
THE VALUE OF FIRST AMENDMENT THEORY

*David S. Han**

I. INTRODUCTION

First Amendment scholars have long struggled to articulate a grand unified theory underlying the protection of free speech. Professor Alexander Tsesis has now thrown his hat into the ring with his own proposed “unified statement of free speech theory”: that “First Amendment doctrine should reflect a general theory of constitutional law that protects individual liberty and the common good of open society.”¹ The natural question to ask is whether Tsesis’s theory succeeds. In order to answer this question, however, one must first delineate the criteria for success; in other words, what is the purpose of First Amendment theory,² and how do we judge its value?

In Part II, I discuss the general aspiration that drives the constant search for a grand unified theory of free speech: the search for such a theory is, at its root, a search for determinacy and consistency in deciding cases. Thus, the value of a grand unified theory lies in the extent to which it guides courts to concrete results in all—or at least most—First Amendment cases. In Part III, I turn to Tsesis’s theory and evaluate it under these criteria, concluding that while his theory avoids the comprehensiveness problem that plagues traditional free speech theories, it does not function as a grand unified theory of the First Amendment, since it is either too abstract to provide concrete guidance if taken solely at face value or too complex to provide such guidance if viewed as a meta-theory encompassing multiple free speech values.

In Part IV, I highlight what I think is the true value and contribution of Tsesis’s theory: it is an elegant and insightful encapsulation of the complex interaction of multiple speech values that underlies the First Amendment—an interplay that, as Tsesis notes, is rooted in the broad structure of the Constitution itself, and one that is generally unaddressed

* Associate Professor of Law, Pepperdine University School of Law. Many thanks to Alex Tsesis for his correspondence and to Randy Kozel for his helpful comments and suggestions.

1. Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 101, 102.

2. I use the term “First Amendment” throughout this response to refer specifically to the First Amendment’s protection of free speech, not the First Amendment as a whole.

in traditional single-value First Amendment theories. As I observe, Tsisis's characterization of the First Amendment's complex theoretical underpinnings carries important implications as to how courts should approach difficult speech cases. Part V concludes.

II. THE PURPOSE OF FIRST AMENDMENT THEORY

Scholars and commentators have spilled much ink in proposing grand unified theories underlying free speech in the abstract, or the First Amendment's protection of free speech in particular.³ The most prominent of these theories contend that speech must be protected to aid in the pursuit of truth, to effectuate democratic self-governance, or simply as an integral aspect of individual autonomy and self-expression.⁴ But these are not the only theories that have been offered; for example, scholars have argued that free speech is an essential means of promoting tolerance,⁵ that it serves to check governmental abuse,⁶ and that it acts as a safety valve for those holding dissenting views.⁷

It is safe to say that none of these single-value theories,⁸ standing alone, has achieved any sort of academic or judicial consensus as the grand unified theory of free speech.⁹ Nevertheless, attempts to identify an overarching First Amendment theory persist. This raises two questions that are inextricably intertwined: What drives this strong desire to articulate a unified theory of free speech, and how does one evaluate the success of any such proposed theory?

As Tsisis indicates, the drive to identify a unifying theory of the First Amendment is ultimately rooted in a search for determinacy and

3. To be clear, the issues regarding grand foundational theory that I discuss in this section are not unique to First Amendment jurisprudence; they are representative of a longstanding debate that extends to constitutional law as a whole. *See, e.g.*, Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 572–76 (1999) (defending traditional constitutional theory “[a]gainst the claims of methodological pragmatists”); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1332 (1988) (“Constitutional law needs no grand theoretical foundation. None is likely ever to be forthcoming, and none is desirable.”).

4. *See* David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 89–93 (2012) (describing the three traditional theories underlying the protection of free speech).

5. *See* LEE C. BOLLINGER, *THE TOLERANT SOCIETY* (1986).

6. *See, e.g.*, Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

7. *See, e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 885 (1963).

8. By “single-value” theories, I mean theories that aspire to unify First Amendment doctrine under a single delineated purpose for protecting free speech—such as, for example, preserving autonomy, effectuating democratic self-governance, or uncovering truth.

