FREE SPEECH AND POLITICAL LEGITIMACY: A RESPONSE TO ED BAKER

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Normative discussion too often suffers from lack of agreement on criteria by which to judge the merits of the various contending theories. Bereft of such common ground normative debate often has the deep subjectivity—and hence the productivity—of schoolyard boasts about whose dog is best. I was therefore delighted to discover that the normative essence of the autonomy-based theory of free speech that Ed Baker proposes in this Symposium is political legitimacy,[1] the same basic norm underlying the somewhat different visions of participatory democracy that Robert Post and I defend in a related symposium as the best explanation of the American free speech principle.[2] Having identified this common ground, I will in Part I of this response attempt to show that there is a firmer connection between legitimacy and participatory democracy than there is between legitimacy and the autonomy theory that Ed proposes. Part II responds to certain of Ed's claims about the fit between his theory and current free speech doctrine. Part III concludes this response with a short discussion of why overall doctrinal fit matters in determining the best theory of the First Amendment.

I. LEGITIMACY

A. DEFINITION

As Ed notes, political legitimacy is at least a partial solution to the age-old problem of justifying the "use of otherwise

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1. C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251 (2011).

2. See Robert C. Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011); James Weinstein, *Participatory Democracy as the Central Value of Free Speech Doctrine*, 97 VA. L. REV. 491 (2011).

immoral force or coercion to enforce the law";[3] or, relatedly, and adopting H.L.A. Hart's famous distinction, a partial answer to the question of what conditions are necessary to "obligate, not merely oblige people" to obey the law.[4] But though Ed, Robert, and I all ground our theories in political legitimacy, none of us so far in this discussion has explained precisely or in any detail what we mean by that term. So I will suggest that the term "legitimacy" in this context has both a descriptive and a normative sense: descriptively, a legal system is invested with legitimacy to the extent that citizens obey the laws not just out of fear of punishment but also out of a sense of duty (or "obligation," to use Hart's term); or if not out of something as strong as duty, at least because they think that obeying the law is generally the right thing to do. Normatively, a legal system is legitimate if it warrants, on moral grounds, the allegiance of its citizens.[5]

Ed's use of the term in his article for this Symposium suggests that he is concerned predominately, if not exclusively, with the normative sense of the term, which may mean that our mutual reliance on legitimacy provides common ground only with respect to the normative but not the descriptive sense.[6] It seems to me, however, that these two senses of legitimacy converge at least at the following point: one reason that citizens might feel obligated rather than merely obliged to obey the laws, or at least might believe that obeying the laws is generally the right thing to do, is their warranted conviction that the legal system is, on the whole, moral. For this reason, I will consider both senses of the term in the discussion that follows. However, in an attempt to find common ground on which to engage Ed, I will emphasize the normative dimension.

B. LEGITIMACY AND DEMOCRACY

Although ultimately basing his theory in autonomy, it is significant that Ed recognizes that "[d]emocracy is one answer"

3. Baker, *supra* note 1, at 262; *see also* H.L.A. HART, THE CONCEPT OF LAW 82–91 (2d ed. 1994).

4. Baker, *supra* note 1, at 262; *see also* Hart, *supra* note 3.

5. This particular phrasing of the normative sense of legitimacy was suggested to me by my colleague Jeffrie Murphy. *See generally* Jeffrie G. Murphy, *Allegiance and Lawful Government*, 79 ETHICS 56 (1968).

6. There is a third, exclusively positivistic conception of legal legitimacy that focuses on whether government assumed power in accordance with the system's rule of recognition for the transfer of power and, while in power, acts in general accord with the constitutional rules that define the scope of the powers given to it under the constitution.

to the question of what can make a legal order legitimate. Indeed, he even allows that because at least in a formal sense

> a democratic process . . . 'equally' respects people as properly having a 'say' in the rules they live under. . . . [D]emocracy 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.[7]

Given this paean to democracy's legitimating power, why then doesn't Ed agree with Robert and me that it is that speech by which people "hav[e] a 'say' in the rules they live under" that is the primary concern of the First Amendment? He offers three interrelated reasons for declining to do so: 1) the proper conception of democracy needs specification in terms of a moral rather than just a sociological or historical basis; 2) "[t]he 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;" and 3) there is "no obvious reason to limit this respect for self-government to collective self-governing—the political sphere—as opposed to self-governing also within private spheres."[8]

I readily agree that the conception of democracy that connects free speech and legitimacy needs "specification" in moral terms. As I will explain in more detail below, the specific moral basis for the conception of democracy that I believe underlies the American free speech principle—popular sovereignty and the individual right of political participation—is a profound commitment to formal political equality. I also agree that this moral basis and the two precepts that it generates require respect for autonomy *within* the law making process. But here Ed and I finally arrive at a crucial point of disagreement: although it may not be "obvious," there is in my view a very good reason for confining the respect for autonomy demanded by political equality, and the specific conception of democracy that it generates, to collective self-governance.

As I have suggested in the related symposium,[9] there are two separate presuppositions (and accompanying ascriptions) of

7. Baker, *supra* note 1, at 263 (emphasis added).
8. *Id.* at 265–66 (emphasis added).
9. See James Weinstein, *Participatory Democracy as the Basis of American Free*

autonomy. The first flows from the basic precept that in a democracy it is the people, both collectively and individually, not the government, who possess the ultimate sovereignty. This basic precept would be inverted if the government could restrict speech on the grounds that the ultimate governors, or some segment of them, were either too foolish or too dependent to be trusted to hear the expression of certain views or receive certain information on matters relevant to their governing authority. The second presupposition flows from the very reason we would care about legitimacy in the first place: that people are, as Ed notes, "agents with proper claims to self-determination . . . [and] interest[s] in self-realization."[10] It is this second, ubiquitous presupposition of autonomy that must be respected both within and outside of the political process. In contrast, since the first presupposition flows from a precept of popular sovereignty, it need be respected only when citizens are acting in their sovereign capacity.

