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Free Speech Foundations Symposium

FOREWORD

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It is quite rare for a legal issue to truly touch upon the lives of every person in our country. In the world of scholarship, nuanced questions of theory and procedure often take center stage, while realistic applications may seem distant from the overall thesis.

Yet, free speech is different.

Few distinctly legal and constitutional creations engender the fervor, emotion, and misunderstanding that free speech causes among the public. It is the topic that all persons use, most persons claim to know, and few persons completely understand. When broached with the topic of freedom of speech, most individuals have *an* opinion and, frequently, also have an anecdote to accompany it. As a fundamental part of the human condition—so tied to our higher intelligence—it is not only the ability to communicate, but also the inherent need to feel heard, to feel as if our individual thoughts prescribe value, that gives substance to free speech rights.

Our founders so internalized such principles that they codified freedom of speech in our Constitution.[1] With its rich history and constant use, free speech hardly goes a day without adapting as a concept. One of the most enriching aspects of the topic remains the ability for any person to add to its changing nature: George Maynard did it when he duct-taped his license plate to censor its language,[2] Gregory Lee Johnson did it when he set an American flag ablaze to lambast the Republican National Convention's politics,[3] and Mary Beth Tinker did it when she wore an armband to school in protest of the war.[4] Whether or not each changed free

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[1] U.S. CONST. amend. I.

[2] Wooley v. Maynard, 430 U.S. 705, 708 n.4 (1977).

[3] Texas v. Johnson, 491 U.S. 397, 399 (1989).

[4] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

speech intentionally or completely unwittingly, these individuals added a dimension to our jurisprudence.

In that certain way that the law shapes our civilization through the actions of few for the rights of the many, free speech has worked. And that is what has always drawn me personally to freedom of speech as a subject area. *Tinker* was the very first Supreme Court opinion I ever read—as a journalism student in high school, no less. I had not previously appreciated the full power of being an individual in this country, and even more so, the power of the legal system to safeguard a fundamental part of being human. I was so inspired, not just by Mary Beth Tinker herself, but by the Supreme Court Justices who carved out the trench for student free speech.[5] Though every law student will finish school with a complicated relationship with each Justice whose cases we internalized, I value the way the Court treats the individuals in its free speech opinions.

When the time came for the *Northwestern University Law Review* to pick a symposium that we felt would advance the field in a meaningful way, the lens of free speech emerged as a natural choice. When students join an institution, their mark may be as fleeting as their tuition money; however, when students *become* an institution, such as with their contributions and membership to a journal like the *Northwestern University Law Review*, they get the opportunity to interact with and shape the changing legal scholarship in the very same fashion that individuals augment free speech. For a group of student editors working steadfastly to make our mark on legal erudition, there is no greater contribution for a focused symposium than on the topic of the freedom of speech.

Therefore, once we came across Professor Alexander Tsesis's proposal for *Free Speech Foundations*, our board was taken with the intricacy of the ideas that its development would embody. In a very metacognitive sense, our journal would be promulgating our own free speech through the topic of free speech methodology. We knew that this theme would speak to the scholars, students, and practitioners that frequently reference our journal for the most pressing and practical legal answers. The academics have given life to innovative ideas in this area, and by giving exposure to this wealth of theory in the proceeding articles, the *Northwestern University Law Review* is able to contribute to the field in a meaningful way. Through editing and publishing, we strive to address the issues that captivate the legal profession. We can only do that through the inspirations of the legal scholars who come to us with their pioneering

[5] The ability of students to push the boundaries of free speech law into new territory continues to be a service to the legal field—even if the phrase, "BONG HiTS 4 JESUS," does not touch upon the heart quite so strongly as wartime protests. *See* Morse v. Frederick, 551 U.S. 393, 397 (2007).

viewpoints that push the limits of the legal jurisprudence. Needless to say, the intellectuals who participated exceedingly impressed us throughout the entire process.

