

## AUTONOMY AND FREE SPEECH

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The legitimacy of the legal order depends, in part, on it respecting the autonomy that it must attribute to the people whom it asks to obey its laws. Despite the plethora of values served by speech, the need for this respect, I claim, provides the proper basis for giving free speech constitutional status.

To justify this claim requires development of five points. First, because the concept of autonomy (or the analogous concept of liberty, treated here as largely interchangeable) is notoriously slippery and subject to varying usages, Part I specifies the particular conception of autonomy that I consider constitutionally relevant and distinguishes it from a prominent alternative that, I believe, should be central legislatively as long as the legislation is consistent with the first conception. Second, since this version of autonomy is, in a sense, simply stipulated, the claim that it is the relevant conception for establishing legal legitimacy and, hence, should have a constitutionally foundational role requires defense and must be connected to constitutional interpretation. That is the subject of Part II. Part II also considers the often raised question of whether any constitutional or foundational role for autonomy should or even can be limited to speech or expressive behavior. Third, it must be shown that this conception of autonomy has sufficient bite to give relatively determinate answers to important First Amendment issues. Fourth, this proposed content must survive reflective equilibrium. For these tasks, giving protection to autonomy need not, and probably should not, duplicate (or merely describe or explain) existing constitutional holdings but should lead to a satisfying account of why many holdings are right and an appealing (or at least plausible) explanation of which other holdings should be rejected. Part III considers these two issues. Finally, interwoven into the remarks is development

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of a view that, rather than free speech being an essential attribute of an otherwise undefended but merely described theory of democracy or, maybe, of “our democracy,” legal legitimacy—and respect for autonomy—requires both constitutional democracy and also broad speech freedom that encompasses non-political speech as a necessary limit on majoritarian or popular rule.

Those who disparage autonomy as a basic, virtually absolute First Amendment value usually take one of three tacks. First, they stipulate or imply that autonomy (or liberty) refers to an individual doing whatever she chooses.<sup>1</sup> This stipulation, often an intellectually lazy way to avoid thinking through the legal implications of a state commitment to respect autonomy, makes the term virtually meaningless for purposes of constructive legal theory or political theory (but maybe not moral theory where the question is often, “should I do this act, obey this law?”). Part I offers an alternative stipulation that, Part II claims, is required by constitutional and political theory. Second, they treat a laissez faire economic order as an implicit aspect of respecting autonomy—a view illustrated by many critical comments here.<sup>2</sup> Recognizing the problem this claim has for my views, I focused on and rejected this claim in my first published writing about free speech,<sup>3</sup> and restate my rejection here in Part III’s discussion of commercial speech. I conclude that right-wing libertarian theory invokes an ideologically useful (to them) but intellectually indefensible conception of autonomy.<sup>4</sup> Third, most plausibly, those who do not regard autonomy as an absolute value, view the only humanly meaningful conception of autonomy to be some version of substantive autonomy, a view that

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1. Compare Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617, 624–25 (2011) with C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 981 (1997) (“[T]he harmfulness of behavior does not, as a general matter, justify legal limits on liberty.”). Post believes that all past societies, which I would add have all been objectionably hierarchical or oppressive or both, have coercively (legally) enforced civility rules. I certainly agree that, in some form, such rules have helped constitute the community on which individual identity depends, but this does not support his view that what would begin to unravel if enforcement were left to voluntary compliance would be society as opposed to hierarchy and oppression.

2. See, e.g., Post, *supra* note 1, at 627–28.

3. See generally C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976) (arguing that a complete denial of first amendment protection for commercial speech is required by first amendment theory).

4. C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 815 (1986) (“While a formal conception of liberty encompasses the right to participate in this collective decisionmaking, it does not dictate the existence of any particular set of economic opportunities.”).

would lead, for example, to the type of balancing advocated by Steve Shiffrin.<sup>5</sup> In the face of this pragmatic challenge, Part II seeks to show that a formal conception has relevance as a side constraint on law necessary for legal legitimacy and appropriate for constitutional theory. If successful, this illustrates the civil libertarian instinct that the constitution restrains the “means” government uses to pursue even good ends as well as prohibits subordinating or enslaving people as permissible ends.

### I. THE CONCEPT OF AUTONOMY<sup>6</sup>

A person’s autonomy might reasonably be conceived as her capacity to pursue successfully the life she endorses—self-authored at least in the sense that, no matter how her image of a meaningful life originates, she now can endorse that life for reasons that she accepts. Surely complete autonomy in this sense is never perfectly realized but will exist only more or less on various continuums. Such autonomy is dependent on the presence, often the distribution, of material resources, psychological resources, and other natural and social conditions. Policy measures—laws or distributions—that increase one person’s autonomy in this sense will often decrease another person’s. This and related conceptions of autonomy I will call substantive theories. My general view is that promoting substantive autonomy, along with matters of collective self-definition, should be a major aim of the state and the legal order. Still, the precise choice of state aims is an appropriate subject of politics, which inevitably balances advantages for those with

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5. Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 559–60 (2011).

6. The approach to autonomy presented in this section, implicit in all my First Amendment writing, is explicitly developed in C. Edwin Baker, *Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment*, 21 SOC. PHIL. & POL’Y 215 (2004). I recognize the diversity of uses of the term. For example, my “formal” conception, because of its emphasis on an individual’s right to rely on her own conceptions of the good and the right in respect to her use of her body or voice, might be viewed as the opposite of autonomy in a Kantian sense because such uses reflect heteronomy rather than self-legislation free of phenomenal influences or conceptions of the good. Possibly my usage reflects my first approaching the need for such a word from the perspective of legal and constitutional rather than moral theory. In any event, some label is needed to describe the principles I wish to defend describing the conception that a state must attribute to its subjects whom it wishes to obligate; given my stipulated usage, autonomy seems to work. Perhaps Tim Scanlon would want to criticize my specific stipulated usage—or, maybe argue that no principles, putting aside the specific label, are useful in this area but, instead, each issue should be discussed on its own bottom without attempts to describe defend general principles. See T. M. Scanlon, *Baker on Autonomy*, 27 CONST. COMMENT. 321–23 (2011).

some ideals against advantages for those with other conceptions of the good.<sup>7</sup> The key claim to be advanced here, however, is a caveat: pursuit of this and other state aims should only use means that respect a more formal conception of autonomy of each person.<sup>8</sup>

In the formal conception, autonomy consists of a person's authority (or right) to make decisions about herself—her own meaningful actions and usually her use of her resources—as long as her actions do not block others' similar authority or rights. This formal autonomy in relation to one's self does not include any right to exercise power over others. It does, however, encompass self-expressive rights that include, for example, a right to seek to persuade or unite or associate with others—or to offend, expose, condemn, or disassociate with them. This formal conception might seem relatively easy to apply in relation to speech though clarification is useful even there. More difficult may be applying it to other behavior. Nevertheless, I have argued elsewhere that this formal conception is coherent and warrants virtually absolute protection from, and respect by, the state especially in relation to self-expressive or value-expressive behavior.<sup>9</sup>

Three features of this formal conception should be noted. (Hereafter, references only to autonomy should, unless the context clearly indicates otherwise, be understood to refer to this formal conception.) First, a person's formal autonomy is not limited to acts that do not harm another person's substantive autonomy but rather is limited to those acts that do not interfere with another's equal formal autonomy. Most obviously, A's autonomous acts can harm B competitively, by persuading C in a manner harmful to B's goals. A can also convince B, for better or worse, to have some view or follow some ideal that B would not otherwise have or pursue—a pursuit that can damage B's (or others') substantive autonomy. Alice might convince Betty that she is personally worthless or that she should only act to serve Alice's desires. Alice can convince Carol that Betty, Carol's spouse, is worthless or unfaithful, making Betty's life miserable

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7. C. Edwin Baker, *Rawls, Equality, and Democracy*, 34 PHIL. & SOC. CRITICISM 203, 203 (2008) (arguing that John Rawls's view of the goals of democracy is not justifiable).

