

## ***REPLIES***

### **PARTICIPATORY DEMOCRACY AS A THEORY OF FREE SPEECH: A REPLY**

*Robert Post\**

**I**N scholarship, one writes with the overt aspiration to persuade but much more primitively with the urgent desire to be seriously engaged in ongoing scholarly conversation. To be carefully read and answered by seven commentators of this power and brilliance is a treasure beyond all reasonable expectation. Of course, no one exactly enjoys going under the surgeon's knife, but I am nevertheless deeply grateful for these illuminating and helpful comments, as well as for Professor James Weinstein's masterly efforts to organize them. I cannot sufficiently express the loss we have all experienced by Professor C. Edwin Baker's untimely death as this symposium was in the process of creation.

I should say at the outset that Professor Vincent Blasi most generously catches the fundamental aspiration of my own work, which is to provide an account of First Amendment doctrine that gives "considerable weight to ease of explanation and comprehension, feasibility of implementation in an imperfect institutional environment."<sup>1</sup> Legal principles should "be made objective enough and authoritative enough to control adaptive rule making."<sup>2</sup> The inevitable consequence is a certain degree of pragmatic simplification, which is exemplified by my effort to develop a lexically fundamental purpose for First Amendment doctrine.

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\* Dean and Sol & Lillian Goldman Professor of Law, Yale Law School. I am grateful to Jim Weinstein for his vision and energy in creating this symposium, and also for his unfailingly helpful and insightful comments on these drafts.

<sup>1</sup> Vincent Blasi, *Democratic Participation and the Freedom of Speech: A Response to Post and Weinstein*, 97 Va. L. Rev. 531, 531 (2011).

<sup>2</sup> Philippe Nonet & Philip Selznick, *Law and Society in Transition: Toward Responsive Law* 77 (1978).

Because law typically acquires authority from the commitments and principles of those whom it seeks to govern,<sup>3</sup> I have sought to identify this fundamental purpose by inquiring into our historical commitments and principles. This inquiry need not entail a passive “apologetic” approach, as Baker or Professor Susan Williams worry that it might, because as Professor Tim Scanlon suggests, the task of explicating our own moral commitments inevitably leaves ample room for critical intelligence.<sup>4</sup> But this inquiry does preclude orienting First Amendment doctrine on the basis of radical first principles, as if American constitutional law were merely a matter of what you or I might personally believe to be best. I had hoped to capture this inevitable tension by appropriating the notion of “reflective equilibrium.”

Commentators in this rich and innovative symposium raise three distinct and important objections to the lexical priority I have accorded to the principle of democratic participation to explain and construct First Amendment doctrine. They argue, first, that “democratic self-governance” cannot plausibly account for the breadth of free speech protections we presently enjoy. They contend, second, that the pattern of First Amendment decisions is better understood as expressing the distinct value of autonomy. Third, they insist that distinctions in First Amendment outcomes are better explained by differences in government interests than by differences in the kind of speech that is being regulated or by different versions of democracy than the participatory model I have advanced. In this short Reply I shall briefly address each of these three principal criticisms.

Scanlon perhaps best expresses the skepticism shared by many in the symposium that the “guiding interests, even the ones that figure centrally in our actual First Amendment jurisprudence can be helpfully subsumed under any single label.”<sup>5</sup> He writes that

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<sup>3</sup> Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 Cal. L. Rev. 1473, 1474 (2007).

<sup>4</sup> C. Edwin Baker, *Is Democracy a Sound Basis for a Free Speech Principle?*, 97 Va. L. Rev. 515, 519 (2011); T.M. Scanlon, *Why Not Base Free Speech on Autonomy or Democracy?*, 97 Va. L. Rev. 541, 543 (2011); Susan H. Williams, *Democracy, Freedom of Speech, and Feminist Theory: A Response to Post and Weinstein*, 97 Va. L. Rev. 603, 604 (2011).

<sup>5</sup> Scanlon, *supra* note 4, at 543.

