the contention that corporations have no First Amendment right to speak, the Court stated that "[t]he Constitution often protects interests broader than those of the party seeking their vindication" and noted that "[t]he First Amendment, in particular, serves significant societal interests." Id at 776.

posed by the Bipartisan Campaign Reform Act of 2002.[51] Similarly, the Court has created a very narrow right of access to information when it is a necessary precondition for an individual citizen to "effectively participate in and contribute to our republican system of self-government."[52]

This information-vindicating norm cannot, however, be properly characterized as a core First Amendment value. Assuring the flow of information likely to enrich public discourse apart from any speaker's interest involved in its dissemination is a concern instrumental to the proper functioning of democracy; it is not, like the speaker's right of participation, constitutive of democracy. Thus, government interference with information flow (unless instituted for illegitimate reasons, as discussed above) would not infringe an individual right in the strong sense of the term. Confirming that laws impeding public access to information needed for democratic decision making do not implicate a core First Amendment right, prior to *Citizens United* the Court had often deferred to legislative judgments that restrictions on information relevant to matters of public concern (but not restricting a constitutionally relevant speaker) were justified by some greater social welfare consideration.[53] The interest in information flow needed for public decision making is thus properly characterized as an important secondary norm.

[51] 130 S. Ct. 876 (2010).

[52] Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982).

[53] See, e.g., McConnell v. FEC, 540 U.S. 93, 205 (2003); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990); see also Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34–35 (1984). Unlike flesh-and-blood individuals, ordinary business corporations are not in need of the legitimating function of political participation. Thus, it is implausible to suggest that the political system is rendered illegitimate as to corporations, managers, or shareholders because these entities are not permitted to vote in elections. Accordingly, the only substantial free speech interest at issue in *Citizens United* was the audience interest in hearing the corporate speech restricted by the campaign finance laws. These restrictions applied only within 30 days of a primary and 60 days of a general election, 2 U.S.C. § 434(f)(3)(A) (2006), and, additionally, had previously been interpreted to apply only to advertisements unmistakably urging the support or defeat of a candidate. See FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 476 (2007). The conclusion that these restrictions unduly curtailed or distorted the information needed by the citizenry to make informed decisions seems difficult to justify, especially in light of the ability of corporations to speak through political action committees during these restricted periods. See 2 U.S.C. § 441b(b)(2) (2006).

Aside from democracy, another popular candidate for a fundamental norm underlying the American free speech principle is the search for knowledge and "truth" in the marketplace of ideas. Although this rationale has long informed American free speech doctrine,[54] it is surely not a core value. One serious problem with the marketplace-of-ideas rationale is that the premise that a completely unregulated market of ideas will lead to discovery of truth is highly contestable. A more profound problem with characterizing the marketplace-of-ideas rationale as a core free speech norm is that it justifies free speech in terms of the good it will produce for society as a whole, not as a true individual right. I agree with Professor C. Edwin Baker that the "marketplace of ideas theory is fundamentally unsound both normatively and descriptively."[55]

Despite the lip service that the Court has paid to the marketplace-of-ideas rationale,[56] the actual decisions show that the Court protects speech promoting the marketplace of ideas much less rigorously than it protects speech by which we govern ourselves. Such lack of concern for maintaining a vibrant marketplace of ideas was demonstrated, for instance, in a 2003 case that refused to apply any meaningful scrutiny to a copyright law that arguably removed important ideas and information from the public domain.[57] Far from a core free speech norm, the marketplace-of-ideas rationale is at most a peripheral value.

Several prominent commentators, including Professors Baker, David Richards, Martin Redish, and Seana Shiffrin, have argued that the core First Amendment value resides among the cluster of norms comprising individual autonomy, self-expression, or self-fulfillment.[58] But whatever might be said in favor of these various theories as a normative matter, they do not accurately describe current free speech doctrine. Redish, for instance, concedes that

[54] See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[55] C. Edwin Baker, First Amendment Limits on Copyright, 55 Vand. L. Rev. 891, 897 (2002).

[56] See, e.g., Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[57] See Eldred v. Ashcroft, 537 U.S. 186, 204 (2003).

