CLARIFYING FREE SPEECH CONSTITUTIONALISM

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Judges and scholars often treat First Amendment concerns apart from other constitutional issues. They typically focus on specific doctrines, dealing with matters such as advertisement, defamation, and incitement, without giving much reflection to competing public interests. While often complex and insightful, these discussions tend to be silent about how particular free speech matters relate to broader theories of constitutionality. The aim of my article, *Free Speech Constitutionalism*, is to articulate the robust relationship between comprehensive constitutional principles and expressive freedoms.

In this and other articles, I argue that the underlying value of the Constitution is to create a stable legal scheme for securing individual rights and advancing the general welfare.[1] A constitutional theory of free speech should provide a framework for examining the legitimacy of various doctrines and for construing various laws, regulations, and customs. A contextual model of free speech should contain the major premises for resolving conflicting claims between speakers' rights and regulatory limits on communications.

As a general matter, constitutional values are binding against contrary policies, statutes, and doctrines. Normative interpretation provides the parameters against which social rules can be tested for consistency with the essential mandates of constitutional governance. In *Free Speech Constitutionalism*, I argue that government, in all its institutions, is created to achieve the synthetic purpose of protecting individual rights on an equal basis in order to achieve the common good. I derive this principle both deductively from the ideals of representative democracy, and inductively from the Declaration of Independence and Preamble to the Constitution.

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1. Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1042 (2015); Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609, 1654 (2013).

A theoretically satisfying explanation of free speech should discount neither the private nor public aspects of the First Amendment. Those are interlinked because the legitimacy of representative democracy is determined by the ability of government to administer offices for the betterment of the people as equal, effective participants in the political dialogue of lawmaking. In their treatment of people as intellectual, political, expressive, and volitional beings, institutional players must abide by a set of norms that prohibit arbitrary uses of power and grant adequate authority for the advancement of beneficent public programs. Speech regulations should demonstrate clear legislative recognition regarding the profound personal value of self-expression and the need for social rules in resolving the inevitable private and public conflicts of interests.[2] Only careful consideration of the facts of a case, the details of a law, and the principles involved can adequately identify the full range of relevant factors. Contrary to the Supreme Court's suggestion,[3] a categorical approach to lower level speech based on history and tradition is not enough to evaluate all relevant factors related to the appropriate level of scrutiny. Contextual and content rich evaluations are indispensable. In some disputes, dealing with private matters and private speakers, such as those involved in common law defamation claims, no more than rational review is needed;[4] however, where conflicting interests arise involving speech about public matters and public figures, only actually malicious speech can be restricted.[5] Determining whether speech concerns a private or public matter and identifying the appropriate level of scrutiny, requires judges to evaluate the whole record to understand the context, content, and form of the communication.[6] A full resolution requires the court to address all the relevant constitutional claims pertinent to comprehensive judgement.

My synthetic formulation of deontic and consequential constitutionalism is meant to shed light on the intrinsic liberty of each human being and the limits placed by the mutually binding compact of national constitutional principle. The ability to speak and communicate ideas is personally cathartic and fulfilling, as well as being essential to the improvement of general welfare and the exercise of political institutions. In short, free speech has a holistic value to individuals and society that traditional theories unnecessarily compartmentalize.

First Amendment jurisprudence, as Professor Mark Graber explains, has been "somewhat insulated from broader constitutional

2. *See* Cohen v. California, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.").

3. United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012).

4. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (*Dun & Bradstreet*), 472 U.S. 749, 758–59 (1985) (balancing "the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression").

5. *See* New York Times v. Sullivan, 376 U.S. 254, 287–88 (1964).

6. *See, e.g.*, *Dun & Bradstreet*, 472 U.S. at 761.

projects."[7] In *Free Speech Constitutionalism*, I tried to break through the First Amendment's "partly autonomous doctrinal history" to demonstrate that the protection of free speech is part of a broader constitutional project, one that is grounded in the aim of creating institutions to protect individual autonomy, gregariousness, and rationality.