8. The term "liberty" could (occasionally herein does) substitute for "autonomy" and I do not intend to signal anything by the substitution. My two uses of autonomy *roughly* correspond to a common but often confused distinction between negative and positive liberty, with substantive autonomy paralleling the later.

9. See generally Baker, *supra* note 1.

when C leaves. Or Alice might simply persuade Carol to choose to socialize with Alice rather than Betty to Betty's great regret. In each case, B and C still have authority, are still authorized, to make choices contrary to the choices to which A's speech leads them. Political and religious analogs to these harms are straightforward. As noted below, however, the characterization should change in each example if A creates the effect by lying (or speaking without regard to her belief in the truth of what she says). In general, though, statements of A, even if harmful of B, are exercises of A's autonomy and are not coercive of either B or C.

Second, in order to identify when someone's behavior interferes with another's decisions presupposes some distribution, constituted by a legitimate legal order, of decision making authority. This distribution, largely constituted by property rights, should reflect the interaction of a democratically authorized (legal) framework, individual acts, and moral requirements of equality and justice. Though some argument is needed, the later moral constraint leads to a demand that allocation of a person's body should be based, at least to a considerable degree not further investigated here, on respect for the autonomy of the person whose body it is. Democratic decision making should not be understood as authorized to establish slavery—or authorized to create a baseline distribution to A (possibly a husband or parent) of general authority over B's body or, more relevantly here, B's speech—though proper paternalism in respect to children raises issues that I put aside. The fact that meaningful opportunities to lead a self-authored life (i.e., substantive autonomy) requires various material conditions—beginning with sustenance and shelter and maybe education and medical care—does not create implications for the required respect for (formal) autonomy but rather is either part of the domain of basic (i.e., constitutional) equality or a matter of democracy, with its general authority over distributive (or redistributive) matters. Formal autonomy and formal equality are both basic but do different, non-conflicting work in relation to a legitimate legal order. In contrast, though hugely significant, substantive autonomy and substantive equality are largely and properly subject to variable democratic promotion.

Third, although this formal conception of autonomy encompasses a person's choices to self-expressive use of her resources or speech (through persuasion or provision of information) to negatively affect another's realization of her

aims, it does not encompass various violent, coercive or manipulative actions as practices that society must respect. These crucial terms, especially coercion and manipulation, require careful and quite restricted elaboration. They provide a basis to see “true threats”<sup>10</sup> (maybe as opposed to expressive or warning threats) and manipulative lies<sup>11</sup> as not merely potentially harmful to the other but as being intrinsically disrespectful of and, therefore, unprotected interferences with others’ autonomy. Importantly, these speech practices do not aim to communicate the speaker’s own views or values, even if in ways that cause harm to others, but rather attempt to undermine the integrity of the other person’s decisionmaking authority.

A common objection to an autonomy theory of free speech takes the following form: No principle of respecting autonomy can distinguish speech and other behavior. Since constitutional principles should not and surely do not protect autonomy generally, speech’s status of being a purposeful exercise of autonomy cannot provide a sound basis for explaining its constitutional protection. I would be happy to defend respect for autonomy on such a broader plane—that represents my libertarian instinct—though the argument becomes quite complex. As an example, it could lead to a right to engage in consensual sex in that this sex, like virtually all intentional actions, is expressive. Even the sex act’s more narrowly communicative aspects are often quite obvious. The association necessarily involved in intercourse provided the First Amendment grounding for *Griswold v Connecticut*.<sup>12</sup> These libertarian arguments, however, leave existing constitutional doctrine far behind. Thus, I do not rely on them here but instead suggest ways to limit the autonomy claim to speech or expression.

The most obvious point is positivist—the text of the First Amendment refers to speech, which might be treated as extending to expression but which most people would not

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10. *Virginia v. Black*, 538 U.S. 343, 344 (2003) (holding that the First Amendment allows state to ban “true threats,” in which “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence”).

11. *Cf. Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (describing the lie, used as “a tool” to achieve “ends,” as not protected under “mantle of the Constitution”).

12. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). Douglas’s opinion for the Court is best read as resting on association as a “penumbral” aspect of the First Amendment, with the privacy penumbras of other Amendments being noted merely as illustrations. *See also Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding that a Texas statute criminalizing homosexual sex acts was unconstitutional).

consider properly encompassing riding a motorcycle without a helmet, even if that behavior were considered expressive. Even if theoretical reasons exist for broader protection, the particular constitutional order in existence might justify not going further.

A more normative and, to an extent, pragmatic point relates to the complexity of paternalism. If self-regarding could be distinguished from other-regarding behavior, as Millian liberals traditionally tried to do (but see the next paragraph), paternalism is possibly the main remaining potential justification for intervention in the first. As a bedrock libertarian principle, general opposition to paternalism (at least by government as applied to adults) connects closely to respect for autonomy—a person making choices about herself. Still, the issue is complicated and contested. Some arguments for paternalism in limited circumstances seem plausible. Typically these arguments become more persuasive the more the unwisely chosen behavior risks permanent limits on a person's capacities and the less the restricted choices seem central to her identity. Empirically, I suspect such criteria will seldom support paternalistic limits on speech (which can be important for who a person is but seldom leave the future person with less capabilities) but give arguable support for limits on unprotected motorcycle riding or drug abuse. Add to this distinction a greater suspicion that often limits on speech are not really motivated by serving the person's own good and a plausible practical argument emerges counseling greater respect for autonomy in relation to speech choices than for behavior in general. Whether ultimately persuasive, each point provides a rationale for limiting strong constitutional respect for autonomy to the context of speech or expression.

Finally, I must observe that some critics of autonomy theory are simply not careful to understand the implication of generally protecting (or respecting) autonomy. Their claims often involve positing an overly broad and untheorized conception of autonomy. Autonomy as specified here, however, in no sense covers all a person's desired behavior—it is fully consistent with most law, what I have called elsewhere “allocation rules,” which determine what resources a person has a right to make decisions about or use.<sup>13</sup> Generally, respect for autonomy involves respect for a person's choices about herself and, maybe, her resources up until her choice involves taking choice away from another about

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13. Baker, *supra* note 1, at 227.

himself or his resources—and, therefore, application of the concept presupposes some distribution.

This distinction between autonomy and interference with another cover roughly the same ground that some theorists, as noted above, tried to find in the distinction between self- or other-regarding behavior. The problem with their arguments is that a person's purportedly self-regarding behavior typically affects who she is in a manner that subsequently affects her interactions with others. Consequently, no significant realm of solely self-regarding behavior remains—the point being that no one is an island. This consequence casts doubt on designating any behavior as purely self-regarding, at least in consequences. Moreover, the distinction does not generate any obvious protection for speech in that, unlike, say, masturbation, painting, or mountain climbing, communication is definitionally and purposefully other-regarding. My suspicion is that theorists' focus on the fact of harm led them to an attempted distinction between self- and other-regarding behavior. Their distinction, however, should have been on how acts cause harm—for example, by an exercise of autonomy, as formally specified here, or by violence or coercion. Most expression that anyone wishes to restrict can be understood to harm some listeners or third parties, often much more seriously than many forms of criminal behavior. The characteristic way speech—certainly constitutionally protected speech—harms others relates, however, to why it should be protected as an exercise of the speaker's autonomy. Speech harms by being informative or persuasive—operating through the mind of the other and thereby gives the other at least the theoretical possibility of rejecting the message or giving it her own chosen significance.

This feature of how speech achieves its effect is, I believe, why Thomas Emerson insisted on the distinction between speech and action,<sup>14</sup> according constitutional protection only to behavior that he believed partook more of the qualities of speech than of action—though he emphatically would protect some non-verbal activity as speech and deny protection to some verbal actions. The distinction he intuited between the behavior he characterized as speech and that which he characterized as action related not to the amount of harm each could cause but to the manner in which it caused harm. If the harm to either the

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14. See, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1971) (surveying free speech law).



listeners or third parties resulted from audience members' mental assimilation of the intended meaning that the speaker honestly expressed, the expressive behavior did not violate the audience members' or other third parties' own formal autonomy. This feature contrasts with the way other criminalized behavior ("action" in Emerson's terminology), including speech criminalized as fraud, perjury, or manipulative lies or speech integral to criminal activities, typically does violate or purposefully undermines other's ability to make her own decisions. In Emerson's analysis, speech or expression is not only a constitutionally specified aspect of autonomy but it is a paradigmatic, and an easily specifiable and hugely socially and personally significant, case of autonomy and should be "fully" protected by the First Amendment.