[58] See, e.g., C. Edwin Baker, Human Liberty and Freedom of Speech 47 (1989); Martin H. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591, 625–29 (1982); David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45, 59–70 (1975); Seana V. Shiffrin, Speech, Death, and Double Effect, 78 N.Y.U. L. Rev. 1135, 1158–85 (2003).

the commitment to the "development of the individual's powers and abilities" or to "the individual's control of his or her own destiny through making life-affecting decisions" is inconsistent with the concept of "unprotected speech," such as obscenity and fighting words.[59] More generally, any autonomy-based theory is also contradicted as a descriptive matter by the multitude of other types of speech, noted previously, that government routinely regulates without any First Amendment hindrance but which arguably promote individual autonomy.[60] Indeed, any free speech theory positing some broad, robust autonomy interest as a core norm would protect even more speech than the all-inclusive approach, examined above and rejected as far too capacious a description of the scope of protection afforded by current free speech doctrine.

Although autonomy is not a core free speech value, this does not mean that it has no role to play in current doctrine. In extending First Amendment protection to ordinary commercial advertising, the Court noted that, in addition to providing information needed for the citizenry to decide matters of public concern,[61] such speech

[59] See Redish, supra note 58, at 593. I appreciate, of course, that there are substantial differences between Redish's theory and other theories based on individual autonomy. As explained in the introduction to this symposium, see James Weinstein, Introduction, 97 Va. L. Rev. vii, viii (2011), the procedure for comparing the relative merits of participatory democracy and individual autonomy as free speech theories was to divide the written discussion into two phases, beginning with a defense and critique of participatory democracy, followed by the same for individual autonomy. As a result, at the time I wrote this defense of participatory democracy, neither Baker nor Shiffrin had written their defense of autonomy. Thus, the draft of this Article that I circulated to the theory group cautiously left open the question of how well their theories would fit current doctrine. The articles subsequently circulated by Baker and Shiffrin confirmed, however, that, like all other autonomy-based theories of which I am aware, neither explains contemporary doctrine nearly as well as a theory grounded in participatory democracy. See 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]; Weinstein, Free Speech, supra note 41.

[60] See supra text accompanying note 4. In addition, such a capacious view of constitutionally protected decisional autonomy is in tension with the Court's narrow view of autonomy in its Fourteenth Amendment substantive due process jurisprudence with respect to such crucial matters as the right of terminally ill people to determine the timing of their death. See Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

[61] See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976). Unlike the Court and Post, I am not persuaded that ordinary commercial advertising is instrumentally related to democratic governance in any significant way. See Robert Post, The Constitutional Status of Commercial Speech, 48 UCLA L. Rev.

also aids private economic decision making.[62] Still, as shown by the lesser degree of protection that the Court affords commercial speech as compared to the rigorous protection it affords public discourse,[63] the autonomy interests served by this speech are not a core free speech value.

II. NORMATIVE APPEAL

In addition to its descriptive power, a free speech theory based in participatory democracy is normatively attractive in at least three ways. First, it is firmly rooted in a value that is accepted by virtually everyone in our society. Relatedly and unsurprisingly, its focus on democracy safeguards core political speech far better than any alternative theory. Finally, it constrains (though, of course, it cannot prevent) judges from using the First Amendment as an excuse to invalidate laws or policies with which they disagree but that do not, in fact, imperil significant free speech values.[64]

1, 25 (2000). Ordinary commercial advertising can, however, significantly promote individual economic decision making, and therefore restrictions on such expression have the potential to unduly interfere with individual autonomy interests arguably protected by the Constitution. Accordingly, while the First Amendment may provide an acceptable source of protection for this interest, grounding a right to receive commercial information in the liberty provision of the Fifth and Fourteenth Amendments under the Court's substantive due process jurisprudence would, in my view, more accurately reflect the essence of the interest involved and thus helpfully expose the danger of "Lochnerizing" raised by extending overly rigorous protection to this interest. See Lochner v. New York, 198 U.S. 45, 57 (1905) (invalidating state law forbidding employment of bakers for more than ten hours a day or sixty hours a week).