The three mainstream theories of interpretation fail to provide the "determinacy, consistency, and comprehensiveness" that Professor David Han points out should be the basis of a unified First Amendment theory.[8] *Free Speech Constitutionalism* offers an alternative to the marketplace of ideas, democratic values, and self-assertion explications theories of free speech.[9] Professor Han provides a very helpful reframing of my argument as a multi-value theory that requires judges to decide on the constitutionality of speech limiting regulations by considering all the relevant truth, autonomy, and self-government issues involved.[10] Although, here I would prefer to say that these values fall under my overarching statement of constitutional maxim, that government must protect individual rights for the common good.

My model is meant to both provide the schema for judges to identify and apply free speech values involved in litigation and any other constitutional issues that might come into play, including public safety,[11] due process,[12] or trademark.[13] The complexity of speech cases is attributable to the multiplicity of issues courts must consider. These issues are not only tied to the facts at bar, but also to the "history, context, dialogue, and open-ended deliberation," which make First Amendment law so culturally salient.[14] Testing the evolution of law, as I seek to demonstrate in *Free Speech Constitutionalism*, requires a deeper level of principle against which change can be tested for its degree of consistency with fundamental, constitutional value. This is an ideal; one that creates deliberative space for personal development, scientific advancement, and individual fulfillment.

Professor Han expresses skepticism that my theory may be at too high a level of abstraction. He is concerned that it may fail to provide courts adequate guidance to decide cases in a determinant and coherent way. Sometimes, as Han points out by relying on *Snyder v. Phelps*,[15] the Court has emphasized one factor above others.[16] In *Snyder*, the Court found the right to debate about public issues in public places to have priority over personal, emotional sensitivities of petitioners claiming

7. *See id.* at 77.
8. *See* David S. Han, *The Value of First Amendment Theory*, 2015 U. ILL. L. REV. SLIP OPINIONS 87, 87 (2015).
9. *See* Tsesis, *supra* note 1, at 1027–42.
10. *See* Han, *supra* note 8, at 92–93.
11. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2728 (2010).
12. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).
13. *See* S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 534–43 (1987).
14. *See* Han, *supra* note 8, at 96.
15. Snyder v. Phelps, 562 U.S. 443 (2011).
16. *See* Han, *supra* note 8, at 92, 95.

intentional infliction of emotional distress.[17] Yet, the majority in *Snyder* did not simply state that conclusion, but reached the priority ordering after considering the private and public interests at stake in the litigation.[18]

The Court falters whenever it fails to take both of them into account. In *Citizens United v. Federal Election Commission*, the Court ignored the personal differences between private citizens and corporations.[19] The majority found that corporations have the same free speech rights as individuals in matters of campaign financing. In its holding, the Court's focus was on the ability of the public to gain political information.[20] Lost in the opinion is the very real concern of ordinary speakers, lacking the enormous coffers of publicly traded entities, to have their messages heard above the din of corporate sponsored political advertising. The Court should have given greater attention to the very real private differences between natural and artificial people. Thus, the Court's First Amendment analysis in *Citizens United* lacks synthetic depth: My theory would have required the Court to consider all the private and public concerns of living and breathing voters, artificial corporations, and interested natural and business audiences before rendering judgments; not singlemindedly fixated, as the Court was in *Citizens United*, to the interest of the audience.

Complex evaluation of relevant values, texts, and facts is costly but necessary to avoid, what Professor Morton Horwitz has called, the "Lochnerization of the First Amendment."[21] *Citizens United*, as Professor Graber demonstrates, is an example of how the Supreme Court has manipulated the Free Speech Clause to thwart legislation designed to level "the political playing field" between the affluent and indigent, by a facade of neutrality between corporate and human persons.[22] A more comprehensive explication of free speech, one that contextualizes free speech disputes and other pertinent constitutional values, such as one-person-one-vote protections, is more likely to adhere to the comprehensive maxim of creating institutions for the common good by securing each person's right to enjoy franchise equality. Theories of the First Amendment that exclude either the deontic or collective values of the Free Speech Clause overlook core constitutional commitments.

Professor Norton finds my "unified free speech theory" admirable, but she "remain[s] skeptical of the possibility—as well as of the value—

17. *Id.* at 1216–17.

18. *Snyder*, 562 U.S. at 452 ("[R]estricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest").

19. 557 U.S. 961 (2009).

20. *Id.* at 369.