Crucially, these two presuppositions of autonomy differ not only in the contexts in which they arise but also with regard to the conditions that can legitimately justify their infringement. Reflecting the vital connection between popular sovereignty and political legitimacy, the autonomy presupposed of people engaged in democratic self-governance can properly be infringed, if at all, only in extraordinary circumstances.[11] In contrast, as I shall discuss in detail below, in most cases no disrespect for the ubiquitous presupposition of autonomy arises if government has good reason for its infringement.

Though he does not say why, Ed obviously does not agree with my view that the presupposition of autonomy relevant to collective self-governance differs from the more minimal presupposition of autonomy that must be ascribed to people in all other capacities. But having noted this crucial point of disagreement, I will now move on to what Ed calls his "more direct affirmative argument" for autonomy as the basis of a theory of free speech,[12] which, as we shall see, will ultimately bring us back to the crucial point of disagreement.

Speech Doctrine: A Reply, 97 VA. L. REV. 633 (2011).

10. Baker, *supra* note 1, at 265.
11. *See* Weinstein, *supra* note 2 at 498–99, 508–09.
12. Baker, *supra* note 1, at 267.

C. IN SEARCH OF THE CONNECTION BETWEEN FORMAL AUTONOMY AND LEGITIMACY

According to Ed, "[t]he 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."[13] The autonomy that Ed is concerned with is formal autonomy,"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."[14] Although such autonomy obviously includes a lot more than speech, this sense of autonomy does, as Ed asserts, readily "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."[15] Although the connection between formal autonomy and speech may be apparent, the connection between respect for such autonomy and legitimacy is not. Specifically, I do not believe that Ed persuasively explains how the "legitimacy of the legal order" depends on government respecting formal autonomy. More crucially, he does not explain why restrictions justified by good and substantial reasons fail to respect this autonomy.

Ed attempts to tie his view of autonomy to legitimacy as follows: After rejecting Kantian notions of consent or self-authorship because they give those who dissent from a given law or an entire legal regime too much power over others, Ed concludes that:

> [T]he 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 reason to the dissenter for why she could and, the majority argues, should accept these laws.[16]

This requirement "is an implicit premise of discourse, that is, of communicative action."[17]

13. *Id.* at 251.
14. *Id.* at 254. Ed contrasts such formal autonomy with substantive autonomy, which he defines as a person's "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." *Id.* at 253.
15. *Id.* at 254.
16. *Id.* at 267.
17. *Id*.

1. The Overlapping Consensus Between Formal Autonomy and Participatory Democracy

To the extent that the focus of Ed's theory is with "discourse" or "communicative action" by which "the majority . . . in good faith give[s] reasons to the dissenter for why she could . . . accept . . . laws," Ed's theory, like Robert's and my participatory democracy theories, focuses on the *process* necessary to make a particular law or the entire legal system legitimate. Moreover, just as our participatory democracy theories ascribe autonomy to those engaged in the project of democratic self-governance through public discourse, Ed's requirement that dissenters be given reasons properly presupposes that these dissenters, as well as the majority with whom they are in dialogue, are autonomous agents. Ed notes the possibility of an overlapping consensus by which our differing theories protect public discourse.[18]

Unlike a theory based in democratic participation, however, Ed's theory also embraces communicative acts that have nothing to do with the process by which laws or social policy are adopted. Rather, as Ed makes clear the "communicative action" central to his theory concerns "a process by which people seek agreement" not just about public decisions through public discourse but also includes private discussion "such as ones in which a group of friends try to decide where to go to dinner."[19] Consistent with this more expansive view, autonomy is ascribed to those engaged in the practice of seeking agreement on all matters whether public or private. The connection between respect for this broader conception of agreement-seeking communicative action and legitimacy is, however, obscure. And to the extent that his theory embraces communicative activity *not* part of the practice of seeking agreement, the connection with legitimacy through the autonomy presupposed for those involved in communicative action is completely severed.[20]

18. *Id.* at 269.
19. *Id.* at 267.
20. Ed's concept of formal autonomy also embraces activity that is non-communicative. However, for reasons of legal positivism, among others, Ed does not maintain that these activities are protected by the First Amendment. See Baker, *supra* note 1, at 256–57.

2. COMMUNICATIVE ACTION AS PART OF THE PRACTICE OF SEEKING AGREEMENT ON PRIVATE MATTERS

Since the concept of seeking agreement with someone with no authority to reject a proposal or to ask for its modification would seem nonsensical, I concur with Ed that the communicative action by which people seek agreement on private as well as public matters presupposes that those engaged in this process are autonomous agents. In addition, I agree that government should respect the presupposition of autonomy inherent in this practice. I will even grant for the sake of argument that laws or regulations that fail to respect this autonomy are illegitimate and, further, that restrictions on autonomy imposed for insufficient reasons do not respect this autonomy. Crucially, however, at least for most exercises of formal autonomy, if government *does* have good and substantial reasons for restricting this autonomy, it does not act disrespectfully, and thus the regulation is not illegitimate, at least not on the ground that it disrespects people's formal autonomy. A fortiori, substantially justified infringement of such autonomy does not undermine the legitimacy of the entire legal system.

To adopt (and modify slightly) one of Ed's examples: Suppose that Alice convinces Carol, Betty's spouse, that Betty is worthless, and persuades Carol to leave Betty and live with her.[21] Suppose further that, based on this communicative action, Betty recovers a judgment against Alice for alienation of affection. Such a judgment would obviously infringe Alice's formal autonomy. In addition, the imposition of legal liability for such conduct may be perfectly lousy social policy (not to mention at odds with the progressive domestic relations policy of a state that recognizes same-sex marriage). Therefore, most, though not all, states have abolished this cause of action.[22] But it is not at all clear how alienation of affection laws are themselves illegitimate,[23] let alone undermine the legitimacy of the entire legal system.

21. *See id.* at 254–55.

22. Seven states—Hawaii, Illinois, Mississippi, New Mexico, North Carolina, South Dakota, and Utah—currently retain such laws. *See* Sheri Stritof & Bob Stritof, *Alienation of Affection State Laws*, ABOUT.COM, http://marriage.about.com/od/legalities/a/alienation.htm (last visited Feb. 27, 2011).

