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EQUALITY-BASED PERSPECTIVES ON THE FREE
SPEECH NORM:
TWENTY-FIRST CENTURY CONSIDERATIONS—
AN INTRODUCTORY ESSAY

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The fall of 2008 marked an exciting new era in the intellectually rich history of the Wake Forest University School of Law. This Issue of the Law Review features writings inspired by a live symposium, the first of an annual series hosted in the fall. The live fall symposium series commenced in 2008 with an innovative program examining free speech norms as they apply to contemporary issues such as race, sexuality, and the inclusive dynamic of human rights. I proudly announce the law school's live fall symposium series and am especially gratified to contribute this modest introduction to the 2008 symposium.

The 2008 symposium's focus on expressive freedom came at a timely moment in our country's continuing legacy of democratic governance. The historic election of President Barack Obama¹ has refocused the public's attention on the dynamics of a truly participatory democracy and a government that fosters such democratic ideals. Democracy, in its most generic sense, conjures notions of a society that fosters egalitarian governance. Traditional Aristotelian philosophy describes a democratic society as one that promotes an equality of justice and ensures that the poor become as politically powerful as the rich.² Citizens in Aristotle's view of

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1. Walter Kelley, *Judicial Profile*, *Hon. U.W. Clemon, U.S. District Judge, Northern District of Alabama*, *FED. LAW.*, Sept. 2008, at 30, 30 (referring to the 2008 presidential election as historic); Susan Donaldson James, *Historic Election 2008: For the Record Books*, *ABC NEWS*, Nov. 4, 2008, <http://www.abcnews.go.com/Politics/story?id=6169622>.

2. See Martin D. Carcier, *Operational Need, Political Reality, and Liberal Democracy: Two Suggested Amendments to Proposition 209-Based Reforms*, 9

democracy exercise their rights while remaining steadfastly obedient to rules and laws of human behavior.³

Of course, Aristotle's democracy, which some view as distributive and not truly egalitarian,⁴ has evolved over time. Modern conceptualizations have seen autonomy emerge as a dominant force, particularly in the consideration of expressive freedom. Strict autonomy represents a fundamentally libertarian philosophy that recognizes the individual's right to free speech.⁵

SETON HALL CONST. L.J. 459, 492 n.133 (1999) (noting Aristotle's statement that "while the goal of democracy is liberty, its conception of justice is equality"); Maureen B. Cavanaugh, *Democracy, Equality, and Taxes*, 54 ALA. L. REV. 415, 443-44, 452 (2003) (commenting that Aristotle's definition of democracy shows that freedom and equality are inherent principles upon which a government where the poor are more powerful than the rich may be founded); Patricia Gurin, *Expert Report of Patricia Gurin: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 363, 374 (1999) (noting that what makes an Aristotelian democracy work is equality among citizens who hold diverse perspectives and whose relationships are governed by freedom and rules of civil discourse); Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 716 (2001) (defining an Aristotelian democracy as one "in which all citizens are 'to rule and be ruled in turn'").

3. See WOLFGANG VON LEYDEN, *ARISTOTLE ON EQUALITY AND JUSTICE* 81-82 (1985) (noting Aristotle's view that democracy includes "moral training and habit-formation for the development of a citizen's sense of law-abidance and for a just application of the principle of equality" and "character-formation" which leads to an "equalisation of desires").

4. As Professor Shannon Gilreath observed during a January 30, 2009 discussion of my Essay, Aristotle treats "likes alike and 'unalikes' 'unlike,' which reinforces discrimination against women, gays, and people of color." Interview with Prof. Shannon Gilreath, Wake Forest Univ. Sch. of Law, in Winston-Salem, N.C. (Jan. 30, 2009).