21. Morton J. Horwitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 109 (1993); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 589 (1980) (asserting in a case creating the current four part test for examining the constitutionality of commercial speech: "The Court in so doing returns to the bygone era of *Lochner v. New York*" (Rehnquist, J., dissenting)).

22. *See* Graber, *supra* note 17, at 75.

of identifying a single theory."[23] That concern is understandable given the many aspects of our behavior that communicate ideas. Yet, a normative necessary is essential to just constitutionalism, without it judicial doctrines are prone to politicization that push aside constitutional values in favor of subjective preferences. My aim is not to identify a methodology capable of providing a single correct answer for any given controversy, as Ronald Dworkin's moral theory might have sought.[24] Instead my project is one of identifying the correct principles to guide decision makers. In the words of Professor Toni Massaro, quoted in Norton's article, "[t]he 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."[25] The "common good" element of my theory, which Professor Norton asks me to clarify, is part of the construct that is meant to shed light on the meaning of the First Amendment within the constitutional scheme. Norton admits that "some amount of indeterminacy in First Amendment law is unavoidable and sometimes even quite valuable."[26] The inherent evolution of the term's meaning, elaborated upon through contextual and historical reasoning, is evident in the Supreme Court's use of "free speech," which has never pigeon-holed its meaning, but to the contrary, kept it open-ended enough for continuous litigation and policy making.

The relevance of the "common good" in free speech analysis is both conceptual and practical. A reply essay is too short to fully explicate the idea. It will take a future article to do so. I hope, however, that a brief statement will shed light on my meaning. In the conceptual realm, the mandate that government seek to advance the common good describes the use of authority to benefit the population as a whole, without showing any arbitrary favoritism or repression. Individual interests in the ability to engage in open dialogue and otherwise to exercise liberty, are periodically bound to come into conflict with an abstract ideal of general welfare. "General welfare" refers to public concerns at stake in limiting speech in contexts ranging from copyright[27] to public safety.[28] Free speech will sometimes need to yield to other constitutional values, such as free and open elections.[29]

23. Helen Norton, *A Few Thoughts on* Free Speech Constitutionalism, 2015 U. ILL. L. REV. SLIP OPINIONS 98, 98 (2015).

24. RONALD DWORKIN, LAW'S EMPIRE 238 *et seq.* (1986).

25. Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 393 (2014).

26. *See* Norton, *supra* note 34, at 102.

27. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (asserting that the "ultimate end" of copyright law is "to stimulate artistic creativity for the general public good").

28. Holder v. Humanitarian Law Project, 561 U.S. 1, 40 (2010) (upholding a federal ban against giving material support to designated foreign terrorist organizations).

29. Burson v. Freeman, 504 U.S. 191, 211 (1992) (stating that in rare cases a regulation of speech may survive strict scrutiny where "the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud").

By themselves, the Free Speech, Press, Assembly and Petition Clauses provide little practical guidance for resolving controversial issues such as the constitutionality, public benefit, and scope of regulations on hate speech, fighting words, commercial speech, secondary effects, revolutionary polemics, student speech, government speech, pornography and obscenity, copyright, sexual harassment, and so on. What is needed, as Professor Graber hints at in his response to this Symposium, is a system of dialogue that is robust enough to both establish legal mandate and pliable enough to offer the space for airing of ideas and collectively establishing conditions for the common good to flourish, where fairness rather than arbitrary rule is the norm.[30]

Lawmakers formulating policies and judges evaluating the constitutionality of regulations on expression, must consider whether the type of speech interest involved is one that the First Amendment protects, and whether the restriction is enforceable for a government purpose of high enough priority. This assessment is often stated in the context of one of the three principle forms of judicial scrutiny—strict, intermediate, or rational—but not all cases, such as those dealing with public employee speech rights[31] or true threats,[32] are tethered to that methodology. Instead, they require a more holistic reflection on relevant factors of personal and public interests at stake in controversies.