23. If the reasons offered by the state to justify the restriction were relatively weak as compared to the importance of the autonomy interests infringed, as may well be the case with respect to applications of alienation of affection laws such as hypothesized here, then this restriction would arguably fail to *respect* formal autonomy, thereby rendering it illegitimate. *See* note 30, *infra*.

Someone who has wooed away another's spouse would no doubt resent being hit with a judgment for alienation of affection. With regard to the descriptive dimension of legitimacy, I doubt that for most people that the primary or even a significant reaction engendered by such judgment would be decreased allegiance to the state's legal system. Similarly, from a normative perspective, such a judgment is not in my view the type of restriction that undermines the moral basis that warrants allegiance to the legal system. In contrast, if this same state passed a law that prohibited anyone from *advocating* abolition of this state's alienation of affection law, I do think that allegiance to this state's legal system would, and should, be diminished[24] for those barred from expressing their views on this matter.[25] Indeed, the moral underpinnings warranting allegiance to the legal system might be diminished even for those who oppose or are undecided about abrogation of such suits but who are committed to fair and open debate on this and other public policy matters.

Having not taken a poll on the issue, my assertion that, as a descriptive matter, a judgment for alienation of affection would undermine the legitimacy of the legal system, if at all, far less than a prohibition of advocacy a particular viewpoint on a

24. I use the word "diminish" advisedly. Thus a single viewpoint restriction on public discourse usually would not significantly undermine the legitimacy of the entire legal system but rather, to borrow Robert Dahl's metaphor, would tend to reduce the level of the legitimacy "reservoir." *See* ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 148–49 (1971). In contrast, even an isolated viewpoint-discriminatory restriction on public debate can render illegitimate the application of a law to any person excluded from participating in the public discussion of that law. See Weinstein, *supra* note 2, at 498.

25. In accordance with the scope of our respective claims, the proper comparison here is between restrictions on formal autonomy without limitation, and *viewpoint-based* restrictions on public discourse, rather than all restrictions on public discourse. For while Ed claims that virtually all restrictions on such formal autonomy are illegitimate, I make no such claim with respect to all restrictions on public discourse generally. For one, in accord with current doctrine, my view is that content-neutral regulations are both constitutional and legitimate unless they impose a burden on citizens' right to participate in public discourse that is both substantial and greatly disproportionate to the asserted state interest justifying the restriction. *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989). And while for pragmatic reasons, I support the Court's view that virtually all content-based restrictions on public discourse are unconstitutional, I do not believe that all such restrictions are always illegitimate. Rather, I agree with Justice O'Connor's observation that the rule against content-based regulation of public discourse sometimes results in the invalidation of laws that "common sense may suggest . . . are entirely reasonable." City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring). But I also agree with her that such a rule is nonetheless a good one "in an area where fairly precise rules are better than more discretionary and more subjective balancing tests." *Id.*

matter of public concern, is, admittedly, based on little more than a hunch. I realize that this is a hunch that other reasonable observers, including some participants in this Symposium, might not share. Similarly, so far I have appealed primarily to intuition in asserting that, as a normative matter, alienation of affection judgments compromise, if they do it all, the moral basis warranting allegiance to the legal system far less than a provision prohibiting advocacy of abolition of such suits. Others, however, might not share this intuition. Since merely trading hunches and intuitions risks the "my dog is better than your dog" type of argument that I had hoped to avoid, I will now try to advance the inquiry by giving specific reasons why there is a more robust connection between participatory democracy and political legitimacy than there is between formal autonomy and such legitimacy.

First, and most obviously, rules that constitute or directly affect the legal *system*, such as voting or election procedures, or limitations on the discussion through which public opinion is formed, will because of their systemic nature tend to have a greater bearing on the legitimacy of the legal system as a whole than will non-systemic rules such as those restricting most exercises of formal autonomy. Relatedly, so long as fair and open political processes exist, the possibility of repealing illegitimate laws not related to the political process remains open. Conversely, illegitimate restrictions on the political processes will make repeal of other types illegitimate laws much more difficult.

More profoundly, measures that selectively restrict the ability of certain individuals or groups to participate in the political process violate the fundamental precept of equal citizenship underlying contemporary visions of democracy. As Robert Dahl has explained: "The democratic process is generally believed to be justified on the ground that people are entitled to participate as political equals in making binding decisions, enforced by the state, on matters that have important consequences for their individual and collective interests."[26] It is such a commitment to formal political equality that provides the moral "specification"[27] for the conception of democracy that I believe underlies the American free speech principle. Whatever

26. ROBERT A. DAHL, CONTROLLING NUCLEAR WEAPONS: DEMOCRACY VERSUS GUARDIANSHIP 5 (1985).

27. *See supra*, text accompanying note 8–9.

may have been thought in times past, it is now a basic American precept that every competent adult member of society has a fundamental right to participate in the process by which society's collective decisions are made,[28] and as a formal matter at least, has a right to do so on an equal basis with all other citizens. Indeed, this norm of equal formal participation has become so deeply entrenched in our political culture that its violation is seen as a denial of the equal moral worth of any individual excluded from this process. For this reason, such exclusion for public debate is likely to be regarded as deeply insulting.

Moreover, if some are selectively excluded from voting, or even have their voting power diluted by malapportionment,[29] or are barred from expressing their views on matters of public concern—be it the war in Iraq, health care reform, same sex marriage, or a proposed tax hike—such a restriction is likely to be perceived as fundamentally unfair. And here I want to suggest that of the various moral pillars that support the legitimacy of a legal system, fundamental fairness is particularly crucial. Thus, laws that are, or are perceived to be, fundamentally unfair are especially corrosive of the moral foundation warranting citizens' allegiance to the legal system. Viewpoint-based restrictions on public discourse are, and are likely to be perceived by those selectively silenced as, grossly unfair. In contrast, fundamental unfairness is not the evil usually associated with restrictions on formal autonomy such as laws penalizing alienation of affection.

In the final analysis, then, it is the insult and profound unfairness produced by denials of political equality, together with their essential connection with the legal system, that render viewpoint restrictions on public discourse particularly corrosive of political legitimacy. And it is these considerations that make such viewpoint discrimination categorically more destructive of legitimacy than are infringements of formal autonomy.