9. *See, e.g.*, Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 U.C.L.A. L. REV. 1615, 1616 (1987) (surveying recent attempts to formulate an overarching First Amendment theory and concluding that “[n]one of them . . . is acceptable as a general theory of the first amendment”); Lawrence B. Solum, *The Value of Dissent*, 85 CORNELL L. REV. 859, 859 (2000) (observing that “despite an outpouring of scholarly effort” to identify a grand unified theory of freedom of expression, “the consensus is that free speech theory has failed to realize this imperial ambition”).

coherence: the hope is that such a theory would yield more definite answers in First Amendment cases.¹⁰ Under this foundationalist perspective, First Amendment theory provides tangible “cash value” insofar as it gives courts concrete predictive or prescriptive guidance in deciding individual cases.¹¹ Furthermore, if a theory aspires to be the unified theory of the First Amendment, then it must also be *comprehensive*: It must yield more definite answers in all—or at least a considerable majority of—First Amendment cases.¹²

Underlying this drive towards determinacy and consistency is the broad assumption that specific cases can be decided by logical deduction from foundational premises.¹³ In the First Amendment context, foundationalist approaches seek the sort of determinacy and consistency that can only be achieved when the answers to particular First Amendment cases are deducible from an overarching theory regarding the purpose of the First Amendment.¹⁴ As Steven Smith has observed, this aspiration towards determinacy and consistency through deduction explains the particular allure of single-value unified theories of the First Amendment, since single-value theories “seem[] more likely to yield definite answers to specific First Amendment questions.”¹⁵

By contrast, when multiple First Amendment values are recognized, deriving answers through deduction from foundational principles becomes far more difficult, if not impossible. Values may be incommensurable against each other, or they may directly conflict; thus, case-specific and practical judgments may be inevitable.¹⁶ Some degree of co-

10. See Farber & Frickey, *supra* note 9, at 1615 (“These writers attempt to identify a single unifying purpose to the first amendment, from which they then deduce answers to concrete first amendment problems.”); Tsesis, *supra* note 1, at 104 (describing how his theory has “greater explanatory power than any of the three major interpretive methodologies of free speech”); *id.* at 105 (arguing that his theory “can provide aspirational guidance and predictive consistency, which legislators can then translate into policy and judges can interpret into doctrine”).

11. See Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 U.C.L.A. L. REV. 1405, 1417 (1987) (stating that the “principal goal” of First Amendment theorists is to “replace uncertainty with certainty,” which would involve giving “clear guidelines for decisionmakers” and “clear rules for decision”); Solum, *supra* note 9, at 859 (“One ambition of [First Amendment] theorizing is the production of a comprehensive theory of the freedom of expression, a set of consistent normative principles that would explain and justify First Amendment doctrine.”).

12. See Solum, *supra* note 9, at 860 n.4 (describing the difference between “global” theories of free expression that aspire for comprehensiveness and “local” theories that address “some portion of free speech doctrine without attempts at global synthesis”).

13. See Farber & Frickey, *supra* note 9, at 1617 (observing that “[f]oundationalism . . . limit[s] our analytical tools to deductive reasoning”); Tsesis, *supra* note 1, at 105 (arguing that his theory “can provide . . . predictive consistency” that “judges can interpret into doctrine”).

14. See Farber & Frickey, *supra* note 9, at 1615. Practically speaking, not all cases would necessarily involve direct deduction from abstract theory; the deductive process might operate through the application of precedent that has previously operationalized the theory in question. See Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1845 (2013) (observing that the existence of precedent sometimes “leads the Justices to embrace a constitutional interpretation despite reservations about its soundness”).

15. Steven D. Smith, *Believing Persons, Personal Believings: The Neglected Center of the First Amendment*, 2002 U. ILL. L. REV. 1233, 1240.

16. See *id.*

herence might perhaps be introduced through a system of lexical priority, in which certain free speech values are deemed to trump others should they come into conflict.¹⁷ But without any such set of robust priority judgments, a multiple-value system cannot provide the sort of determinacy and consistency that is the *raison d'être* behind grand unified First Amendment theories.