[62] *Va. State Bd. of Pharmacy*, 425 U.S. at 763–64. It remains to be seen how the Court will reconcile protection of commercial speech under this rationale with its adamant refusal since 1937 to directly afford any meaningful protection under its substantive due process jurisprudence to private economic decision making.

[63] See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[64] Sadly, fervent policy disagreement may well be the best explanation of the Court's recent invalidation of the key provision of the Bipartisan Campaign Reform Act of 2002 in its highly questionable *Citizens United* decision. See supra note 53 and accompanying text. The quantitative analysis required to determine whether a law unduly restricts information needed for democratic self-governance opens up the possibility that judges will smuggle disagreement (or agreement) with the policy of the law into the analysis much more so than does the qualitative analysis by which it is determined whether participatory interests have been impaired. To reduce the risk of such illegitimate use of judicial power, courts should invalidate laws to vindicate this instrumental democratic interest only when the impairment of the information flow is manifestly unjustified.

A. Grounding Free Speech Theory in an Undisputed Norm

Many years ago Redish astutely recognized the danger of basing a theory of free speech in "some unsupportable, conclusory assertions of moral value."[65] He pointed out that, no matter how appealing some observers may find the proposed value, if others were to deny that it provides the normative basis for free speech, the proponent would have little more to say than "Oh, yes it does."[66] In an attempt to give his free speech theory a firm foundation, Redish sought to ground it in "what we in this nation take as given: our democratic system of government."[67] Redish's view that democracy is a basic postulate of the American constitutional arrangement is echoed by Professor Frank Michelman's statement that the commitment to democratic self-governance is a value "no earnest, non-disruptive participant in American constitutional debate is quite free to reject."[68] I want here to slightly refine Redish's and Michelman's observations by claiming that the consensus they identify extends not just to democracy writ large but also embraces an uncontestable right of each individual to free and equal participation in the political process, including the public discussion by which our society's laws, policies, and norms are evaluated.[69] It therefore may be safely asserted that no "earnest non-disruptive participant in American constitutional debate" can deny that each individual has

[65] Redish, supra note 58, at 594. Redish made this point in criticizing Baker's "liberty" model of the First Amendment and its foundational view that, for the community to legitimately expect individuals to respect collective decisions, "the community must respect individuals as equal, rational and autonomous moral beings." Id. at 594 n.20 (internal quotation marks omitted).

[66] Id. Accord John Ely's imaginary Supreme Court opinion that reads: "We like Rawls, you like Nozick. We win, 6-3. Statute invalidated." John H. Ely, Democracy and Distrust: A Theory of Judicial Review 58 (1980). Though it would serve advocates of unbounded liberal judicial activism right, I fervently hope that we do not see a decision from the current conservative Court amounting to the following twist on Ely's quip: "We like Nozick, you like Rawls. We win, 5-4. Obamacare invalidated."

[67] Redish, supra note 58, at 594. Redish then hoists himself on his own petard by failing to show a necessary or even close connection between democracy and self-realization, thus leaving his self-realization theory hovering in mid-air.

[68] Frank Michelman, Law's Republic, 97 Yale L.J. 1493, 1500 (1988).

[69] See Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

a free and equal right to participate in the speech by which we govern ourselves.

This does not mean, of course, that there is agreement about what exactly this right of free and equal political participation entails. Some will argue for a thick, substantive view, while others will argue for a thin, procedural commitment. But since the former view entails the latter, it follows that there is at least a consensus that we all have a right to formal participation in the political process. This basic participatory right includes at least the right to be free from coercive laws forbidding speakers from expressing some particular view on a matter of public concern and laws that seek to prevent audiences from hearing certain views because the government fears that they will be persuaded to support some unwise policy. Though Professor Alexander Meiklejohn may have gotten certain essential aspects of his democracy-based theory of free speech theory wrong,[70] he was correct in observing that free speech in this country is "a deduction" from the basic American democratic agreement.[71] And it is difficult to overstate the advantage to having a core free speech right derived from a norm that garners allegiance from virtually everyone involved with this right—from the judge vindicating it, to the law enforcement official restrained by it, to the citizen protected by it.