The pragmatic aspect of the "common good" is both prudential, in so far as it sets a mutual civic backdrop against which people engage in dialogue and debate about their private and public concerns. "General welfare" and "common good are, to adopt a term of social philosopher Jurgen Habermas, "fundamentally unsaturated."[33] These principles provide those who compose the United States polity the principled anchoring and latitude of discursive reasoning to benefit from First Amendment guarantees and to construct legal and cultural meanings. Even reciprocally beneficial limits on the rights of persons, as Habermas has explained, are "legitimate insofar as they grant equal liberties to each, so that each's freedom of choice can coexist with freedom of choice of all."[34] Through time and much social discussion and advocacy, abolition, sex equality, suffrage, healthcare, social security for the elderly, and far more have been understood to be intrinsic to national welfare. The debate is by no means at an end, nor can it ever be at an end since each generation and each individual bring new perspectives to the ongoing conversation, and there is a constant tug to further redefine its meaning. The abstraction inherent in the question of how to achieve the common good, en-

30. *See* Mark A. Graber, Harper*ooning*, Groe*ing*, *and* Brown*ing the First Amendment*, 2015 U. ILL. L. REV. SLIP OPINIONS 75, 86 (2015).

31. *See* Lane v. Franks, 134 S. Ct. 2369 (2013).

32. *See* Virginia v. Black, 538 U.S. 343 (2003).

33. Jurgen Habermas, *Remarks on Legitimation through Human Rights*, *in* THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 122 (Max Pensky trans. 2001).

34. JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 31–32 (William Rehg trans. 1996).

ables each of us, in every stage of American political evolution, to engage respectfully in the often heated polemics on the meanings of constitutional guarantees in their applications to contemporary problems. While this does not create certainty in the resolution of every difficult case, it provides the value that must guide that debate. In her response essay, Professor Margot Kaminski asserts that, "the mess of First Amendment theory is also part of its beauty."[35] That characterization is also true of the general welfare aspect of constitutional maxim, as it is located in the General Welfare Clause of the Preamble to the Constitution.

From the nation's founding, social movements have played a profound role in identifying the meaning of the common good. As with other general constitutional terms—such as "due process," "equal protection," "speech," and "religion"—what constitutes the general welfare is always subject to reinterpretation as long as legal definition does not arbitrarily infringe on fundamental rights. The common good and liberal equality play a role in what Professor Jack Balkin calls the constitutional framework:

Judges are obligated to enforce the constitutional framework and they may not vary from it. Nevertheless, by definition that framework is unfinished, offering an economy of delegation and constraint to future actors, including judges. By itself the basic framework will not be sufficient to decide many if not most constitutional controversies that arise over time. Therefore good judging requires constitutional construction within the basic framework. Judges must build constitutional doctrines that best serve constitutional functions and purposes, and they must apply them to even new situation, leading to further constructions.[36]

Constitutional interpretation creates a dialogue between the people and their representatives which can influence a shift in public understanding of the common good and its balance with fundamental, albeit not absolute, rights. The evolution of values within the confines of a central mandate of government directs decision makers to reflect on how they can best optimize social benefits while capturing the values of individual pursuits of happiness.

On a more inductive level, identifying the common good comes from case law, historical documents, and aspirational ambitions. From the historical perspective, James Madison's originally proposed amendment contained a common good clause: "The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances."[37] Accordingly, the original version adopt-

35. Margot E. Kaminski, *The First Amendment's Public Relations Problem: A Response to Alexander Tsesis's* Free Speech Constitutionalism, 2015 U. ILL. L. REV. SLIP OPINIONS 103, 109 (2015).

36. Jack M. Balkin, *Framework Model and Constitutional Interpretation*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONALISM (David Dyzenhaus and Malcolm Thornburn eds. 2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2607105.

37. James Madison, House of Representatives (June 8, 1789), *in* 1 THE FOUNDERS CONSTITUTION ch. 14, *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch14s50.html.

ed by the House of Representatives contained "common good" in its wording of the First Amendment.[38] While the phrase does not appear in the ratified version of the Amendment, there is no reason to believe that the people are limited to autonomy rights and not able to deliberate of the common good of health and safety. This is especially so because the Preamble's guarantee of "general welfare" applies to the entire Bill of Rights, including the First Amendment. The Court has rarely weighed in on the meaning of the phrase, but some of it precedents acknowledge that the balancing of factors is necessary between private and public conflicts. For example, in one case the Court found that "some [private] religious practices [must] yield to the common good."[39] This sort of balancing is not to be done as a mere formality, but in an effort to holistically address conflicting claims.[40] These and other Revolutionary Era statements, as well as Supreme Court cases, create a starting point for exercising a contextual method of decision making, without overly specifying the meaning of that broad phrase, and thereby enabling the concept to develop through *stare decisis.*

