THE VIEW FROM MY WINDOW

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INTRODUCTION

The experience of writing a book and then reading what some very smart and knowledgeable people have to say about the subject matter is humbling and a little dizzying. In *Managed Speech: The Roberts Court's First Amendment*, I try to make some sense of the present Supreme Court's decisions over the past decade about the First Amendment's protections for free expression.[1] The book argues that those decisions, taken as a whole, excessively constrain free speech within a particular managerial framework. Rather than helping speech to flourish in all its noisy, messy glory, the Roberts Court favors First Amendment claims from powerful institutional speakers while backing the government against more socially and politically marginal speakers. Corporate political spenders[2] and commercial data miners[3] exemplify the Roberts Court's First Amendment winners, while peace activists[4] and fringe religions[5] exemplify its losers. The Roberts Court's First Amendment priorities constitute the *managed speech* of my title. The book contrasts managed speech with a free speech model I call *dynamic diversity*, which seeks to protect the change-making capacity of free speech by maximizing the range of perspectives and participants in public debate.[6]

Managed Speech opens a window onto the Roberts Court's First Amendment. This symposium affords me the privilege of looking out, from the constraints of my knowledge and imagination, to observe what some friends whose work I greatly admire see in the spaces that window reveals. The main part of this essay highlights and briefly discusses some of the insights that I have found most immediately stimulating and valuable from

* Professor of Law, Washington University in St. Louis. I am deeply grateful to the editors of the *Washington University Law Review* for hosting this symposium and to all of the symposium participants, especially the contributors to this volume, for their engagement with my ideas. Between the symposium's conception and fruition, I lost both of my parents, Jean and Don Magarian. I would be nowhere without their inspiration, support, and love. This is for them.

1. *See generally* GREGORY P. MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT (2017).
2. *See* Citizens United v. FEC, 558 U.S. 310 (2010).
3. *See* Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).
4. *See* Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).
5. *See* Pleasant Grove City v. Summum, 555 U.S. 460 (2009). In fairness, a different sort of fringe religious group won a notable First Amendment victory before the Roberts Court. *See* Snyder v. Phelps, 562 U.S. 443 (2011). The book's critique is a best-fit line, not a golden mean.
6. *See* MAGARIAN, *supra* note 1, at xvi–xx.

each contribution to the symposium. The final section indulges some soul-searching. Our society over the past two years has plunged into a state of political chaos and uncertainty that, for many of us, has brought an overwhelming sense of rapid, highly unappealing displacement. Is this really the right time for me, or any person of good will, to be loudly criticizing the Supreme Court's penchant for stability and insisting that, instead, First Amendment law should prioritize political and social dynamism?

I. THE SYMPOSIUM: DYNAMIC DIVERSITY IN ACTION

Given that *Managed Speech* advocates an approach to First Amendment law called "dynamic diversity," this collection of writings perfectly fits a symposium around the book. The contributions reflect a great diversity of perspectives, ranging from more theoretical to more doctrinal, more descriptive to more normative, more targeted in their concerns to more general. The contributions also show a vibrant dynamism. The authors deploy their varied expertise and talents to develop incisive thoughts and critiques about the Roberts Court's First Amendment jurisprudence and about how my book tackles that jurisprudence.

A. Justice in the Streets

Richard Nixon famously damaged his 1960 campaign for the U.S. presidency by visiting every state in the nation, an effort that left him depleted and his campaign unfocused.[7] The broad coverage of a book like *Managed Speech* creates a similar risk. Examining a decade of the Supreme Court's free speech decisions requires attention to a great range of subjects and contexts, from state primary elections[8] to high school sports,[9] vanity license plates[10] to stoner comedy.[11] *Managed Speech* centrally criticizes the Roberts Court's subordination of political and social dissent to managerial order, and my dynamic diversity theory prioritizes dissent.[12] That priority, however, can get obscured in the thicket of details. I wrote this kind of book because the present Supreme Court provides a useful laboratory for teasing out First Amendment doctrine's immediate pathologies and an important

7. *See* THEODORE H. WHITE, THE MAKING OF THE PRESIDENT 1960 263–78 (1961).
8. *See* New York State Board of Elections v. Lopez Torres, 552 U.S. 196 (2008).
9. *See* Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291 (2007).
10. *See* Walker v. Texas Division, Sons of Confederate Veterans, 576 U.S. ___ (2015).
11. *See* Morse v. Frederick, 551 U.S. 393 (2007).
12. *See* MAGARIAN, *supra* note 1, at xviii–xix.

context for understanding them. Still, that approach leaves me looking for the thematic car keys under a very specific streetlight.

