A FEW THOUGHTS ON *FREE SPEECH CONSTITUTIONALISM*

*Helen Norton**

In his thought-provoking article, Professor Alexander Tsesis rejects traditional theories that the First Amendment is primarily informed by individual autonomy, political self-governance, or enlightenment values. Finding each of these theories incomplete in their explanatory power, he blames these flaws on "their supporters' almost single-minded emphasis on First Amendment values."[1] Identifying the Declaration of Independence and the Preamble to the Constitution as articulating the premises underlying all constitutional theory, he urges instead that "First Amendment doctrine should reflect a general theory of constitutional law that protects individual liberty and the common good of open society."[2]

I fully agree that none of the traditional theories of the First Amendment is adequate by itself. But unlike Professor Tsesis, I am among those who remain skeptical of the possibility—as well as of the value—of identifying a single theory that is complete in its explanation of the First Amendment. As Steven Shiffrin has observed, "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."[3] For these reasons, I am persuaded by Toni Massaro's more recent suggestion that

> The right theoretical question is not whether a theory solves every free speech problem, but whether it casts meaningful light on the difficult task of explaining the fundamental purpose of the First Amendment. Does it better guide judges and scholars than other

* Professor, University of Colorado School of Law.

1. Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV 1015, 1042 (2015).

2. *Id.* at 1017.

3. Steven M. Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1283 (1983); *see also id.* at 1251–52 ("For many years, the Court has pursued what I call a general balancing methodology or an eclectic approach, and I believe it has been right in doing so. . . . The Court's approach has been eclectic in several respects. First, in striking a general balance, the Court has been unwilling to confine the first amendment to a single value or even to a few values.").

> theories do, while respecting other legitimate government purposes?[4]

As I will briefly explain in the next few pages, I think that Professor Tsesis's project does indeed cast meaningful light on our understanding of free speech theory, even while he has more work to do in offering guidance to judges and scholars wrestling with challenging First Amendment problems.

On one hand, he valuably illuminates potential purposes of the First Amendment (and indeed of the entire Constitution) by proposing to integrate deontological and consequentialist goals of autonomy and governance into a single theory: "The First Amendment, then, is not exclusively concerned with self-expression nor self-government but a combination of the two."[5] At times he proposes this integration in the conjunctive—that the Constitution seeks to protect individual liberty and the common good.[6] At other times, however, he suggests that the protection of individual liberty is instead a means to the collective end of promoting the common good—that government must "protect individual rights for the common good."[7] His conclusion offers a somewhat different framework, characterizing the purpose of the Constitution as "the development and enforcement of policies conducive to the public good that safeguard individual liberties on an equal basis."[8] These various formulations suggest somewhat different applications, and I hope that Professor Tsesis will clarify and elaborate them in future work. For now, it seems to me that his theory is most accurately articulated as protecting individual rights as a means for achieving the end of the common good—not only because this conceptualization appears most frequently within his Article, but also because it offers a method for resolving the inevitable tensions between individual rights and the collective public interest. In other words, I read Professor Tsesis to urge that individual rights are generally to be protected not only for their own sake but also because they generally tend towards the common good—except in those (relatively rare) cases when their exercise endangers the collective good, in which case individual rights must give way to that good. His theory thus offers a tiebreaker for resolving First Amendment challenges to the government's regulation of speech in ways that endanger individual rights while advancing the collective public interest. In this way, his theory meets Professor Massaro's aspiration that "[t]he real value of the free

4. Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 393 (2014); *see also id.* at 367 ("Efforts to reconcile these doctrinal results, or to offer one, unifying theoretical framework for First Amendment problems, fail. They are stymied by the sprawl of First Amendment coverage, the changing variables and policies that influence the free speech balance across contexts, the common law resistance to abandonment of precedent, and the internal cacophony that all of this produces. A better understanding of free speech practice requires thinking that is factored, not formulaic; contextual, not trans-contextual; dynamic, not static; tentative, not absolutists; plural, not singular.").

5. Tsesis, *supra* note 1, at 1043.

6. *See, e.g.*, *id.* at 1017, 1018–19, 1044.

7. *Id.* at 1019; *see also id.* at 1017, 1027, 1032–33, 1043–44.

8. *Id.* at 1067.

speech theories is that they remind judges of the normative stakes of doctrinal decisions. Even the most romantic rhetoric is of practical use because it cautions judges about pathological fears . . . ."[9]

Indeed, in this respect Professor Tsesis' integrationist goal is akin to that of Steven Heyman in its ambition and generosity of spirit. Professor Heyman proposes a "liberal-humanist" view of the First Amendment that "recognize[s] both sides of our nature: it must affirm the value of individual autonomy as well as of the social dimension of liberty—the freedom that we find through relationship with others."[10] While Professor Tsesis relies on the Declaration of Independence and the Preamble to the Constitution as textual and democratically legitimate sources of his theory, Professor Heyman relies instead (but relatedly, given its shared roots in Locke's natural rights theory[11]) on a theory of the self, in which we "realize our nature and find fulfillment not only through the development of our individuality, but also through social relationships and participation in community,"[12] and a corresponding theory of the state as "a framework within which members of the political community can deliberate and act together for the common good, and thereby also shape and express their common identity."[13] To be sure, the targets of the two papers are a bit different: Professor Heyman's work seeks directly to reject the "conservative-libertarian approach" to the First Amendment that often commands a majority on today's Supreme Court,[14] while Professor Tsesis targets instead what he sees as the incompleteness, and thus inadequacy, of traditional First Amendment theories.[15] Even so, like Professor Heyman, Professor Tsesis rejects libertarian understandings of the First Amendment as inappropriately single-minded and self-absorbed, as failing to recognize the Constitution's emphasis on collective goals along with the protection of individual rights.[16]

Professor Tsesis's project is admirably ambitious in aspiring to identify a unified free speech theory by integrating the Constitution's deontological and consequentialist goals. Such an integration is attractive, among other reasons, because it appears to release us from having to choose between important individual and collective goals in at least some cases.