As we began to compile the panel of professors who would eventually make this Issue possible, the original premise of *Free Speech Foundations* really began to take shape. For all the appeal that free speech provides for us as individuals, the methodology for solving the tough free speech problems has remained murky; the lines of reasoning for First Amendment cases do not always follow predictable paths. The scholars whose writings follow have attempted to parse the answers from the incongruous cases that plague the minds of those that follow the scholarship closely. Every sophisticated legal topic seems to eventually reach an impasse at the Supreme Court level, and while free speech is no exception, the following articles have done a remarkable job at making sense of freedom of speech methodology at a macro level. The articles succeed at suggesting methodology, painting cultural insight, crafting solutions, and predicting government action for the various free speech questions whose relevance grows each day in our tumultuous legal and political climate. By not only examining the free speech foundations themselves, but connecting those founding principles to the present needs of the public, this Symposium has achieved a level of insight that we could only hope for as editors.

By immediately tackling the current challenges in judicial analysis, the first article, Professor Alexander Tsesis's *Multifactoral Free Speech*, expertly crafts a methodology for examining free speech concerns that balances the countervailing considerations arising in any speech conflict.[6] Acknowledging the competing interests at the heart of a disagreement is not enough for a rigorous application of free speech law; Professor Tsesis proposes an approach that gives substance to the underlying interests of parties and the foreseeable consequences of a case's resolve.[7]

Though the recent Supreme Court cases have trended toward formalism under the Roberts Court, there is still room—or the possibility of a paradigm shift—in free speech precedent for a case-by-case balancing approach.[8] Through his framework, Professor Tsesis proposes deciders consider:

> (1) whether the expression at issue is likely to implicate specific constitutional, statutory, or common law harms; (2) whether the restriction on speech is based on a historical or traditional doctrine; (3) whether any

[6] Alexander Tsesis, *Multifactoral Free Speech,* 110 NW. U. L. REV. 1017, 1020–21 (2016).

[7] *Id.*

[8] *Id.* at 1040–42.

> government policies benefitting the general welfare weigh in favor of the regulation; (4) whether the regulation on speech closely fits the public ends that is sought; and (5) whether there are any less restrictive alternatives to achieving them.[9]

The methodology takes into account the multiple considerations that become important in a speech conflict between the government and an individual in a way that preserves individual freedoms and gives credence to the importance of government interests, all while assessing any potential harm to our constitutional standing and society.

The methodology proposed by Professor Tsesis fits snugly into a primary emphasis of the First Amendment—as articulated by several scholars—which is to "advance democratic self-governance."[10] However, Professor Ashutosh Bhagwat contemplates a purpose that reaches even further in *The Democratic First Amendment*.[11] In his conception of individual involvement within conventional democracy, Professor Bhagwat suggests the paramount importance of an engaged citizenry that functionally uses its free speech to involve itself in government.[12] The discussion of Thomas Jefferson's Democratic-Republican philosophy in Professor Bhagwat's analysis[13] deeply touches on the appeal of this topic and the need of this discussion from the view of the *Law Review* in picking a symposium topic that would make a meaningful difference in legal scholarship.

Calling attention to the sense of incompleteness that some narrowly tailored free speech opinions leave in their examination, *The Democratic First Amendment* addresses the roles that each of the five non-religious First Amendment principles—freedom of speech, freedom of the press, freedom of assembly, freedom of association, and the freedom to petition—play in the jurisprudence and methodology.[14] Rather than confine our analysis to the publically prevalent Meiklejohn model of the First Amendment—one that contains simply a Speech Clause and Press Clause[15]—Professor Bhagwat explains, through his examination and

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[9] *Id.* at 1036.

[10] Ashutosh Bhagwat, *The Democratic First Amendment,* 110 NW. U. L. REV. 1097, 1098 (2016); *see also* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2362–63 (2000).

[11] Bhagwat, *supra* note 10, at 1098 (arguing that the self-government view is "radically incomplete").

[12] *Id.* at 1099–1100. This feature is pivotal to the full democratic conception of the First Amendment.

[13] *Id.* at 1121–22.

[14] *Id.* at 1101–10.

[15] *Id.* at 1113.

comparison of several First Amendment models, that these constrictions have limited the depth of our thinking surrounding free speech foundations.[16] As a legal system, we want to avoid an "impoverished vision" of the First Amendment,[17] and this Issue aims to illustrate its greater nature.

Expounding on the democratic conception of the First Amendment, Professor Jack Balkin emphasizes that cultural democracy embodies the dual notions of "protecting individual liberty" and "promoting democracy," rather than dividing them.[18] Many of the current prevailing theories surrounding the First Amendment eschew the role of culture as irrelevant or unimportant. However, Professor Balkin argues that current culture is valuable in involving the greater public in its own self-governance by providing context to the political landscape.[19] As one of the functions of free speech and the First Amendment is to allow for the public to communicate their thoughts and concerns about and to their government, cultural democracy helps bridge the people to their representation through the media of communication with which individuals feel most comfortable.[20] A First Amendment that is adaptive to cultural changes broadens its usefulness to the public it serves.

