THE FIRST AMENDMENT'S PUBLIC RELATIONS PROBLEM: A RESPONSE TO ALEXANDER TSESIS'S *FREE SPEECH CONSTITUTIONALISM*

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The First Amendment has a public relations problem. It has been used to defend Nazis and cross-burners, derail campaign finance reform, protect tobacco advertisers, and defeat health privacy.[1] It is no big surprise that a number of scholars have called for rolling back the Supreme Court's First Amendment absolutism.[2] Alexander Tsesis's *Free Speech Constitutionalism* provides a theoretical framework for reconsidering the First Amendment. The estimable aim of the article is to provide a guiding theory for bringing more balancing into First Amendment doctrine.

Tsesis proposes that First Amendment doctrine be grounded in a general theory of constitutional law that aims to protect both individual liberty and society's common good. He refers to these two aims as deontological (rights-based) and consequentialist (social benefit-oriented).[3] The Article contends that not only is this retheorizing of the First Amendment constitutionally necessary, it also provides an accurate account of First Amendment doctrine.

Tsesis joins others in arguing that none of the top contenders for First Amendment theory—the marketplace of ideas, democratic self-governance, or autonomy theories—adequately accounts for the entirety of First Amendment doctrine. While Tsesis's theory would likely result in a more balanced First Amendment, it is crucial that we not forget why the doctrine was made imbalanced in the first place. This Essay responds

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1. *See* Sorrell v. IMS Health Inc., 131 S Ct. 2653 (2011); Citizens United v. FEC, 558 U.S. 310 (2009); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Brandenburg v. Ohio, 395 U.S. 444 (1969); Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012); Skokie v. Nat'l Socialist Party of Am., 51 Ill. App. 3d 279 (1977).

2. *See e.g.*, Micah Berman, *Manipulative Marketing and the First Amendment*, 103 GEO L.J. 497 (2015); Andrew Tutt, *The New Speech*, 41 HASTINGS CONST. L.Q. 235 (2013).

3. Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 105 (forthcoming 2015).

to *Free Speech Constitutionalism* by asking whether an overarching theory is in fact necessary, and provides some context for why the doctrine currently looks the way it does.

In *Free Speech Constitutionalism*, Tsesis identifies and rejects the three most popular theories of the First Amendment, both for inadequately considering the broader framework of constitutional governance and as inadequately descriptive of the doctrine. He then proposes his own theory, based on a broader view of constitutional governance, and applies it to several strains of First Amendment doctrine.

The three best-known theories of the First Amendment are the autonomy theory, the theory of democratic self-governance, and the theory of the marketplace of ideas, which Tsesis calls the marketplace for truth. Tsesis reviews and finds value in each theory, but contends that none adequately explains all of First Amendment doctrine. He is not the first to have recognized significant gaps in theoretical coverage of the First Amendment.[4]

The autonomy theory of the First Amendment explains the protection of speech as part of the fundamental protection of the dignitary interests of an autonomous human being.[5] Speech should be protected because one's ability to speak is intimately tied to the development of one's personal identity. Proponents of the autonomy theory include Martin Redish,[6] David A. J. Richards,[7] and C. Edwin Baker.[8] Tsesis critiques autonomy theory for failing to recognize the times when the Supreme Court has taken the public good into account in First Amendment cases, instead of focusing solely on individual rights. He points to copyright cases as an example.[9] I would caution that, from a copyright scholar's perspective, pointing to these cases as exemplary might be counterproductive. The Court's treatment of copyright has spurred much criticism, and few fans.[10]

The democratic self-governance theory of the First Amendment instead explains that speech is protected as a necessary prerequisite for an informed and involved polity. The focus for self-governance theorists is not on the protection of an individual's speech rights for the individual's sake, but on the protection of those rights in furtherance of collective public engagement and political action. Alexander Meiklejohn is the

4. *See, e.g.*, CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1995); Robert C. Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011).

5. *See* Tsesis, *supra* note 3, at 114.

6. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

7. David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).

8. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978).

9. *See* Tsesis, *supra* note 3, at 117–18.