## II. THE BASIS OF A CONSTITUTIONAL THEORY OF FREE SPEECH

A constitutional theory of free speech depends on two features: a theory of constitutional interpretation and the specific contours of speech protection that this interpretative methodology picks out. The great value(s) of speech cannot in itself explain or identify its constitutional status. The economy and war have great human significance but we leave regulation of one and declaration of the other to Congress. An explanation is needed to explain why—and which—speech to treat differently. Speech, for instance, might be central for providing information and argument relevant for the hugely important tasks of finding truth (compare trials) or reasoned decision making (compare parliamentary debates, administrative hearings, or peer reviewed publications) or democratic will-formation (compare elections). Still, in each case, these objectives might be more wisely or more fairly advanced if speech is intelligently and appropriately regulated. Of course, different theories of constitutional interpretation can lead to identical conclusions—as John Rawls pointed out in a different context related to a possible overlapping consensus of comprehensive views. I simply outline my key assumptions concerning interpretation before moving to my claim that the most appealing approach supports seeing the constitutional status of free speech as required respect for a person's autonomy in her speech choices. Clearly, though, despite my connecting the topics of proper constitutional interpretation and proper scope

of speech protection, one could agree with my analysis of one but not the other.

#### A. INTERPRETATION

Legal practice as we have developed it treats the constitutional text itself as unchanging (absent Article 5 processes) but it also treats changing judicial interpretations as having equal status as constitutional law. Interpretative practices, precedents, and text are equally parts of our accepted “rule of recognition.” On the basis of acceptance, no part of this whole is in any sense superior even though only the textual part is unalterable (except by Article 5 processes)—with alteration coming from interpretations that we come to accept. These observations do not, however, yet say anything about how proper interpretative legal practices should treat—should detract from or supplement, both of which precedent unquestionably does—the unchanging text. Nor does it yet explain interpretative change: when and why particular doctrines are properly rejected.

Much more needs to be said, but my operative premise is that the Constitution should be understood as an attempt to set up a legitimate and workable government—or at least that constitutional interpretation should posit this aim. Constitutional interpretative and judicial practice often can and, I have argued,<sup>15</sup> should be understood as a conversation, making periodic enduring gains of insight and less frequent serious missteps but properly always guided by that aim. Consider, however, other possibilities.

A straightforward rule of law originalism might claim, first, that the Constitution is law because those who created it were “authorized” to create the content and, second, this fact requires or at least justifies that content remaining fixed until a properly authorized process changes it. This “originalist” constitutionalism, though, begs key questions. Who has or had authority to authorize any authority of the framers? What were the framers authorized to do? What did the framers or ratifiers actually do? It is hardly obvious that a text should be coercively binding law for those who do not authorize or accept its creation—and certainly, most people living in the territory at the time of adoption were not in the electorate, many of those who were in the electorate voted “no,” and no one living today

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15. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 272–83 (1989).

authorized this activity. Something more needs to be said to each of these categories of people before they have would any reason to conform to some purported constitutional content.

Hart emphasized that his “rule of recognition” is not, cannot, be valid but can only be accepted and that it must be so accepted at least by some officials in order to operate as law. When do they have grounds to accept it? In the face of the questions of the last paragraph for which there are no deductive answers, those who, as it turns out in practice, exercise power under the constitution have an obligation toward dissenters—those whom they ask to obey—to show why the legal/constitutional order is one that the dissenters should or at least reasonably could accept. Without those exercising power being convinced that they have made this showing, they have no good faith basis to claim that dissenters have an obligation to obey. Thus, the conversational aim of constitutional law (or interpretation) should be agreement on the constitution’s acceptability even if in the real world that agreement should not be predicted.<sup>16</sup> Proper interpretation takes this as its orienting aim.

This understanding of the interpretative obligation of current officials would not see those original framers as authorized to create simply any constitution that a ratifying majority accepts. That earlier majority had no inherent authority to impose on others. Rather these officials should see those framers as authorized to create—or as aiming to create—a workable and legitimate legal order that those creators and their empowered successors stand ready to defend as providing a constitutional framework that those who dissent can and should accept. If this is the nature and extent of the framers’ authority, they would be unreasonable to think that their own insights inevitably provide all the right answers to all questions of constitutional design. Rather, since these right answers were their only proper aim, the view that can be best attributed to them is that they saw themselves as making a first stab at an answer, an initial move that leaves this issue of legitimacy (agreeability) and hence of content continually on the table. Their more modest but reasonable self-understanding is that their efforts initiated the conversation—with Article 5 not so

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16. Below I give reasons not to expect symmetry. What is required of those who exercise power to justify their coercive acts is not enough to make obedience obligatory for those who dissent.

much the only basis for change but rather a power of the populace to redirect the conversation if they conclude that it has gone too far off-track.

The merits or demerits of our actual constitutional order are surely contestable, but clearly the constitutional order that people historically did create—the rule of recognition that officials and the public generally have accepted—treats these further judicial interpretative activities, often guided by the aim to create a workable and legitimate constitution, as part of our open-textured rule of recognition. Any different originalist claim about the place or status of constitutional interpretation represents advocacy, based on plausible but ultimately (I think) unpersuasive normative assumptions, for creating a different, purportedly desirable, but in this country, rejected rule of recognition.<sup>17</sup> Such originalist claims do not correspond to what dominant authorities now or in the past have accepted as constitutional law. Consequently, the best interpretation and “our” existing constitutional interpretations of the First Amendment should and usually do aim at content necessary—but given the general propriety of democratic choice, no more than the content necessary—for the legitimacy of the legal order.

#### B. LEGITIMACY<sup>18</sup>

Law purports to be authoritative in creating a framework for interaction in society—or, as Hart emphasized in his path breaking critique of Austin’s positivism, law purports to empower and obligate, not merely oblige people. The question is: what conditions must the legal order meet to justify its claim to create real obligations—or to be legitimate? Can any legal process or legal content (substance) justify use of otherwise immoral force or coercion to enforce the law? Many answers have been advanced, some I think overtly unpersuasive despite impressive pedigrees (Hobbesian answers, for example). Moreover, many answers are overlapping, possibly telling part of the story or pointing to relevant considerations. Two proposed answers, however, are particularly relevant for what they suggest

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17. See generally Richard H. Fallon, Jr., *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition*, in MATTHEW ADLER & KENNETH EINAR HIMMA, *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 47, 50–55 (2009) (arguing that Article VI does not exhaust the practice of recognition).

18. This section overtly uses, maybe not always felicitously, concepts drawn without citation from various theorists including Kant, Scanlon, Habermas, and Michelman as well as my own work.

about a constitutional theory of free speech. I argue the first is not so much wrong as inadequate and the second, going beyond the first, is more powerful in showing what the state needs to offer in asserting that a person should accept the legal order as obligatory and providing a proper basis for understanding free speech. Of course, these broad issues cannot be fully dealt with here. I offer only an outline showing a direction that discussion could follow.

Democracy is one answer. Not only does social life necessarily require behavioral norms but a reasonable argument is that at least many of these norms achieve their ends much better if they are authoritative and enforced in the manner described as a legal order. There will always be dissent to the favored norms. All specifications of legal rules inevitably produce losers, those who claim other rules would be better. A democratic process, however, in one sense “equally” respects people as properly having a “say” in the rules they live under. (Though “equally” only in a formal sense of “voice”—in another way, democracy gives those in the majority more than it gives losers whose objections potentially have no effect on resulting norms.) On this ground, 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. The pay-off for the First Amendment is the possibility that a theory of democracy can ground a theory of free speech.