“[p]erhaps the phrase ‘democratic self-governance’ might be stretched sufficiently to encompass” relevant interests, but the resulting distortion suggests “that it is a mistake to look for any one phrase to sum up all of these interests.”<sup>6</sup> Scanlon includes in our First Amendment values

our interests in participation in democratic politics (both as speakers and as voters), our interests as participants in the informal politics of shaping the mores of our society, and (taking “*self-governance*” in a slightly different sense) our interest in being in a good position to form our own values and decide how to live our own lives.”<sup>7</sup>

He believes “that an understanding of the interests that guide the right to freedom of expression that left any of these things out would be inadequate.”<sup>8</sup> “A state law that banned the film *Brokeback Mountain* because it presented homosexuality in a favorable light,” Scanlon writes, “would violate the First Amendment, but this is not only because gay rights and marriage are possible matters of legislation or constitutional change. The important interests that freedom of expression, and hence the First Amendment, seeks to protect include our interest in participating in the process of determining how our informal social mores will evolve and our interest in deciding for ourselves how to conduct our private lives.”<sup>9</sup>

I take this cluster of objections roughly to assert (1) that freedom of expression in our society expresses many different values; (2) that each of these values ought to be expressed in First Amendment doctrine; and (3) that many paradigmatically essential instances of freedom of expression cannot be easily explained by a focus on democratic self-government.

The first of these points is undoubtedly correct. Americans have many diverse and disparate reasons for valuing freedom of expression. It is quite a different question, however, whether constitutional doctrine should express each of these different reasons. Constitutional doctrine must be formulated in a way that serves the need of the legal system to develop relatively simple, clear, and

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<sup>6</sup> Id. at 544.

<sup>7</sup> Id.

<sup>8</sup> Id. at 545.

<sup>9</sup> Id.

consistent lines of precedent capable of guiding lower courts and governmental actors.<sup>10</sup> This is the point that Blasi makes in his comment.

I agree with Scanlon, however, that it would be unacceptable if there were core instances of freedom of speech that failed to receive constitutional protection.

Art is a paradigmatic case that Scanlon and others like Baker, Professor Seana Shiffrin, and Professor Steve Shiffrin mention. I would certainly be the last to argue that the reason that *Brokeback Mountain* deserves constitutional protection is because the LGBT community is now seeking legal reform. I instead consider art as deserving constitutional protection because of its connection to public opinion formation in a democracy.

I regard democracy as “the rule of public opinion, ‘government by public opinion.’”<sup>11</sup> Madison pointed out at the Founding that “public opinion is the real sovereign in every free” government.<sup>12</sup> The task of the First Amendment is to ensure the integrity of “the great process by which public opinion passes over into public will, which is legislation.”<sup>13</sup> If, as sociologists teach us, public opinion is formed within the “public sphere” and if “the public sphere in the political realm evolved from the public sphere in the world of letters,”<sup>14</sup> *Brokeback Mountain* is protected as public discourse be-

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<sup>10</sup> On the tension between the complexity of moral norms and the relative simplicity of the moral norms that can and should receive legal protection, see Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 Cal. L. Rev. 957, 992 (1989).

<sup>11</sup> Carl Schmitt, *Constitutional Theory* 275 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928).

<sup>12</sup> James Madison, *Public Opinion*, Nat'l Gazette, Dec. 19, 1791, reprinted in 14 *The Papers of James Madison* 170, 170 (Robert A. Rutland et al. eds., 1983).

<sup>13</sup> Francis Lieber, *On Civil Liberty and Self-Government* 128 (Theodore D. Woolsey ed., Da Capo Press 1972) (1853).

<sup>14</sup> Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* 30–31 (Thomas Burger trans., MIT Press 1991) (1962). The common law privilege of fair comment about matters of public concern, for example, ultimately traces back to an 1808 decision involving the harsh criticism of three travel books. Although the criticism was otherwise defamatory, the judge charged the jury:

Every man who publishes a book commits himself to the judgment of the public, and anyone may comment upon his performance . . . [W]hatever their merits, others have a right to pass their judgment upon them—to censure them if they be censurable, and to turn them into ridicule if they be ridiculous.

cause it is paradigmatically constitutive of the public sphere. To receive constitutional protection as public discourse, *Brokeback Mountain* need not concern potential policy decisions; it need only contribute to what people think when they communicate to each other in public, which is what we mean when we refer to “public opinion.”