10. *See, e.g.*, NEIL W. NETANEL, COPYRIGHT'S PARADOX (2010).

most prominent advocate of democratic self-governance.[11] Robert Post updated the theory to expand beyond the purely political to recognize the importance of the role of individuals in the community. Post continues Meiklejohn's focus on the centrality of public, rather than private, debate.[12] The biggest hurdle for democratic self-governance as articulated by Meiklejohn is that it requires prioritizing the political, which sits uncomfortably with a subject-matter-neutral First Amendment.[13] And Tsesis criticizes Post for continuing to overlook significant areas of jurisprudence where only individual autonomy can justify First Amendment protection, such as the right to keep one's utterances private.[14]

The third, or really first, theory of the First Amendment is the marketplace of ideas, which Tsesis refers to as the marketplace for truth.[15] This theory, based on early decisions by Justice Oliver Wendell Holmes, contends that the First Amendment protects speech in service of a greater, Darwinistic search for truth.[16] The customary criticism of the marketplace of ideas is that it deprioritizes certain types of "lower value" or less truthful speech that current doctrine no longer ignores. Tsesis points to First Amendment protection of parody,[17] and to recent Supreme Court cases protecting lies.[18]

The criticisms of these three theories are both familiar, but well-argued. Tsesis's contribution is to contend that the reason these theories do not work is because they are not sufficiently grounded within the broader framework of constitutional governance.[19] "None of them adequately place the First Amendment within the greater context of constitutional value, the preservation of equal rights for the general welfare."[20]

The theory Tsesis proposes as a substitute for all three theories thus blends a deontological (rights-based) approach, with a consequentialist (social-benefits oriented) approach.[21] Tsesis grounds both portions of his theory in text, tracing the interest in general welfare to the Preamble, and the focus on innate human rights to the Declaration.[22] He writes: "A theoretically satisfying explanation of free speech should discount neither its public nor private components; the two go hand-in-hand because representative democracy legitimizes governmental authority in so far as

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11. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (Galaxy Books 1965) (1948) (drawing a connection between free speech and self-government); Post, *supra* note 4, at 484.
12. *See* Tsesis, *supra* note 3, at 123.
13. *Id.* at 122.
14. *Id.* at 124.
15. *Id.*
16. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
17. *See* Tsesis, *supra* note 3, at 125.
18. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537 (2012).
19. *See* Tsesis, *supra* note 3, at 104.
20. *Id.* at 124.
21. *Id.* at 128.
22. *Id.* at 112.

it furthers the interests of individuals."[23] Tsesis believes this framing of the purposes of the First Amendment can provide both aspirational guidance and predictive consistency.[24]

There is value to this reframing: it helps to reconcile the different theories recognizable in First Amendment jurisprudence. The autonomy theory of the First Amendment does go to the protection of individual rights, and the democratic self-governance theory does go to general welfare, as does the marketplace of ideas. By identifying that most constitutional governance requires weighing these two sets of values—individual and societal—Tsesis suggests how to reconcile the parallel existence of autonomy theory with the other two main theories of the First Amendment.

But he does not stop there, and this is where *Free Speech Constitutionalism* gets more problematic. Tsesis wants to make the First Amendment less exceptional. His underlying claim is that free speech doctrine should not be treated as it is, as an exceptionalist strain of doctrine. "Free speech is not an interest independent of any other; it is derived from the very function of a constitutional democracy."[25]

The consequences of this goal—the normalization and rebalancing of First Amendment doctrine—are visible in the Article's examples. Tsesis uses jurisprudence on defamation, intentional infliction of emotional distress (IIED), incitement, and true threats to both illustrate the limitations of other First Amendment theories and tout the benefits of his own. He ends with an extensive discussion of true threats and hate speech, observing that proponents of other theories "overemphasize[] free expression and give[] too little consideration for how hate speech threatens constitutional order and public peace."[26]

Tsesis' version of the First Amendment would produce a more more palatable First Amendment doctrine, with fewer public relations problems. That doctrine would look a lot more like free speech coverage in Canada, France, Germany, and the United Kingdom, which allow bans on hate propaganda.[27]

Is this the First Amendment that the United States should have? To answer, one needs to start by asking whether there is actually a need for an overarching theory of the First Amendment. And if there is, does Tsesis propose the right theory? It produces a more balanced, less exceptionalist First Amendment, both vis-a-vis other countries and vis-a-vis other parts of U.S. constitutional law. But is that a good thing?