Few other contenders for recognition as a core free speech norm attract nearly the consensus that exists about the commitment to participatory democracy. The other leading candidate—promotion of individual autonomy—would, in any form robust enough to provide meaningful protection to free speech, be particularly contentious.[72] Indeed, visions of individual autonomy that reject the le-

[70] See Robert Post, Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse, 64 U. Colo. L. Rev. 1109, 1114–19 (1993).

[71] Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 27 (1948).

[72] Seana Shiffrin has proposed a theory based on the promotion of individual autonomy interests that, in my view, might indeed be as widely accepted and uncontentious as the commitment to the individual right to participate in the political process on which my theory is based. See Seana Valentine Shiffrin, A Thinker-Based Approach to Freedom of Speech, 27 Const. Comment. (forthcoming 2011). For the reasons stated in the text, I count this as an enormous advantage for a free speech theory. But as explained in my critique of her theory, it is unlikely to yield doctrine robust enough to adequately protect speech that abrasively challenges the status quo. See Weinstein, Thinker-Based Theory, supra note 59. In contrast to the largely undis-

gitimacy of morals legislation, as most do, lie at the fault line that has traditionally separated liberals from conservatives. A key liberal tenant holds that the only legitimate reason for prohibiting an activity by force of law is "the prevention of harm or offense to [nonconsenting] parties other than the actor."[73] In contrast, social conservatives endorse the enforcement of morals both to protect the tone of society and the individual from himself. In the area of free speech, a robust commitment to individual autonomy as a constitutional norm leads liberals to reject the legitimacy of restrictions on pornography, particularly if imposed, as are traditional bans on obscenity, to protect the viewer from the "corrupting" influence of the material. Conservatives, in contrast, have traditionally seen no constitutional problem with such laws. This basic ideological difference continues to divide the liberal and conservative members of the Court on such issues as whether nude dancing is protected speech[74] and whether local jurisdictions may, consistent with the First Amendment, "zone" adult bookstores and other establishments that provide sexually explicit material.[75]

Similarly, different visions of individual autonomy have split liberals and conservatives (though not nearly as predictably as with respect to legal moralism) on how much protection should be afforded commercial speech, especially with regard to paternalistic justifications for suppressing commercial messages. In the economic arena, however, it is conservatives who are often less toler-

puted norms on which Shiffrin's theory rests, the account of autonomy Baker endorses is by his own admission "wildly contested." See C. Edwin Baker, Autonomy and Free Speech, 27 Const. Comment. (forthcoming 2011).

[73] See Jeffrie G. Murphy, Legal Moralism and Liberalism, 37 Ariz. L. Rev. 73, 75 (1995) (quoting Joel Feinberg, Some Unswept Debris from the Hart-Devlin Debate, 72 Synthese 249 (1987)).

[74] See City of Erie v. Pap's A.M., 529 U.S. 277, 289–302 (2000) (Rehnquist, C.J., and O'Connor, Scalia, Kennedy, Thomas, and Breyer, JJ.) (upholding ban); id. at 316–17, 326–32 (Stevens, Souter, and Ginsburg, JJ., dissenting) (finding ban unconstitutional).

[75] See, e.g., City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 442–43 (2002) (Rehnquist, C.J., and O'Connor, Scalia, Kennedy, and Thomas, JJ.) (rejecting First Amendment challenge to the regulation); id. at 462–66 (Stevens, Souter, Ginsburg, and Breyer, J.J., dissenting) (finding regulation unconstitutional). And it is differing visions of the nature and constitutional strength of individual autonomy interests that account for the split between the liberal and conservative justices in other areas of the law, such as abortion rights, e.g., Roe v. Wade, 410 U.S. 113 (1973), the right to die, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990), and the right to engage in homosexual sex, Lawrence v. Texas, 539 U.S. 558 (2003).

ant of paternalism, with at least some liberals allowing more leeway for arguably paternalistic restrictions of commercial messages.[76] The Court would therefore likely divide along such ideological lines if faced with a ban on cigarette advertising justified as a means of preventing people from being persuaded to smoke.[77] In any event, the question of whether such a paternalistic ban is unconstitutional is a difficult one, thus underscoring the contentious nature of individual autonomy and its relationship to free speech.