Understood in this way, public opinion is the location of that democratic sovereignty which Jürgen Habermas attributes to “subjectless forms of communication[:]”<sup>15</sup>

Subjectless and anonymous, an intersubjectively dissolved popular sovereignty withdraws into democratic procedures and the demanding communicative presuppositions of their implementation. It is sublimated into the elusive interactions between culturally mobilized public spheres and a will-formation institutionalized according to the rule of law. Set communicatively aflow, sovereignty makes itself felt in the power of public discourse. Although such power originates in autonomous public spheres, it must take shape in the decisions of democratic institutions of opinion- and will-formation, inasmuch as the responsibility for momentous decisions demands clear institutional accountability.<sup>16</sup>

Public opinion is thus a far wider category than communications about potential governmental decision making. Public opinion refers to what a society generally believes and thinks. In a democracy, government institutions translate public opinion into “decisions.” So long as *Brokeback Mountain*, and indeed all forms of communication that sociologically we recognize as art,<sup>17</sup> form part of the process by which society ponders what it believes and thinks, it is protected under a theory of the First Amendment that stresses democratic participation.

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Carr v. Hood, (1808) 170 Eng. Rep. 983, 985 n\* (K.B.). See John E. Hallen, Fair Comment, 8 Tex. L. Rev. 41, 43–44 (1930).

<sup>15</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 486 (William Rehg trans., Polity Press 1996) (1992).

<sup>16</sup> Id.

<sup>17</sup> Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1253–56 (1995).

Professor Eugene Volokh raises the excellent point (which I myself have made<sup>18</sup>) that all communications more or less influence the content of public opinion.<sup>19</sup> The content of public opinion is affected not merely by art that is broadcast to the public but also by private conversations in coffeehouses and at the kitchen table. It follows that if the only criterion for including a communicative act within public discourse were whether, as a matter of causal and empirical fact, it might potentially affect the content of public opinion, public discourse would be a useless constitutional category. But the boundaries of public discourse are not set in this fashion. The location of these boundaries reflects judgments that are ultimately normative. Such judgments express two distinct kinds of considerations. The first concerns the classification of social roles; the second concerns the functional prerequisites for social solidarity.

Advertising widgets for sale communicates information that no doubt affects the content of public discourse. This is why the Court has extended constitutional protections to commercial speech.<sup>20</sup> Yet the social role of selling widgets is instantly recognizable as different from the social role of attempting to influence the content of public opinion. To accord a speech act the protections of public discourse is to endow it with privileges and protections we attribute to the latter role, which is quite distinct from other social roles like a doctor giving medical advice to a patient, a lawyer speaking in court, or a professor lecturing in class.

This suggests that Volokh overstates his case when he suggests that public discourse is merely “a conclusory label for that speech which is most protected.”<sup>21</sup> But Volokh is correct to imply that there are normative definitions of role that underlie many judgments concerning the boundaries of public discourse. I do not think we have a very clear or hard-edged account of these judgments,<sup>22</sup>

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<sup>18</sup> Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v. Falwell*, 103 Harv. L. Rev. 601, 640 (1990).

<sup>19</sup> Eugene Volokh, The Trouble with “Public Discourse” as a Limitation on Free Speech, 97 Va. L. Rev. 567, 573 (2011).

<sup>20</sup> Robert Post, The Constitutional Status of Commercial Speech, 48 UCLA L. Rev. 1, 23–25 (2000).

<sup>21</sup> Volokh, *supra* note 19, at 575.

<sup>22</sup> For a preliminary effort to scout the territory, see Post, *supra* note 17, at 1278.

but it is anthropologically apparent that they do exist and are reflected in constitutional doctrine. There are no doubt close cases—for example, whether family conversations about presidential politics should be protected as public discourse—but the most constitutional theory can do in such cases is to illuminate the stakes that are raised in choosing one or another constitutional characterization of particular speech acts.

There is a second, functional kind of judgment that also underlies how courts set boundaries to public discourse. In his comment, Volokh postulates that Bill defames Dan, and he then asks why the law should regard Bill and Dan as interdependent if they happen to be private friends but as autonomous if they happen to be city councilmen.<sup>23</sup> Williams has eloquently and (in my view) accurately noted that most persons are all the time *both* interdependent *and* autonomous. But the attributes that persons actually possess, and the attributes that the law can or should ascribe to them, are two separate issues.