As Tsisis and others have noted, if grand unified theories of the First Amendment are ultimately judged based on determinacy, consistency, and comprehensiveness,¹⁸ none of the traditional single-value theories pass muster.¹⁹ For example, democracy-based theories of speech have struggled to explain why artistic expression and private speech ought to be entitled to First Amendment protection.²⁰ Autonomy-based theories of speech fail to articulate clear limiting principles, both as to why such rationales should apply only to speech as opposed to all individual conduct,²¹ and as to when an individual's interest in self-expression ought to be trumped by other interests geared towards the common good.²² And the "pursuit of truth" theory leaves large swaths of First Amendment doctrine unexplained,²³ while also resting on the perhaps misbegotten assumption that truth will necessarily prevail in an open clash of ideas.²⁴

The persistent challenges of identifying a unified, single-value theory of free speech have produced a profound skepticism amongst many scholars that any such theory actually exists.²⁵ These scholars generally

17. See Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2372 (2000) ("When theories conflict with each other, courts must decide the order in which theories should take precedence. To say, therefore, that a theory like 'individual self-fulfillment' or even the marketplace of ideas is not powerful is to say that it ranks low in this lexical order, and that it cannot explain many decisions whose outcomes are not also required by lexically prior theories.").

18. This is assuming, of course, that the theory meets some baseline standard of substantive plausibility. An utterly implausible theory has little value even if it meets the criteria set forth above. See Douglas Laycock, *Constitutional Theory Matters*, 65 TEX. L. REV. 767, 775 (1987) ("Some theories are too implausible to matter").

19. See Tsisis, *supra* note 1, at 102 (stating that the traditional theories "are all too narrow to describe the entire range of concerns embedded into the First Amendment's Free Speech Clause").

20. *Id.* at 122-24.

21. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971) (observing that autonomy-based rationales "do not distinguish speech from any other human activity").

22. See Tsisis, *supra* note 1, at 117 ("Self-realization is limited by the rights of others, not all of which are speech based.").

23. See, e.g., *id.* at 126; James Weinstein, *Database Protection and the First Amendment*, 28 U. DAYTON L. REV. 305, 324 (2002) (observing that under the marketplace of ideas theory, the First Amendment would not "allow the government to subsidize pro-democracy speech or speech promoting racial tolerance while refusing to fund pro-communist or racist speech").

24. See, e.g., FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 130 (1982) (noting that the truth-based theory "presupposes a process of rational thinking" and therefore "weakens or dissolves when the process does not obtain").

25. See Cass, *supra* note 11, at 1422 ("[T]he protection accorded speech has never represented a commitment to any single principle or value."); Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 386 (2014) (observing that no single speech value "by itself adequately explains all of the terrain below the line of elevated scrutiny, or offers a complete explanation for speech that falls above-the-line but is unprotected due to the many doctrinal caveats").

argue that First Amendment theory must be eclectic, since the full range of First Amendment cases implicates multiple sets of values and policy issues,²⁶ including considerations unrelated to speech.²⁷ Furthermore, they argue against a purely deductive mode of reasoning from abstract principle²⁸ in favor of a more open-ended approach based on practical reason—an approach that also takes history and context into account, with a healthy recognition of the value of dialogue and deliberation amidst unavoidable ambiguity and complexity.²⁹

Many scholars—myself included—are sympathetic to this view of First Amendment theory. But even those who are most skeptical of the existence of a grand unified First Amendment theory cannot categorically dismiss the possibility that such a theory exists. As Steven Shiffrin has noted, “an eclectic approach affirms a negative,” as it “denies the possibility of any general theory that would dictate solutions in most concrete cases.”³⁰ In this context, “[p]roving a negative . . . requires refutation of the alternatives and there is no way to assure that all alternatives have been canvassed.”³¹ Just because a successful general theory of the First Amendment has yet to be identified does not mean such a theory does not exist.

