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REFINING THE ARGUMENT FROM DEMOCRACY

Gabe Broughton

THE FREEDOM of expression raises a philosophical problem. Speaking, writing, painting, publishing—these are ultimately just different kinds of conduct.[1] And like other kinds of conduct, they sometimes cause harm or impede the achievement of valuable social goals. Giving an incendiary speech to an agitated crowd can cause a riot or even an insurrection. Publishing military secrets in wartime might expose the identity of an intelligence source, hinder negotiations with an ally, or prolong hostilities. Now, as a general matter, when people cause social problems or seriously harm others, we often think the government should try to do something about it. What is puzzling is that when the relevant problems are caused by *speech*, in many cases we think that a principle of freedom of expression makes it impermissible for the government to intervene.[2] But why should that be? Why should we demand more justification for interferences with harmful speech than with other harmful conduct? What justifies the right to the freedom of expression?

According to one family of views, the freedom of expression is justified by its contribution to democratic self-government. The argument comes in different flavors. One version emphasizes that a democracy is a society where the power to decide political questions must ultimately belong to the people.

1 I am not concerned here with any *doctrinal* distinction between speech, on the one hand, and conduct, on the other. My point is just the obvious one that speaking, writing, and the rest are ways of *acting* on one's environment; they are things that one *does*, which can have different sorts of causal effects on the world. While people may sometimes lose sight of this point in free speech discussions, I take it that nobody actually wants to *deny* it, since this would be absurd. (For criticism of those who would assimilate expression to thought in the free speech context, see, e.g., Gelber and Brison, "Digital Dualism and the 'Speech as Thought' Paradox.") Thanks to an anonymous reviewer for alerting me to this potential misunderstanding.

2 Or perhaps it only makes it impermissible for the government to intervene in certain *ways*. The important point is just that if the free speech principle is doing any work at all, then it must make certain sorts of interventions in expressive conduct impermissible under circumstances in which, if the relevant bad effects were not caused by speech, those same sorts of interventions *would* be permissible.

In a democracy, the idea goes, we are supposed to decide important policy matters for ourselves. But to genuinely decide for ourselves, we need to know something about the alternatives and their likely effects, and we need to think through the issues together, which means that we need to talk about them. Another version focuses on our interest in being able to participate in policy debates as equals, suggesting that it would be unfair to impose a collective decision on dissenters who were denied the chance to make their case to the public. A third version points out that if the government is actually going to serve the public, we must be able to speak up when policies fail or officials abuse their power. For all their differences, however, the core claim of any argument from democracy is that the freedom of expression is justified because it is either a constitutive component of democracy or at least necessary for democracy to work well. Since we must live in a functioning democracy, we must have free speech.

There is surely *something* to these arguments. The value of democratic self-government is widely recognized, of course, and on any plausible interpretation of democracy, some form of freedom of expression really does seem indispensable. Modern-day Russia, where officials nominally stand for reelection but critics of the incumbent regime are routinely jailed or murdered, is hardly a democracy. Also, certain paradigm violations of the freedom of expression—like the criminalization of seditious libel—really do seem to undermine the proper functioning of democratic government, and this, more than any affront to a particular person's ability to express herself, intuitively lies at the core of what is so objectionable about them. Finally, the argument from democracy is well placed to explain our occasional ambivalence about the freedom of expression, since we are all familiar with the temptation to waffle even about democracy itself when the immediate results are sufficiently grim.

As a *general* account of the freedom of expression, however, the argument from democracy looks radically incomplete. The problem, according to what I will call the *Stravinsky objection*, is that lots of expression that intuitively deserves protection under a free speech principle has little to do with politics. Monet's water lilies, Gödel's incompleteness proofs, Shakespeare's sonnets—surely these should be protected. But if they should, then it is hard to see how the argument from democracy can be correct. Diehard democracy theorists have tried to salvage the view by dramatically expanding the category of political speech so that it turns out to include all the sonatas and sculptures that intuitively deserve protection. But it remains dubious that even a generous understanding of political speech can cover everything that intuitively deserves protection, and, in any case, it is implausible that the *reason* that abstract art and instrumental music ought to be protected is their contribution to democratic self-government.

This can leave the motivation for democratic accounts of the freedom of expression obscure. In any sensible discussion of free speech, it should be common ground that (1) political speech is important and that (2) political speech is not the only kind that matters. If the argument from democracy denies 2, then it is deeply implausible. But if it merely affirms 1, then it is banal, and its proponents flatter themselves when they claim to offer a distinctive *theory* of, or *approach* to, the freedom of expression. Given the variety of expression that intuitively deserves protection, the Stravinsky objection seems to leave us with just two plausible strategies for developing a satisfactory account of the freedom of expression. The first is to pursue a pluralist theory, appealing to different values to justify protections for different kinds of speech. The second is to search for a unifying value—more fundamental than the value of democratic self-government—that can offer a deeper justification for the protection of political speech and can justify proper protections for abstract art and instrumental music as well. While either approach might give the argument from democracy some modest role to play—perhaps as a sound but derivative argument for the protection of just one sort of expression among many—neither promises to single out democratic considerations or political speech as distinctively important to the freedom of expression.

As far as the moral right to the freedom of expression is concerned, this does strike me as the unmistakable lesson of the Stravinsky objection. But it is important to recognize that the moral right to the freedom of expression is not the only free speech right worth caring about. We might also want to consider, for example, whether there is a specifically *human* right to the freedom of expression, understanding a human right as a moral right whose contours are insensitive to institutional arrangements and historical circumstances.[3] Or we might want to know instead what *legal* free speech rights—or, more specifically, what *constitutional* free speech rights—we ought to have. These are interesting and practically significant questions, and it is far from evident that they are all settled straightaway by an adequate theory of the moral right to the freedom of expression. Nobody thinks that every moral right ought to be a legal right, after all, or that every legal right ought to be a constitutional one. And this raises an intriguing possibility: even if the argument from democracy is hopeless as a general theory of the moral right to the freedom of expression, could it be enlisted to give a plausible account of a free speech right of some other kind? Or would the Stravinsky objection sink the argument from democracy in these other forms as well?

3 See Alexander, *Is There a Right of Freedom of Expression?*

Although the argument from democracy draws on ideas old enough to be found in Hume and Kant, it really only came of age in the law reviews over the course of the twentieth century. In that context, it was developed primarily as an interpretive theory of the freedom of expression under the first amendment.[4] What theorists were looking for was a package of free speech principles that fit (most of) the relevant legal materials—constitutional text, case law, historical practice—and was normatively attractive in its own right. The suggestive point, for our purposes, is that part of what it meant for a candidate first amendment principle to be normatively attractive, in this context, was for it to be suited, in a broadly democratic society, for *judicial enforcement* under a system of strong-form judicial review.[5] Many first amendment theories—including many versions of the argument from democracy—were thus shaped not only by ideas about our interests in being free to express ourselves in different ways but also by (1) various features of the American free speech tradition and (2) ideas about the legitimate scope of judicial review in a democratic society. While 1 and 2 were supposed to support democratic theories of the first amendment, however, those considerations are obviously out of place in philosophical debates about the *moral* right to the freedom of expression. We should not be surprised, then, if the argument from democracy looks unmotivated in the context of those debates.

While democratic theories of the first amendment continue to be developed and debated by scholars of American constitutional law, I do not intend to contribute to those discussions here.[6] Nor do I intend to somehow salvage

4 See especially Meiklejohn, *Free Speech and Its Relation to Self-Government*, "What Does the First Amendment Mean?" and "The First Amendment Is an Absolute." See also, e.g., BeVier, "The First Amendment and Political Speech"; Blasi, "The Checking Value in First Amendment Theory"; Bork, "Neutral Principles and Some First Amendment Problems"; Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment"; and Sunstein, "Free Speech Now."

5 The distinction between weak- and strong-form judicial review is set out in section 2. Very roughly, however, the difference concerns who has the last word on the constitutionality of legislation. Under strong-form judicial review, if an apex court strikes down a law as unconstitutional, then barring a full-blown constitutional amendment, this is effectively the end of the matter. Under weak-form review, by contrast, the legislature has the opportunity to "overrule" the court and repass the law by a simple majority.

6 Democratic theories are defended in, e.g., Post, "Participatory Democracy and Free Speech"; Sunstein, *#Republic*; and Weinstein, "Participatory Democracy as the Central Value of American Free Speech Doctrine." Note that contemporary democratic theories of the first amendment do not generally attempt to ground all constitutional speech protections *exclusively* in the value of democratic self-government. Instead, they typically hold that the value of democratic self-government is at the core of the first amendment freedom of speech, and that speech bearing some favored relation to that value receives

the argument from democracy as an account of the moral right to the freedom of expression. Instead, I wish to construe the argument from democracy as an account, roughly, of the specifically constitutional free speech rights that we ought to have. This version of the argument—what I will call the *refined* argument from democracy—gives the democracy theorist an interesting reply to the Stravinsky objection. On the new strategy, the democracy theorist can accommodate the intuition that abstract art deserves protection by agreeing that we have a moral right, and probably ought to have an ordinary legal right, to produce and view abstract art. She must only insist that nonpolitical abstract art should not be protected by a specifically constitutional right administered by judicial review.[7] Not because abstract art does not *deserve* constitutional protection but because, on this view, whether a particular right ought to be enshrined in the constitution and administered by judicial review is not solely a matter of the importance of the right or the value of the interests it protects.

What we have in our sights, then, is an argument from democracy that avoids the Stravinsky objection and provides a plausible account of an important kind of free speech right. Earlier I called the prospect of such an account *intriguing*. For some readers, however, 'intriguing' may not be the first word that comes to mind. For you might think that the best response—indeed, the obvious response—to the Stravinsky objection is to simply abandon the project of grounding free speech rights exclusively in the value of democracy in favor of a broadly liberal approach that appeals to autonomy or dignity or some such. Under these circumstances, why is it not unreasonably *stubborn*, or even *perverse*, to insist on trying to develop a workable argument from democracy? Is there something wrong with the obvious response, or what?