This is not to deny that *some* restrictions on formal autonomy might be illegitimate because they fail, as Ed argues, to respect the autonomy that must be attributed to the people

28. One remaining exception from this modern muscular commitment to political equality is the ability of states to constitutionally disenfranchise convicted felons. See Richardson v. Ramirez, 418 U.S. 24 (1974).

29. *See, e.g.*, Reynolds v. Simms, 377 U.S. 533, 565 (1964) (in announcing one person, one vote standard the Court explains that "[f]ull and effective participation in state government requires . . . that each citizen have an equally effective voice in the election of members of the state legislature").

whom government asks to obey its laws.[30] It may even be the case that, like viewpoint-discriminatory restriction on public discourse, a small subset of these restrictions might tend to corrode the legitimacy of the entire legal system.[31] Still, in sharp contrast to virtually any viewpoint-discriminatory restriction on public discourse, many restrictions on the vast array of liberty interests encompassed within Ed's vision of formal autonomy are not illegitimate in themselves, and even more certainly do not implicate the legitimacy of the legal system. This is true even of restrictions on agreement-seeking communicative action, let alone all other exercises of formal autonomy.

A defamation suit by a private person on a matter of private concern provides a good example of infringements of formal autonomy with no negative implications for political legitimacy. Assume that Andy tells Bob that he should shun Charlie, a newly-admitted member of their social club, because Charlie regularly beats his wife, an accusation that turns out to be false. Assume further that Charlie is neither a public official nor a public figure, and that although Andy acted negligently in making this false accusation, he did not know that the allegation was false, nor did he act in reckless disregard of whether it was false or not. Andy's condemnation of Charlie fits squarely within Ed's definition of communicative action. Thus contrary to current doctrine, which would allow Charlie to recover damages from Andy,[32] Ed believes that at least in the absence of proof

30. This might be the case if a law infringed an exercise of formal autonomy based upon some relatively weak justification, such as was the case with the ban on homosexual sodomy struck down in *Lawrence v. Texas*, 539 U.S. 558 (2003). *Accord* Baker, note 1 at 256. The alienation of affection judgment that I hypothesized in text, an activity that even more clearly involves communicative action than does sexual conduct, might, arguably, be another example. See note 23, *supra*. It is telling, however, how difficult it is to come up with actual restrictions on communicative action, or even realistic hypothetical ones, outside of public discourse that, by my lights at least, would clearly be illegitimate in themselves, let alone undermine the political legitimacy of the legal order.

31. The ban on homosexual sodomy invalidated in *Lawrence* might again provide an example, at least for the class of people targeted by the law. Interestingly, however, such arguable corrosion of the political legitimacy of the legal order likely results as much, if not more so, from the discriminatory aspect of that law, which applied to acts of homosexual but not heterosexual sodomy. (*Cf. Lawrence*, 539 U.S. at 579–86 (O'Connor, J., concurring) (arguing that the law should be invalidated as violating equal protection not due process)). This view is consistent with my suggestion in text that the deeper norms underlying political legitimacy are commitments to formal political equality and fundamental fairness. Violation of other norms besides formal autonomy and formal equality might also undermine the legitimacy the legal system. For example, violation of respect for basic human dignity through the routine use of judicial torture would obviously compromise the legitimacy of the legal order.

32. Assuming that the statement was not deemed a matter of public concern, which would be likely, Charlie could recover even in the absence of a showing of fault on

that Andy acted in knowing or reckless disregard for the truth, allowing Charlie to recover for Andy's defamatory statements would violate the First Amendment because such recovery would fail to respect the autonomy of people engaged in communicative action.[33]

There can, of course, be reasonable disagreement as to what level of protection, if any, the First Amendment should provide defamatory speech such as Andy's. But in light of Charlie's important substantive autonomy interests that would likely be compromised by the spreading of this false information about him, including being shunned, it is difficult to comprehend how allowing him to recover damages from Andy is illegitimate in itself, let alone diminishes the moral basis that warrants allegiance to the legal system. Indeed, it could be more plausibly argued that *not* allowing Charlie to recover damages for Andy's culpable and harmful conduct will tend to corrode the moral underpinnings of the legal system.

So even if Ed is right that "[t]he 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,"[34] government does not fail to respect this autonomy when it has good reasons, which will often involve protecting the substantive autonomy interests of others, for restricting exercises of formal autonomy.[35] In contrast, reflecting the essential connection between public discourse and political legitimacy, governmental interests far more pressing and urgent are needed to justify viewpoint-discriminatory restriction on public discussion.[36] For

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Andy's part. *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 the judgment); *id.* at 774 (White, J., concurring in judgment). But even in the unlikely event that Andy's statement were found to be on a matter of public concern, Charlie could still recover upon showing that Charlie acted negligently. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

33. *See* Baker, *supra* note 1 at 282 n.62.

34. *Id.* at 251 (emphasis added).

35. The constitutionality of content-neutral regulations on public discourse are judged by a not dissimilar standard. *See supra* note 25.

36. Even if not viewpoint based, content-based restrictions on public discourse are subject to strict scrutiny. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115–16 (1991). And since "[w]hen 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," Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995), viewpoint-discriminatory restrictions are especially anathema to the First Amendment. Indeed, the better view may be that such restrictions are never permissible.

as Learned Hand recognized nearly a century ago,[37] even an interest as vital as preventing interference with the war effort is not sufficient reason for suppressing anti-war protests in democratic societies "dependent upon the free expression of opinion as the ultimate source of authority."[38]

3. Other Communicative Acts

The formal autonomy embraced by Ed's theory extends not just to communicative action by which people seek agreement but to many other forms of communication as well. It encompasses, for instance, "self-expressive rights that include, for example, a right to . . . offend, or condemn,"[39] not only as part of public discourse or to seeking agreement on matters of private concern, but also to face-to-face insults, so-called "fighting words."[40] But by including such communication, Ed's theory not only becomes further attenuated from its purported legitimacy touchstone but also encounters a logical problem.