Three immediate problems with this answer are: (i) The proper conception of democracy needs specification. (ii) The specification cannot be merely sociological or historical but must rely on moral or ethical considerations. (iii) Both the status and source of these moral considerations needs explication. Consideration of these problems, taken up in turn, provides, I believe, one route to a preferable and richer theory.

Obviously, any democratic theory of a constitutional status for free speech must rely on a particular conception of democracy. For example, constitutional democracy could make the legitimacy of majority decision-making depend on the process not making any decisions violating particular substantive rights—rights which might include some form of voice within the process or which might include legal respect for individuals’ general authority to make autonomous speech choices. Many believe that something like the second conception of democracy is accepted in the United States and many other constitutional

democracies. Why is not this conception, rather than the first theory that sees democracy more purely procedurally and that gives majority rule a more expansive authority to restrict at least non-political speech, the better theory of democracy? The issue is not definitional—some substantive argument must be given.

A procedural theory that asserts that democracy implies authority to decide any question by “majoritarian processes,” whatever these processes are, is overtly question begging. Why accept a mere procedural theory? And how does one determine and why should one accept specific majoritarian processes? Even if a procedural conception were favored, logically it requires freedom (of speech) only to propose an issue for democratic vote. After certain proposals are made, for example, after a proposal to eliminate an existing ban of talking about a particular issue, procedure rules could require an immediate “call of the question.” This procedural view presumably allows majoritarian decisions to prohibit or regulate any speech, including public discourse—except for guaranteeing the right of legislators to propose and then vote, maybe immediately, on proposals to repeal an existing restriction. (Compare Robert’s Rules on non-debatable motions.) Limits on speech—for example, prohibitions on speech supporting communist or Nazi parties or agendas or, within an electoral campaign, on the use of music jingles, “excessive” expenditures, certain promises of political candidates related to their proposed job performance, or announcements by a (judicial) candidate of her views on matters which may come before her if elected<sup>19</sup>—could be explained either on grounds of hypothesized objectionable qualities of the prohibited speech or as ways to improve democratic deliberation. These restrictions would embody democratic decision making when adopted. Each limit on speech, however, conflicts with other procedural interpretations of democracy. In other words, a commitment to democracy does not tell whether any significant guarantee of free political (or non-political) speech should exist.

If a procedural conception of democracy provides a basis for a free speech guarantee, it could provide the guarantee with either of at least two justifications, which lead to different

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19. The first two in this list exist in some democratic countries. Versions of the last three were enacted here but then struck down by the Court. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (judicial candidate announcements); *Brown v. Hartlage*, 456 U.S. 46, 61 (1982) (campaign promises); *Buckley v. Valeo*, 424 U.S. 1, 39–60 (1976) (campaign expenditures).

protections. Meiklejohn is normally seen as offering the first, apparently valuing free speech simply for its instrumentalist contribution to deliberation: “What is essential is not that everyone shall speak, but that everything worth saying shall be said.”<sup>20</sup> This instrumental argument, though restricted to the political sphere, has all the weaknesses of any marketplace of ideas theory and I will put it aside—as arguably Meiklejohn himself did when he referred to, “the sheer stupidity of the policies of this nation,” a stupidity that speaks against the argument.<sup>21</sup> The alternative, also offered by Meiklejohn, is virtually definitional, purportedly following deductively from the people’s decision to “govern themselves.”<sup>22</sup> The appeal of this interpretation of democracy as deductively including individual rights to engage in speech, at least in the public sphere, follows most obviously from—I believe embodies—respect for the individual as an agent, as an autonomous being. This value-based interpretation of democracy does not, however, show whether there are proper limits on democracy but certainly raises the possibility that limits should reflect the same values as the justification.

Only value commitments—not abstract logic, deduction, and certainly not mere facts such as history, even “our” interpreted history or information about “our” framers—can require a particular connection between democracy and free speech. The obvious value premise that requires that democracy take a form that protects people’s political speech is a principle that requires respect for citizen’s autonomy within the law making process—that views them as agents with proper claims to self-determination as well as having their interest in self-realization. This respect not only gives reason to interpret democracy as including speech freedom but provides a ground to value democracy—two conclusions following from the value of respecting their claims for self-determination.

The problem for this argument, however, is that it provides no obvious reason to limit this respect for self-government to collective self-governing—the political sphere—as opposed to

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20. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (1960). See BAKER, *supra* note 15 (discussing the tension in Meiklejohn between the two theories). This first argument is the one Robert Post identifies as Meiklejohn’s Mistake. ROBERT POST, *CONSTITUTIONAL DOMAINS* 268–89 (1995).

21. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263.

22. MEIKLEJOHN, *supra* note 20, at 5.

self-governing also within private spheres. Post rightly notes that we might be only (or differently) committed to collective but not individual self-determination,<sup>23</sup> but I wonder how that distinction is justified (or attributed to Americans). I conjecture that the two are so intrinsically intertwined that neither can really be guaranteed without the other, hence Habermas's suggestion about the co-originality of public and private autonomy. I also suspect that most people in their lives rebel more at limits on their individual (private) than their political (public) autonomy. In any event, the premise of respect for self-determination, which most plausibly justifies protection of political speech, leads to the second answer to the question of legitimacy: a legitimate legal order must fully respect (among other things, e.g. equality) both individual and collective autonomy—both non-political and political speech.

This last claim represents the following reasoning. Grant the claim that a mandated respect for autonomy provides the best argument for a conception of democracy whose meaning includes a guarantee of political speech freedom. What more can be said for this conception of democracy, attributed autonomy, and their respective extent and relationship? The legal order potentially contributes greatly to human actors achieving both individual and collective projects. The legal choices that contribute to projects of either sort inevitably produce losers who would have benefitted more from other choices. This “inevitability” suggests that the existence of losers cannot itself be an objection to the resulting order. Still, the regrettable fact of losers leaves open whether any principles support claims to limit the collective projects or collective means that are to their disadvantage.<sup>24</sup> The propriety of the legal order's promotion of selected conceptions of the good, for example, does not imply that an aim of making people losers can be a proper project, a proper basis of law. If the moral value of democracy lies (in part) in its contribution to people's political autonomy in pursuit of their democratically chosen projects—with its implicit premise that it values these people as autonomous—democracy's authority should be limited by this same value. Given this value, democracy (or law) should not, therefore, be authorized to enact

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23. Post, *supra* note 1, at 626–27.

24. I pursue this type of reasoning to derive three principles that I argue would be more rational to choose within Rawls's original position than either the difference principle or restricted utility, the primary alternative that he considered. Baker, *supra* note 7, at 203–04.



laws that disrespect, that are premised on the propriety of denying, a person's autonomy (or, though less relevant here, her equality and maybe her dignity). This conclusion should then guide interpretation of the constitutional guarantee of free speech. It gives equal status to protecting speech as a part of personal, individual self-government and as an aspect of her participation in collective self-government.

The above is the argument for an autonomy interpretation of free speech working out from a commitment to democracy. What is the more direct affirmative argument? People's capacity to embody their values in law enables them to pursue their values collectively and to create a favored world. But in contrast to voluntary associations, the impermissibility of escape from law's coercive reach makes its propriety subject to challenge by dissenters given the positive value of this capacity for self-determination. Consent—or, better, agreement or self-authorship—might solve this legitimacy question. Kantian moral theory might argue that a person should be governed only by laws that she gives—or, with considerable loss of justificatory force, only by law that she should or, maybe, could give herself, or could not reasonably reject giving to herself. Inevitably, in any actual legal order some will (certainly might) dissent—say “no” to a given law or even to the entire “constitutional” lawmaking practice. For this rejection to disable the use of law would effectively give the dissenter, gives minorities, power over others, which is morally problematic. For this reason, the most that moral theory should expect of the majority, those prepared to back their law with force, is that they propose only laws or projects for which they can in good faith give reasons to the dissenter for why she could and, the majority argues, should accept these laws. This reduced requirement is an implicit premise of discourse, that is, of communicative action, a process by which people seek agreement and crucially, is not limited to public discourse, but also includes private discussion such as ones in which a group of friends try to decide where to go to dinner.<sup>25</sup> It cannot be found as implicit in a solipsistic notion of reason, of the categorical imperative, or an isolated individual's autonomy. It looks instead to the nature of our unavoidable commitments within communicative action rather than to either

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25. For a brief discussion, see JÜRGEN HABERMAS, *BETWEEN FACT AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 1–9 (William Rehg trans., 1996).

agreement or to an absence of reasonable rejectability.<sup>26</sup> Still, this limitation on proposals does seem to rule out certain proposals—such as those that positively value, as opposed to recognizing the inevitability, that some will disagree and become losers. And it rules out those that endorse limits on the autonomy of some as the means to advance proper ends. Thus, this discourse requirement leads to a “liberal” value of toleration of autonomy, not neutrality between conceptions of the good. Laws inevitably support some people’s substantive autonomy over that of others, but respect for formal autonomy rules out an affirmative purpose of restricting people’s substantive autonomy. On this view, legitimacy requires that the legal order not adopt laws restricting individuals’ expressive freedom either as an end or a purposeful means.