Timothy Zick manages to ameliorate both the breadth and the narrowness of *Managed Speech*.[13] Professor Zick is a preeminent scholar of public protest.[14] That subject has become increasingly important in our society over the past decade, but the Roberts Court has largely ignored it. Here Professor Zick trains a critical laser on the implications of managed speech for public protests. He properly calls out the Roberts Court for protecting only public political activity that does not disrupt social order[15] and for subordinating U.S. speakers' transnational political activism to the government's assertions about national security risks.[16]

At the same time, Professor Zick situates the central arguments of *Managed Speech* in both a deeper historical context and a wider socio-cultural context. The Roberts Court did not invent the pathologies at the heart of my critique, and the Supreme Court—indeed, the law—does not cabin them. Professor Zick richly details how past Supreme Courts created templates for managed speech. In a nuanced critique of the public forum doctrine, for example, he shows how the Court has long conditioned public speech rights on an expectation that public speakers will not deviate widely from established political and social norms.[17] Even more important, and more troubling, Professor Zick shows how elected officials and our society at large care even less for public protest than the Roberts Court does. While the Court diminishes protest rights through mere neglect, state legislatures plot to squelch street demonstrations and license physical attacks on protesters.[18] Universities establish their own bureaucratic and punitive mechanisms for managing the speech resources they control.[19] Most dispiriting of all, large segments of the public condemn protesters whose

13. *See* Timothy Zick, *Managing Dissent*, 96 WASH. U. L. REV. (forthcoming 2018).

14. *See* TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES (2009).

15. *See* Zick, *supra* note 13 (manuscript at 10–11) (discussing McCullen v. Coakley, 134 S. Ct. 2518 (2014)).

16. *See id.* (manuscript at 13) (discussing Holder v. Humanitarian Law Project, 561 U.S. 1 (2010)).

17. *See id.* (manuscript at 8–12).

18. *See id.* (manuscript at 15–16).

19. *See id.* (manuscript at 34–38). I agree with Professor Zick's suggestion that university students' speech can itself become a form of speech management when students seek "a say in the management of outside speakers." *Id.* (manuscript at 5–6). Mere participation in a discussion is not speech management, but speech that seeks to constrain other speech by influencing or building an institutional power structure can be managerial. For my own thoughts on the relationship between student speaker protests and universities' institutional power, *see* Gregory P. Magarian, *When Audiences Object: Free Speech and Campus Speaker Protests*, 89 U. COLO. L. REV. (forthcoming 2018).

messages they oppose, like professional football players who take a knee during the National Anthem to protest institutional racism.[20]

Managed Speech calls on the Supreme Court to expound a more dissent-friendly First Amendment doctrine.[21] Professor Zick correctly points out that even the highly unlikely realization of that goal would not reach the roots of our problem with public dissent. Law is only as reliable as the social reality that contains it, and speech values in particular rest on a social rather than legal foundation. Professor Zick sets out an urgent project for a wise free speech agenda: changing society, not just law, to deepen appreciation for the value of public dissent. From the sobering perspective he provides, our challenge does not simply entail making legal institutions embrace a richer version of the First Amendment. Rather, we have to convince regular, busy people to welcome and engage with challenges to received wisdom and social norms.