In her review of my article for this Symposium, Professor Kaminski challenges me for rocking the doctrinal boat that has been purposefully "made imbalanced" in favor of free speech.[41] As she correctly points out, my proposed model of balancing individual and public interests relevant to cases would be closer to some of the balancing models of free speech relied on in "Canada, France, Germany, and the United Kingdom."[42] This she regards as troubling because Supreme Court doctrine tends to favor individual speech. As she herself realizes, however, my approach does not discount individual rights but balances them against any relevant social needs of pluralism, inclusiveness, and dignity. I therefore question the Court's unwillingness to broadly consider social costs of speech in cases such as *United States v. Stevens*,[43] where the majority's focus was on individual communication rather than the negative social

38. On an interesting historical note, the version of the First Amendment that passed the House of Representatives on August 24, 1789, read: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed." House of Representatives, Amendments (Aug. 24, 1789), *in* 1 THE FOUNDERS CONSTITUTION ch. 14, *available at* http://press-pubs.uchicago.edu /founders/documents/v1ch14s54.html; *see* Jones v. City of Opelika, 319 U.S. 105, 124 n.6 (1943).

39. United States v. Lee, 455 U.S. 252, 259 (1982).

40. *See, e.g.*, United States v. Cent. Eureka Mining Co., 357 U.S. 155, 182 (1958) ("[N]o case in this Court has held that the Government is excused from providing compensation when property has been 'taken' from its owners during wartime in the interest of the common good"); *see also* United States v. Caltex, 344 U.S. 149, 156 (1952) (Douglas, J., dissenting) ("Whenever the government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse rather than the individual, should bear the loss.").

41. *See* Kaminski, *supra* note 35, at 103.

42. *Id.* at 106.

43. 559 U.S. 460, 470 (2010).

impact.[44] A balanced approach is more transparent about the pertinent public and private values involved. My method is not only in line with European and Canadian models on such issues as hate speech, but also the United States Supreme Court's approach in *New York v. Ferber*, where the majority balanced private and social interests to uphold a state statute prohibiting the distribution of child pornography.[45]

Kaminski rightly asserts that "theory becomes valuable . . . when we encounter new social practices that do not squarely fit into existing doctrinal categories."[46] To her insight it should be added that in adjusting or applying doctrine to new social practices, speech rights are often only part of the equation. Even overtly expressive matters such as commercial speech, copyright, and campaign financing—involve a variety of interests, including due process,[47] creativity and fair use,[48] and electoral confidence[49] that are not strictly about the First Amendment. In these cases, it would be better to honestly balance competing interests rather than automatically presume speech to be preeminent. Justice Frankfurter poignantly pointed out that the "historical antecedents of the First Amendment preclude the" notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interests."[50] In some circumstances, such as cases implicating national security, a weighing of competing social concerns against the private right of expression is better suited to the complexity of the issues rather than a reduction of adjudication to formulaic categories of protected and low level speech.

44. *See* Brief for the United States at 27–28, United States v. Stevens, No. 08-769 (U.S. June 8, 2009); Elizabeth L. Kinsella, Note, *A Crushing Blow: United States v. Stevens and the Freedom to Profit from Animal Cruelty*, 43 U.C. DAVIS L. REV. 347, 375, 377 (2009).

45. 458 U.S. 747 (1982).

46. *See* Kaminski, *supra* note 35, at 107.

47. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 749 n.1 (1976).

48. *See* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575–90 (1994).

49. *See* McConnell v. FEC, 540 U.S. 93, 136 (2003) (stating that treatment of campaign finance regulation reflected "importance of the interests that underlie contribution limits--interests in preventing 'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.'"), *overruled in part on other grounds by Citizens United*, 558 U.S. 310 (2010).

50. Dennis v. United States, 341 U.S. 494, 521 (1951).