Ed seems to believe that if autonomy is properly presupposed for people engaged in seeking agreement through communicative action, then this presupposition must carry forward the very different types of communicative activity (and even to non-communicative exercises of formal autonomy). But why should this be? Whether there is a presupposition about a particular practice should, it seems to me, depend entirely on the nature and function of that practice. Accordingly, as I have previously discussed at some length in the related symposium[41] and more briefly above, a basic presupposition of popular sovereignty that people are autonomous and rational when engaged in democratic self-governance should not automatically carry over to people acting in other capacities such as consumers

37. Masses Publ'g Co. v. Patten, 244 F. 535, 539–40 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

38. *Id.* Admittedly, part of the explanation for the virtually absolute prohibition of viewpoint-discrimination in public discourse is the warranted skepticism of attempts by government to suppress speech critical of it or its policies, skepticism that is usually not as justified for restrictions on most liberty interests, including exercises of formal autonomy. Still, as Hand suggests, suppression of antiwar speech would not be defensible even if it were a moral certainty that widespread public opposition to a war would result in increased death of American troops. *Id*.

39. *See* Baker, *supra* note 1, at 254.

40. *See id.* at 278, which seems to imply that Ed considers "fighting words" protected by his theory. In any event, such expression would seem to be fall squarely within the scope of his definition and explication of formal autonomy. See *supra*, text accompanying notes 14–15.

41. See Weinstein, *supra* note 9, at 670–72.

of commercial products or as medical patients. Similarly, the fact that government must respect the presupposition of autonomy inherent in the communicative acts of people seeking agreement would not seem relevant to whether government must also respect the autonomy of people involved in communicative activity not relevant to this practice.

There may well be reasons, independent of the presupposition proper to agreement-seeking communicative action, why government must respect the formal autonomy of people engaged in communication that is not part of the practice of seeking agreement. But in the absence of such an argument, Ed's argument that restrictions on such communication are illegitimate would seem to have a hole in it. And consistent with this logical lacuna, it is not surprising that concrete examples of restriction of speech not part of the practice of seeking agreement reveal an even more attenuated connection with legitimacy than is the case with restrictions on agreement seeking-communication.

Suppose, for instance, that in an exercise of his formal autonomy, a white man walks up to a black man waiting for the bus and calls him a "dirty nigger." It is plausible (though I believe mistaken) to maintain, as does Ed, that face-to-face insults such as this should be constitutionally protected. But it is implausible to maintain that a law preventing someone from engaging in such expression undermines the legitimacy of the legal system. As with defamation on matters of private concern, both the utterer and the target of this expression have moral claims sounding in autonomy. For this reason, it is difficult to see how prohibiting the speaker from verbally attacking a fellow citizen in this way is illegitimate in itself, let alone undercuts the moral basis warranting allegiance to our legal system.

In summary, when we consider the entire gamut of communicative acts embraced by Ed's vision of formal autonomy, those part of the practice of seeking agreement as well as those outside that practice, the connection with legitimacy is remote. Restrictions on some of these communicative acts outside of public discourse may arguably raise legitimacy concerns in themselves, and a few may possibly even threaten the legitimacy of the entire legal system. In contrast, virtually any viewpoint-discriminatory restriction on public discourse—whether about such monumental issues as race relations, the war in Afghanistan, health-care reform, abortion or global warming, as well as more mundane issues

such as where a new stop light should be placed—denies the equal moral status of those so excluded from participation in the political process. For this reason, such restrictions are particularly likely to corrode the moral foundations warranting allegiance to the legal system. So with respect to the task of guarding political legitimacy, my dog Demo *is* better than Ed's dog Auto.

II. FORMAL AUTONOMY AND DOCTRINAL FIT

Ed contends that the appeal of a theory of constitutional theory should be judged by "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."[42] Accordingly, although he denies that a theory's *overall* fit with current doctrine argues in favor of a theory, Ed spends considerable effort attempting to show how well his autonomy theory explains key areas of doctrine of which he approves. But even this attempt to demonstrate limited doctrinal fit is unpersuasive and the overall fit between his theory and contemporary doctrine is remarkably poor.

A. ED'S EXPLANATION OF DOCTRINE OF WHICH HE APPROVES AS VINDICATING FORMAL AUTONOMY

1. Compelled Speech

According to Ed "[t]he poster child" for doctrinal fit with formal autonomy is the *West Virginia State Board of Education v. Barnette*,[43] the World War II era case holding that public school children cannot constitutionally be compelled to salute the flag.[44] There is, it is true, language in that case emphasizing such autonomy.[45] But despite this language, a commitment to formal autonomy with the robustness and breadth that Ed claims for it cannot possibly have been at play in that case. For instance, it is inconceivable that the *Barnette* Court (or any Court before or since) would have recognized the constitutional right of a public school child to refuse to recite a poem that offended the

42. Baker, *supra* note 1 at 270.
43. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
44. Baker, *supra* note 1 at 270–71.
45. 319 U.S. at 642 (noting that in compelling the flag salute, government "invades the sphere of intellect and spirit").

child's aesthetic sensibilities. ("I'm sorry Miss O'Grady, but being required to recite drivel such as 'Stopping by Woods' disrespects my autonomy; I would, however, agree to recite one of Tennyson's better works. Otherwise, please speak to my lawyer.") And recent Supreme Court cases confirm that school children have no such far-reaching autonomy rights.[46]

Ed also attempts to explain in terms of formal autonomy *Wooley v. Maynard,*[47] which held that a motorist has a First Amendment right to cover up New Hampshire's state motto "Live Free or Die" on his license plate.[48] But as confirmed by the Court's repeated reference to the "ideological" or "political" content of the compelled expression at issue,[49] *Wooley* cannot plausibly be read as recognizing a similar right of a motorist to object on aesthetic grounds to the color of the license plate that the state requires to be affixed to his automobile, as would follow if this decision had vindicated the formal autonomy interests that Ed contends underlies the First Amendment.

2. The Rule Against Content Discrimination

Although its scope of operation is often grossly exaggerated, the rule against content discrimination is nonetheless unquestionably a centerpiece of modern free speech doctrine. Therefore, a good test of any theory's doctrinal fit is its ability to explain the purpose and scope of this rule. As do Robert and I, Ed seems to recognize that the rule does not extend with the same rigor to all settings.[50] Ed does not,

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46. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Frazer, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007).