5. See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 199-200 (1996) (recognizing the importance of autonomy as a fundamental value of the First Amendment, with freedom of expression as a furtherance of the individual will). Other scholars provide insight into the bounds of libertarianism as it applies to free expression. Summarily stated, libertarianism assumes an absolutist view, which as Professor Harry Kalven, Jr. writes, requires that speech must be protected for everyone, or "we will have it for none." Victor C. Romero, *Restricting Hate Speech Against "Private Figures": Lessons in Power-Based Censorship from Defamation Law*, 33 COLUM. HUM. RTS. L. REV. 1, 15 (2001) (quoting Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 432 (1967)). But see LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 57 (1986) (opining that libertarianism's weakness is the protection it affords those who seek to destroy the values of free speech of others). For distinctions between libertarian and democratic theories of speech, see OWEN M. FISS, *THE IRONY OF FREE SPEECH* 3 (1996).

Thus, freedom of speech, which many recognize as fundamental,⁶ becomes a paramount right that the government must foster with minimal restriction.⁷

However, the unabashed fostering of free speech has its drawbacks, key among them is the reality that every member of society, for a plethora of socioeconomic and political reasons, does not fully enjoy expressive autonomy. As a result, democracy suffers due to the lack of a fully participatory body politic. The advancement of a civic republican theory of democracy by such notable scholars as Professors Owen Fiss⁸ and Cass Sunstein⁹

6. The First Amendment to the U.S. Constitution reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

7. Of course, expressive freedom is not boundless. That said, the fundamental negative theory of free speech demands that the government resist limitations on expression. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 209 (1993) (explaining that the First Amendment acts as a negative liberty to free individuals from governmental intrusions of their free speech rights) [hereinafter SUNSTEIN, *PARTIAL CONSTITUTION*]; see also Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 438 n.306 (1999) (stating that a negative liberty's version of the First Amendment would be concerned that government refrains from preventing speech or punishes people for speaking).

8. See Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 786 (1987) [hereinafter Fiss, *Why the State?*] (arguing against an overemphasis on autonomy and noting that such an emphasis leads to the domination of debate by those who control the economic and political power structure in society); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408-11, 1425 (1986) (noting the occasional need for speech restrictions in an effort to further public discourse). See generally OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996) (espousing the need to interpret the First Amendment to accommodate contemporary social change). Fiss's desire for a focal shift from autonomy to more balanced public discourse represents a public debate approach to First Amendment jurisprudence. See Fiss, *Why the State?*, *supra*, at 786 (espousing that decision makers should judge action by its impact on the richness of public debate, rather than its interference with autonomy).

9. See generally CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 7 (advancing liberal republicanism or deliberative democracy that requires legislatures to become more activist to protect individual rights); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) [hereinafter Sunstein, *Beyond the Republican Revival*] (demonstrating a nexus between republicanism and deliberative democracy); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (advocating that the judiciary utilize republicanism to evaluate political processes and outcomes). See also Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71,

addresses the problem of limited participation. Civic republicanism deemphasizes individual autonomy and favors a democracy that promotes universal participation by its citizenry.¹⁰ As you will discover, the participatory element of civic republicanism, particularly as it relates to deliberative governance, permeates the writings in this symposium.¹¹

In my view, enjoyment of expressive rights by each individual requires respect for the expressive rights of others. This respect-based notion of democracy has its roots in civic republicanism¹² and epitomizes a complex democracy, which is championed by Professor Edwin Baker.¹³ When manifested and fostered, mutual respect for

73 (2000) (stating that “many recent observers have embraced the traditional American aspiration to ‘deliberative democracy,’ an ideal that is designed to combine popular responsiveness with a high degree of reflection and exchange among people with competing views”) (citations omitted).

10. See MICHAEL ALLEN GILLESPIE & MICHAEL LIENESCH, *RATIFYING THE CONSTITUTION* 85 (1989); see also William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 638–39 (2001) (noting republicanism’s fostering of a “forum for deliberation”); Saul Cornell, *Moving Beyond the Canon of Traditional Constitutional History: Anti-Federalists, the Bill of Rights, and the Promise of Post-Modern Historiography*, 12 LAW & HIST. REV. 1, 7–8 (1994) (describing “civic republicanism” as a positive liberty that empowers a community through the fostering of public good); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 596–97 (2001) (espousing the view that civic republicanism requires present desires to be fluid in order to accept ideas from open debate, which should be inclusive of alternate perspectives); W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 2001 (2001) (noting republicanism’s feature of “interlocking relationships” and the State’s neutrality in its conceptualization of the “common good”).