B. The Anti-Cynical First Amendment

Garcetti v. Ceballos[22] strikes me as one of the Roberts Court's most frustrating free speech decisions. Richard Ceballos, an assistant district attorney in Los Angeles, found good reasons to believe his office had misrepresented key facts in a criminal prosecution. He wrote his concerns in a memo to his supervisors. For his trouble, they downgraded his assignments and declined to promote him. The First Amendment protects public employees against job reprisals when they speak about "matters of public concern."[23] The Roberts Court, though, found that Ceballos had not spoken about a matter of public concern when he notified his superiors about possible misconduct. Instead, he had merely created work product that belonged to the District Attorney. Justice Kennedy, writing for the majority, reasoned that letting the First Amendment check government employers' absolute control over such work product would impose an unacceptable cost on government efficiency. The decision defers reflexively and thoroughly to the government employer's managerial interest. It completely ignores the societal benefits of protecting conscientious government employees who try to ensure, from inside the public workplace, the integrity of the people's business.

20. *See* Zick, *supra* note 13 (manuscript at 43–44).
21. *See* MAGARIAN, *supra* note 1, at 243–44.
22. 547 U.S. 410 (2006).
23. *See* Pickering v. Board of Education, 391 U.S. 563 (1968).

Oscar Wilde's Lord Darlington defined a cynic as "[a] man who knows the price of everything, and the value of nothing."[24] *Garcetti*, by those lights, stands out as an exceptionally cynical piece of First Amendment adjudication. The Supreme Court only sees (and likely exaggerates) the cost of the dissident lawyer's speech while ignoring its value. In fact, First Amendment law has a persistent problem with valuing speech. Courts get understandably nervous about the prospect of ascribing different sorts of value to different sorts of speech. Courts, after all, are part of the government, and the First Amendment axiomatically bars the government from drawing content-based distinctions among different speakers and expressions. Judicial reluctance to assess the value of speech, unfortunately, leaves speech more vulnerable to the government's regulatory—or managerial—whims. In situations like *Garcetti*, where the government can claim special authority or urgency for restricting speech, flattening the distinctive value of the speech in question leaves the government's claim effectively unchallenged. *Managed Speech* maintains, as I have argued before,[25] that courts should take a frankly normative approach to balancing speech interests against government prerogatives. Making that approach work, however, presents a serious challenge.

Heidi Kitrosser squarely confronts that challenge.[26] Professor Kitrosser's account of how government employees advance First Amendment principles by scrutinizing the government's messages provides a brilliant, clear model of how to construct an argument about the normative value of particular speech.[27] She identifies a baseline First Amendment interest: the public's access to information, particularly about matters of government policy and practice.[28] She then defines a metric: the degree to which the public understands the government's behavior free from willful government distortions of reality. Finally, she uses that metric to assess the speech at issue—public employees' internal and internal reports about their employers' actions and motives—against the baseline interest.[29] Crucially, public employees possess the key expressive resources of insider knowledge and access to important internal channels of communication.[30]

24. OSCAR WILDE, LADY WINDERMERE'S FAN 96 (The Floating Press ed., 2009) (1892).

25. *See* Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation Enhancing Review*, 83 NOTRE DAME L. REV. 185 (2007).

26. *See* Heidi Kitrosser, *Public Employee Speech and Magarian's Dynamic Diversity*, 96 WASH. U. L. REV. (forthcoming 2018).

27. *See id.*

28. *See id.* (manuscript at 22–23).

29. *See id.* (manuscript at 10–12).

30. *See id.* (manuscript at 13).

Professor Kitrosser persuasively shows how those advantages imbue public employee speech with far more value for public discourse than the Roberts Court grasped in *Garcetti*.

Professor Kitrosser offers her valuation of public employees' internal critiques as a "friendly supplement" to the dynamic diversity theory I promote in *Managed Speech*,[31] and I welcome the refinement. What of courts' insistence about the need for neutrality and impartiality in adjudicating First Amendment disputes? I think judges' recourse to those shibboleths ends up infecting First Amendment doctrine with exactly the kind of bias they aim to avoid. Abjuring valuation disadvantages speech, such as public employees' internal push-back against their employers' willful distortions, that relatively less powerful speakers create under the sway of relatively more powerful institutions. Professor Kitrosser lays this problem bare when she dissects the *Garcetti* Court's impoverished assessment of public employees' internal speech.[32] Determining the normative value of particular speech is not easy; but then, easy is not always good. Shrugging off vulnerable speech is easy when you avoid confronting the value that speech contributes to society. The kind of difficult analysis Professor Kitrosser's paper advocates and performs would make First Amendment law more forthright, more grounded in practical reality, and more beneficial to the public interest.