47. Wooley v. Maynard, 430 U.S. 705 (1977).

48. Baker, *supra* note 1, at 271 n.30.

49. *See, e.g.*, 430 U.S. at 713 ("We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of *an ideological message* by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."); *id.* at 714 ("A system which secures the right to proselytize *religious, political, and ideological* causes must also guarantee the concomitant right to decline to foster such concepts.").

50. *See* Baker, *supra* note 1, at 280–81. Because Ed's discussion of the rule against content discrimination is limited to speech on government property, my response is also limited to those contexts. However, following Robert's seminal work on the subject (e.g., ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 200–01 (1995)), I have elsewhere attempted to show more generally that this rule exists primarily within contexts dedicated to democratic self-governance. *See, e.g.*, JAMES WEINSTEIN, HATE SPEECH, PORNOGRAPHY AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE 40–43 (1999). This larger point is neatly made in the related symposium by Robert's contrasting the First Amendment protection afforded a dentist who publicly disagrees the American Dental Association's policy against dentists advising their patients to have their mercury amalgam filings replaced, with the lack of

however, attempt, as we do, to explain the Court's fierce but limited antipathy to content discrimination by positing that the rule operates primarily within settings dedicated to democratic self-governance, such as in a traditional public forum, but not in settings dedicated to other purposes, such as courtroom or government workplace.[51] Rather, Ed attempts to explain the wavering pattern of protection by arguing that respect for formal autonomy requires government to allow speech on public property and "institutionally bound" speech unless it is "basically incompatible with the normal activity of a particular place at a particular time,"[52] citing the Court's 1972 opinion in *Grayned v. City of Rockford.*[53] The problem with Ed's explanation, as a descriptive matter at least, is that time and doctrine have passed it by.

In the early 1970s the Court did, as recited in *Grayned*, fleetingly embrace an "incompatibility" standard. Just a couple of years later, however, the Court was already backing away from this standard,[54] and by 1983 it had completely changed course, adopting instead a rigid, categorical approach in *Perry Educ. Assoc. v Perry Local Educators' Assn.*[55] *Perry*'s tripartite division of public property includes the speech-limiting concept of the "non-public forum,"[56] settings in which government has extensive authority to regulate both access to the forum and the content of speech in ways patently inconsistent with the flexible "incompatibility" standard described in *Grayned.*[57]

The same term that it decided *Perry*, the Court also handed down *Connick v. Myers*,[58] which held, with one important

protection for the same dentist who advises her patient to have such filings replaced. *See* Robert C. Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 481-82 (2011).

51. Also, as I discuss in note 24, above, the rule against content discrimination is best understood as strategic overprotection against viewpoint discrimination.

52. Baker, *supra* note 1, at 280.

53. 408 U.S. 104 (1972). Though *Grayned* dealt with a content-*neutral* ban on access to public property (upholding an anti-noise ordinance applicable to property adjacent to schools), it is fair enough that Ed uses that decision's incompatibility approach for measuring the validity of *all* restrictions for speech on public property, including content-based restrictions in the workplace and other "institutionally-bound" contexts.

54. *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

55. 460 U.S. 37 (1983).

56. Recently, and confusingly, referred to in *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2985 n.11 (2010), as a "limited public forum."

57. *Perry's* reservation of the rule against content-discrimination to traditional and designated public forums is, in contrast, easily explained by a theory based in participatory democracy.

58. 461 U.S. 138 (1983).

exception, that the First Amendment places virtually no limits on the authority of managers to discipline public employees for the content of their workplace speech. The exception is for speech is on a "matter of public concern," expression eligible for First Amendment protection.[59] The nearly complete authority that the Court gives workplace managers to regulate speech not of public concern specifically belies specifically an "incompatibility" standard for "institutionally-bound" speech. More generally, such managerial authority over the content of workplace speech is inconsistent with the view that the First Amendment mandates respect for the formal autonomy of government employees. In contrast, the availability of protection for speech on matters of public concern, but not for other workplace expression, fits snuggly with the view that participatory democracy is the First Amendment's primary concern.[60]

B. THE POOR OVERALL FIT BETWEEN FORMAL AUTONOMY AND CURRENT DOCTRINE

Ed readily admits there are several important areas of the law that contradict the view that free speech doctrine is based on respect for formal autonomy. He writes, for instance, that defamation law is "possibly the area where case law most obviously contradicts" such a theory.[61] Other areas that contradict his theory include "fighting words,"[62] copyright[63] obscenity and commercial speech.[64]

With regard to obscenity, Ed is surely right that "[f]rom an autonomy perspective, the issue is easy," for "the right to exercise 'autonomous control over the development and expression of one's intellect, tastes, and personality'" would plainly seem to embrace the right to produce, distribute, and consume obscene material.[65] But as Ed also correctly observes, "existing doctrine denies protection to obscenity." In contrast, as

59. *Id.* at 146 .
60. *See* Weinstein, *supra* note 2, at 493–97.
61. Baker, *supra* note 1, at 282.
62. *See supra* note 40 and accompanying text.
63. *See* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 951 (2002) (arguing contrary to First amendment doctrine that "copyright generally cannot be applied to limit noncommercial copying" consistent with the individual autonomy interests he believes the First Amendment protects).
64. Baker, *supra* note 1, at 272–74.
65. Baker, *supra* note 1, at 276.