Speech sometimes contributes to the search for truth, to democracy, and to substantive autonomy. Unlike these unpersuasive instrumentalist justifications of constitutional speech freedom, here the argument for toleration reflects a formal, but not a substantive, conception of speech autonomy. People cannot be expected to accept collective proposals—laws—that value restricting their own chosen expression. In contrast, everyone could value many particular collective projects even if these projects leave people with varying and, sometimes, at least from their own point of view, inadequate speech opportunities.

One final caveat needs emphasis. The central claim is not that a legal order’s respect for each person’s autonomy (especially, her expressive freedom) combined with respect for each person’s equality, dignity, and humanity suffices to leave each person unable to reasonably reject the legitimacy of particular laws or even of the legal order as a whole. Non-rejectability is fine as a goal—an aim always implicit in dialogue, in communicative action—but nothing said above shows that it can be achieved. Some people—the religious devotee, for example—can have good reason to reject even the legal order that meets requirements of respect for people’s formal autonomy (and equality). The dialogic situation has two poles—the person making a proposal and the person who can say either “yes” or “no.” There is no reason to assume that the first person’s meeting the requirements placed on her means that the

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26. C. Edwin Baker, *Basic Equality: Grounded Universal Commitments* (2008) (unpublished manuscript).

second will have reason to respond as hoped. This distinction has, for example, huge implications for a theory of civil disobedience. Rejectability may justify an individual in violating a law. The concern here, however, has only been with the obligations placed on the lawgiver. The claim is that a legal order cannot reasonably claim legitimacy without (among other requirements) respecting people's autonomy.

If this criterion of legitimacy is right (obviously the argument here is too summary), democracy is not the starting point, providing a basis for the constitutional status of free speech. Rather law's aspiration to legitimacy grounds both a properly expansive democracy and limits on democracy (in behalf of respecting autonomy, equality, etc.).

Is constitutional interpretation's reliance on moral theory regrettable? Avoidable?<sup>27</sup> Moral theory—and particularly this favorable evaluation of autonomy—is wildly contested and its controversial nature might be grounds to seek to avoid it. Instead, maybe free speech represents simply “our” overlapping consensus on a democratic faith, possibly a uniquely American faith given our courts' divergence from an international consensus on prohibiting hate speech and varying responses to other speech issues. The two problems are obvious. First, the laws Congress (and individual states) pass limiting political (and non-political) speech suggest that “our” consensus is not so clear. When the Supreme Court strikes down these laws, it must rely on considerations less sociological than “our” conception of democracy. When Congress or a state violates the Court's conception of free speech (or of democracy), the Court implicitly claims that its conception is more justifiable—not more descriptive—than the legislators'. Second, as a narrow argument for a political speech theory, reliance only on the Supreme Court's enunciation of “our conception” must still make room for evidence discussed in Part III that the Court's theory is much broader. Inevitably, if only implicitly, legal argument must rely on moral commitments and these point to the autonomy theory of free speech.

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27. Vince Blasi's response to Post and James Weinstein in the Virginia Law Review symposium on the relationship between democracy and First Amendment theory implicitly raises these questions. See Vincent Blasi, *Democratic Participation and the Freedom of Speech: A Response to Post and Weinstein*, 97 VA. L. REV. 531 (2011). Obviously, lawyers and judges normally and probably wisely avoid explicit engagement with moral philosophy. That fact does not deny, however, that they necessarily rely on normative premises and, if so, that these should be evaluated and criticized on the basis of their persuasiveness.

## III. DOCTRINAL FIT AND REFLECTIVE EQUILIBRIUM

The crucible of litigation, social movements, and scholarly debate have left us with a robust, though somewhat uneven, First Amendment doctrine that, I believe, overall is best justified by the autonomy theory offered above. Still, academic thought sinks to its lowest depths when its methodological ambition is to be an apologist for the status quo. The measure of the appeal of a First Amendment theory should not be the extent that it conforms to existing doctrine but the quality of its explanation of those aspects of existing doctrine that should be approved and, while linking meaningfully to existing constitutional discourse, the persuasiveness of its critique of aspects of doctrine that should be rejected. Though some scholars see their task to explain the at least legal correctness of *Dred Scott*, *Plessy*, *Lochner*, or more relevant to us, *Dennis*,<sup>28</sup> at least at the time they were decided, with their task and theory requiring change as doctrine twists and turns, my hope is that I would have been one who, at the time of these decisions, would offer a legal critique, as the dissenters on the Court attempted, in addition to a political critique. With this criterion in mind, I consider doctrinal areas that the autonomy theory does better than some or all other theories in justifying and other areas where its merit lies in the critique it offers.

***Flag Salute.*** The poster child of autonomy theory is the Court's opinion in *Barnette*, which forwent reliance of the religion clauses and gave a ringing endorsement of the school children's right to abstain from saluting the flag on the basis of First Amendment protected liberty. The Court emphasized the child's liberty, not political debate nor any marketplace of ideas. The political order received attention primarily in the Court's recognition that its legitimacy depends on this limitation—that assuring secure rights will “[make] us feel safe to live under [a strong government],” while the compelled flag salute “invades the sphere of intellect and spirit,” involving the “coercive elimination of dissent” that ends only in “the unanimity of the

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28. *Dennis v. United States*, 341 U.S. 494, 516–17 (1951) (holding that the Smith Act to prevent the formation of a Communist Party does not violate the First Amendment). Interestingly, Frankfurter, in his remark that the revolutionary advocacy involved in the case “ranks low” on any scale of first amendment values, *id.* at 544 (Frankfurter, J., concurring), effectively restated the democratic speech theory of *Learned Hand from Masses Publ'g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917), denying that counseling law violation can be part of democratic public opinion.

graveyard.”<sup>29</sup> In dissent, Justice Frankfurter, distancing himself from the majority’s emphasis on liberty, essentially invoked democratic discourse in explaining that he would vote for the children if the state had in any way restrained their or their parents’ speech repudiating the flag salute and criticizing the compulsion. Frankfurter emphasized that the required salute did not impede the children’s freedom to participate in or to place any views into political discourse—in fact, he hypothesized that prior compulsion might enhance the salience of any subsequent critical expression.<sup>30</sup> But the majority rested on different grounds. Compulsion directly abridged children’s liberty—their expressive autonomy.

**Art and Music.** Abstract art and compositional music, found, for example, in the Court’s dicta referring to Jackson Pollock and Arnold Schönberg’s music,<sup>31</sup> require a stretch to justify as political speech or truth propositions to test in a marketplace of ideas. Sure, all aesthetic experiences, like all experiences generally, can affect who a person is, how she sees the world, and thereby affect her values, politics, and notions of truth.<sup>32</sup> Such explanations for their relevance to the political

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29. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636, 641, 642 (1943).