III. INDIVIDUAL LIBERTY AND THE COMMON GOOD AS A GRAND UNIFIED THEORY

Given these criteria for evaluating a grand unified theory of the First Amendment, let's turn to Tsisis's proposed theory. Recognizing the shortcomings of the most prominent single-value First Amendment theories, Tsisis's theory takes a radically different approach. According to Tsisis, the “unified statement of free speech theory” is that First Amendment doctrine should “protect[] individual liberty and the common good of open society.”³² In other words, “[t]he First Amendment should be understood as an essential component of a nation whose pri-

26. Farber & Frickey, *supra* note 9, at 1627 (“Each first amendment case—or at least each important or difficult case—involves a unique pattern of conflicting values and policy issues.”); see also Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1252 (1983) (observing that the Supreme Court “has been unwilling to confine the first amendment to a single value or even to a few values”).

27. See Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 435 (1992) (“Because free speech values do not exist in a void but interact with society in complicated ways, free speech must yield in certain limited circumstances to social regulation.”).

28. Farber & Frickey, *supra* note 9, at 1617 (“By confining reason to logical deduction from set premises, foundationalism curtails the use of our most powerful problem-solving abilities.”).

29. *Id.* at 1646 (contrasting pure deduction with “practical reason,” which involves, for example, “concern for history and context,” “some faith in dialogue and deliberation,” and “an appreciation of the complexity of life”); see also Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 838–39 (1988) (observing that “[p]ractical reason is . . . a grab-bag of methods” that includes “anecdote, introspection, imagination, common sense, intuition . . . , empathy, . . . metaphor, analogy, precedent, custom, memory, ‘induction’ . . . , ‘experience.’”).

30. Shiffrin, *supra* note 26, at 1255 (1983).

31. *Id.*

32. Tsisis, *supra* note 1, at 103.

mary purpose is the protection of individual rights for the common good.”³³ In Tsesis’s view, First Amendment doctrine should reflect the understanding that “each individual has an equal claim to government safeguards of fundamental and legally created rights,” but where these claims conflict, “concerns for the general welfare become deciding factors.”³⁴ This understanding, Tsesis observes, derives from “the very function of a constitutional democracy”—it reflects the broad values that underlie the entire constitutional framework.³⁵

Tsesis’s approach is notably different from the traditional theoretical approaches, as it operates at a higher level of abstraction than such approaches. If one of the major shortcomings of the traditional approaches is their lack of comprehensiveness—that is, a failure to account for the full range of First Amendment cases—Tsesis avoids this shortcoming by offering a more generalized theory that appears capacious enough to include the whole range of First Amendment coverage within its scope. In doing so, Tsesis sidesteps one of the most common critiques leveled against the traditional theories.

But as discussed above, the success of Tsesis’s formulation as a grand unified theory ultimately rests on the extent to which it leads courts to more definite answers in most individual cases. And under this criteria, I am skeptical that it succeeds. The major advantage that Tsesis’s theory has over traditional single-value First Amendment theories—its all-encompassing nature—also works to its disadvantage, for two reasons. First, his theory, if taken on its face without any additional glosses, is simply too abstract to act as a guide to judicial decisionmaking in individual cases. Second, when one does include Tsesis’s additional glosses—that is, reading his theory as effectively incorporating the traditional rationales of autonomy, democratic self-governance, and truth-seeking—his approach reveals itself as a multiple-value theory that, by nature, cannot produce determinacy and consistency in individual cases.

To illustrate the first point, let’s look at the democratic self-governance theory as applied by the Supreme Court in *Snyder v. Phelps*.³⁶ Writing for the majority, Chief Justice Roberts explicitly identified this theory as the analytical starting point;³⁷ from this theory, he extracted the general principle that speech on matters of public concern is entitled to greater constitutional protection than speech on matters of

33. *Id.* at 128.

34. *Id.*

35. *Id.* at 128–29. See also Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609, 1612–13 (2013) (arguing that “a simple maxim is at the root of the Constitution”: that “[t]he underlying purpose of government is to secure equal rights for the common good”).

36. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

37. *Id.* at 1215 (“The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”).

private concern.³⁸ Finally, he applied this principle to the facts, finding that the Westboro Baptist Church's protest constituted speech addressing matters of public concern that is entitled to substantial First Amendment protection.³⁹ Thus, despite democratic self-governance theory's shortcomings as a grand unified theory, it does have some capacity to provide concrete guidance in judicial decisionmaking.

Contrast this with Tsisis's theory that "[t]he First Amendment should be understood as an essential component of a nation whose primary purpose is the protection of individual rights for the common good."⁴⁰ For now, let's take his theory strictly on its face, without any additional normative glosses beyond this abstract formulation. While Tsisis's theory is surely more expansive than the democratic self-governance theory, his theory by itself would not offer much concrete guidance to the *Snyder* Court. If Chief Justice Roberts used Tsisis's theory as a starting point, then it's unclear how he would operationalize the theory into legal principles that create determinacy and consistency. What is the scope of the individual liberty in question? What constitutes the "common good," and what sorts of social harms should count in the balancing calculus?⁴¹ Without any underlying normative theory (or theories) to give it a meaningful degree of guidance, Tsisis's theory is simply too general and abstract to produce practically useful principles that can guide courts to results in particular cases. Like, say, a grand unified theory that "speech should be protected unless it causes too much harm," Tsisis's theory is pitched at such a high level of abstraction that without any more targeted and robust normative theories to fill it out, it can be applied to justify a wide range of possible results.⁴²

Tsisis, however, does not actually present his theory in this bare-bones form. Rather, he fills it out by folding into it all of the traditional rationales: autonomy, democratic self-governance, and truth-seeking.⁴³

38. *Id.* (observing that because "speech concerning public affairs" is "the essence of self-government," such speech "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection").

39. *Id.* at 1216–17 (analyzing the content of the church's signs and the context of the speech).

40. Tsisis, *supra* note 1, at 128.

41. After all, if listeners suffer severe moral offense based on the ideas contained in speech, this certainly represents a form of social disutility, at least in the abstract. The democratic self-governance theory is sufficiently particularized to resolve this issue—even morally offensive ideas must get a fair hearing in order to ensure optimal decisionmaking by self-governing sovereigns—but Tsisis's theory, at least on its face, is not.

42. See Frederick Schauer, *Codifying the First Amendment*: New York v. Ferber, 1982 SUP. CT. REV. 285, 312 ("Use of a single principle to deal with all of our problems produces application that is more likely to be conclusory than principled."); Shiffrin, *supra* note 26, at 1254 ("[T]here are limits to the level of generality we can achieve in free speech theory without falling into triviality or falsehood.").

43. See Tsisis, *supra* note 1, at 129 ("A well-rounded theory of free speech should explain the need of a constitutional guarantee that integrates the three most common understandings of free speech into a more complete analytical framework."). Tsisis's discussion suggests that his theory incorporates additional dimensions beyond these traditional rationales, such as a general distrust of state regulation of speech. See *id.* at 133 (stating that his theory "prevents the exercise of arbitrary power"). This distrust reflects a negative theoretical approach to freedom of speech, which "focus[es] not on any special value of free speech, but on the special dangers presented by government regulation of

But in doing so, he reveals the true nature of his theory: it is a composite meta-theory that captures the complex interaction of the multiple values associated with the primary speech theories. Thus, Tsesis's theory does not qualify for "grand unified theory" status in the usual sense. It is not a single-value theory from which courts can derive concrete guidance through deductive reasoning. It is a multiple-value theory without any robust and clear rules of lexical priority⁴⁴—and as discussed above, such a theory cannot, by nature, function as a coherent grand unified theory, since it cannot produce determinate and consistent results through pure deduction.

Thus, Tsesis's theory—whether viewed in isolation or as a composite theory encompassing the traditional theories of free speech—does not satisfy the criteria for a grand unified theory of the First Amendment. Yet Tsesis's theory is valuable and important for a very different set of reasons, to which I now turn.