This reaction is certainly understandable. In response, let me reiterate that as far as the moral right to the freedom of expression is concerned, I *agree* that the Stravinsky objection is an utterly decisive refutation of the argument from democracy. I agree, moreover, that it *would* be unreasonably stubborn to insist on trying to develop a workable democratic account of the moral right to free speech; such an effort seems bound to fail, and we have no good reason to hope that it might succeed. Fortunately, this is not the sort of view that I propose to develop. To repeat, the refined argument from democracy is directly concerned not with the moral right to free speech but with the constitutional free speech

(and ought to receive) the most stringent constitutional protection, while allowing that certain other kinds of speech might appropriately receive some lesser measure of constitutional protection.

7 Strictly speaking, she can allow that abstract art ought to be protected by a constitutional right administered by *weak-form* judicial review. She need only insist that this right is inapt for administration by *strong-form* judicial review.

rights that we ought to have.[8] Since the refined argument from democracy does not aim to provide an account of the moral right to the freedom of expression, its proponent is free to accept whatever account of the moral right turns out to be best, including a broadly liberal account along the lines suggested above.

Here, in broad strokes, is how I see the initial motivation for developing a refined argument from democracy. Contemporary moral and political philosophers tend to dismiss democratic free speech theories out of hand, largely due to the Stravinsky objection.[9] In fact, that objection looks so devastating that it is hard to see why anyone might have taken democratic theories seriously in the first place. As it happens, the argument from democracy has looked most plausible not as a philosophical theory of the moral right to free speech but as an interpretive theory of the first amendment.[10] Such theories are defended partly on the basis of general considerations of political morality—the same sorts of considerations that political and moral philosophers invoke in theories of the moral right to free speech—but they are also defended by appealing to claims about the appropriate role and extent of judicial review under the US Constitution. And this suggests an interesting possibility. Could the argument from democracy be developed in such a way as to give us neither a theory of the moral right to free speech nor an interpretive theory of the first amendment but a philosophical theory of the constitutional free speech rights that we ought to have? Given that many people have found democratic theories of the first amendment plausible, the fact that such theories are defended partly based on considerations about the proper role of judicial review suggests that a more general philosophical account of this kind might have some promise.

Of course, this initial motivation for pursuing a refined argument from democracy would be dampened considerably if we already had a fully

8 More specifically, it is concerned with the free speech rights that ought to be constitutionalized and administered by strong-form judicial review.

9 Of course, this is not the only objection that has been raised against democratic free speech theories. For additional objections, see, e.g., Alexander, *Is There a Right of Freedom of Expression?*; and Schauer, *Free Speech*.

10 As interpretations of the law of the first amendment, relatively narrow democratic theories—on which constitutional protections are limited, more or less, to a fairly strict conception of political speech—were at their most plausible in the period between World War I and roughly the 1970s. (Prior to World War I, of course, the Supreme Court had almost nothing to say about the free speech clause of the first amendment.) Since the 1970s, the Court has extended first amendment protections too far beyond explicitly political speech, in too many directions, for a narrowly democratic theory to offer a credible interpretation of our actual constitutional doctrine. Hence the tendency of contemporary democratic theories of the first amendment to endorse a tiered conception of some sort, reserving the strictest protections for political speech (or perhaps for contributions to "public discourse") while providing more modest protections for expression of other kinds.

convincing account of the strong-form constitutional rights to free speech that we ought to have.[11] In my view, however, we do *not* already have a fully convincing account on hand; in fact, we do not have much of an account at all. Moral and political philosophers tend to play pretty fast and loose with the distinction between our moral free speech rights and the constitutional free speech rights that we ought to have. Having argued for a certain kind of moral right to the freedom of expression, many philosophers seem happy to conclude straightaway that the courts ought to be in the business of enforcing a corresponding constitutional right, often without so much as acknowledging that an inference is being drawn. These philosophers may be vindicated in the end—it may turn out that the correct account of the constitutional free speech rights we ought to have falls out of the correct account of the moral right to the freedom of expression—but it would be nice to have an argument.[12]

I recognize that many philosophers—perhaps especially those raised in the United States—will find the conclusions of the refined argument from democracy unacceptable. Let me put my cards on the table, then, and acknowledge that I am not sure about them myself. The refined argument from democracy is worth exploring, I submit, not because it is necessarily sound but because it is *interesting*. To be sure, it is interesting in part because it is plausible; I do want to vouch for the argument at least to the extent of denying that it is *obviously* wrong. But it is interesting for reasons broached in the last paragraph as well. To get the refined argument from democracy off the ground, we must draw a clear conceptual distinction between our moral rights and the constitutional rights that we ought to have. We must at least allow for the possibility that these should come apart. In the philosophical literature on the freedom of expression, however, this distinction is rarely taken seriously and sometimes ignored altogether. For this reason, I take one of the contributions of the paper to be the way it calls attention to this distinction and opens up the possibility that the best account of the moral right to free speech and the best account of the

11 In this essay, I use 'strong-form constitutional rights' simply as a shorthand for the unwieldy 'constitutional rights administered by strong-form judicial review'. Likewise, *mutatis mutandis*, for 'weak-form constitutional rights'. On this usage, to say that a right is or ought to be a strong-form constitutional right is not to say anything about the strength of the right itself, either in terms of the sorts of actions it prohibits or requires or in terms of the strength of the countervailing considerations necessary to overcome it.

12 Arguably, then, the truly stubborn party is not the proponent of the refined argument from democracy but the liberal critic who refuses that argument a hearing without offering any alternative account of the strong-form constitutional free speech rights that we ought to have. Such a critic refuses without good reason to entertain the possibility that the best account of the moral right to free speech and the best account of the constitutional free speech rights that we ought to have might come apart.

strong-form constitutional free speech rights that we ought to have may come apart.[13] This contribution, it is worth noting, is not hostage to the ultimate success of the refined argument from democracy.

The paper proceeds as follows. The next section introduces the Stravinsky objection and explains why democracy theorists cannot meet it simply by endorsing a more expansive conception of political speech. Section 2 lays the groundwork for the refined argument from democracy by distinguishing some of the different aims that a theory of the freedom of expression might have. A given theory might reasonably aim to justify (1) a moral right, (2) an ordinary legal right, or (3) a specifically constitutional right. If it aims to justify a constitutional right, then it might aim to justify a constitutional right administered by either weak-form judicial review or strong-form judicial review. The refined argument from democracy aims to justify a specifically constitutional right enforced by strong-form judicial review. If this argument is going to survive the Stravinsky objection, then the democracy theorist needs to argue that the strong intuitions underlying that objection—intuitions that this or that bit of nonpolitical speech deserves protection under a free speech principle—are not best understood as intuitions about the strong-form constitutional rights that we ought to have. In section 3, I argue that these intuitions are best understood as intuitions about the *moral* right to the freedom of expression. If this is right, then the challenge to the argument from democracy is mitigated, since there is no inconsistency between the claim that we have a moral right to hear *The Rite of Spring* and the claim that this right should not be enforced by strong-form judicial review.

The democracy theorist has more work to do, however, since she still needs to explain why the moral right to political speech should be constitutionalized, while the moral right to Stravinsky should not. What she needs is an account of the proper scope of strong-form judicial review, one that recommends constitutionalizing rights to political speech but not the right to Stravinsky. We take up this task in section 5, first setting out Jeremy Waldron's influential argument against all strong-form judicial review and then developing a novel objection to Waldron's argument insofar as it concerns one particular set of rights—including rights to political speech—without undermining his conclusions about other rights. This objection points the democracy theorist toward a plausible account of the proper scope of strong-form judicial review that is fit for her purposes. Section 6 wraps things up.

13 Cf. Waldron, "A Right-Based Critique of Constitutional Rights."

1. THE TRADITIONAL DIALECTIC

The freedom of expression is supposed to protect certain kinds of speech from interference. If the justification for that freedom is that it is necessary to ensure democratic self-government, this presumably has some bearing on what kinds of speech are protected. In particular, while the argument from democracy suggests that *political* speech should be protected, it offers no straightforward justification for protecting *nonpolitical* speech.[14] What speech counts as political? Alexander Meiklejohn suggests that the freedom of expression protects speech that "bears, directly or indirectly, upon issues with which voters have to deal."[15] It covers, he says, speech on all "matters of public interest." Cass Sunstein holds that speech is political just when "it is both intended and received as a contribution to public deliberation about some issue."[16] While these dicta leave a lot unresolved, the basic idea is clear. On this view, the freedom of expression primarily protects policy arguments and political criticism. Other types of expression are protected, if at all, only insofar as they sufficiently resemble these paradigm cases or provide necessary inputs for them.

But democratic theories of the freedom of expression face a critical objection. The problem is that "people do not need novels or dramas or paintings or poems because they will be called upon to vote."[17] These forms of expression do not seem to qualify as political speech or even as politically relevant speech. Thus, the argument from democracy provides little protection for them. Yet many people firmly believe that they deserve protection. According to Seana Shiffrin, for example, any "decent regime of free speech" must provide robust

14 I do not mean to rule out from the start the possibility that the argument from democracy offers a *non*straightforward justification for protecting facially nonpolitical speech. The remainder of this section considers two closely related proposals along these lines, grouped together under the heading of the "standard response" to the Stravinsky objection. A third proposal in the literature goes something like this: "The speech that really must be protected, as a matter of principle, is core political speech. In practice, however, it is extremely difficult to distinguish political speech from nonpolitical speech. To ensure that core political speech is fully protected, then, it is best to draw the line much further out from core political speech than one might have thought appropriate purely as a matter of principle. The upshot is that a variety of nonpolitical speech ought properly to be protected." For this type of argument, see, e.g., BeVier, "The First Amendment and Political Speech." I do not address this view directly in what follows, but it faces many of the same objections as the standard response. I also think that these sorts of worries about line-drawing problems are overblown. Although I lack the space to defend this position here, see, e.g., Sunstein, "Free Speech Now."