Because the normative point of public discourse is to exercise collective autonomy, the law will ascribe autonomy to persons who are categorized as speaking within public discourse; it will do so in order to protect the capacity of persons collectively and autonomously to determine their own fate. Defamation law classifies Bill's defamation as within public discourse if it is about a public official because the law will presume that in such circumstances the defamation is about what the public should think about public matters. Instead of imposing upon Bill the basic prerequisites of civility, instead of requiring Bill to respect Dan's dignity, the law will absolve Bill of these basic requirements in order to maintain Bill's autonomy.

But if Bill and Dan are merely private persons who happen to be friends, the law will presuppose that Dan's dignity depends upon Bill's observance of basic norms of civility, which the law will enforce through the tort of defamation. The law will presuppose that Bill and Dan are interdependent, as indeed all well-socialized persons are. When the law acts in this way it maintains what I have

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<sup>23</sup> Volokh, *supra* note 19, at 581.

elsewhere called the social order of “community,”<sup>24</sup> in which persons are connected to each other through common socialization in mutual social norms.

As a sociological formation, community is more fundamental than democracy. This is true for three reasons. First, persons can exercise autonomous choice only after they have become fully developed persons, and they can become such persons only after they have internalized ambient social norms through various forms of socialization. Feral children do not display the value of autonomy. Second, democracy refers to the value of collective self-government, and this value is itself a social norm. The value of democracy does not depend merely upon choice and consent but upon its continuous socialization into the personalities of our citizens, which is why “democratic education” is essential for the maintenance of democracy.

Third, democracy allows persons to believe that the state is potentially responsive to their views because the decisions of the state are subordinated to a public opinion that is not conceptualized as merely the statistical outcome of a vote (which is why North Korea is not really a democracy). Public opinion could not create democratic legitimacy if it were merely the voice of the loudest or the most violent. Participation in public discourse allows persons to feel that the state is potentially responsive to their views, because we believe that public opinion is at least partially formed through reason and debate. (Not entirely, of course, but this merely indicates how the formation of public opinion might be improved.) Public opinion can therefore serve the cause of democratic legitimacy only if it is at least partially formed in compliance with the civility rules that constitute reason and debate. This creates what I have elsewhere referred to as the paradox of public discourse: In the name of autonomy, the First Amendment suspends legal enforcement in public discourse of the very civility rules that allow public opinion to confer democratic legitimacy.

If this analysis is correct, it implies that the autonomy that attaches to public discourse must always be surrounded by a much

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<sup>24</sup> Robert C. Post, *Community and the First Amendment*, 29 *Ariz. St. L.J.* 473, 475 (1997); Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in *Democratic Community: NOMOS XXXV* 163, 165 (John W. Chapman & Ian Shapiro eds., 1993) [hereinafter Post, *Democratic Community*].



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larger sea of nonpublic discourse, in which essential community values of civility and dignity are nourished and supported. If every speech act that potentially influences the content of public discourse were to be constitutionally classified as public discourse, society would be constitutionally forbidden from enforcing these essential community values. Because democracy presupposes community, democracy would itself suffer. Democracy would not be possible in such an anomic society.

Baker asks whether these community values need to be enforced by law, to which my short answer is in the affirmative.<sup>25</sup> I cannot in this short Reply argue the point, but I would note that essential values of dignity and civility receive legal enforcement in every society with which I am familiar.<sup>26</sup> The immunity accorded to those who seek to influence the content of public opinion represents an unusual exception to this pervasive background regulation. The First Amendment privileges those who speak in public discourse from the obligations and responsibilities that the law normally imposes on citizens. But if the First Amendment were to spread this immunity too widely, the very social structure of community that sustains democracy might begin to unravel.

This functional argument explains why I find autonomy theory implausible as a general account of the First Amendment. Autonomy theory imagines the private speaker engaged in private speech as the paradigmatic example of First Amendment freedom. Yet most legal systems, including our own, regard the regulation of such speech as indispensable to the maintenance of the values of civility and dignity. Oblivious to the forms of social solidarity necessary to sustain constitutional values, autonomy theory seems to me to have the sociology of freedom of speech exactly backwards. In most legal systems with which I am familiar, the law is reluctant to release speakers from the obligation to conform to the community values of civility, because the law is quite aware of how difficult it is to be dragged into the pitiless and unrelenting glare of public discourse, where persons are stripped of legal protections for their dignity and privacy, and where they cannot assert legal

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<sup>25</sup> Baker, *supra* note 4, at 523.