30. *See id.* at 664. The majority of the Court made clear that, except for the legitimate strength of the state interest (they could teach patriotism by persuasion), nothing turned on the political or public discourse salience of the salute. It was a similar interest in liberty not to have to bow and get permission from the state, not the opportunity to participate in public discourse, that Justice Stevens emphasized in *Watchtower Bible & Tract Soc’y v. Stratton*, 536 U.S. 150, 169 (2002). Similarly, in *Wooley v. Maynard*, 430 U.S. 705, 713 n.10 (1977), the Court explicitly rejected reliance on the possible symbolic speech argument that covering the motto on the license plate would make Maynard’s act a communication within public discourse.

31. *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

32. Clearly contrary to existing doctrine, which belies any hope for his political participation theory to be descriptive of existing doctrine, Jim Weinstein’s suggestion that much speech should be protected as an aspect of privacy or liberty under the due process clause is reminiscent of Meiklejohn’s approach. *See* James Weinstein, *Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply*, 97 VA. L. REV. 633, 656 (2011). Also, reminiscent is the arguable collapse of the bite of Meiklejohn’s theory, when in the face of criticism for the potential political relevance of whole categories of speech that he seemed to exclude, he expanded his category of democratic relevant content. *Compare* Zechariah Chafee, Jr., Book Review 62 HARV. L. REV. 891 (1949) (reviewing ALEXANDER MEIKLEJOHN, *FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT* (1948)) (criticizing Meiklejohn’s expansive conception of the First Amendment), *with* Meiklejohn, *supra* note 21, at 255 (“[The First Amendment] is concerned, not with a private right, but with a public power, a governmental responsibility.”) Kitchen, bedroom and front door “private” speech can contribute to democracy, of course. But their protection should not depend on any such connection. Once Weinstein grants First Amendment protection to interfamilial or intimate speech exclusively because it is part of “democratic discourse,” however, the

sphere or to a marketplace of ideas do not, however, distinguish them from, say, hiking in a wilderness area, cooperation in a barn raising, or engaging in a criminal enterprise. Though Post might treat these as part of public discourse that affects the public opinion, which democratic government should reflect, this is seldom the aim of the communication and this ground for protection surely feels far from the heart of why most people engage in these forms of expression or why they should be protected. In contrast, the liberty of the creators or performers and their audiences is clearly at stake and, in a free society, should be legally respected.

**Commercial Speech.** Characterization of commercial speech provides a clear battle ground for free speech theories. Information or advice in commercial advertisements can in principle make the same contribution as can any other form of speech either to a marketplace of ideas or to the listener's substantive autonomy. Protection, as Martin Redish showed long ago, follows.<sup>33</sup> This speech's potential contribution to democratic self-government is somewhat more complicated. If the democratic discourse theory focuses on the information potentially relevant to or that can affect self-government, protection again follows as Redish and then, beginning in *Virginia Board*,<sup>34</sup> the Court recognized. If, however, democratic discourse focuses on citizens' participation in the public sphere or her aim to contribute to public opinion, denial of constitutional protection would follow. Democratic legitimacy involves empowering citizen governors, not commercial entities. This second democratic argument, however, is essentially a restricted autonomy-based theory—one limited to the political sphere.

From a (formal) autonomy theory, there are at least three—though contestable—arguments to deny protection to commercial speech. First, to the extent the “free” market works as Karl Marx, Max Weber, and modern conservative economists claim, its competitive dynamics compel market participants to seek profit maximization (and, some market apologists wrongly

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category has lost power to discriminate between protected and unprotected speech.

33. Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 *GEO. WASH. L. REV.* 429, 432 (1971) (arguing that some traditionally protected speech that happens to be profit-making is denied protection).

34. *Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council, Inc.*, 425 U.S. 748, 773 (1976) (holding that commercial speech by pharmacists advertising prescription prices was not outside the protection of the First Amendment).

assert, efficient results). In Jurgen Habermas' terminology, in this "system realm," money, not communicative action, provides the steering mechanism. The structural compulsion of the market means that neither liberty nor autonomy is at stake, at least to the extent this sphere works according to its ideal. (Autonomy may exist in respect to a person's choice of the entity for which to work—but not the entity's behavior.) Some commentators assert that the same is true in other "spheres." For example, the pressure to get elected is said to control politicians' speech. However, unlike the market, for which profitability and purported consequential efficiency provide the realm's regulative ideals,<sup>35</sup> the regulative ideal of the political sphere is for candidates to be persuasive about values actually held—and much of the structure of the political in any broad sense makes central the persuasive, expressive quality of "grass-roots" speech.

Second, a legally constituted business entity that communicates or sponsors speech—it typically pays for and may deduct the cost of the speech as a business—is a legally constructed, instrumentally valued, artificial entity. Although defensible policies often grant these entities various freedoms, including some communicative freedom, the moral/constitutional autonomy-based justification for protecting speech of flesh and blood people is simply not at stake here.

Third, market exchanges use property as power. Both parties use their property, money or labor not to persuade the other about values, attitudes, desirable associations, or facts about the world but directly to change the other's situation in order to get the other party to do something she otherwise would not want to do—give the speaker her money, property, or service. This description essentially distinguishes the (instrumentalist) exchange and (substantive) use value of property. This instrumental aspect contrasts with speech (and voluntary associations) that often seek to influence other's behavior but by influencing her understanding of her reasons, changing her beliefs, or by giving her new associational opportunities without seeking or obtaining any behavior that she would prefer to skip. The instrumental value that a listener places in her responsiveness to the persuasiveness of commercial

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35. Seana Shiffrin has recently raised the question of whether we should accept the economists' and the Weberians' regulative ideal of the market—a point that raises issues I put aside here.

speech or a gun to her head contrasts to the substantive or solidarity value a listener places in her response to a solicitation for contribution. In the second circumstance, but not the first, the listener comes to value the recipient having that with which she parts. And the speaker in the charitable solicitation seeks to persuade the listener on agreement in values while in the commercial speech or gun case only seeks behavior that the listener now instrumentally values because of how the speaker has changed her options. Though a society should provide people with various opportunities to engage in mutual exercises of power, these exercises of power should always be subject to collective (legislative) control. Here, the value of liberty or autonomy is simply not at stake—which is probably why John Stuart Mill explained that any argument for free trade rested on different premises than the argument for liberty and why he was more ready to accept regulation of commercial promotional speech than other speech.<sup>36</sup>

Each of these points about commercial speech depend on controversial analyses—which I have taken pains to defend elsewhere<sup>37</sup>—but the essential claim is the one made by the dissent in *Bellotti* (and subsequently adopted by the majority in *Austin*): “[W]hat some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profitmaking corporations . . . do not represent a manifestation of individual freedom or choice.”<sup>38</sup>

**Press.** The arguments to deny protection to the speech of commercial entities immediately put into question the status of the press, which today is largely constituted by large market-oriented entities. My autonomy argument seeks to justify individuals’ speech freedom. A full interpretation of the First Amendment must consider whether the press clause should have an independent meaning. History going back to the country’s founding suggests that it should and more specifically that its

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36. See generally JOHN STUART MILL, *On Liberty*, ch. 5, in MILL 41, 115 (Alan Ryan ed., 1997) (discussing trade policies and communication).

37. C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 981–85, available at <http://ssrn.com/abstract=1019264>; BAKER, *supra* note 15, at 194–224. See generally Baker, *supra* note 3.

38. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 804–05 (1978) (White, J., dissenting); see also *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (distinguishing media corporations from other corporations because of the nature of media communications).



protection should relate broadly to its instrumental democratic roles.<sup>39</sup> Elsewhere I have argued that, in place after place, existing judicial doctrine is incoherent without the assumption that the press clause has an independent meaning.<sup>40</sup> This independent meaning explains holdings giving substantially different speech rights to media corporations than to other corporations. It explains the Court's approval of limits on non-press corporations' speech rights that would be inconceivable if applied (and, therefore, for which there has been no attempt to apply) to press entities. Laws restrict non-press businesses' speech in order to protect privacy, to stop unauthorized use of people's image, and to prevent professional malpractice—all in ways inapplicable to the press. Lower courts have long granted journalists whose confidential sources might be exposed, but not individuals, some protection from compelled testimony. On the other hand, courts have upheld obligations for newspapers, broadcasters, and cable, but not for individuals, to carry speech mandated by the government. Though never thoroughly rationalized, limits on content discrimination apply differently and on basis of different rationales to the press than to individuals on the street corner. These points only begin to note the “specialness” of the press clause.