15 Meiklejohn, *Free Speech and Its Relation to Self-Government*, 94.

16 Sunstein, "Free Speech Now," 304.

17 Kalven, "The Metaphysics of the Law of Obscenity," 16.

protections not only for political speech but also for fiction, art, music, and much else besides.[18] We can call this the

> *Stravinsky Objection:* The argument from democracy fails to justify protections for many kinds of nonpolitical speech that deserve protection.

Since the argument from democracy does not deliver these protections, the critics insist, the argument fails.[19]

Are theories of the freedom of expression really in the business of delivering protections for Stravinsky? Recall that the primary philosophical problem associated with the freedom of expression—the problem to which rival free speech theories are largely addressed—is to explain when and why speech ought to be protected *even when* it causes problems (by harming people, e.g.). We do not need a free speech theory to explain why the government should not target benign speech with censorship laws that make nobody better off. The government should not censor benign speech for the same reasons it should not stop you from going for a run or having a nap. Along with these and countless other activities, benign speech is already protected by a more general principle of liberty, something roughly along the lines of Mill's harm principle. What we need a free speech theory to do is to explain why speech that would be regulable under the general principle of liberty is nevertheless immune from regulation (except perhaps in extraordinary circumstances). But then we might wonder why it should be any objection to the argument from democracy that it does not justify protections for abstract art and instrumental music, since these are seldom harmful. Why can the democracy theorist not reply that protections for abstract art and the like are not part of the job description of a free speech theory?

Although this issue is largely ignored in the literature, the answer should probably go something like this. Even if harmless speech is already protected under a more general liberty principle, it seems reasonable to expect an adequate account of the freedom of expression to justify protections for at least some benign speech. Why? Because a theory of free speech will generally consist, at least in part, in an identification of the values served by leaving people free to express themselves in different ways, or in the identification of important interests that we have in this sort of freedom, and it would be strange indeed if those values or interests only *kicked in*, as it were, when speech starts to cause problems. So it seems reasonable to expect an adequate account of the freedom of expression—one that is not bizarrely disjointed or filled with arbitrary

18 Shiffrin, "A Thinker-Based Approach to Freedom of Speech," 285.

19 Variations on this perennial objection can be found in, e.g., Cohen, "Freedom of Expression"; Scanlon, "Freedom of Expression and Categories of Expression," 529–30; and Shiffrin, *Speech Matters*, 83–84.

thresholds—to justify protections for a lot of speech that is already protected under a general liberty principle. If this is true, then the Stravinsky objection cannot be met by claiming that because abstract art is harmless, an adequate free speech theory can disregard it.

It makes sense, then, that most democracy theorists concede, albeit implicitly, that the Stravinsky objection would be devastating if it could be made to stick. Accordingly, the standard response among such theorists is to argue that the objection is misplaced because, appearances notwithstanding, people actually *do* need novels and dramas and paintings and poems because they will be called upon to vote. In other words, democracy theorists have tried to expand the political speech category to include all the facially nonpolitical works of art, music, and science that intuitively deserve protection. This expansion is typically motivated in one of two ways. The first strategy is to look for subtle elements of social and political commentary in expression that does not announce itself in those terms. This is how Sunstein attempts to defend a broad conception of political speech, for example:

> The definition I have offered would encompass not simply political tracts, but all art and literature that has the characteristics of social commentary—which is to say, much art and literature. Much speech is a contribution to public deliberation despite initial appearances. . . . Both *Ulysses* and *Bleak House* are unquestionably political. . . . The same is true of Robert Mapplethorpe's work, which attempts to draw into question current sexual norms and practices, and which bears on such issues as the right of privacy and the antidiscrimination principle.[20]

The second strategy is to concede that much expression that intuitively deserves protection is not itself a contribution to political discourse but to argue that such speech is nevertheless crucial to the proper functioning of democracy because of its role in fostering the emotional and intellectual maturity required of democratic citizens. According to Meiklejohn,

> there are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express. These, too, must suffer no abridgment of their freedom.[21]

20 Sunstein, "Free Speech Now," 308.

21 Meiklejohn, "The First Amendment Is an Absolute," 256.

These forms of thought and expression include not just commentary on pressing public issues, he argues, but also philosophy, science, literature, and art. On either strategy, the point of the standard response is to argue that many, if not all, of the critics' apparent counterexamples are merely apparent.[22]

This response faces serious objections. First, even a liberal understanding of political speech may fail to encompass everything that intuitively merits protection.[23] Take Sunstein's suggestion that the category of political speech ought to include art and literature that functions as social commentary. This conception may be capacious enough to include Mapplethorpe's nudes, as Sunstein suggests, but what about Shakespeare's sonnets? What about David Lewis's metaphysics or Gödel's logic? It is unclear that Sunstein's conception of political speech, or any other, can reach all these sorts of expression. Since they intuitively deserve protection, this seems like a problem for the argument from democracy.

Many critics have expressed a second objection along the following lines: *even if* the democracy theorist rigs up a conception of political speech that manages to include Gödel, the argument from democracy still fails because the *reason* the first incompleteness theorem ought to be protected is not the contribution it makes, whether directly or indirectly, to democratic self-government.[24] Different critics have different positive ideas about what really does justify the protection of this or that bit of facially nonpolitical expression, of course. One might appeal to an idea of autonomy, another to self-fulfillment or moral development. But they all agree that whatever justifies the protection of these kinds of expression, it is *not* their connection to the value of democracy.

There is something intuitive about this second objection, but critics can be too casual about spelling out precisely what the problem is supposed to be.

22 A related strategy involves appealing to a more expansive conception of the value of democracy, or of democratic legitimation, to help justify free speech protections in the first place. The idea is for this expansive conception of democracy to yield a similarly expansive conception of the sorts of expression at the heart of the enterprise. This approach is developed in different ways in, e.g., Balkin, "Cultural Democracy and the First Amendment"; Post, "Participatory Democracy and Free Speech"; and Weinstein, "Participatory Democracy as the Central Value of American Free Speech Doctrine." I do not have the space to treat these particular views in any detail here, but insofar as they endorse protections for abstract art, instrumental music, and the like, the refined argument from democracy will eventually make the case that they are mistaken (see section 5 below), at least if they are construed not as interpretive theories of the first amendment but as noninterpretive accounts of the strong-form free speech rights that we ought to have.

23 See, e.g., Shiffrin, "Methodology in Free Speech Theory," 555n17.

24 See, e.g., Bollinger, "Free Speech and Intellectual Values," 444; Cohen, "Freedom of Expression," 227; Seana Shiffrin, "Methodology in Free Speech Theory"; and Steven Shiffrin, "Dissent, Democratic Participation, and First Amendment Methodology," 560–61.

Some seem to suggest that the argument from democracy would fail even if it managed to justify precisely the correct set of free speech principles, providing all and only the protections that really ought to be provided. But if democratic considerations really did *justify* the proper protections for Shakespeare's sonnets, how could it be, as the objection would have it, that the argument fails to identify the reasons those sonnets ought to be protected? To really justify the proper protections, would the argument not have to at least identify reasons that are *sufficient* to show that the sonnets ought to be protected? And if the argument really did manage to provide a sufficient justification for precisely the correct set of free speech principles, how defective could it be?

For some critics, the point may be about our national history or political culture. The argument from democracy, even if it justifies the proper protections in some abstract sense, fails to identify the reasons that *we* protect Shakespeare's sonnets. Alternatively, the problem may be with the modal profile of the democracy theorist's principles. This version of the objection suggests that while the argument from democracy might justify the proper protections for Shakespeare's sonnets in our actual empirical conditions—since, contingently, the sonnets happen to contribute to democratic decision-making in the right ways—those same protections would be justified even if our conditions were such that the sonnets did *not* contribute to democratic decision-making, and *this* is something that the argument from democracy fails to capture.

The most forceful version of the objection denies that the argument from democracy can justify the correct free speech regime in the first place. To understand this version, we need to distinguish a free speech regime's *coverage* from the strength of the *protections* it provides to particular kinds of expression.[25] A free speech regime operates in the context of a background standard of justification for the exercise of government power. The point of a free speech regime is to ensure that when the exercise of government power interferes with certain choices or activities involving expression, or when it is motivated by certain aims regarding expression, the government must meet a higher standard of justification. A regime's coverage refers to the range of activities, or the range of government motivations, that trigger the demand for extraordinary justification. But even where a free speech regime covers a particular kind of expression, the protection it receives need not be absolute. Depending on the regime, this protection may be stronger or weaker, and it may be stronger for some kinds of expression than others.

The original Stravinsky objection targets the coverage of the argument from democracy. Accordingly, the standard response tries to reconfigure the theory's

25 See Schauer, "Categories and the First Amendment" and *Free Speech*.

coverage to reach all the right kinds of expression. We previously considered follow-on objections maintaining that the argument from democracy would fail even if it managed to justify precisely the correct free speech regime. But now, having distinguished coverage and protection, we can articulate a different version of the objection. This version holds that even if the democracy theorist manages to ensure that *The Rite of Spring* counts as political speech, thus delivering a free speech regime with the proper coverage, the argument nevertheless fails. Why? The issue is supposed to lie in failing to identify the right reasons for protecting Stravinsky, which we can now understand as a worry about justifying the appropriate level of protection. If *The Rite of Spring* is protected only insofar as it contributes to democratic self-government, then presumably the level of protection it receives will reflect the modesty of its political contribution. The objection, on this construal, begins with the observation that we not only have powerful intuitions that *The Rite of Spring* ought to be covered, as the Stravinsky objection points out. We also think it deserves powerful protections. Because the only reason to protect these forms of expression that the argument from democracy acknowledges is their contribution to democratic self-government, it cannot respect these intuitions.[26]

None of this shows that democratic considerations do not *help* to justify the freedom of expression, of course. Everybody agrees they have a role to play. But the argument from democracy is supposed to do more than identify one reason, on a par with many others, for protecting one category of speech, itself on a par with many others. And the Stravinsky objection and its close relatives seem to show that the argument cannot accomplish anything more than this. For they remind us—if we needed reminding—of the tremendous range of expression that surely ought to remain free from interference or censorship, and also, if only indirectly, of the great diversity of vital interests at stake in regulating these different kinds of expression. Democratic accounts of free speech seem to miss all of this, obtusely focusing on politics at the expense of everything else.