<sup>26</sup> On the importance of legal enforcement, see Jeremy Waldron, *Kant's Legal Positivism*, 109 *Harv. L. Rev.* 1535 (1996).

claims to be treated with respect and care.<sup>27</sup> In part this reluctance stems from an appreciation of the importance of maintaining the social solidarity of community.

Although our society attributes many values to freedom of speech, ordinary legal regulation of communication both internalizes these values and balances them against other socially important values. The value of disseminating accurate information is balanced against the value of civility; the value of publicity is balanced against the value of privacy; and so on. The First Amendment disrupts such balances only in discrete circumstances, largely in order to protect the particular political role associated with the free formation of public opinion in a democracy.

Some commentators in this symposium, like Seana Shiffrin, contend that I have not offered a sufficiently subtle account of the value of autonomy, which in her view is a deep and encompassing principle that includes the ideal of collective self-government.<sup>28</sup> I agree with Shiffrin that interpretive charity must be spread lavishly and equally, but at root I find myself unable to concede what autonomy theory would seem to require: the thought that in our society freedom of speech is the rule rather than the exception. The vast majority of communications in society today are regulated without constitutional interference; they are outside the scope of the First Amendment. It therefore seems to me that the essential task of First Amendment is to explain why constitutional immunity is extended only to some forms of communication. Because autonomy theory postulates a value that any speaker can almost always plausibly claim to be fulfilling, autonomy does not seem to me to be a principle that can be usefully employed for this task.

A second point made by several commentators, including Ed Baker, Seana Shiffrin, and Steve Shiffrin, is that because democracy is valuable only insofar as it fosters autonomy, it is simply illogical to imagine that the First Amendment could advance the value of democracy without more fundamentally serving the value

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<sup>27</sup> See *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R.

<sup>28</sup> Seana Valentine Shiffrin, *Methodology in Free Speech Theory*, 97 *Va. L. Rev.* 549, 554 (2011).

of autonomy.<sup>29</sup> I am not convinced by this line of argument. While it is true that collective self-determination serves values that are related to the principle of individual autonomy, it is also true that democracy serves values that are independent of this principle. Democracy creates forms of social solidarity and social peace that cannot be reduced to individual autonomy. The most fundamental problem of any constitutional order is how to establish stable forms of social ordering, a value that democracy uniquely facilitates and that does not entail further systematic commitments to individual autonomy.

Even if one were to concede that the value of democracy depends upon the value of autonomy, it would not follow that the constitutional doctrine of the First Amendment should be organized around the value of autonomy rather than that of democratic self-governance. Because individual autonomy is always and everywhere in tension with all the innumerable reasons a modern state has for regulating social life, we typically endow legislatures with the authority to mediate this inevitable and perennial conflict. Legislatures could barely function without this authority. This does not imply, however, that we should also concede to legislatures the additional authority required to mediate such conflicts when they occur within the public space that alone allows us to know and establish our own political commitments. It is not implausible to reserve the distinctive vehicle of constitutional law to mediate these specific kinds of conflicts. This would mean, however, that our First Amendment doctrine would be organized around the project of democratic self-government rather than around the value of autonomy. And this might be the case even if our society retained a general liberal commitment to the value of individual autonomy.

Consider in this regard:

1. A palmist sells her services to a customer for a fee and is punished by a statute prohibiting fraudulent future telling.
2. A palmist writes a book on palmistry to the general public. A member of the public sues and the palmist successfully pleads the First Amendment as a defense.

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<sup>29</sup> Baker, *supra* note 4, at 519; Seana Shiffrin, *supra* note 28, at 560; Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 *Va. L. Rev.* 559, 560 (2011).

Or:

3. A lawyer advises a client not to pay taxes that are owed and is sanctioned for malpractice.

4. On a television show, a lawyer advocates withholding taxes because the government is illegitimate. He is sued for malpractice by a viewer who takes his advice. The lawyer successfully pleads the First Amendment in defense.

Or:

5. Bill believes that his friend, Dan, is a thief and tells their mutual friends; Dan successfully sues for defamation.

6. Bill believes that his friend Dan is a thief and tells their mutual friends. Dan is a congressman, and Bill successfully pleads the First Amendment in defense of Dan's lawsuit for defamation.