11. See C. Edwin Baker, *Giving the Audience What it Wants*, 58 OHIO ST. L.J. 311, 366–72 (1997); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 795–98 (1981); Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 GEO. L.J. 373, 373 (1993); see also *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* (James Bohman & William Rehg eds., 1997); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 128–64 (1996); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 287–328 (William Rehg trans., Polity Press 1996) (1993).

12. See *supra* notes 7–9 and accompanying text.

13. See C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 73 (2002) [hereinafter BAKER, *MEDIA, MARKETS, AND DEMOCRACY*]; C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 59 (1989) (stating that “respect for individual integrity and autonomy requires the recognition that a person has the right to use speech to develop herself or to influence or interact with others in a manner that corresponds to her values”). Professor Baker’s complex democracy recognizes that each individual has the right to influence and engage others. This engagement, in my view, forms the foundation for the respect that

the expressive rights of others furthers fuller participatory debate¹⁴ and achieves a multiplicity of discourse that enriches society.¹⁵

The writings in this 2008 fall symposium amplify the essence of a respect-based theory of democracy with a series of thematic pieces. The always-perceptive observations of Professors Richard Delgado and Jean Stefanic poignantly analyze expressive freedom as it relates to the rights of traditionally unrepresented groups and individuals. The writings of Professors Gabilondo, Marcus, and Tsesis vividly capture the essence of respect-based theory as they note the impact of stark autonomy on the rights of the underrepresented. Professor Kathleen Mahoney tacitly endorses a respect-based theory of democracy through her thoughtful examination of the reality of true equality in the free speech debate. Professors Curtis, Gillborn, and Gilreath ultimately and subtly demonstrate the practical reality of a respect-based theory through discussions of assaultive speech in schools and education.

The collective writings of this symposium prove the analytical potency of a respect-based theory of democracy. These writings, however, also highlight the omnipresent challenges that stand in the way of the theory's complete manifestation. Despite these challenges, the robust dialogue that took place during the live portion of this symposium and the resultant writings confirm the evolving nature of expressive freedom in a democratic society and the compelling charge to achieve its full potential.

individuals must have for the expressive rights of others.

14. The theory of democracy I promote borrows from Professor Baker's preferred complex democracy. Individual autonomy and preservation of the common good are interdependent concepts that must be simultaneously fostered in varying measure depending upon context. For a more detailed explanation of complex democracy, see BAKER, MEDIA, MARKETS, AND DEMOCRACY, *supra* note 13, at 143–47. The author posits a more realistic theory of “complex democracy,” which draws on elements of both liberal pluralist and republican democracy. *Id.* “[I]t assumes that a participatory democracy would and should encompass arenas where both individuals and groups look for and create common ground, that is, common goods, but where they also advance their own individual and group values and interests.” *Id.* at 144.

15. Blake D. Morant, *Democracy, Choice, and the Importance of Voice in Contemporary Media*, 53 DEPAUL L. REV. 943, 962–64 (2004); see also ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 77 (1960) (arguing that “the citizens of the United States will be fit to govern themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favor of those institutions, [and] everything that can be said against them”); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 379 (arguing that the long-term effect of the unequal distribution of power is an unequal exposure of ideas, leading to the “stifling . . . of [new and] more radical . . . ideas”).

In a symposium issue entitled *Race and the Law* published in the DePaul Law Review, I observe that a “fully functional and pluralistic democracy continually strives to further society’s interest in robust debate, while simultaneously promoting respect for the expressive right of all members of that society.”¹⁶ As you will discover from the writings in this symposium, a rich, societal colloquy that defines a true democracy not only has diverse voices, but also endures because each voice is respected and shares in the totality of deliberative governance.

16. Morant, *supra* note 15, at 962.