26 Why not just say that all expression that makes even a minimal contribution to democratic self-government ought to receive maximally stringent protections? Because there is a huge variety of expression that just about everybody agrees ought to be regulated but that plausibly contributes at least as much to democratic self-government as *The Rite of Spring*. Just think, for example, of the myriad kinds of expression that are treated by antitrust law, food and drug regulations, copyright law, the common law of contract, and so on. If all that it takes for speech to receive maximally stringent protections is that it contribute at least as much to democratic self-government as *The Rite of Spring*, then it is very hard to see how these different areas of law could survive in anything like their current forms. Cf. Weinstein, "Participatory Democracy as the Central Value of American Free Speech Doctrine," 491–97.

This section has been devoted to giving the Stravinsky objection its due. In the rest of the paper, I want to sketch a version of the argument from democracy with the resources to say something reasonable in response.

2. DIFFERENT RIGHTS, DIFFERENT THEORIES

It will be instructive to consider a patently ridiculous objection of the same form as the Stravinsky objection. Let us suppose that someone objects to the argument from democracy because it fails to justify rights against torture. (If it helps, you might imagine that this person has accidentally wandered into the wrong Q&A session and *thinks* she is objecting to an entirely different theory.) How should the democracy theorist respond? Presumably by politely explaining that even granting that we all have rights against torture, this is no objection to the argument from democracy because that argument was never intended to deal with rights against physical violence in the first place. Because the argument from democracy is concerned only with rights of a particular kind, there can be no underinclusiveness objection to that theory based on the fact that it does not justify rights of some *other* kind. Despite the absurdity of the torture objection, I want to suggest that the democracy theorist might actually respond to the Stravinsky objection along similar lines.

The Stravinsky objection is motivated by intuitions that this or that bit of nonpolitical speech deserves protection under a free speech principle. According to the view that I will be developing, the standard response is right to try to accommodate these intuitions rather than debunk them, just as the democracy theorist is right to accommodate her misguided interlocutor's claim about rights against torture. The standard response errs, however, by assuming that the protection that abstract art intuitively deserves is the same kind of protection that the argument from democracy should be trying to justify. The purpose of this section is to clear the way for the refined argument from democracy by distinguishing some of the different aims that a "free speech theory" might have.

A theory of the freedom of expression can serve various purposes. One sort of theory attempts to justify or explain a particular body of existing law in a specific jurisdiction.[27] Such *interpretive* theories start with a collection of judicial decisions regarding the freedom of speech under a particular constitution or other legal provision—together with other facts about the legal and social history of the relevant jurisdiction—and try to develop a normatively attractive account that fits most of the data, including especially those decisions

27 See Moore, *Placing Blame*, ch. 1, for a general account of theories of areas of law in this sense. See also Dworkin, *Law's Empire*; and Raz, *Between Authority and Interpretation*, ch. 13.

and practices deemed most central to the tradition. Many theories of the freedom of expression, and many democratic theories in particular, are interpretive theories in this sense.[28] But not all free speech theories are like this. As Shiffrin makes clear in the following passage, her "thinker-based" account of free speech is not tethered to any existing body of legal doctrine:

> My paper aims to identify strong theoretical foundations for the protection of free speech but not to provide the best theoretical account of *our system* or *our current practices* of protecting (or failing to protect, as the case may be) free speech. Articulating a theory of free speech along the former, more ideal, lines provides us with a framework to assess whether our current practices are justified or not, as well as which ones are outliers. An ideal theoretical approach also supplies both a measure for reform and some structural components to form the framework to assess new sorts of cases.[29]

A theory of this second sort attempts to justify free speech protections without regard to the fit between the protections it justifies and those recognized by any existing tradition or practice. Accordingly, it is no objection to such a theory that it fails to vindicate some particular legal precedent, at least absent an independent moral argument supporting the relevant decision. In this paper, I will generally be concerned with theories of this second type, and I will construe the refined argument from democracy as such a theory.

But even once we have focused on this class of theories, it remains unclear what precisely they aim to accomplish. Following Shiffrin, one might develop such a theory to justify "strong theoretical foundations" for free speech protections from a more "ideal," critical point of view. But precisely what sort of protections does this kind of theory aim to justify? Consider how T. M. Scanlon describes the task at hand:

> Freedom of expression, as a philosophical problem, is an instance of a more general problem about the nature and status of rights. Rights purport to place limits on what individuals or the state may do, and the sacrifices they entail are in some cases significant. . . . The general

28 For democratic theories of the freedom of expression that are interpretive theories in this sense, see, e.g., BeVier, "The First Amendment and Political Speech"; Bork, "Neutral Principles and Some First Amendment Problems"; Meiklejohn, *Free Speech and Its Relation to Self-Government*; Post, "Participatory Democracy and Free Speech"; and Weinstein, "Participatory Democracy as the Central Value of American Free Speech Doctrine."

29 Shiffrin, "A Thinker-Based Approach to Freedom of Speech," 284.

> problem is, if rights place limits on what can be done even for good reasons, what is the justification for these limits?[30]

Scanlon says he wants to justify certain limits on what individuals or the state may do. But what *kind* of limits, in the particular case of the freedom of expression, are at issue? What kind of *right* are we trying to justify? As we will see, there are several relevant possibilities.

To begin, we may want to justify either a *moral* right or a *legal* right. These are different undertakings, since moral rights and legal rights are different things—not all moral rights are legal rights, and not all legal rights are moral rights.[31] But even if our notions of moral and legal rights are distinct, you might think they enjoy a close connection. You might think that to claim that I have a moral right is just to claim that I *ought* to have a corresponding legal right. This suggestion must be rejected, however, for it is simply not the case that every instance of

> *X* has a moral right to *Y*

entails, conceptually or otherwise, the corresponding instance of

> *X* ought to have a legal right to *Y*.[32]

Consider a simple promise between friends. If I promise you that I will go to your softball game to cheer you on, this gives you a moral right that I should turn up. But I doubt that you ought to have a *legal* right that I be there, so that you can take me to court if for some reason I miss the game. Or think of the division of domestic labor. While I have a moral right against my partner that she should do her fair share of chores around the house, it is dubious that I should have a corresponding legal right.

Moral rights and legal rights are different, then, and a given free speech theory might reasonably aim to justify either one or the other. But we also need to distinguish different kinds of legal rights. Specifically, we need to distinguish

30 Scanlon, "Freedom of Expression and Categories of Expression," 519.

31 Justifying a moral right differs from justifying a legal right in another way. When we succeed in justifying a legal right, we properly conclude that there *ought to be* such a legal right. When we succeed in justifying a moral right, by contrast, we properly conclude that *there is* such a moral right. Successful justifications of moral rights ground existence claims in a way that successful justifications of legal rights do not. Despite this difference between justifying a moral right and justifying a legal right, however, it plainly remains open to theorists of free speech to engage in the one task or the other.

32 Cf. Waldron, "A Right-Based Critique of Constitutional Rights," 24–25. Objections to this sort of view are canvassed in Feinberg, *Problems at the Roots of Law*, ch. 2; and Hart, *Essays on Bentham*, ch. 4.

constitutional rights from the rest. Constitutional rights are legal rights granted as a matter of constitutional law. For our purposes, constitutional law can be roughly distinguished by the following two features. Constitutional law, in a particular jurisdiction, is (1) *supreme* law that is (2) *entrenched*.[33] To say that constitutional law is supreme is to say, *inter alia*, that when a new statute conflicts with existing constitutional law—including an existing constitutional right—it is the statute that must give way. (When a fresh statute conflicts with an ordinary legal right already on the books, by contrast, the new law implicitly repeals the old right.)[34] To say that constitutional law is entrenched is to say that it is relatively resistant to change by regular democratic processes. Thus, while ordinary laws can be amended or repealed by legislative majorities, something more is needed to change the law of a constitution, usually a legislative or popular supermajority or some combination thereof. Finally, although this does not distinguish constitutional law from ordinary law, I will also assume that constitutional law is (3) *justiciable*, in the sense that the courts have some powers of judicial review.

But judicial review comes in different forms. In particular, we need to distinguish *weak*- and *strong*-form judicial review. The difference emerges when an apex court determines that a particular law violates the constitution. In a jurisdiction with strong-form judicial review, such as Germany or the United States, the court's decision and its interpretation of the relevant constitutional provision are effectively final.[35] The court invalidates the law, and the elected

33 'Constitution' and cognate terms are sometimes used in a thinner sense. In the thin sense, every legal system necessarily has a constitution, for a constitution consists in the rules or conventions that establish and regulate the powers and responsibilities of the main organs of government, and there must be some rules or conventions of this kind for a legal system to exist at all. This is a perfectly fine sense to give these expressions; it is just not how I will be using them in this paper. I take it that nothing substantive hangs on this terminological stipulation. On the distinction between thinner and thicker senses of 'constitution' and 'constitutional law', see, e.g., Marmor, *Law in the Age of Pluralism*, ch. 4; and Raz, *Between Authority and Interpretation*, ch. 13. The distinction is sometimes marked by referring either to a *small-c constitution* (thin) or a *capital-C Constitution* (thick). See, e.g., King, *The British Constitution*, ch. 1.

34 American courts recognize a presumption against implied repeal, so that, *ceteris paribus*, they will prefer a reasonable interpretation of the new statute that does not conflict with the existing right to one that does. But if the conflict is irreconcilable, then the statute repeals the right. See, e.g., *Posadas v. National City Bank of N.Y.*, 296 U.S. 497, 503 (1936). For discussion, see Scalia and Garner, *Reading Law*, sec. 55.