Each of these examples concerns speech, not thought or belief. The autonomy of a speaker to say what he or she chooses is equally at stake in all six of these cases, but in Numbers 1, 3, and 5 we trust legislatures to override the autonomy to speak in the name of other, competing social values. First Amendment doctrine does not interfere. By contrast, autonomy of speech is protected in Numbers 2, 4, and 6 because of the peculiarly *public* nature of the speaker's communication. I submit that this pattern of outcomes makes sense if First Amendment doctrine is structured to protect democratic legitimation, but not if First Amendment doctrine is structured to protect individual autonomy. The pattern would be explicable even if the value of democracy were ultimately to rest on the principle of individual autonomy. Finally, Volokh and Blasi offer many doctrinal examples that they argue are inconsistent with the doctrinal patterns one would expect to see if the First Amendment were fundamentally about a commitment to participatory democracy. It would take me far afield to discuss each of their many examples, so I shall quickly and inadequately respond with more general thoughts. Volokh argues that our case law and our values are better captured by what he calls a "presumptive all-inclusive approach" than by focusing on the special characteristics of public discourse. Volokh concedes, of course, as he must, that different forms of speech are accorded different forms of constitutional pro-

tection. But if I understand Volokh correctly, he argues that these differences are best explained by differences in the governmental interests that are at stake.<sup>30</sup> The government as an employer has different interests, and so can regulate speech differently, than the government as an educator or the government as a patron or the government as a general regulator of citizen conduct. I believe that Volokh is making this point to establish that all speech, speech “as such,” should receive a uniform level of protection; the only variables that can alter this protection are the strength and nature of government interests in regulation.

I agree that there are distinct governmental interests and that the character of First Amendment protection frequently depends upon the nature and force of these interests. But I do not believe it credible to maintain that all communication has equal constitutional force and value. Many government regulations fall outside the scope of the First Amendment not because the government has especially strong interests at stake but because the regulations control forms of communication that do not have constitutional value. Examples would be regulations of product liability, medical malpractice, or contract formation. What is constitutionally determinative in such cases is the nature of the communication at issue, not the strength or weakness of government interests in regulation.

This same point can be seen in the basic structure of First Amendment doctrine, which requires the state to demonstrate stronger interests to regulate public discourse than to regulate commercial speech. This difference is explicable only if the constitutional value of speech also varies depending upon the nature of the communicative acts that the state seeks to regulate.

Consider Volokh’s own example of Bill and Dan. Dan is equally injured whether he is a congressman or a private friend; the state’s interest in suppressing defamation is thus equally important in the two cases. Yet the First Amendment character of the case will vary depending upon whether Bill is constitutionally conceived as participating in public discourse. It is the strength of the constitutional

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<sup>30</sup> Volokh, *supra* note 19, at 572 (“A distinction in how the two kinds of speech are treated by First Amendment law (private teacher speech not regulable by the government, public teacher speech regulable by the government acting as employer) must turn on something other than the ‘public discourse’ status of the speech.”).

value served by the speech that changes, not the strength of the state's interest in regulating the speech.

The same might be said about the contrast between *In re Primus*<sup>31</sup> and *Ohralik v. Ohio State Bar Ass'n*,<sup>32</sup> to which Volokh objects.<sup>33</sup> The state's interest in protecting clients from misleading solicitation is equally present in the two cases; the potential injury to the clients is also invariant. But the constitutional protection afforded the speech of the two lawyers depends entirely upon whether the Court classifies the public interest lawyer as participating in public discourse or as engaging in commercial speech. Volokh may not agree with this classification, but it seems clear that it explains the difference between the two cases.

Once it is agreed that the constitutional protection merited by speech varies with the kind of speech at issue, the "presumptive all-inclusive approach" ceases to be very useful as a First Amendment guide. The question is always the *kind* of protection particular forms of speech deserve, and the "presumptive all-inclusive approach" will not help us in this regard. The whole point of the presumptive all-inclusive approach is to flatten and eliminate differences between kinds of speech, except for speech that fails the presumption of protection. The kind of approach I am suggesting, by contrast, seeks first to determine the constitutional value served by particular forms of speech and only afterwards to fashion doctrinal protections adequate for safeguarding that value.