I have discussed at length elsewhere,[66] and as Ed agrees,[67] the exclusion of obscenity from First Amendment protection does not contradict a theory rooted in participatory democracy.[68] With respect to commercial speech, Ed argues that under his view of formal autonomy there are multiple reasons "to *deny* protection to commercial speech."[69] But contradicting any claim of doctrinal fit with Ed's theory, the Court has extended increasingly rigorous protection to commercial advertising.[70] A theory based in participatory democracy, in contrast, at least offers a plausible justification for this result.[71]

The strong protection that current doctrine provides abstract art and symphonic music, as well as private speech not related to public issues, are areas where formal autonomy's fit with current doctrine is superior to democratic theory's doctrinal fit.[72] But in light of all the other crucial areas of free speech

66. James Weinstein, *Democracy, Sex and the First Amendment*, 31 N.Y.U. REV. L. & SOC. CHANGE 865 (2007) [hereinafter Weinstein, *Democracy, Sex*]; James Weinstein, *Free Speech Values, Hardcore Pornography and the First Amendment: A Reply to Professor Koppelman*, 31 N.Y.U. REV. L. & SOC. CHANGE 911 (2008) [hereinafter Weinstein, *Reply to Koppelman*].

67. *See* Baker, *supra* note 1, at 277 (explaining that the denial of protection coheres with "most political speech theories" including ones based in "participation in public discourse").

68. For an interesting argument that obscenity doctrine *does* interfere with democratic participation, see Thomas M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 544–46 (1979). For a response to this argument, see Weinstein, *Democracy, Sex*, *supra* note 66, at 888–92.

69. Baker, *supra* note 1, at 272 (emphasis added).

70. *See, e.g.*, 44 Liqormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

71. *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1. (2000). I, however, continue to think that promotion of the audience's substantive autonomy interest provides a more forthright explanation for the protection of commercial advertising. *See* James Weinstein, *Fools, Knaves, and the Protection of Commercial Speech: A Response to Professor Redish*, 41 LOY. L.A. L. REV. 133, 150–52 (2007).

72. As I discuss in the related symposium, with respect to the few areas where participatory democracy cannot easily explain current doctrine, the problem is one of incompleteness rather than inconsistency or contradiction. *See* Weinstein, *supra* note 2, at 500. Unlike the massive contradiction that would attend any attempt to explain current doctrine in terms of autonomy, formal or substantive, incompleteness does not undermine doctrinal coherence. Rather, the failure of participatory democracy to explain all of free speech doctrine can be explained by recognizing the undeniable fact that as a descriptive matter several values inform American free speech doctrine. *See id.* at 497–504. Admittedly, the existence of highly protected speech such as abstract art or symphonic music is in tension with my descriptive claim that participatory democracy is the only *core* free speech norm. My proposed solution for solidifying participatory democracy as the sole core free speech norm is to protect exercises of formal autonomy such as the creation of abstract art and symphonic music as well as intimate conversation not related to matters of public concern as fundamental liberty interests under the Due Process Clause, in accordance with the protection already provided kindred autonomy interests under that provision. *See* Weinstein, *supra* note 2, at 499 n.45; Weinstein, *Reply*

doctrine that have a poor fit with formal autonomy, including the key areas discussed in Section A of this Part, the overall fit between doctrine and formal autonomy is relatively poor, especially as compared to the good fit between these crucial areas and a theory grounded in participatory democracy.

In the related symposium, Ed made the astute observation that we do not have an agreed upon metric to measure overall fit.[73] The absence of such a metric would indeed be a problem if there were not such an obvious disparity between the fit of the two theories we are comparing. Thus we might need a scale to determine (and here I am afraid I am dating myself) whether Orson Wells or Jackie Gleason was heavier; but we need no such "metric" to confidently conclude that Gleason weighed more than Willie Shoemaker. By the same token, if I am correct that in such key areas as defamation, copyright, compelled speech, obscenity, commercial speech and the scope and operation of the rule against content discrimination, there is poor fit between doctrine and formal autonomy; and if there is a much better fit in most of these area with participatory democracy; then there is no need for a sophisticated metric to conclude that a theory grounded in participatory democracy fits doctrine better than does a theory based on formal autonomy.

III. WHY FIT MATTERS

The demonstration that a theory grounded in participatory democracy has a better overall fit with current doctrine than does a theory based in formal autonomy raises the question of why fit matters in judging the merits of a free speech theory.[74] This question is particularly pertinent here since Ed denies that overall fit is relevant to such a determination. The answer to this question depends crucially on what a theory of free speech doctrine is meant to accomplish. If one is especially interested—as I am—in bringing coherence to what otherwise might appear to be largely a jumbled assortment of cases,[75] the importance of a

to Koppelman, *supra* note 66, at 915 n.22. Ed charges that this move is "reminiscent" of Alexander Meikeljohn's extending the scope of his democracy-based theory to give it better doctrinal fit, but which simultaneously diminished his theory's "bite." *See* Baker, *supra* note 1, at 271 n.32. I do not believe the comparison is apt. Assigning the protection of certain activity to another constitutional provision to which it more properly belongs rather than to the First Amendment is quite unlike Meikeljohn's expanding the scope of the protection provided by his First Amendment principle to improve its doctrinal fit.

73. *See* C. Edwin Baker, *Is Democracy a Sound Basis*?, 97 VA. L. REV. 515 (2011).

74. See Baker, *supra* note 1, at 270.

75. As Robert has aptly observed, "first amendment doctrine is neither clear nor

theory with good doctrinal fit is manifest. Such coherence will increase doctrine's clarity, stability, and administrability, benefits that are particularly desirable in this area of the law.[76] Of course, any attempt to understand and organize case law requires interpretation and judgment, and thus cannot be a purely descriptive, value free exercise. Indeed, the pragmatic benefits just described, as well as my attempt to organize free speech doctrine around a single core principle so as to decrease judges' ability to smuggle their ideological predilections into the application of doctrine, are, at bottom, normative concerns.[77] Still, determining which principle best fits the pattern of the decisions can and should be a primarily descriptive exercise.

This largely descriptive process of determining which theory best fits contemporary doctrine is, however, only the first step in deciding whether it is the best overall free speech theory. Overt normative critique also has a crucial role to play in this process. In interpreting an open-textured provision such as the Free Speech Clause of the First Amendment, a morally repugnant theory, or even a merely unappealing one, should be rejected no matter how good the doctrinal fit.[78] Similarly, if two theories fit doctrine approximately equally as well, the more normatively appealing one should be judged the best theory. Indeed, if one theory is demonstrably more appealing than all others, than it should be acclaimed the best theory even if it does not have as good doctrinal fit as contending but less appealing theories. If there is common ground for judging the normative appeal of two competing theories, then it might be possible to determine which theory is the more normatively appealing. But if two theories are both appealing, though in different, incommensurate ways, it would, as I suggested at the beginning of this response, most likely be bootless to argue that one theory is more appealing

logical. It is a vast Sargasso Sea of drifting and entangled values, theories, rules, exceptions, predilections." Robert C. Post, *Racist Speech, Democracy, and the First Amendment,* 32 WM. & MARY L. REV. 267, 278 (1991).