35 Classic discussions of strong-form, American-style judicial review include, e.g., Bickel, *The Least Dangerous Branch*; Ely, *Democracy and Distrust*; Hand, *The Bill of Rights*; Thayer, "Origin and Scope of the American Doctrine of Constitutional Law"; and Wechsler, "Toward Neutral Principles of Constitutional Law."

branches have no power to use the ordinary channels of lawmaking to correct the court where they judge that it has gone wrong.[36] In a jurisdiction with weak-form review, such as Canada, the situation is different.[37] In a weak-form system, if the legislature believes that the court has made a mistake—that it has misconstrued either the law or the relevant constitutional right—then it can override the court's judgment and repass the law by a simple majority. For our purposes, the critical difference between weak- and strong-form judicial review is that the former gives the final say to the representative branches of government while the latter effectively gives it to the courts. On the face of it, a given free speech theory might wish to justify a constitutional right of either kind, one protected by weak-form judicial review or one protected by strong-form judicial review.

Let us take stock of what we have established in this section. We saw that our second type of free speech theory aims to justify free speech protections without regard to the fit between those protections and any going legal or social practices. But we noticed that this leaves open just what sort of free speech protection—just what sort of free speech *right*—a given theory of this type aims to justify. We then distinguished some possibilities. A particular theory of the freedom of expression might aim to justify a moral right, an ordinary legal right, or a specifically constitutional right. If it aims to justify a constitutional right, then it might aim to justify a constitutional right administered by either weak-form judicial review or strong-form judicial review.

If the argument from democracy is understood as a theory of the moral right to the freedom of expression, then I agree with the critics that it is hopeless, as there is simply no reason to think that this right should be grounded exclusively or even predominantly in our interests in effective democratic self-government. What I would like to consider, however, is a version of the argument that aims to justify a specifically constitutional right administered by strong-form judicial review. In that case, if the democracy theorist is going to respond to the Stravinsky objection the way she responded to the (admittedly fanciful) torture objection raised at the start of this section, then she will need to maintain that our strong intuition that we have a right to hear *The Rite of Spring* concerns something other than a specifically constitutional right protected by strong-form judicial review. We take up this issue in the following section.

36 A constitutional amendment may theoretically be possible, but the amendment process is liable to be too cumbersome for this to represent a realistic option in the usual case.

37 On weak-form judicial review, one might wish to consult Albert and Cameron, eds., *Canada in the World*; Dixon, "The Core Case for Weak-Form Judicial Review"; Gardbaum, *The New Commonwealth Model of Constitutionalism*; and Sigalet et al., eds., *Constitutional Dialogue*.

3. THE STRAVINSKY INTUITION

The Stravinsky objection is motivated by a variety of pretheoretical intuitions. Some of these concern particular cases, such as the intuition that the freedom of expression protects Jackson Pollock's right to display *Autumn Rhythm (Number 30)* or the intuition that it protects your right to view *Un Chien Andalou*. Others are more general, such as the intuition that the freedom of expression protects the right to produce and view abstract art or the intuition that it protects the right to express one's religious beliefs. This section concerns how these intuitions are best understood. Specifically, we want to see if the democracy theorist can plausibly argue that they are *not* best understood as intuitions about the strong-form constitutional rights that we ought to have.

To focus discussion, let us single out the

> *Stravinsky Intuition*: The freedom of expression protects our right to hear *The Rite of Spring*.

I think that the democracy theorist ought to follow the standard response in allowing something like the Stravinsky intuition to be correct. But she is now in a position to distinguish several claims that might be in play. These include:

1. We have a moral right to hear *The Rite of Spring*.
2. We ought to have an ordinary legal right to hear *The Rite of Spring*.
3. We ought to have a weak-form constitutional right to hear *The Rite of Spring*.
4. We ought to have a strong-form constitutional right to hear *The Rite of Spring*.

Which claims, if any, are embodied in the Stravinsky intuition?

I submit that, insofar as the Stravinsky intuition is supposed to be quite strong and widely shared, it is probably best understood as an intuition about the *moral* right to the freedom of expression. Although I have no knock-down argument to offer, I will briefly present a handful of considerations supporting this reading. Together, they make a strong case.

The first thing to notice is that, as a practical matter, 4 is a stronger claim than 1. Apart from the full-blown skeptic about moral rights, few people will want to endorse 4 who do not also endorse 1—and indeed, those who endorse 4 are likely to do so in part because they also endorse 1—and yet it may be perfectly sensible to endorse 1 without endorsing 4, since nobody thinks that every moral right ought to be a strong-form constitutional right. As an initial matter, then, regardless of precisely how confident we are in any of these propositions, we should probably have *more* confidence in 1 than we have in 4.

But while 1 and 2 are deeply intuitive judgments whose truth would be hard to deny, the same cannot be said of 4.[38] To see this, consider what exactly in the vicinity of the Stravinsky intuition strikes you as obviously correct. The clearest and most fundamental judgment here, it seems to me, is just that it would be quite wrong for the government to prevent us from hearing *The Rite of Spring*. We might also be confident that if the government were to do so, not only would it be acting wrongly, it would also be *wronging us* (perhaps among others). But if these judgments form the heart of the Stravinsky intuition, then 1 offers a perfectly reasonable summary expression of them. By contrast, it is unclear that 4 is in order, since there are many ways for the government to act wrongly, and even to wrong us, without violating a right that ought to be administered by strong-form judicial review.

The Stravinsky objection is not supposed to be based on a controversial conclusion from a philosophical or legal theory. The underlying intuition is supposed to be obvious, something that everybody recognizes—or at least *ought* to recognize—up front. It is worth noting, then, that many countries whose political systems are taken to be reasonably just—countries like Canada, England, and New Zealand, to name a few—reject strong-form judicial review *altogether*, across the board. *A fortiori*, they do not recognize a strong-form constitutional right to hear Stravinsky. It may turn out that despite their liberal bona fides, these countries are making a grave mistake. I do not mean to claim otherwise. I want only to suggest that if they *are* making a grave mistake, then this is probably something that should emerge in the course of theorizing. Simply assuming that they are mistaken in advance of any argument smacks of chauvinism.

Finally, I doubt that our judgments in the vicinity of the Stravinsky intuition—the firmest, most basic judgments in the neighborhood—are responsive to a key set of considerations that should be among the grounds of any verdict on judicial review that is worthy of respect—namely, considerations of *institutional competence*. We can approach this point by considering what is actually involved in constitutionalizing a particular right under a system of strong-form judicial review. Let us start, then, by imagining a country without strong-form judicial review but where citizens and legislators generally care about moral rights. Let us suppose more specifically that people generally recognize that we all have a moral right to the freedom of religion and that most people take this fact seriously. Legislators take themselves to have a moral duty to vote against legislation that violates this right, citizens recognize that they have a moral duty to support political candidates who respect it, and so on.

38 The same probably cannot be said of 3 either, but the nonobviousness of 4 is what really matters for present purposes.

Despite all this agreement on the existence of the right to free exercise, thorny questions about its contours remain. Does the right protect only the freedom of religious *belief*, or does it also protect religiously motivated *conduct*? If it protects some religiously motivated conduct, how far does this protection extend? Can polygamy be prohibited without violating the rights of Mormons? Can high school attendance be required without wronging Amish children or their parents? Must religious groups be allowed to worship together in large numbers during a deadly pandemic? Can the government require all businesses serving the public to do so on a nondiscriminatory basis, or must business owners with religious scruples about serving certain kinds of people be allowed to follow their conscience and turn those people away?

Without strong-form review, it is up to the legislature to deliberate about these matters and to settle them, at least provisionally, as a matter of public policy. Under these circumstances, when the legislature passes a law—for instance, a law prohibiting all businesses, without exception, from discriminating based on sexual orientation—this presumably reflects its judgment that the law does not violate the right to free exercise, though of course this judgment may be mistaken in particular cases, and public debate on the issue may well continue. In such a society, what would be involved in constitutionalizing the right to freedom of religion under a system of strong-form judicial review? This would involve giving judges the power to invalidate laws when *they* determine, correctly or incorrectly, that those laws violate the right to free exercise. The effect of constitutionalizing this right under a system of strong-form judicial review, then, is not to subordinate legislation to the right to the freedom of religion but to subordinate legislation to the judiciary's understanding of that right.[39]

In light of this, my suggestion is that in order to be worthy of respect, a judgment about which rights ought to be constitutionalized must be sensitive to the relative *reliability* of legislatures and courts in dealing with rights. If someone judges that a particular right ought to be enforced by strong-form review without ever considering how well the legislature or the courts can be expected to perform in elaborating and specifying that right, then this judgment is not something that we need to take very seriously. Certainly it is not the sort of judgment that we ought to give a privileged position in constraining our theorizing in political philosophy. And my sense is that our superstrong judgments in the vicinity of the Stravinsky intuition are *not* responsive to these sorts of considerations. Instead, they are based almost entirely on ideas about the value of different kinds of expression or of having the ability to engage in them.

39 See Alexander, "Constitutions, Judicial Review, Moral Rights, and Democracy."

All of this suggests that while the Stravinsky intuition ought to be taken seriously, the claim we must be sure to accommodate is not 4 but 1. While this would certainly be a challenge for any version of the argument from democracy aiming to account for the moral right to the freedom of expression, once we construe the argument as aiming to justify a specifically strong-form constitutional right, the difficulty is mitigated, as there is simply no inconsistency between the claim that we have a moral right to hear *The Rite of Spring* and the claim that this right should not be administered by strong-form judicial review.

4. THE NAIVE PICTURE OF LEGAL AND CONSTITUTIONAL RIGHTS

When faced with the objection that the argument from democracy fails to justify rights against torture, the democracy theorist could simply dismiss the complaint as confused. Even if the critic is right about torture, this is no objection to the argument from democracy because that argument is not offered as a theory of rights against physical violence in the first place. If the arguments from the last section are on the right track, then the democracy theorist can now say something similar about the Stravinsky objection: even if the critics are right about what is protected by the moral right to the freedom of expression, this is still no objection to the (refined) argument from democracy because that argument is not being offered as a theory of that moral right. It is being offered as a theory of the strong-form constitutional rights to the freedom of expression that we ought to have.