9. Massaro, *supra* note 4, at 390.

10. Steven J. Heyman, *The Third Annual C. Edwin Baker Lecture for Liberty, Equality, and Democracy: The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 343 (2014).

11. *Id.* at 328.

12. *Id.* at 320.

13. *Id.* at 322.

14. *Id.* at 238 (charactering the Court's approach as "based on an excessively narrow and one-sided view of the self—a view that stresses the ways in which we are separate and independent individuals, but that fails to adequately recognize the social dimension of human life").

15. Tsesis, *supra* note 1, at 1042.

16. *Id.* at 1067 ("I have sought to demonstrate that a better approach to free speech theory is one that allows government actors to advance the underlying purpose of the Constitution," which, among other things, better explains "why speech is not purely libertarian since it can harm the legally recognized interests of other members of a complex society.").

In hard cases, however, we must choose. Indeed, that's what often makes them hard cases. To this end, Professor Tsesis has more work to do in conceptualizing what he means by "the common good" to guide judges and scholars working through vexing free speech controversies. Relatedly, has he yet to identify the level of scrutiny, or suspicion, that judges should apply when evaluating challenges to the government's regulation of individual speech rights ostensibly to advance the public interest.

For example, I remain unsure at what point Professor Tsesis would find that hate speech unacceptably threatens the public good such that government may regulate it consistent with the First Amendment. At times, I read his paper to urge the regulation of hate speech that rises to the level of incitement or true threats, broadly understood—i.e., speech that the Court's current First Amendment doctrine arguably already treats as unprotected.[17] At other times, however, I read his Article to suggest an understanding of the First Amendment that would permit regulation of a considerably wider swath of hate speech, akin to approaches adopted by Canada and a number of European nations.[18] In other words, we could use more help from Professor Tsesis in determining when hate speech sufficiently endangers the common good to justify its regulation consistent with the First Amendment.

Relatedly, I wonder how Professor Tsesis would define the "common good" outside of the copyright, defamation, and hate speech contexts specifically discussed in his Article. Consider, for example, campaign finance laws that limit expenditures, contributions, or other political activity by corporate, wealthy, or other often-powerful parties. As Kathleen Sullivan points out, the constitutional debates over campaign finance reform involve a clash between two visions of free speech that vigorously contest the meaning of the public good.[19] More specifically, in *Citizens United v. Federal Election Commission*, the Court concluded that protecting the ability of all speakers—corporate or otherwise—to add to public discourse advances the public's interest in fully informed decision-making more generally.[20] In contrast, the dissent urged that measures that prevent wealthy or otherwise powerful speakers from dominating or distorting public discussion through their greater resources instead valuably protect listeners'—and thus the public's—interests.[21] In other words, the controversy in Citizens United was not over whether we should interpret the Constitution to protect the public's collective interest, but instead over whether the government's campaign finance restriction furthered or frustrated that interest. Even if we agree with Professor Tsesis- that we should interpret the Constitution to pro-

17. *See id.* at 1058–61.
18. *See id.* at 1062–66.
19. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010).
20. 558 U.S. 310, 349–54 (2010).
21. *See id.* at 469–72 (Stevens, J., dissenting).

tect individual rights for the common good—and we may or may not—we thus may still vigorously contest the meaning of the "common good" in the context of campaign finance regulation and elsewhere.

How should scholars and courts be guided in determining the "common good"? That is no easy question, and to be clear, I think that some amount of indeterminacy in First Amendment law is unavoidable and sometimes even quite valuable.[22] But Professor Tsesis' optimism and idealism perhaps lead him to underestimate this challenge, as his article does not yet appear fully to acknowledge it. For this reason, it has yet to offer the "predictive consistency" that he identifies as among the benefits of a unified constitutional theory.[23] So I look forward to learning more from Professor Tsesis about how he would give content to the "common good" when that good is contested—i.e., in the hard cases. To be sure, he promises future work in this area,[24] and I very much look forward to it.

22. *See* STEPHEN BREYER, ACTIVE LIBERTY 124–33 (2005) (explaining that unpredictability may be inevitable in most judicial enterprises); Heyman, *supra* note 10, at 325 ("[J]udges must use all of their faculties to discern the interpretation that most accords with our society's understanding of constitutional principles. In doing so, they are likely to disagree about many of the difficult cases that come before them. But such disagreement is inevitable. When the community itself is divided on matters of basic principle, it is too much to expect that this division will not be reflected in all their government institutions, including the courts.").

23. *See* Tsesis, *supra* note 1, at 1019.

24. *Id.* at 1044.