76. For a discussion of other advantages of good doctrinal fit, see Weinstein, *supra* note 9, at 634–35.

77. One might also add that the largely unconscious exclusion of the host of logically possible but morally or culturally unacceptable explanations of the data is also a deeply normative process.

78. Thus although I do believe that doctrinal fit should have a significant role to play in determining the best theory in various areas of constitutional law, this does not require, as Ed seems to suggest, that one to be "an apologist for the status quo" or to explain the "legal correctness" of morally repugnant cases. Baker, *supra* note 1, at 270. See, for example, my explanation in the related symposium of why *Citizens United v. FEC*, 130 S. Ct. 876 (2010), was wrongly decided. Weinstein, *supra* note 2, at 501 n.53, 504 n. 64, 510 n.85.

than the other. In such a case, if doctrinal coherence and the pragmatic benefits it brings are to be given any significant weight, then among normatively appealing theories, the one with the best doctrinal fit should be acclaimed the best overall theory of free speech.

Ed agrees with Robert and me that the touchstone for determining the normative appeal of a basic free speech principle is how well it promotes political legitimacy. If, as I attempted to show in Part I of this response, democratic participation is more robustly connected with the promotion of legitimacy than is formal autonomy, then as between these two theories, one based in democratic participation is the better theory of free speech, further enhanced by its superior doctrinal fit. Ed might argue, however, that since his theory encompasses participatory democracy and all the legitimacy it bestows, while my theory excludes exercises of formal autonomy not related to democratic participation and whatever contribution to legitimacy it has to offer, then even on the assumption that participatory democracy has a closer tie to legitimacy than does formal autonomy, his more inclusive theory is necessarily more appealing. In light of such demonstrable normative superiority, the argument might continue, a theory based in formal autonomy is the better free speech theory even if participatory democracy can claim better overall doctrinal fit.

Significantly, however, my theory does not preclude constitutional protection of formal autonomy; it merely denies that this norm is, or should be, a core free speech principle. Though I think it would be preferable if all exercises of formal autonomy, including expressive ones, were dealt with exclusively as liberty interests under the Court's substantive due process jurisprudence,[79] I have no strong objection to the Court extending First Amendment protection in appropriate cases to expressive exercises of formal autonomy. However, because, as I explained in Part I, restrictions on the wide range of expressive activities embraced with Ed's vision of formal autonomy will not usually jeopardize the legitimacy of the legal system, I do strongly disagree with his view that all expressive exercises of such autonomy warrants "virtually absolute" First Amendment protection.[80] Accordingly, if political legitimacy is to be the

79. *See supra* note 72.

80. Baker, *supra* note 1, at 252. Which is not to deny that, in some respects, such a broadly encompassing theory may have advantages over one more narrowly based in democratic participation. For example, Ed's autonomy principle might, even in its core

primary criterion for judging the merits of a free speech theory, one having a direct and robust connection with such legitimacy is to be preferred to a contending theory that would extend rigorous protection to a great deal of expression having little or no connection to that norm.[81]

But let's assume for the sake of argument that the neither theory is demonstrably more appealing than the other, but, rather, that the most that can be established in a discussion among informed observers such as this is that formal autonomy and participatory democracy each, though in different ways, supply very appealing bases for a theory of free speech. In that event, if the interest in creating coherent, workable free speech doctrine is to be given any significant weight, the question of which principle has the superior overall doctrinal fit then becomes determinative.

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application, protect important liberty interests that would otherwise fall between the cracks of my participatory democracy principle and the Court's current substantive due process jurisprudence. But this possible benefit is, in my view, more than offset by the risk that massively extending the First Amendment to protect activity having little or no connection to political legitimacy will dilute the protection available to activity such as core political speech having a vital connection with the legitimacy of the legal system. For a more detailed discussion of this dilution problem, see James Weinstein, *Seana Shiffrin's Thinker-Based Theory of Free Speech: Elegant and Insightful, But Will it Work in Practice?*, 27 CONST. COMMENT. 385, 393–95 (2011). *See also* Weinstein, *supra* note 71, at 156–58.

81. Though its more vital connection to the promotion of legitimacy is primarily what makes a theory based in democratic participation more appealing than one based in formal autonomy, there is another advantage of political participation worth mentioning. As Ed concedes, his vision of formal autonomy is "wildly contested" as a moral theory, let alone a basis of free speech doctrine. Baker, *supra* note 1, at 269. In contrast, that each citizen in this country has an equal right to participate in the democratic process, including the right to voice her views on matters of public concern, is a proposition that, to borrow Frank Michelman's remark about democratic self-governance in general, "no earnest, non-disruptive participant in American constitutional debate is quite free to reject." Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1526–27 (1988). All things being equal (and then some), basing free speech doctrine on a principle that attracts near-universal acceptance from both legal actors and the American public will tend to produce clearer, more certain and more stable doctrine in an area of the law in which such attributes are particularly desirable than would basing doctrine on a wildly contested principle. Ed writes that "the laws Congress (and individual states) pass limiting political . . . speech" suggest that consensus that I claim about democratic participation is "not so clear." Baker, *supra* note 1, at 269. I am not sure what laws Ed has in mind, for attempts to pass blatant viewpoint restrictions on public discourse are nowadays rare, even at the state and local level. In any event, that politicians do not always act in accordance with what they know to be a core democratic precept is neither surprising nor disproof that there is in fact a clear consensus about that precept. Also, that there is wide-spread consensus about a norm does not assure that there will always be consensus either about its interpretation or application. Still, a principle reflecting a widely-shared national commitment will be interpreted and applied with more clarity and certainty that one based on a "wildly contested" norm.