Unfortunately, this response does not amount, all on its own, to a sufficient response to the Stravinsky objection. For even once we recognize that the core underlying intuition is directly concerned with our moral rights rather than with the strong-form constitutional rights that we ought to have, it might *still* seem relevant to the (refined) argument from democracy, as there is presumably some connection between our moral free speech rights and the constitutional free speech rights that we ought to have. Moreover, the right to political speech is itself a moral right, just like the rights highlighted by the Stravinsky intuition. So the democracy theorist needs to explain why the moral right to political speech should be constitutionalized, while the moral right to hear Stravinsky should not. What the democracy theorist needs, then, is an account of the proper scope of strong-form judicial review, one that recommends constitutionalizing rights to political speech but not the right to Stravinsky.

We have so far taken the core of the traditional argument from democracy to be a claim about the *importance* of political speech. That argument, recall, goes roughly like this: the right to political speech is a constitutive element of democracy; so, since it is important that we live in a democracy, it is important

that we have the right to political speech. Is there an account of the proper scope of strong-form judicial review anywhere to be found in this argument? Actually, if we see the argument as an attempt to justify a strong-form constitutional right, you might think that the account does presuppose a particular account of judicial review. For if the argument is to have any hope of achieving the aim we have given it, then it might seem that the question whether a particular right ought to be constitutionalized and administered by strong-form judicial review must be settled by the importance of the right and the interests that it protects.

This idea is part of what we might call the naive picture of legal and constitutional rights. The usual way to argue for the existence of a moral right is to identify certain interests—interests of the putative right holder but perhaps interests of others as well—and to try to show that those interests are sufficiently weighty to place others under a moral duty, either to promote the relevant interests or to avoid impeding them. Suppose that this sort of case has been made for a particular moral right. At this point, you might think that if the relevant interests are *really* weighty, then they will justify not only placing others under a moral duty but placing them under a *legal* duty as well, despite the costs of administering and enforcing such a duty. On this picture, in other words, the moral rights that ought to be legal rights are just the moral rights that are especially important. And continuing in the same vein, you might think that the rights that ought to be *constitutional* rights are just those that are more important still, with the protection of strong-form judicial review reserved for the most fundamental rights of all.[40] While seldom defended explicitly, this picture exercises a tremendous influence on popular and scholarly thought about constitutional rights.

In fact, this conception is hard at work in the background of many objections to the argument from democracy focused on the protection of facially nonpolitical expression. For many of the intuitions that drive these objections, it seems to me, are themselves animated by a sense of the value of the relevant kinds of expression. We can see this clearly in Zechariah Chafee's criticism of the classic argument from democracy defended by Alexander Meiklejohn:

> If [on Meiklejohn's account] private speech does include . . . art and literature, it is shocking to deprive these *vital matters* of the protection of the inspiring words of the First Amendment. . . . *Valuable as self-government is*, it is in itself only a small part of our lives.[41]

40 For an illuminating critical discussion of the naive picture, see Strauss, "The Role of a Bill of Rights."

41 Chafee, "Review," 900 (emphasis added).

Why is Chafee shocked that Meiklejohn might limit first amendment protections to political speech at the expense of art and literature? Plainly, it is because art and literature are such "vital matters." They are so vital, in fact, that our interests in producing and engaging with art and literature must be at least as strong as our interests in participating in democratic self-government (politics being "in itself only a small part of our lives"). The key point for our purposes is that Chafee implicitly treats the claim that political speech, but *not* (nonpolitical) art and literature, should receive specifically constitutional protection as entailing the claim that art and literature are less valuable than politics. We can find this same assumption in the work of other writers who press the Stravinsky objection against democratic theories of the freedom of expression, and I think that this partly explains some of the outrage—these critics are *indignant* on behalf of art, literature, and the rest.[42]

If the naive picture is correct—if the moral rights that ought to be constitutionalized are distinguished primarily by their value—then the democracy theorist is forced to argue that the right to political speech is more important than the right to Stravinsky. While this challenge may not be hopeless, I will not pursue it here. Instead, I want to consider a more conciliatory response to the Stravinsky objection, one that does not involve the suggestion that political rights are more valuable than others. To make this work, the democracy theorist will need at least a rough account of the proper scope of strong-form review on which those rights that are suited for strong-form review are distinguished by more than their relative value. For her purposes, however, there is no need to settle on a strict set of necessary and sufficient conditions for when an arbitrary right ought to be enforced by strong-form review. What she needs is a plausible argument that rights to political speech ought to be strong-form constitutional rights and a plausible argument that rights to nonpolitical speech ought *not* to be strong-form constitutional rights. The next section develops these arguments on her behalf.

5. THE PROPER SCOPE OF STRONG-FORM JUDICIAL REVIEW

I propose to begin the process of developing these arguments by reflecting on Jeremy Waldron's influential attack on all rights-based strong-form judicial

42 See, e.g., Shiffrin, *Speech Matters*, 93–94. Cf. Posner, "Free Speech and the Legacy of *Schenck*," 133 (suggesting that "the people who want to privilege political speech are often people who simply think that politics is the most important activity that people engage in").

review.[43] Before we dive into the substance of that attack, however, I want to give a quick preview of where we are headed. Waldron's argument plays a fairly subtle role in the remainder of the paper, and it will be worthwhile to forestall some possible misunderstandings at the outset.[44]

The refined argument from democracy is an argument about the strong-form constitutional rights that we ought to have. It aims to support the view that (1) rights to political speech ought to be strong-form constitutional rights, while (2) other kinds of free speech rights ought *not* to be strong-form constitutional rights. Waldron argues, roughly, that we should reject all strong-form judicial review based on constitutional rights. He argues, in other words, that *no* rights ought to be constitutionalized and enforced by strong-form judicial review. In one way, of course, this conclusion is congenial to the democracy theorist, since it entails that nonpolitical speech rights ought not to be strong-form constitutional rights. The problem is that if Waldron's argument succeeds, then it *also* follows that rights to *political* speech ought not to be strong-form constitutional rights. And this is something that our democracy theorist cannot accept.

The trick, for the democracy theorist, is to poke a hole in Waldron's argument that is wide enough for rights to political speech to escape but not so wide that rights to nonpolitical speech make it out as well. Accordingly, we will develop a targeted objection to show that Waldron's argument does *not* work for rights to political speech. Since the objection does not apply to other free speech rights, however, the democracy theorist can maintain that Waldron's original conclusion concerning *those* rights still stands. And, again, that conclusion is just that those rights should not be strong-form constitutional rights, i.e., they should not be constitutionalized and enforced by strong-form judicial review. This is the primary role I see for Waldron's argument in the paper. The refined argument from democracy enlists a modified form of that argument in order to show that rights to nonpolitical speech should not be enforced by strong-form judicial review.

Waldron's argument also indirectly helps the democracy theorist to defend her second key claim, which is that rights to political speech ought to be strong-form constitutional rights. Again, we will be objecting that Waldron's original argument against strong-form judicial review does *not* work for rights to political speech. In general, an objection refuting an argument *against* strong-form review of rights to political speech need not provide anything like a positive

43 Waldron develops this attack in a number of places, but see especially "A Right-Based Critique of Constitutional Rights," *Law and Disagreement*, and "The Core of the Case Against Judicial Review."

44 Thanks to an anonymous reviewer for encouraging me to spell this out more clearly.

argument *for* strong-form review of those rights. Fortunately, however, the particular objection that we develop will turn out to provide the democracy theorist with the materials to mount such a positive argument. The secondary role for Waldron's argument, then, is the heuristic one of engaging the democracy theorist in a critical exchange that suggests a plausible argument in favor of strong-form judicial review of rights to political speech.

One last prefatory point. Waldron's argument builds on some familiar doubts about the compatibility of judicial review and the democratic ideal of collective self-rule. This *countermajoritarian difficulty* has inspired an enormous amount of work by legal theorists and political philosophers, some of it seeking to discredit strong-form judicial review or to cabin its scope but the majority of it, at least in the United States, attempting to defend an active role for the courts.[45] Waldron aims to distill a core argument against strong-form judicial review that is not tied to the history or institutional details of any one jurisdiction. While the argument is supposed to generalize, however, it is not supposed to apply to every possible jurisdiction, regardless of social or political conditions. Accordingly, he begins the article "The Core of the Case Against Judicial Review" by stipulating four broad assumptions about the political institutions and culture of the societies to which the argument is to apply:

> We are to imagine a society with (1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law; (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights (i.e., about what the commitment to rights actually amounts to and what its implications are) among the members of the society who are committed to the idea of rights.[46]

45 The term 'countermajoritarian difficulty' was coined by Bickel, *The Least Dangerous Branch*, 16. For criticism of giving judges broad powers of strong-form judicial review, in addition to Waldron's work, see, e.g., Bellamy, *Political Constitutionalism*; Hand, *The Bill of Rights*; Railton, "Judicial Review, Elites, and Liberal Democracy"; and Thayer, "Origin and Scope of the American Doctrine of Constitutional Law." Strong-form review is defended by, e.g., Bickel, *The Least Dangerous Branch*; Dworkin, *Taking Rights Seriously*; Fallon, "The Core of an Uneasy Case for Judicial Review"; Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review"; and Kavanagh, "Participation and Judicial Review."

46 Waldron, "The Core of the Case Against Judicial Review," 1360 (hereafter in this section cited parenthetically).

In a society that meets these conditions, Waldron argues, disagreements about rights ought to be settled in the legislature rather than the courts. Since the refined argument from democracy will eventually appeal to a revised version of Waldron's argument, it too is subject to these conditions. Having dealt with these preliminaries, we are now ready for the argument proper.