After exemplifying the importance of culture in the existing First Amendment frameworks, Professor Balkin elucidates the different ways that constitutional freedom actually serves "legitimate state power."[21] By using this fundamental freedom, citizens can assist representatives in making the informed decisions necessary for effective state function; similarly, it helps the people to feel connected to their government and to avoid alienating them through uninformed state decisionmaking. Finally, the allowance of such a right acts as an acknowledgement on the part of the government that the voice of the individual is to be respected, in a show that the state's primary function is to serve the people.[22] Professor Balkin goes on to explain the implications of his analysis for commercial speech and its addition to the current precedential analysis.[23]

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[16] *Id.* at 1119.

[17] *Id.*

[18] Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1054 (2016).

[19] *Id.* at 1055.

[20] *See id.* at 1057.

[21] *Id.* at 1068.

[22] *Id.* at 1069.

[23] *Id.* at 1080–89.

The free speech rights implicated in individual self-governance appear prominently in Professor Andrew Koppelman's *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*.[24] The intersection of free speech with regards to gay rights and religious liberty has remained a contentious topic in the time after Indiana's Religious Freedom Restoration Act[25]—which allows individuals and businesses to assert that their religious exercise has been substantially burdened as a legal defense, typically as a justification to turn away homosexual customers without threat of discrimination lawsuits—and the landmark Supreme Court decision legalizing gay marriage, *Obergefell v. Hodges*.[26] Professor Koppelman hypothesizes what might happen if those with sincerely held religious beliefs use their speech to proclaim their views to the public—such as through a publically posted disclaimer—thereby allowing consumers to choose services based on beliefs that match their own.[27]

With an innovative solution, however, legal consequences may follow as free speech is tempered by the existing law of harassment.[28] An important facet of this issue going forward will be whether courts are able to properly parse antidiscrimination law from the nuances of free speech law.[29] More importantly, where the Supreme Court might draw the lines of speech nonprotection around this issue is in question, as well as whether the Court will be "curiously disabled" from making a helpful ruling in this arena.[30] Many writers of free speech jurisprudence struggle to pin down where one's right of free speech crosses or subsumes another's right of free speech or nondiscrimination. Professor Koppelman aims to help explain where the purposes of free speech fill in the uncertainty.

Building on the rights of individuals theme, Professors Toni Massaro and Helen Norton take the theory of free speech jurisprudence into the hypothetical future in which computers develop such artificial intelligence capacity to compel their own freedom of speech.[31] Society's current ambivalence to the rise of computerized assistance for virtually every task makes the process of anthropomorphization to a rights-worthy being more likely as technology becomes more autonomous. Through explaining the

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[24] Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict,* 110 NW. U. L. REV. 1127 (2016).

[25] Religious Freedom Restoration Act, IND. CODE § 34-13-9-9 (2015).

[26] 135 S. Ct. 2584 (2015).

[27] Koppelman, *supra* note 24, at 1043–45.

[28] *Id.* at 1045.

[29] *Id.* at 1151.

[30] *Id.*

[31] Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1171 (2016).

current free speech climate and weaving the potential rights of intelligent technology into the methodology, Professors Massaro and Norton propose a masterful network of technologically available free speech.[32]

When fit into the arguments based on democracy and self-governance that are prevalent throughout this Symposium composition, the speaker's identity—for AI in particular—is, at best, irrelevant and, at worst, subject to speech limitations.[33] However, Professors Massaro and Norton's greatest discussion for artificially intelligent free speech rights lies in the realm of autonomy, as it goes directly to the heart of the speaker's purpose and ability to produce meaningful information.[34] The thought experiment extends into the content of technologically independent speech and the framework that would be sufficient to tie the different free speech pieces together.[35] Finally, approaching the potential risks of doling out speech rights to robots, the authors describe strict scrutiny's effect on computer speech and the circumstances where computers might retain even *more* free speech protection than their human counterparts.[36]