To appreciate, in contrast, how remarkably uncontentious is the core democratic precept of participatory democracy that I have identified, consider this scenario: suppose that a state, afraid that people might foolishly be persuaded to vote for a pending initiative that would repeal a law prohibiting smoking in restaurants and bars, bans all advocacy in favor of such repeal. Whereas a ban on cigarette advertising presents a difficult First Amendment issue, a ban on speech in favor of repealing smoking laws—while no more paternalistic than the advertising ban and while seeking to prevent the same ultimate health risks—is so inimical to a fundamental precept of democracy[78] that no jurisdiction in the United States would consider enacting such a law.

Several decades ago, Professor T.M. Scanlon argued that the First Amendment in principle forbids regulations "which appeal to the fact that it would be a bad thing if the view communicated by

[76] See, e.g., Thompson v. W. States Med. Ctr., 535 U.S. 357, 368–77 (2002) (O'Connor, Scalia, Kennedy, Souter, and Thomas, JJ.) (striking down allegedly paternalistic FDA speech regulation); id. at 378–90 (Rehnquist, C.J., and Stevens, Ginsburg, and Breyer, JJ., dissenting) (voting to sustain the regulation); see also Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561–66 (2001) (Rehnquist, C.J., and O'Connor, Scalia, Kennedy, Thomas, JJ.) (invalidating ban on advertising of tobacco products within 1000 feet of a school or playground); id. at 590–605 (Stevens, Souter, Ginsburg, and Breyer, JJ., dissenting) (voting to remand for further fact finding); 44 Liqourmart, Inc. v. Rhode Island, 517 U.S. 484, 518–29 (1996) (Thomas, J., concurring) (arguing that paternalistic justifications for banning commercial advertisements are per se illegitimate).

[77] The neat conservative/liberal split in *Lorillard Tobacco Co.*, described in note 76, may well provide a preview of how the Court would divide in such a case.

[78] 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, Jonathan Elliot 1836) (stating that "[t]he people, not the government, possess the absolute sovereignty").

certain acts of expression were to become generally believed."[79] Scanlon later came to believe that this principle was "too strong and too sweeping to be plausible."[80] But this discussion shows, I think, that Scanlon's repudiation of his former view is only half right. While his principle was indeed too sweeping, it is not too strong if limited to the domain of public discourse. If the people, both collectively and individually, have a right to govern, then for the government to restrict speech because it fears that the people might be persuaded to adopt some unwise policy would contradict the basic democratic precept that the people must be trusted to govern themselves.[81]

Crucially, however, this basic democratic precept is not applicable outside the realm of public discourse and collective decision making to which such expression is essential. So, while paternalistic restrictions on private decision making, through speech regulation or otherwise, might in some cases unduly infringe individual autonomy in a way that offends a basic precept of liberalism, they do not implicate the autonomy that must be ascribed to individuals when acting in their capacity of ultimate governors of society. For this reason, the Court has correctly granted government more leeway to impose paternalistic speech restrictions on individual, as compared to collective, decision making.[82]

B. Promoting Legitimacy by Appropriately Confining the Scope of Rigorous Free Speech Protection

A second attractive feature of recognizing participatory democracy as the core free speech value is that it properly reserves the

[79] Thomas Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204, 209 (1972).

[80] Thomas Scanlon, Freedom of Expression and Categories of Expression, 40 U. Pitt. L. Rev. 519, 532 (1979).

[81] See First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791–92 (1978) ("[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments . . . . [I]f there be any danger that the people cannot evaluate the information and arguments[,] . . . it is a danger contemplated by the Framers of the First Amendment.").

[82] For further discussion of the crucial distinction between paternalistic restrictions on speech addressed to people qua citizen as opposed to speech directed to us in other capacities, such as consumer or medical patient, see Weinstein, Speech Categorization, supra note 4, at 1105–06.

most rigorous protection for the type of speech most in need of immunity from suppression. As discussed above, adoption of an autonomy-based rationale will greatly expand the scope of expression covered by the First Amendment, and by some accounts, will lead to the coverage of virtually all speech. Such expansion of the scope of free speech coverage would be doubly unfortunate. For one, it would dilute the rigorous protection currently afforded public discourse. In addition, it would illegitimately empower the judiciary to interfere with matters that should be left to the democratic process for resolution.