We have widespread disagreements about rights, yet a variety of issues concerning rights need to be settled for the community in some way, at least provisionally, for practical purposes. So we need a procedure for settling them. What kind of procedure should this be? In particular, should we let the courts decide, using a system of strong-form judicial review, or should we look to the legislature? Waldron suggests that two different sorts of reasons bear on the question: *outcome reasons* and *process reasons* (1372). Process reasons concern the propriety of a procedure without regard to the desirability of the policies it produces. Outcome reasons, by contrast, focus precisely on the desirability of those policies. With this distinction on the table, Waldron's argument has two steps. In the first, he argues that the outcome reasons are inconclusive. They fail to provide a strong case either for judicial review or against it. In the second, he argues that the process reasons overwhelmingly disfavor strong-form judicial review and support legislative decision-making. On balance, he concludes, we have good reason to reject strong-form judicial review.

Regarding the outcome reasons, many people have responded to the countermajoritarian difficulty by arguing that courts actually are more likely than legislatures to decide questions about rights correctly.[47] People often suggest, for example, that courts are epistemically superior because they specify rights in the context of concrete particular cases rather than in the abstract and because they are expected to explicitly give reasons for their decisions, in the form of detailed judicial opinions.

Waldron is unconvinced. As he points out, reasons are hardly the exclusive property of courts. Often enough, "legislators give reasons for their votes just as judges do" (1382). As for the judiciary's orientation to particular cases, Waldron argues that this is "mostly a myth" because appellate courts, the ones that actually make law, tend to approach and decide cases in fairly abstract terms (1379). But the point is moot anyway, on Waldron's view, because legislatures can consider individual cases too, for instance in hearings or debates.

Judicial decision-making also exhibits some distinctive epistemic vices. Waldron argues, for example, that judicial deliberations about rights tend to get sidetracked by narrow legalistic concerns about the details of precedent

47 See, e.g., Bickel, *The Least Dangerous Branch*, 24–27; Brest, "The Misconceived Quest for Original Understanding," 228; Dworkin, *Taking Rights Seriously*, ch. 5; and Wellington, "Common Law Rules and Constitutional Double Standards," 248–49.

decisions or the precise verbiage of canonical constitutional texts rather than focusing on the genuine moral issues at stake. These distractions, he suggests, are less likely to hinder the moral deliberations of legislators. All things considered, Waldron judges that the outcome reasons are simply inconclusive. They do not, as many have thought, make out anything like a convincing argument for strong-form judicial review.

Which means that the issue must be settled by the process reasons. For Waldron, this is a matter of political legitimacy:

> Political decision-procedures usually take the following form. Because there is disagreement about a given decision, the decision is to be made by a designated set of individuals $\{C_1, C_2, \ldots, C_m\}$ using some designated decision-procedure. The burden of legitimacy-theory is to explain why it is appropriate for these individuals, and not some others, to be privileged to participate in the decision-making. As C_n [a citizen who, not unreasonably, disagrees with the substance of a given policy affecting rights] might put it, "Why them? Why not me?" The theory of legitimacy will have to provide the basis of an answer to that question. (1387)

When C_n disagrees with a legislative decision about rights, Waldron argues, we have a good story to tell. In general, the response to a citizen who is disappointed with a legislative decision about rights and wants to know why the matter was decided in the way it was is that the matter was decided in a way that gave her as much of a say as possible while allowing every other citizen an equal say on the issue.

What about when C_n disagrees with a judicial decision on a vexed question of rights under a system of strong-form judicial review? Suppose we are dealing with a decision by the US Supreme Court. Why, C_n wants to know, should these nine men and women be able to impose their views on the rest of us? One answer that might carry some weight is that they are particularly likely to decide the issue correctly. But Waldron has already argued that this is not true. And once this response is set aside, Waldron suggests, the question is hard to answer. We might try pointing out that while the justices were not themselves elected by the people, they were at least appointed and approved by officials—the president and the members of the Senate, in the US case—who were. This is true enough, as far as it goes, but Waldron insists that since legitimacy is a *comparative* matter, "it is a staggeringly inadequate response" (1391). In sum, the process reasons weigh heavily in favor of legislative decision-making and against judicial review. Since the process reasons strongly disfavor judicial review, and the outcome reasons are inert, judicial review is illegitimate.

While the objection to Waldron's argument that I want to commend to the democracy theorist is straightforward, it has not, to my knowledge, been raised before in the literature.[48] Here is the problem. In evaluating the outcome reasons for and against strong-form judicial review, Waldron considers only whether legislatures or courts are better at answering questions about moral rights *in general*, across the board. But even if we accept Waldron's arguments on this score—even if we are prepared to agree that judges are no better than legislators at correctly answering questions of rights as a general matter—judges might still do better than legislators in certain *particular* domains. In that case, there would be good reasons—good outcome reasons, in Waldron's terminology—to support strong-form judicial review with an appropriately limited scope. My suggestion is that the democracy theorist can plausibly argue that judges are likely to outperform legislators regarding rights to political speech.

Since this part of the argument is familiar, I will not belabor the point. The idea is that elected officials, including legislators, are especially unreliable judges of the moral permissibility of restrictions on political speech because political speech is particularly liable to directly and conspicuously threaten their continued authority. Elected politicians want to be reelected, after all, and a politician's reelection hopes may be frustrated by a documentary highlighting the failure of her signature policies, a news story implicating her in an abuse of power, or a public protest calling for her resignation. Given the threat that these and other kinds of political speech represent to her deepest personal and professional ambitions, even a politician who genuinely cares about rights may convince herself in good faith that speech restrictions a more disinterested observer would condemn are consistent with the freedom of expression. Since judges with lifetime appointments are insulated from these pressures, however, we might reasonably expect them to do better.[49]

Where does all of this leave the democracy theorist? At the start of this section, she was in the market for plausible arguments that (1) rights to political speech ought to be strong-form constitutional rights, while (2) other free speech rights ought *not* to be strong-form constitutional rights. Schematically, at least, Waldron's core case against strong-form judicial review looks like this:

1. The process reasons heavily disfavor strong-form judicial review.

48 This is probably because Waldron's critics are typically interested in justifying strong-form review with a very wide scope, while this objection would open the door to only a more limited jurisdiction.

49 It is not strictly necessary that judges be given lifetime appointments, as they are in the US, so long as they are appointed for terms long enough to insulate them from the pressures of ordinary politics.

2. So we should have strong-form judicial review only if the outcome reasons significantly favor the practice.
3. But the outcome reasons do *not* significantly favor strong-form judicial review. In general, we have no good reason to think that courts will outperform legislatures in administering constitutional rights.
4. So we should not have strong-form judicial review.

If the democracy theorist were looking only for a plausible argument against strong-form constitutional rights to nonpolitical speech, then she could just grab Waldron's argument off the rack and call it a day. True, that argument is not directed *specifically* at rights to nonpolitical speech; it is directed at *all* rights. But if no rights should be enforced by strong-form judicial review, then obviously rights to nonpolitical speech in particular should not be enforced by strong-form judicial review. (Given the prominence and influence of Waldron's core case, I will simply assume that the argument is at least plausible.)

Unfortunately, it also follows from Waldron's core case that rights to *political* speech should not be enforced by strong-form judicial review, and this is something our democracy theorist is keen to reject. So the democracy theorist cannot simply accept Waldron's argument as it stands. This is where our objection comes in. It starts with a broadly logical point: while Waldron's core case considers only whether legislatures or courts are better at answering questions about moral rights in general, there is no reason to rule out *a priori* the possibility that they are better at answering questions about certain particular rights. This suggests that a defensible version of Waldron's core case would need to defend his position that the outcome reasons fail to support strong-form review on a *right-by-right* basis. Instead of 2 and 3, for example, the argument would need to defend

2*. For every candidate right *r*, we should have strong-form judicial review with respect to *r* only if the outcome reasons provide some significant support for the practice.

and

3*. But for every *r*, the outcome reasons do *not* provide significant support for strong-form judicial review with respect to *r*.

At this point, however, the democracy theorist claims that we should reject 3*. Even if courts are no better than legislatures at dealing with rights in general, she argues, because of the perverse incentives that the power to regulate political speech would give elected officials, we have good reason to believe that courts will outperform legislatures in this particular area. So we should

reject Waldron's core case against all strong-form judicial review even in this modified form.

At the same time, though, the objection concerning rights to political speech does nothing to cast doubt on Waldron's conclusions about many other rights. True, the right to political speech is probably not *unique* in giving elected officials perverse incentives to unjustifiably restrict rights in order to safeguard their own status and power. It seems plausible that roughly similar problems arise in the case of voting rights, for example. For most rights, however, the parallel objection is simply not credible. And this is what the democracy theorist claims about rights to nonpolitical speech. Consider, for example, the right to engage in commercial advertising, and suppose that a new bill up for consideration would prohibit outdoor advertising of cigarettes or vaping products near primary or secondary schools.[50] In deliberating about this bill, would a legislator's desire for reelection give her a perverse incentive, akin to the incentive to forestall public criticism and embarrassment, to shortchange whatever genuine moral rights we have to engage in commercial speech? The answer, surely, is no. Or consider a town ordinance that would prevent a local jazz club from putting on live music past midnight. Whatever else one might think about such an ordinance, it plainly does not invite the sort of legislative self-dealing associated with restrictions on political speech. And so it goes, the democracy theorist claims, for rights to nonpolitical speech more generally: the perverse incentives that incumbent officials have to restrict political speech simply do not arise for nonpolitical speech.

This suggests that the democracy theorist can still appeal to a modified version of Waldron's argument that is confined to rights to nonpolitical speech. Before stating that version, however, it will help to draw a distinction between two kinds of outcome reasons bearing on the permissibility of strong-form judicial review of constitutional rights: general outcome reasons and domain-specific outcome reasons. General outcome reasons are the kinds of reasons that Waldron considers in his original core case; they point to general institutional features of legislatures or courts that bear on their likely competence or reliability as administrators of important constitutional rights. Domain-specific outcome reasons are the kinds of reasons that the democracy theorist adduces in her objection to Waldron's core case insofar as it concerns rights to political speech; these point to some combination of general institutional features of legislatures or courts and the contents of specific rights that bear on competence or reliability with respect to those particular rights.