Finally, as more individuals attain speech rights, the government consequently gains more listeners for its own speech. In Professor Mary-Rose Papandrea's *The Government Brand*, readers gain insight into the ever-changing government speech doctrine.[37] While the First Amendment prohibits the government from restricting individual speech, its purpose is not to limit the government's own speech in any way. As such, Professor Papandrea guides readers through the entanglement of a state's own speech through modern free speech methodology.[38] As the ability of government to speak can act to disfavor the content of other individual speakers, the need for a doctrine becomes apparent.[39]

Based on the Supreme Court's record of decisions on the topic, it has become challenging to predict where the government speech doctrine will extend. From its traditional *Summum* test, in which government need only have the "final approval authority over expression on its property,"[40] the Supreme Court turned on its heel in the more stringent *Walker,* when it openly declared license plates government speech without much

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[32] *Id.* at 1177–84.
[33] *Id.* at 1184.
[34] *Id.* at 1180–84.
[35] *Id.* at 1191–94.
[36] *Id.* at 1192.
[37] Mary-Rose Papandrea, *The Government Brand,* 110 NW. U. L. REV. 1197 (2016).
[38] *Id.* at 1199–1200.
[39] *Id.* at 1202. Viewpoint based restrictions are typically prohibited under the First Amendment. *Id.*
[40] *Id.* at 1203.

consideration to the quasi-free speech aspects inherent to specialty plates.[41] Professor Papandrea walks through the history of government speech and the subjective reasonable observer test favored in *Walker*.[42] By seizing on the wide open question as to how a reasonable observer is framed in a free speech context as opposed to the Establishment Clause context, Professor Papandrea draws an interesting juxtaposition of the guiding principles of the "mythical reasonable observer."[43] Wrapping up with the staggering ramifications that *Walker* may unveil for government speech, readers learn that such content-based restrictions on viewpoint could become more prevalent in a society that increasingly relies on the touch of government through its services.[44]

As the Symposium pieces wind their way through free speech methodology, to scope, to individuality, to technology, and to government control, the full impact of such a broad range of scholarship becomes clear. At the Symposium presentation of *Free Speech Foundations* presented at Northwestern Pritzker School of Law in October 2015, the attendees were able to witness firsthand the blending of these ideas, the cooperation among the participants, and the passion that each scholar felt for the chosen topic. It is mighty infrequent that such intellectual talent and corroboration can truly occur in a symposium setting. As readers make their way through the issue, we truly hope they notice and appreciate the footnotes of gratitude the participants dedicated to the program's other authors for their insight, edits, and input. Few published symposia are able to produce a true agora of ideas, but the scholars wholly dedicated themselves to the art of the thought exchange, which helped us create a well-rounded and intuitive Issue. As editors of the *Northwestern University Law Review*, we were proud to present such a captivating conference in our own home.

This Issue and presentation would not have been possible without the vibrant ideas and continuing guidance of Professor Alexander Tsesis, who trusted us to bring this complicated Symposium to life, and we cannot thank him enough for helping us put the pieces together. Likewise, the unbelievable support and help from our Editor-in-Chief, Meghan Hammond, cannot be oversold; thank you for the time, the effort, the endless emails, and the dedication to making this happen. Similarly, we could never have put on a symposium of such excellence without the truly innovative pieces by those scholars who dedicated their summers to writing

[41] *Id.* at 1210–11.
[42] *Id.* at 1212–22.
[43] *Id.* at 1219–21.
[44] *Id.* at 1228–36.

and speaking for us; thank you so much to Professors Jack Balkin, Ashutosh Bhagwat, James Lindgren, Andrew Koppelman, Toni Massaro, Helen Norton, Mary-Rose Papandrea, and Alexander Tsesis. This Symposium would not have been possible without the unwavering support from our own faculty and administrative team at Northwestern; thank you to Jim McMasters, Jim Speta, Janice Nadler, and Jessica Clements for making an event of this scale possible. Finally, to the *Northwestern University Law Review* staff, you can never receive the thanks and the credit you deserve for choosing to put your time and energy into this publication; thank you for making this Symposium a reality.

Finally, to our readers, we implore you to read this issue, to mentally chew on its ideas, and to go forth and discuss your impressions. It is our vision to create an ongoing dialogue about this sincerely fundamental right. As lawyers, our profession is fruitless without free speech's merits. As a journal, our construction is worthless without free speech's power. And as a public, our liberty is illusive without free speech's vitality.