My focus on public discourse is not designed to show that only public discourse carries First Amendment value, but that the typical protection that we associate with the First Amendment follows from the unique and distinctive constitutional value of public discourse. Rules that prohibit content discrimination or compelled speech follow from the specific constitutional value of public discourse but not from the constitutional value of other forms of speech, like commercial speech.<sup>34</sup> We therefore permit content discrimination and compelled speech in the context of commercial speech.

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<sup>31</sup> 436 U.S. 412 (1978).

<sup>32</sup> 436 U.S. 447 (1978).

<sup>33</sup> Volokh, *supra* note 19, at 574–75.

<sup>34</sup> See Post, *supra* note 20, at 2.

If a theory of how speech contributes to constitutional values is necessary to determine the character of the First Amendment protections it should receive, then the presumptive all-inclusive approach cannot help us unless it offers a theory of why all speech should presumptively be understood to contribute to a constitutional value. The only value I can imagine that would be remotely adequate to this task would be “autonomy,” which, for the reasons I have already suggested, does not seem to possess very powerful explanatory force with regard to most First Amendment cases.

The basic difficulty is that the presumptive all-inclusive approach does not correctly formulate the problem. It seeks to provide guidance about First Amendment doctrine by pointing to a fact in the world—speech. I believe, by contrast, that the relevant question is the constitutional value served by conduct, which may or may not be what in ordinary language we call “speech.” A law prohibiting the production of newsprint in order to save trees does not apply to what in ordinary language we call “speech,” yet such a law would certainly trigger First Amendment scrutiny because of its effect on the constitutional values served by newspapers. Conversely the regulation of some forms of communication that are undoubtedly “speech” in the ordinary meaning of language is simply outside the scope of the First Amendment. Contract law is a good example. The basic point is that normative questions about First Amendment scope and protection must depend upon normative considerations and not upon some “fact” in the world.

Like Volokh, Blasi offers many examples of First Amendment decisions that he believes would have been decided differently if the Court were in fact dedicated to the ideal of participatory democracy. But in contrast to Volokh, I do not believe Blasi adduces these cases in the service of some larger theoretical point but rather only to demonstrate that there are many different concepts of democracy that are compatible with one or more of the Court’s opinions. It is difficult for me to answer Blasi’s many good examples, so I will make only two general points.

The first is that I think Blasi pays insufficient attention to the question of who the Court imagines is a participant in public discourse. Blasi argues, for example, that if the Court cared about participatory democracy, it would not forbid “a legislatively man-

dated right of access to the mass media.”<sup>35</sup> Blasi’s point is true on the assumption that media outlets are not themselves participants in public discourse. If media outlets were equal to citizens as participants in public discourse, Blasi’s point would fail. Think, for example, what would happen if Virginia were to grant to the general public a right of access to Blasi’s computer so that the maximum number of people could participate in internet conversations. Such a law would severely undermine Blasi’s ability to participate in public discourse. For this reason the failure of the Court to establish public access does not establish Blasi’s point, except on the assumption that news media ought to be regarded as common carriers rather than as speakers. This assumption may be more or less defensible, but the Court’s refusal to adopt it does not suggest that the Court is not moved by a commitment to participatory democracy.

My second general comment is that a great many of Blasi’s examples come from the specific area of election law. I agree with Blasi that this is a difficult and complex area, which is hard to explain under any given theoretical approach. It is possible, however, that the Court may implicitly be moved by the idea that elections, as Baker intimated a long time ago, exist as managerial domains designed to ensure fair and legitimate decisions rather than merely as a kind of public discourse.<sup>36</sup> Although I believe that the Court is deeply confused on this point, there is a perceptible theme in its opinions expressing this idea, and this theme may account for some of the opinions that Blasi cites.<sup>37</sup>

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<sup>35</sup> Blasi, *supra* note 1, at 534.

<sup>36</sup> C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 *Harv. C.R.-C.L. L. Rev.* 1, 3 (1998). But see Robert Post, *Regulating Election Speech Under the First Amendment*, 77 *Tex. L. Rev.* 1837 (1999) (arguing that attempts to distinguish election speech from public discourse are potentially problematic).

<sup>37</sup> For a clear recent statement of this position, see *Doe v. Reed*, 130 S. Ct. 2811, 2833–34 (2010) (Scalia, J., dissenting).