50 See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (invalidating such a restriction).

With this rough-and-ready distinction on the table, the refined argument from democracy is ready to incorporate the following modified version of Waldron's argument, directed specifically at rights to nonpolitical speech:

1. For every candidate moral right *r*, the process reasons heavily disfavor strong-form judicial review with respect to *r*.
2. So we should have strong-form judicial review with respect to *r* only if the outcome reasons significantly favor it.
3. The general outcome reasons do not significantly favor strong-form judicial review with respect to *r*.
4. So we should have strong-form judicial review with respect to *r* only if the relevant domain-specific outcome reasons significantly favor strong-form judicial review with respect to *r*.
5. In the case of rights to nonpolitical speech, domain-specific outcome reasons do not significantly favor strong-form judicial review.
6. So we should not have strong-form judicial review with respect to rights to nonpolitical speech.

Again, this conclusion is entailed by Waldron's original core case against all strong-form judicial review. As we have just seen, the democracy theorist has been led to modify the form of that argument and confine it to rights to nonpolitical speech.[51] The result, I submit, is a plausible argument that rights to nonpolitical speech ought not to be strong-form constitutional rights.[52]

This leaves rights to political speech. Since Waldron's core case is an argument *against* strong-form judicial review with respect to constitutional rights, the democracy theorist cannot enlist that argument to *support* strong-form rights to political speech. The core of the limited objection that we raised to Waldron's argument, recall, is the claim that courts actually *are* likely to be better stewards when it comes to rights to political speech. Even if this is correct, however, it

51 The democracy theorist can also accept that Waldron's case applies to many other rights besides rights to nonpolitical speech, of course. It is just that those other rights are not her concern.

52 Note that the distinction between general outcome reasons and domain-specific outcome reasons is playing a heuristic role in this argument and is not strictly necessary. All that the democracy theorist ultimately needs to claim is that the (undifferentiated) outcome reasons do not significantly favor strong-form judicial review with respect to rights to nonpolitical speech. By making the rough distinction between general reasons and domain-specific reasons, I mean only to highlight that once one accepts Waldron's argument that courts are not generally better than legislatures at dealing with rights, one can maintain that a particular right *r* ought to be subject to strong-form review only by arguing that *r* is special in some way that suggests that courts actually *are* better than legislatures at dealing with *r*.

does not strictly follow that rights to political speech ought to be strong-form constitutional rights. Waldron defends the claim that judicial review should not exist if the outcome reasons do not support it; he offers no argument for the inverse claim that review *should* exist if the outcome reasons *do* support it.

Waldron does seem to find the latter claim plausible, though. While strong-form judicial review trenches on the rights of citizens to participate as equals in the process of government, he says, the practice might *still* be "tolerable" if there were "a convincing outcome-based case for judicial decision-making" (1393).[53] Evidently, Waldron is not prepared to deny that strong-form review *would* be appropriate, or at least permissible, *if* the courts were more likely than the legislature to decide these issues correctly.[54] As one might expect, this conditional claim is widely endorsed—indeed, relied upon—by judicial review's many defenders, as well.[55] (Unlike Waldron, of course, they go on to insist that courts *are* generally better at deciding these issues.) Now consider one particular instance of the general conditional claim:

> If the balance of outcome reasons significantly favors strong-form judicial review for rights to political speech, then rights to political speech ought to be strong-form constitutional rights.

While the truth of this conditional is not quite common ground in debates about strong-form review, since critics like Waldron tend not to definitively endorse claims of this kind, its considerable plausibility is accepted on all sides, and this is good enough for present purposes.

At the start of this section, the democracy theorist was in the market for plausible arguments that (1) rights to political speech ought to be strong-form constitutional rights, while (2) other kinds of free speech rights ought *not* to be strong-form constitutional rights. We saw earlier how the refined argument from democracy defends 2. Here, finally, is her argument for 1:

1. If the balance of outcome reasons significantly favors strong-form judicial review for rights to political speech, then rights to political speech ought to be strong-form constitutional rights.[56]

53 See also Waldron, "A Right-Based Critique of Constitutional Rights," 49.

54 Peter Railton is another critic of strong-form judicial review who acknowledges that the practice might be justified if the outcome reasons supported it. See Railton, "Judicial Review, Elites, and Liberal Democracy."

55 E.g., Bickel, *The Least Dangerous Branch*, 24–27; Brest, "The Misconceived Quest for Original Understanding," 228; Dworkin, "What Is Equality?" 30; and Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review."

56 I do not mean to saddle the refined argument from democracy with the claim that superior judicial competence or reliability is sufficient, all on its own, to show that any given right

2. The balance of outcome reasons significantly favors strong-form judicial review for rights to political speech.
3. So rights to political speech ought to be strong-form constitutional rights.

The plausibility of the first premise is accepted on all sides of debates over strong-form judicial review. The second premise is justified by concerns about the incentives for self-dealing that the power to regulate political speech would give legislators. From these two premises, the conclusion logically follows.

This concludes the refined argument from democracy. I do not claim that the argument is sound, only that it is interesting and deserves consideration.[57] Whatever its ultimate fate, however, it cannot be dismissed straightaway merely by pointing out that political expression is not the only kind that matters.

6. CONCLUSION

The Stravinsky objection asserts that the argument from democracy fails to justify protections for lots of deserving nonpolitical speech. My suggestion is that the democracy theorist can essentially *agree* with this claim. We do have rights to nonpolitical speech, and the argument from democracy does not account for them. But we need to be careful about what rights are at issue. While the refined argument from democracy is specifically concerned with strong-form constitutional rights, the democracy theorist can maintain that our rights to

ought to be administered by strong-form judicial review. The point is just that whatever other conditions rights must meet in order to qualify for strong-form review are surely satisfied by rights to political speech. Incidentally, suppose that one of the other necessary conditions for *r* to be apt for strong-form review is that *r* must be sufficiently valuable or important. In that case, we might think of the traditional argument from democracy as aiming to show that rights to political speech are sufficiently valuable or important to be constitutionalized and administered by strong-form judicial review, while the refined argument from democracy aims to show that those rights also meet the condition regarding judicial competence or reliability. Concerning rights to nonpolitical speech, the democracy theorist can maintain that these rights satisfy the importance requirement but fail to satisfy the requirement of superior judicial reliability. Thus, she can maintain that rights to nonpolitical speech are inapt for strong-form judicial review not because they are unimportant but because we have no reason to think that courts will do better than legislatures at administering them. Thanks to an anonymous reviewer for encouraging me to clarify this point.

57 My reservations concern Waldron's underlying argument against all strong-form judicial review, which is incorporated, in a limited and modified form, in the refined argument from democracy. Some of these worries, at least, are roughly along the lines of Fallon, "The Core of an Uneasy Case for Judicial Review." Unfortunately, I do not have the space to discuss these issues here.

nonpolitical speech are ordinary moral rights against the government.[58] She remains free to agree that these moral rights ought to be legal rights as well, and possibly even constitutional rights protected by weak-form judicial review. Her argument simply does not commit her to any position on these matters.

Why think rights to nonpolitical speech should not be administered by strong-form judicial review? Earlier, in section 3, I suggested that the strong intuitions on which the Stravinsky objection is based are best understood as directed toward ordinary moral rights rather than strong-form constitutional rights. But suppose the critics continue to insist that the Stravinsky intuition is best understood as referring to a specifically strong-form constitutional right. In that case, it is important to remember that this sort of intuition can serve at most as a *provisional* fixed point in the construction of a free speech theory. If there are good theoretical reasons to reject this intuition (and others like it), then it must ultimately be discarded. In our initial sketch of the traditional argument from democracy, the democracy theorist did not provide good theoretical reasons to reject this intuition—she simply failed to give any good reasons to accept it. But the democracy theorist now has a theoretical argument, in the form of Waldron's core case against judicial review (as modified by our objection and limited to rights to nonpolitical speech), for the conclusion that, if the Stravinsky intuition concerns strong-form constitutional rights, then it ought to be rejected in the end.

The democracy theorist can also explain why people find the Stravinsky intuition so compelling and why they have (mistakenly, she claims) taken it to be so devastating to the argument from democracy. People find the intuition compelling because it is *true*—so long as it is understood as referring to the moral right to the freedom of expression rather than to a specifically strong-form constitutional right. And they have taken it to be devastating for at least two reasons. First, we are often a bit lax about distinguishing different kinds of rights and clarifying which are at issue in any given discussion, especially when we take ourselves to have overlapping moral, legal, and constitutional rights in some domain. This makes it easy to overgeneralize a strong intuition that is true with respect to one kind of free speech right but false (or at least nonobvious) with respect to another. Second, even when writers are relatively clear about the distinction between moral rights and strong-form constitutional rights, they often slide from claims about moral rights to claims about constitutional rights without ever making an explicit argument about the proper scope of strong-form judicial review. They simply assume that something like the naive picture of

58 And against others as well, presumably, but we have been focusing on rights against the government.

constitutional rights must be correct. In that case, even if one does not conflate moral rights with legal and constitutional rights, one may tend unthinkingly to infer a conclusion about strong-form constitutional rights from an intuition about moral rights. But the democracy theorist can argue that, because the naive picture is mistaken, these natural-seeming inferences are unjustified.

Finally, the democracy theorist can reassure her critics that the reason that rights to nonpolitical speech are unfit for strong-form judicial review, according to her refined account, has nothing to do with the value of the rights themselves or the underlying interests they protect. On her view, rights to nonpolitical expression are inapt for strong-form judicial review not because they are unimportant but because we have no reason to think that courts will outperform legislatures in administering them. Insofar as negative responses to traditional democratic free speech theories are driven partly by a perceived affront to these other rights, this should make the refined argument from democracy a bit more palatable.[59]

Princeton University
gb9@princeton.edu

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