Redish's argument in favor of recognizing self-realization as the core free speech value nicely demonstrates the potential for an autonomy-based theory to dilute the rigorous protection currently afforded core political speech. Confirming my view that such theories will result in an all-inclusive approach to speech protection, Redish writes that his self-realization theory "leads to the view that all forms of expression are equally valuable for constitutional purposes."[83] Though Redish applauds this result, he also recognizes that his approach will require "balancing" through which "full constitutional protection of free expression may be forced to give way to competing social concerns."[84] But there's the rub.

Consistent with what the Court already does, I have no strong objection to subjecting regulation of speech that promotes only secondary or peripheral free speech values to such an ad hoc balancing test.[85] Nor would I object to Redish's suggestion of providing speech currently deemed outside the scope of the First Amendment, such as fighting words and obscenity, the possibility of the limited protection that such a balancing test might provide. But subjecting public discourse—including core political speech—

[83] Redish, supra note 58, at 595.

[84] Id.

[85] See supra text accompanying notes 49–63. As mentioned, the problem with such ad hoc balancing is that it can lead to judges invalidating laws with which they fervently disagree but which do not in fact infringe important free speech interests. A partial solution to this problem would be to place a heavy burden on those challenging laws that do not implicate the core democratic right of participation to show that important secondary interests have been unduly infringed. Such an approach is close to the one the Court actually took in cases challenging restriction on corporate political expenditures until taking a wrong turn in *Federal Elections Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) and then driving off a cliff in *Citizens United*, 130 S. Ct. 876 (2010). See supra note 53.

to an amorphous procedure would greatly reduce the rigorous protection from content regulation that such speech currently enjoys.[86] In addition, it would invite judges to smuggle their own ideological bias into the analysis of any case involving controversial expression within public discourse and thus engage in the particularly pernicious practice of "judicial viewpoint discrimination."[87] More generally, if cases from other democracies are any guide, a jurisprudence that "balances" the right to engage in controversial political speech against "competing social concerns" would threaten to curtail the right Americans currently possess to voice unpopular, provocative, or even highly offensive views in public discourse.[88]

Proponents of extending First Amendment coverage to all speech would argue that no such dilution will occur because the uniform standard for regulating the content of speech should "strict scrutiny," which requires that the regulation be necessary to achieve some "compelling interest." But even if the Court were to extend First Amendment coverage to all expression,[89] it is doubtful that it would adopt such a rigorous standard as a uniform test for the regulation of the content of all communication. As previously discussed, there are numerous examples of speech that government now regulates on the basis of its content, such as misleading proxy statements, profanity in the classroom, negligently written instructions on consumer products, and works that infringe copyright, to mention just a few.[90] While government has a legitimate, or perhaps even a substantial or important interest in preventing or redressing

[86] Cf. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) ("To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech.").

[87] See James Weinstein, Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination, 29 U.C. Davis L. Rev. 471, 481–85 (1996).

[88] For example, in *Regina v. Keegstra*, [1990] 3 S.C.R. 697 (Can.), the Canadian Supreme Court held that the right of individuals to express racist and anti-Semitic ideas as part of public discourse was outweighed by various competing societal interests, including: preventing members of groups vilified in such speech from feeling "humiliated and degraded," id. at 746; reducing the risk of "serious discord between various cultural groups," id. at 747; and protecting "the enthusiasm with which the value of equality is accepted and acted upon by society," id. at 758.

[89] For the distinction between First Amendment coverage and protection, see supra note 5. See also Robert C. Post, Participatory Democracy and Free Speech, 97 Va. L. Rev. 477, 478 (2011).