C. There Is Power in a Union

The Roberts Court's most striking First Amendment quirk has been its fixation on protecting non-union government workers from every conceivable risk of political association with public sector unions. The Supreme Court long ago decided that the First Amendment protected non-union workers from supporting public sector unions' political advocacy but not from funding the unions' collective bargaining services.[33] In two recent cases,[34] with a third on the near horizon,[35] the Roberts Court has restricted unions' ability to collect and use the "agency fees" that some public sector labor contracts require non-members to pay unions for collective bargaining costs. These decisions erase unions' First Amendment interests by focusing entirely on non-union workers' First Amendment rights while treating

31. *Id.* (manuscript at 13).
32. *See id.* (manuscript at 22–23).
33. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).
34. *See* Harris v. Quinn, 134 S. Ct. 2618 (2014); Knox v. Serv. Empls. Int'l Union, Local 1000, 567 U.S. 298 (2012).
35. *See* Janus v. Am. Fed'n of State, Cty., and Mun. Empls. Council 31, 851 F.3d 746 (7th Cir. 2017), *cert. granted*, 86 U.S.W.L. 3148 (U.S. Sept 28, 2017) (No. 16-1466).

agency fees as impositions of government power rather than fuel for unions' expressive autonomy.[36] The Roberts Court's analysis of the agency fee cases continues a long Supreme Court pattern of refusing to acknowledge and grapple with collisions of First Amendment interests.[37]

Like the problem of valuing speech, the problem of colliding First Amendment interests resists easy resolution. Just as Professor Kitrosser uses the Roberts Court's public sector employment cases to illuminate the valuation problem, Tabatha Abu El-Haj uses the Roberts Court's public sector labor cases to illuminate the colliding interests problem.[38] Professor Abu El-Haj's key move is to distinguish the essentially expressive interests of non-union workers from the essentially associational interests of unions.[39] Viewing these colliding First Amendment interests as conceptually distinct phenotypes gives Professor Abu El-Haj a way to prevent their collision. She can describe the pre-Roberts Supreme Court's distinction between unions' problematic political and unproblematic collective bargaining activities not as a half-baked protection for non-union workers' speech interests but instead as a fulsome, prudent reconciliation of two different sorts of First Amendment interests.[40]

Like Professor Kitrosser's valuation analysis, Professor Abu El-Haj's analysis of colliding interests injects a welcome dose of normative substance into a First Amendment problem whose avoidance has caused the Roberts Court and its predecessors to hand down some highly questionable decisions. Like Professor Kitrosser, Professor Abu El-Haj proposes friendly revision of my dynamic diversity model for First Amendment law.[41] She offers two related amendments: first, that I should recognize the importance not just of diverse discourse (free speech) but also of diverse opportunities for collective action (free association or assembly); second, that I should acknowledge the proper grounding of both sorts of First Amendment rights in a procedural commitment to robust legislative policymaking.[42] I fully embrace the first point, but I remain conflicted about the second.

I have long identified with the tendency in First Amendment scholarship to tether First Amendment rights to the functional needs of democracy. Over

36. *See* MAGARIAN, *supra* note 1, at 219–20.
37. *See generally* Magarian, *supra* note 25.
38. *See* Tabatha Abu El-Haj, *Public Unions Under First Amendment Fire*, 96 WASH. U. L. REV. (forthcoming 2018)
39. *See id.* (manuscript at 12–13).
40. *See id.* (manuscript at 10–21).
41. *See id.* (manuscript at 8).
42. *See id.* (manuscript at 58–63).

time, though, I have moved from a resolute version of that commitment[43] toward a more qualified variant, paying greater attention to diverse social as well as political underpinnings of the First Amendment. *Managed Speech* reflects that slippage or evolution. I admire Professor Abu El-Haj's resolve and consistency in viewing both expressive and associational rights in terms of their contributions to republican democracy, but I cannot work entirely within the boundaries that vision draws. Professor Abu El-Haj cares about civic organizations as democratic structures. She thus worries not that the Roberts Court's agency fee decisions will make it harder for unions to get their views out but rather that those decisions will make it harder for unions to organize their own members.[44] In marginal but meaningful contrast, I care about unions' capacity to organize because I care about organizing as the precondition for unions' getting their views out. A rich sense of unions' contributions to employees' and society's well-being shines through Professor Abu El-Haj's analysis, reinforcing my own sense that unions matter not just for what they are in republican democracy but for what they say in public discourse.