IV. INDIVIDUAL LIBERTY AND THE COMMON GOOD AS AN ECLECTIC, MULTIPLE-VALUE APPROACH

As discussed above, Tsesis's theory is not a foundational grand unified theory of the First Amendment in the traditional sense. Rather—although Tsesis himself might resist this characterization⁴⁵—it is a composite meta-theory that, in practice, encapsulates the sort of eclectic, multiple-value approach advanced by anti-foundationalist scholars. Thus, in my view, the value of Tsesis's theory lies in its acknowledgment and embrace of *complexity*: its recognition that values such as democratic self-governance, autonomy, and truth-seeking all play a necessary role in the calculus, and that the interaction between these values can be complicated, messy, and context-specific. His theory makes the insightful and important observation that the complexity of the First Amendment is fundamentally the same complexity that arises from the general goal of constitutional democracy: How do we protect individual liberty for the common good of society at large?

Unlike the traditional, single-value First Amendment theories, Tsesis's meta-theory expressly recognizes the reality of overlap and conflict between different speech values—the sort of complex interaction that is a fundamental aspect of our underlying intuitions regarding the protection of free speech.⁴⁶ For example, preserving individual autonomy

that right." Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51, 89 (1994).

44. Tsesis's broad formulation of his theory does not, on its face, indicate any clear hierarchy of values when the multiple values in question conflict, and Tsesis never clearly indicates whether one value consistently trumps the others whenever they come into conflict.

45. See Tsesis, *supra* note 1, at 105 (contrasting himself from theorists "who believe a search for comprehensive theory is distracting and hopeless").

46. *Id.* at 129 (observing that autonomy, truth-seeking, and democratic self-governance "cannot be unbundled in a constitutional democracy").

by protecting speech might, in itself, establish the social preconditions for effective self-governance.⁴⁷ Or certain speech might promote individual self-realization while degrading the ability of others to partake in democratic self-governance.⁴⁸ Single-value speech theories, by nature, cannot adequately account for these sorts of complex interactions, which are rooted in the pragmatic observation that speech regulation involves a confluence of multiple values.⁴⁹ Tsisis's meta-theory embraces the eclectic set of values that underlie the First Amendment's protection of free speech and the many ways in which these values interact.

As Tsisis observes, understanding this complex interplay of values is necessary to fully appreciate the difficult judgments required in cases dealing with, for example, defamation, IIED, and hate speech. And although I have some quibbles regarding his application of the traditional theories in these areas,⁵⁰ Tsisis's theory elegantly captures the clash of values that stands at the center of these cases. We want to preserve people's right to self-expression and the integrity of democratic self-governance—values that are, in reality, often tied together in complex ways, particularly in cases like *New York Times v. Sullivan*⁵¹ and *Snyder*.⁵² At the same time, we need to account for the harm speech can inflict on the dignity of others and the extent to which speech might in fact undermine unfettered participation in democratic processes—like, for example, in the context of hate speech.⁵³ In a messy and complicated world, both the value of speech and the social harms associated with speech represent an intertwined web of values that often overlap, reinforce, or conflict with each other.⁵⁴ And as Tsisis observes, this is, in fact, the same complexity that underlies the entire project of constitutional democracy:

47. *Id.* at 119 (“[T]he Court has time and again integrated the values of the speaker with the social need for communicative liberties.”).

48. *Id.* at 140–53 (analyzing hate speech regulations); see also Post, *supra* note 17, at 2369 (“American courts have consistently opted to protect individual autonomy against regulations of public discourse designed to maintain the integrity of collective thinking processes.”).

49. See Shiffrin, *supra* note 26, at 1283 (“Speech interacts with the rest of our reality in too many complicated ways to allow the hope or the expectation that a single vision or a single theory could explain, or dictate helpful conclusions in, the vast terrain of speech regulation.”).

50. For example, Tsisis argues that the democratic self-governance theory alone cannot explain the high burden of proof associated with defamation of public figures or the protection accorded to emotionally charged public speech that has no truth value. Tsisis, *supra* note 1, at 132, 139. The self-governance theory, however, does arguably control these situations under a chilling effects rationale. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (observing that “erroneous statement is inevitable in free debate, and [] it must be protected if the freedoms of expression are to have the ‘breathing space’ that they need to survive”). If speech on issues of public concern is of central value to the First Amendment for self-governance reasons alone, then that theory might justify protecting even technically *unprotected* speech in order to ensure that valuable speech is not chilled. See David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135, 1159–61 (describing chilling effects and their role in First Amendment doctrine).