[90] See supra text accompanying notes 4, 6–8.

harms such as these, it does not have a "compelling" interest in doing so, at least not as that term is used in current jurisprudence.[91] I am fairly certain, however, that even if the Court were to declare that all content regulation of speech is to be measured by the same standard, it would not want to bar government from regulating these forms of expression. Rather, as I discuss below, the Court would likely adopt something less rigorous than strict scrutiny as the unitary standard for measuring the validity of content regulation of speech. But in the unlikely event that the Court would formally declare that strict scrutiny is the uniform standard for measuring the validity of all content regulation, it would in practice likely apply a watered-down version of strict scrutiny, lest it be forced to invalidate the regulations just mentioned.[92] In either event, the fierce protection currently afforded core political speech and other forms of public discourse would likely be diminished if thrown in the same free speech hopper as these examples.

Nor can such dilution be avoided if the unitary test for suppressing speech of all sorts requires, as other fans of the all-inclusive approach have urged, not strict scrutiny but rather a showing that the speech in question causes harm that government may legitimately address. As I have already mentioned,[93] a distinctive feature of contemporary American free speech doctrine is that public discourse is immune from the usual legal presumption that activities causing harm may be suppressed. Thus, despite the harm that the following types of expression can cause, American citizens currently have a right to make negligently libelous statements about government officials;[94] to advocate lawless conduct up the point of incitement;[95] to deliver racist or anti-Semitic diatribes as part of public discourse;[96]

[91] With very few exceptions, application of the "compelling" interest standard as used in the Supreme Court's free speech jurisprudence leads to invalidation of a law restricting speech. See Weinstein, Hate Speech, supra note 3, at 39, 55–56.

[92] Cf. Eric Barendt, Freedom of Speech 174–75 (2d ed. 2005) ("The best argument for restricting racist hate speech is undoubtedly that a state has a compelling interest to protect members of target groups against the psychological injuries inflicted by the most pernicious forms of extremist hate speech.").

[93] See supra text accompanying notes 47–48.

[94] See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[95] See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[96] See supra text accompanying note 47.

and to denounce our country's war effort even if it encourages the enemy to fight harder and results in the death of our soldiers.

A free speech theory firmly based in the right of individual participation in the political process provides a solid justification for protecting these examples of harmful speech, while simultaneously allowing appropriate suppression of harmful speech not connected with the political process.[97] Autonomy-based theories, in contrast, would have a much more difficult time explaining why these examples of political expression should be entitled to such immunity, while nonpolitical speech that causes harm should not be protected.[98] As a result, free speech doctrine based on some broad autonomy interest is likely to lead either to the underprotection of public discourse, including core political speech, or to the overprotection of other types of speech. The most likely possibility, however, is that it will lead to both of these unfortunate outcomes.[99]

Finally, the protection of autonomy-promoting speech sharply raises the enduring problem of why it is legitimate in a democratic society for an unelected judiciary to invalidate democratically enacted laws. In contrast, this concern is not raised, or at least not as acutely, by judicial protection of public discourse—speech that is itself necessary to the legitimacy of the entire legal system. This is not to say that it is always illegitimate for the judiciary to aggressively protect individual rights other than those essential to democracy. But the vexed question of whether judicial invalidation of duly enacted laws undermines the legitimacy conferred by the democratic process is not an issue when courts strike down laws that violate a basic precept of participatory democracy.

So, at best, rigorous protection of autonomy under the auspices of the First Amendment will sacrifice the formal legitimacy provided by the participatory democratic process in order to vindicate substantive legitimacy. At worst, since almost any legal prohibition

[97] See supra text accompanying note 90.

[98] Since the autonomy of the speaker will often interfere with the autonomy of the audience, autonomy-based theories also have a more difficult time than a theory based in participatory democracy explaining, for example, why the First Amendment should protect defamation of public officials and private individuals concerning matters of public concern.

[99] This is true even of autonomy-based theories, such as Seana Shiffrin's, which are less capacious than those proposing coverage of all expression. See Weinstein, Thinker-Based Theory, supra note 59.

implicates someone's autonomy, I fear a free speech doctrine based on some broad, robust vision of individual autonomy will invite courts to invoke the First Amendment to invalidate laws which offend not some important free speech norm, but rather the judiciary's view on social policy issues properly left to the democratic process for resolution.