First, many have questioned whether we need an overarching theory of the First Amendment at all. Cass Sunstein, for example, has pro-

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23. *Id.* at 128.
24. *Id.* at 105.
25. *Id.* at 129.
26. *Id.* at 141.
27. *Id.* at 149–50.

posed that First Amendment doctrine is incompletely theorized.[28] With an "I know it when I see it" approach to constitutional rights, judges may agree that a "certain practice is . . . not constitutional, even when the theories that underlie their judgments sharply diverge."[29] Doctrine can propel itself forward for some time using this approach.

Where theory becomes valuable is when we encounter new social practices that do not squarely fit into existing doctrinal categories.[30] With new social practices brought on by new technologies, First Amendment theory can be a necessary guide for new doctrinal application.[31] This does not, however, mean that one theory needs to rule them all—just that in new situations, it can be important to identify theoretical principles to identify norms that guide judges around doctrinal dead-ends.[32]

Is what Tsesis proposes workable? It depends on what one understands First Amendment theory to do. If theory comes before doctrine, then Tsesis's proposal is certainly appealing in the abstract. But if one goal of theorizing is to try to represent "the actual shape of entrenched First Amendment jurisprudence," then Tsesis's proposal falls short—as he might be the first to acknowledge with respect to the American treatment of hate speech.[33]

In practice, recent but entrenched First Amendment doctrine has been explicitly reluctant to look to general social welfare. Beyond hate speech, the Supreme Court in recent cases refused to allow a ban on video depiction of cruelty to animals, or violent videogames sold to minors.[34] The Court explained that it would not create new exceptions to strict scrutiny that rely upon "an ad hoc balancing of relative social costs and benefits."[35]

Where does this reluctance to balance come from? The Supreme Court initially created strict scrutiny in a First Amendment case, as a way to reconcile between a balancing approach to individual speech (such as

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28. *See* Cass Sunstein, *Incompletely Theorized Agreements in Constitutional Law*, 74 SOC. RES. 1 (2007).

29. *Id.*

30. *See, e.g.*, Robert C. Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713 (2000); *see also* Andrew Tutt, Software Speech, 65 STAN. L. REV. ONLINE 73 (2012).

31. *See* Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445 (2013); Margot Kaminski, *From Google to Tolstoy Bot: Should the First Amendment Protect Speech Generated by Algorithms?*, JOTWELL (Sep. 2, 2014), http://cyber.jotwell.com/from-google-to-tolstoy-bot-should-the-first-amendment-protect-speech-generated-by-algorithms/.

32. *See, e.g.*, Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 390 (2014) ("[W]ork that refuses to consult theory at all risks being normatively rudderless, especially when it confronts new forms of expression or government regulation that fall outside conventional doctrinal categories.").

33. *Id.* at 386–87 (outlining two approaches to First Amendment theory). *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 5 (2012) ("To determine the purposes of the First Amendment, therefore, we must consult the actual shape of entrenched First Amendment jurisprudence.").

34. *See* Brown v. Entm't Merch. Ass'n, 131 S .Ct. 2729 (2011); United States v. Stevens, 559 U.S. 460 (2010).

35. United States v. Stevens, 559 U.S. 460, 470 (2010).

that advocated by Tsesis), and an absolutist approach (that is, if there's individual speech, speech wins).[36] Strict scrutiny, now characterized as "fatal in fact," at first functioned as a thumb on the scale in favor of speech over other values.[37] Early forms of strict scrutiny thus did involve balancing societal and individual values.[38] But the balance of values still put weight towards an individual's speech. The test later evolved from balancing into a hammer: now, content-based regulations of speech are subject to strict scrutiny and are almost always found unconstitutional.[39]

There are clearly speech-protective benefits to this approach. Unlike the balancing of complex values, drawing clear lines as to what is protected results in fewer borderline cases, which lowers costs for free speech defendants.[40] Courts' aversion to balancing in the First Amendment context also stems from important historical examples. Use of the "clear-and-present-danger test" in the 1950s gave First Amendment balancing a bad name, as the Court condemned minority propagandists who turned out, with some historical distance, to have been potential drivers of important social change.[41]