The press's role in democratic discourse—or, more broadly, its role of being an independent (of government) originator or reporter of information and vision—justifies, I have argued, the separate constitutional significance of the press and the differences between its treatment and the treatment of either individuals or other corporations. This different and instrumental basis for protection generally does not justify less (or more) affirmative speech rights for the media than for individuals.<sup>41</sup> It does, however, justify some forms of special

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39. See especially David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983) (describing the history and scholarship of the Press Clause). Although Vincent Blasi does not read the historical evidence he marshaled in defense of the checking function to support the view that it is particularly the press that is valued for its potential performance of this checking function, I think the evidence he marshaled supports such a view. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

40. See generally C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955 (2007). The normative theory for this view of the press is given in BAKER, *supra* note 15, at 225–71. See also C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 193–214 (2002) (discussing the implications of interpretations of the Press Clause); C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57 (describing the decision in *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994)).

41. But see C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L.

protections for the press as an institution and allows, arguably calls for, some special structural regulation of the press that have no coherent application to individuals. (For example, since the adoption of the Thirteenth Amendment, we do not allow other than self-ownership rules for individuals.)

**Obscenity.** Obscenity doctrine presents another battleground. In *Roth*, Brennan indicated that the First Amendment did not protect obscenity but fully protected “all ideas having even the slightest redeeming social importance.”<sup>42</sup> Brennan ignored Douglas’s later libertarian observation that obscene material clearly had importance to some people (e.g., its purchasers),<sup>43</sup> presumably because his concern was “importance” within a marketplace of ideas. Having “any” such value, he subsequently explained, was key to the conceptual basis of that approach. But Brennan ultimately abandoned the *Roth* approach and rejected the majority’s “balancing” approach in *Paris Adult Theatre*.<sup>44</sup> Although he explicitly relied on the ground that regulation of obscenity cannot avoid constitutionally intolerable vagueness, in a footnote Brennan implicitly offered a liberty or autonomy theory that paralleled Douglas’ approach.<sup>45</sup> Brennan indicated that he now accepted the earlier decision in *Stanley v. Georgia*, which he originally had not joined, possibly because it made little sense to give First Amendment (as opposed, maybe to Fourth Amendment) protection to possession within the home of otherwise unprotected material. Now his reasoning referred broadly to the objectionable nature of regulating speech involving “willing adult[s],” virtually code words for a liberty approach, and “the right to exercise ‘autonomous control over the development and expression of one’s intellect, tastes, and personality.’”<sup>46</sup> For individual autonomy, protection does make sense. Essentially, in *Roth*, his rejection of protection for obscenity was rooted in its lack of role in any search for truth—though it could have equally well been

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REV 891, 899 (2002) (noting some differences under the theory advanced here and noting that these differences conform to early American copyright law—and hence, maybe to original intent—and are still reflected in existing law).

42. *Roth v. United States*, 354 U.S. 476, 484 (1957).

43. *Ginzburg v. United States*, 383 U.S. 463, 489–90 (1966) (Douglas, J., dissenting).

44. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 96–98, 97 (1973) (Brennan, J., dissenting).

45. *Id.* at 85 n.9.

46. *Id.* (quoting *Doe v. Bolton*, 410 U.S. 179, 211 (1973)).

for its lack of role in public discourse. When he changed, he highlighted the relevance of obscenity for individual autonomy.<sup>47</sup>

In short, existing doctrine denies protection to obscenity—although given widespread availability at newsstands in most cities and everywhere on the internet of material hard not to describe as hard core, this quixotic denial of protection seems increasingly belabored outside the area of child pornography, where the constitutionally accepted evil is not obscene content but abuse involved in production. Still, obscenity remains a theoretically contentious area where surely different theories are better judged by their own appeal than by their conformity with current doctrine. Here, Brennan’s original reasoning, which has some coherence from a marketplace of ideas perspective, denies protection. So do most political speech theories, though not because pornography is without political effect. Like many activities or experiences, its effect reflects its potential to change the person who partakes, not its participation in public discourse—points forcefully made by MacKinnon in her critique of the dominant marketplace of ideas paradigm.<sup>48</sup> From an autonomy perspective, the issue is easy, at least if one adds that even commercial production can be protected under the press clause. For the reasons Brennan eventually gives, obscenity should be protected

***Speech and Secrecy.*** Given their instrumentalism, any substantive autonomy theory and many versions of marketplace of ideas theory should have trouble distinguishing in principle the government keeping specified information secret and its prohibiting communication of that specified information in order to keep it unknown. Both interfere equally with listeners’ substantive autonomy. Both serve roughly the same government purposes. Thus, it might seem that either both government acts should be permissible or, if sufficient weight is placed on the information’s contribution to actors’ substantive autonomy or their search for truth or for political or other wisdom, both should be impermissible. Judicial doctrine, however, clearly rejects this symmetry. The Court, sometimes unanimously,

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47. Though a subject for a different paper, this represents a more general move within Brennan’s free speech thinking, illustrated by his statement: “[F]reedom of expression is made inviolate by the First Amendment.” *Richmond Newspapers, Inc. v. Va.*, 448 US 555, 585 (Brennan, J., concurring in the judgment).

48. CATHARINE MACKINNON, *ONLY WORDS* (1993) (discussing defamation and discrimination, racial and sexual harassment, and equality and speech). *But see* C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181 (1994) (disputing the “theories or speech and equality that MacKinnon offers in *ONLY WORDS*”).

invalidates limits on publication of information that the government can properly keep secret.<sup>49</sup> Although difficult to explain on grounds of the substantive value of the information to people, this distinction follows easily from speakers' (or the press's) formal freedom to say whatever they choose (given their knowledge or imagination). The point is that government often has legitimate—important, maybe even compelling—ends but can pursue these only by means that do not violate people's autonomy, or the press's freedom, in respect to speech.

**Content Discrimination.** Hornbook doctrine exhibits confusion over and routinely overstates the force of the doctrinal bar on content discrimination (and if, as I believe, Justice Kennedy is right,<sup>50</sup> understates its proper force where it is properly applicable). Of course, no proponent of the doctrine imagines that it provides an objection to suppressing content which First Amendment theory does not identify as covered speech.<sup>51</sup> Though disagreement exists over whether the First Amendment should protect for incitement to crime, obscenity, negligently false defamatory statements, and fighting words, once a “no” answer is given, the reasons to deny protection justify bans on the unprotected content. Still, standard versions of the doctrinal bar on content discrimination clearly create problems for any theory that claims heightened protection for political speech over non-political speech.

The logic of autonomy theory, however, can be seen in *Chicago Police Department v. Mosley*,<sup>52</sup> the case routinely cited for establishing the no content discrimination doctrine—although any careful observer would find the doctrine rooted in

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49. *E.g.*, *Landmark Commc'ns, Inc. v. Va.*, 435 U.S. 829, 845 (1978). The Court has also held that, although the state can keep certain information secret, once the state makes it publicly available or the press learns it independently, the state cannot stop its further communication. *See, e.g.*, *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) (name of rape victim); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979) (identity of alleged juvenile delinquent); *Cox Broad. Corp. v. Cohn*, 420 US 469 (1975) (name of rape victim).

50. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd*, 502 U.S. 105, 123–28 (1991) (Kennedy, J., concurring).

51. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396–96 (1992) (invalidating a city ordinance prohibiting bias-motivated disorderly conduct) may appear to contradict this claim, but it does not if it is seen, as it should, as an application of the *O'Brien* doctrine, which allows invalidating a law or its application if it restricts unprotected expressive conduct when the reason for the restriction must be understood as aiming at suppressing protected expression. *Cf. United States v. Eichman*, 496 U.S. 310, 318–19 (1990) (holding that the Flag Burning Act violates the First Amendment). Then Scalia's reasoning makes sense but he misapplied it in *R.A.V.* while the Court properly applied it in *Va. v. Black*, 538 U.S. 343, 367–68 (2003).