51. 376 U.S. 254 (1964).

52. See Tsisis, *supra* note 1, at 130–40.

53. See *id.* at 140–53.

54. See Farber & Frickey, *supra* note 9, at 1640 (“Rather than thinking of free speech as one level in a hierarchy of values, it may be better to think of it as part of a web of mutually reinforcing values.”).

elucidating how exactly we can preserve individual liberty for the common good.⁵⁵

This recognition of multiple First Amendment values and the complexity resulting from their interactions has important implications as to how difficult speech issues ought to be approached. Tsisis's project, in my view, falls within the tradition of the First Amendment anti-foundationalists, who argue that First Amendment jurisprudence involves a complex interplay of different values that is best developed via pragmatic deliberation and dialogue in addition to pure deduction.⁵⁶ Indeed, Tsisis's explication of his overarching constitutional theory implies this approach to First Amendment analysis; as he observes, "[d]eliberation is essential to flesh out general statements of ultimate value," and "[t]erms charged with ideological value . . . require elaboration through formal political channels, town squares, social media, and face-to-face debates."⁵⁷ If the whole scope of First Amendment coverage cannot be reduced to a single foundational free speech value or a concrete hierarchy of values, then pure deduction will often be insufficient to solve difficult First Amendment cases.⁵⁸ Clarity and determinacy—if they are possible at all—must necessarily emerge from a pragmatic approach encompassing history, context, dialogue, and open-ended deliberation.⁵⁹

And as Tsisis makes clear, this approach to resolving difficult First Amendment questions is a microcosm of constitutional decisionmaking on a broader sense: we can only give meaningful content to "general statements of ultimate value"—like "individual liberty" and the "common good"—through these sorts of deliberative processes. Both his theory and his characterization of his theory within the broader constitutional framework serve as a valuable reminder of how complex these sorts of constitutional judgments can be and the significant efforts necessary to make such judgments. Tsisis's recognition of complexity and its ramifications serves as a welcome counterpoint to traditional First Amendment theories, which generally overlook such considerations.

V. CONCLUSION

Professor Tsisis's framing of the First Amendment as an application of broader constitutional norms preserving individual liberty and advancing the common good uniquely captures the complex dynamic underlying

55. Tsisis, *supra* note 1, at 128.

56. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, n. 120 (1987).

57. Tsisis, *supra* note 1, at 110. Tsisis does not conceive of this deliberative process as completely unbounded, but rather as premised on "the aspirational directive to pursue justice and equality." Tsisis, *supra* note 35, at 1654.

58. See Farber & Frickey, *supra* note 9, at 1645 ("A supportable answer may sometimes descend from deductive analysis alone. More often such an answer will ascend from a combination of arguments, none of which standing alone would constitute a sufficient justification.").

59. See, e.g., Massaro, *supra* note 25, at 436 ("A multi-factored, pragmatic and non-formalist approach to freedom of speech best describes the free speech doctrine we have, and is a better way to develop that doctrine going forward than is close-ended formalism.").

First Amendment doctrine. Individual autonomy must be preserved, for example, but it must be preserved in the context of a democratic constitutional structure where citizens are free to “voice their separate opinions and to compromise in the interest of community unity.”⁶⁰ As Tsesis observes, this complex dynamic is merely representative of the broad project encapsulated in the Constitution and the Declaration of Independence: the development of a state that preserves and protects individual liberty, yet does so in a manner geared to securing the common good of all.⁶¹ While Tsesis’s theory may fall short of the likely unattainable standards of a grand unified theory of the First Amendment, it is ultimately a valuable and insightful representation of the true complexity of the First Amendment—a complexity that is better confronted by directly embracing it with reasoned deliberation, practical balancing, and dialogue rather than searching for a single skeleton-key value.

60. Tsesis, *supra* note 1, at 107.

61. *See id.*