To be fair, Tsesis does not call for unprincipled balancing of an individual speech right against just any countervailing state interest. He calls for balancing of the individual right with an interest in the general welfare. The problem is that it can be extraordinarily difficult to determine just what the general welfare is—especially in a pluralistic society

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36. *See* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J.L. HIST. 355, 361–80 (2006) (discussing the "Birth of the Compelling State Interest Test and Strict Scrutiny" as part of the First Amendment jurisprudence in 1963, when used in three opinions written by "high-protectionist Justices Brennan and Goldberg").

37. *Id.* at 376; *see* Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795–96, 844 (2006) (pointing out that in Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995), the Supreme Court "wish[ed] to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact,'" and showing that strict scrutiny is not always deadly, but that it is "most fatal in the area of free speech.").

38. Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 841(2011) (noting that "[a]s we found with respect to earlier versions of strict scrutiny, American judges considered [proportionality analysis] to be inherent parts of the judicial repertoire.").

39. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296–97 (1992) (observing that "[w]hen applied in its strong bipolar form, such a two-tier system functions as a de facto categorical mode of analysis despite its nominal use of balancing rhetoric").

40. *See, e.g.*, Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2733–35 (2011) (applying *Stevens* in an easy and straightforward manner, and firmly rejecting a balancing test as "startling and dangerous," holding instead that the categorical approach is better because it clearly articulates the details of the obscenity exception to the First Amendment).

41. *See, e.g.*, Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1428–49 (1962) (arguing that the clear-and-present danger balancing test has been over applied and overused); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 249–50 (1961) (claiming that the Dennis opinion, which argued against an absolutist interpretation of exceptions to First Amendment rights, was predicated on an erroneous conception of the absolutist interpretation).

where one person's religious speech is another person's fighting words.[42] And in practice, it will be extremely hard to tell a Supreme Court that has just declared its rejection of "ad hoc balancing of relative social costs and benefits" that it should now take the general welfare into account.[43]

Nonetheless, something strange is going on. The increased visibility of multiple actions as "speech" under the First Amendment, combined with increased First Amendment formalism, has been expanding the scope of First Amendment coverage. This expansion will inevitably force reevaluation of underlying values. These questions are already arising in the context of discussions of "revenge porn," of data privacy laws, and of the EU "right to be forgotten." If we consistently and wholesale prioritize individual information collection and dissemination over general social harms, we may end up in a society incapable of producing truly free speech to begin with.[44]

The question is, then, at what point does concern over historical consistency get obviated by a clearly new set of factors to balance? Another way of putting it might be: at what point does adherence to formalism run counter to valuable underlying principles? Tsesis is admirable in his energetic attempt to answer this question by identifying underlying principles to guide us at this stage. But the mess of First Amendment theory is also part of its beauty. First Amendment cases are so often the vehicle for truly hard lessons about the rule of law. They can present a choice between heartstrings and high principles. A theory that eliminates this dizzying tension risks destroying a valuable vehicle for teaching citizens constitutional principles.

As for what judges should do with current First Amendment formalism, the answer is far from clear. Judges already often skirt around it, finding ways to shunt difficult questions into a line of doctrine that allows for more judicial balancing.[45] Perhaps the answer is truly context-based.[46] Or perhaps this balancing Tsesis identifies is already sometimes present in the doctrine—just not quite in the way he envisions it.

42. *See* Chaplinsky v. State of New Hampshire, 315 U.S. 568 (1942).

43. United States v. Stevens 130 S. Ct. 1577, 1585 (2010).

44. *See* Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465 (2015).

45. Margot E. Kaminski, *Copyright Crime and Punishment: The First Amendment's Proportionality Problem*, 73 MD. L. REV. 587, 593 (2013).

46. *See* Massaro, *supra* note 32, at 367 ("A better understanding of free speech practice requires thinking that is factored, not formulaic; contextual, not trans-contextual; dynamic, not static; tentative, not absolutist; plural, not singular.").