52. 408 U.S. 92 (1972).

decisions from the 1930s and 1940s when the Court rejected permit requirements not constrained by clear standards and effectively identified the evil as potential of content discrimination by the local officials. *Mosley* offered three arguments. First, it referred to the importance of government neutrality, presumably within a marketplace of ideas. A requirement of neutrality cannot explain First Amendment mandates. It would rule out huge, constant governmental expenditures on speech and publications that promote its views on how issues should be resolved and what values ought to obtain. The Court offers approval of the government trying, by persuasion or school curriculum, to favor patriotism and to inculcate community values. More fundamentally, the whole legal structure inherently favors some views over others, which suggests that neutrality cannot be a standard or even a goal—without an appropriate baseline from which no views would be advantaged.

Second, the Court objected somewhat more plausibly to restrictions of speech on the basis of content that leaves open the possible permissibility of promotion of various viewpoints. According to the Court, “[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . [It] may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.”<sup>53</sup> Maybe (though only on various unrealistic assumptions) the marketplace of ideas eventually leads to what is true or wise, maybe public opinion is wise or at least appropriate, as long as no speech is suppressed by government (as opposed to by private corporate power or by socially-enforced civility rules). Nevertheless, it is hard to believe that Chicago’s content discrimination showed that Chicago favored labor picketing over—much less wanted to suppress—assemblies celebrating the Fourth of July or speech promoting re-election of the mayor.

At least in *Mosley*’s street-speech context, the Court’s only relevant argument easily follows from autonomy theory—though not, or at least not easily, from other theories. Specifically, the Court said: “Although preventing school disruption is a city’s legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference

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53. *Id.* at 95–96.

with school. Therefore, . . . Chicago may not maintain that other picketing disrupts the school unless that picketing is clearly more disruptive than the picketing Chicago already permits.”<sup>54</sup> From the perspective of valuing autonomy, although government clearly must be permitted to use public property to advance public projects and, thus, to impose time and place limits on speech that constitute actual interferences with these projects, respect for individual expressive autonomy means that the expression must be allowed on public property when it does not constitute such an interference. Here, the rule against content discrimination serves merely as an evidentiary ground for finding that this respect for autonomy is absent. “The crucial question,” no matter whether the person wants “to ask the time or the weather forecast”<sup>55</sup> or to engage in protest, “is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”<sup>56</sup>

***Institutionally bound speech and unconstitutional conditions.*** These huge topics cannot be adequately explored here but since they are often said to embarrass autonomy theories, I briefly suggest, to the contrary, that autonomy theory provides the best insight into the morass. When government sets up a governmental structure—a court, legislature, an administrative agency, or, I have argued, an election<sup>57</sup>—or when it offers a job or a grant, a person (say, an autonomous agent) who chooses to become enmeshed<sup>58</sup> must accept those restrictions on her autonomy that are necessary for the

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54. *Id.* at 100. (citations omitted). The Court treated this argument as an equal protection matter and later noted that disruption can be handled by a more “narrowly tailored” or “narrowly drawn” statute. *Id.* at 101–02. Interestingly, though citing equal protection cases for the narrowly tailored standard, all other cases cited to illustrate why the law failed this constitutional standard were First Amendment cases. *See id.* at 101 n.8; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (prohibiting the wearing of armbands violates rights of expression); *United States v. O’Brien*, 391 U.S. 367, 386 (1968) (holding that burning a selective service card is not symbolic speech); *Niemotko v. Md.*, 340 U.S. 268, 273 (1951) (holding that charging defendants for religious meetings in a public park violated protection of speech and religion); *Saia v. N.Y.*, 334 U.S. 558, 562 (1948) (holding that banning loudspeakers in a general way violated freedom of speech).

55. *Hill v. Colo.*, 530 US 703, 768 (2000) (Kennedy, J., dissenting).

56. *Grayned v. Rockford*, 408 US 104, 116 (1972).

57. *See generally* C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1 (1998) (arguing that elections and campaign speech should be distinguished from the broader category of political speech in First Amendment doctrine).

58. Thus, restrictions on out of court statements by criminal defendants or witnesses called by subpoena should be much more problematic than restrictions on the prosecution or police for an autonomy theory.

legitimate operation of the institution, successful carrying out the aims of the grant program, or proper performance of the job. This is the compatibility standard noted in the paragraph above. Though there is a role-based contextual loss of authority (autonomy) over both her political and non-political speech, this loss is not inconsistent with the general attribution of autonomy. The limits do not disrespect as opposed to presuppose the person's general status as an autonomous agent. The limit becomes disrespect only when the condition or institutionally-bound contextual restriction on expression is not required by the legitimate functions of the institution or goals of the job or grant.

Other theories may reach similar conclusions though arguably the autonomy theory is most straightforward at getting at what is normatively at stake. Post's political discourse theory, for example, might do so because, at bottom it is an autonomy theory that differs from the one I offer most overtly in that it attributes autonomy to a person only when and because the person is participating in public discourse. Since, however, his theory does not make an attribution of autonomy as a fundamental baseline but rather only contextually when a person is participating in public discourse, it presents a quandary. A person presumptively has no (attributed) autonomy despite speech with overt political relevance (as in *Connick*<sup>59</sup>) when enmeshed in activities organized by the government in exercise of its managerial (as opposed to its governance) authority.<sup>60</sup> To be consistent with the case law, however, his theory must explain why a person sometimes suddenly obtains the attributed political discourse-based autonomy when engaged in politically-themed but assertedly private banter with a boy friend or in private discussions with her supervisor.<sup>61</sup>

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59. *Connick v. Myers*, 461 U.S. 138 (1983) (holding that the discharge of an assistant district attorney for political speech did not violate the First Amendment).

60. See, e.g., POST, *supra* note 20, at 179–98 (discussing concepts of democratic community from “the specific perspective of the American legal system”).

61. *Rankin v. McPherson*, 483 U.S. 378, 392 (1987) (holding that in some cases involving private conversation matters of public concern still trigger First Amendment rights); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 417 (1979) (holding that public employees do not lose the right of free speech because of arranging to speak privately with an employer). Weinstein's politically-centered theory emphasizes political content more than context, and, therefore, avoids Post's precise problem. He could also argue that autonomy theory has trouble here because the Court requires the speech be about a matter of “public concern.” Though I find the propriety of the limitation to matters of “public concern” doubtful, I can understand that a court which wanted to avoid continual second guessing of routine employment matters might conclude that firings due to the speech in categories that it does not protect in this context will seldom really reflect dismissal for lack of cause and that adequate protection can be best left to

**More.** I have avoided discussion of defamation law, possibly the area where case law most obviously contradicts my understanding of autonomy theory.<sup>62</sup> And other areas obviously could be examined—hate speech and copyright and privacy would be obvious additions—but I fear that I have already overburdened the patience of readers. Those areas discussed here suffice to show, I believe, how autonomy theory best explains many results that I, and I believe most First Amendment commentators, approve and shows that its critical force, giving specific, contested (but I believe persuasive) answers in areas that conflict with currently prevailing doctrine and in areas where controversy continues to rage.

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normal contract law or labor activism.

62. Contrary to the Court, autonomy theory would, I believe, justify general application of the *New York Times* standard: “[K]nowledge that [the defamatory content] was false or with reckless disregard of whether it is false or not.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). I would think, though, that Post would also have trouble here. The Court’s restriction of constitutional protection to talk about public officials and figures and, with reduced protection, to talk about public issues provides a content, not a public discourse, focus—making it possibly consistent with Meiklejohn’s political speech theory, but not Post’s. I do not see, for example, how Post could conclude that I would be engaged in public discourse if I told mutual friends in private that Congressman Dan is a thief in order to help them protect their personal assets in their personal dealings with Dan. *Cf. Post, supra* note 1.