D. E Pluribus Novem

Managed Speech seeks to treat the Roberts Court's free speech decisions as a body of work, a unified if deeply complex text.[45] That approach conceptualizes the Court as a collective entity, an idea at once central to the book's value and somewhat limiting. The Justices of the Supreme Court, after all, are nine distinct, idiosyncratic *individuals*. In fact, the Roberts Court has included a total of twelve individuals: Justices Souter, Stevens, and Scalia have left the Court, replaced by new Justices Sotomayor, Kagan, and (after I finished the book) Gorsuch. Collective entities cannot have behavioral psyches (any more, one might crack, than corporations can have ideas); their actions just represent the intersections of individual vectors. Justice Breyer's preference for pragmatic balancing, Justice Kennedy's libertarian probity, and Justice Alito's didactic moralism all produce very different approaches to First Amendment problems. *Managed Speech* acknowledges this conundrum and defends the collective entity approach, but it does not deal systematically with the Justices as individuals.

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43. *See, e.g.*, Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247 (2005).

44. Abu El-Haj, *supra* note 38 (manuscript at 59–62).

45. *See* MAGARIAN, *supra* note 1, at xv–xvi.

Ashutosh Bhagwat presents a smart, innovative strategy for addressing this problem.[46] If we can identify important variables in individual Justices' behavior, then we can track those variables over a salient set of cases and gain valuable insights about what makes each Justice tick. Professor Bhagwat shows how the Justices' votes and reasoning in cases involving information technologies can help us profile their general attitudes toward technology, deepening our understandings of what they have done and enabling reasonable predictions about what they may yet do.[47] Some members of the Roberts Court, like Justice Kennedy, are usually Candides, celebrating the benefits of information technologies; others, like Justice Alito, are usually Cassandras, warning against technological dangers; and a third group, exemplified by Justice Breyer, fall between those two extremes. This individualized analysis of the Justices' attitudes provides a narrative, qualitative complement to quantitative analysis of their behavior by scholars like my colleague Lee Epstein.[48]

Every attempt to make sense of the Supreme Court's work runs into limitations. *Managed Speech* wrestles with outlier cases that pull against the thematic best-fit line I see running through the Court's free speech jurisprudence. Likewise, a focus on individual Justices may overdetermine their attitudes based on small or inconsistent samples. Professor Bhagwat astutely considers that concern when, for example, he points out the prominence of threats to children in the technological dangers that the Court's Cassandras emphasize[49] and the untidy array of positions that idiosyncratic cases with multiple moving parts can cause a Justice to take.[50]

In addition, coding Supreme Court opinions may invite specious classifications. For example, Professor Bhagwat codes Justices Ginsburg and Thomas as technology "Candides" in the context of their separate, brief statements that the Court should revisit its allowance for FCC regulations of broadcast "indecency."[51] Do those statements, though, really tell us anything about these Justices' technological optimism or pessimism? The FCC indecency regulations stretch back almost a century. The Supreme Court decision that upheld the regulations forty years ago certainly pathologizes broadcasting enough to warrant the "Cassandra" tag.[52] Justice

46. *See* Ashutosh Bhagwat, *Candides and Cassandras: Technology and Free Speech on the Roberts Court*, 96 WASH. U. L. REV. (forthcoming 2018).

47. *See generally id.*

48. *See, e.g.*, Lee Epstein, *The Judicial Behavior of the Roberts Court*, 54 WASH. U. J. L. & POL'Y (forthcoming 2018).

49. *See* Bhagwat, *supra* note 46 (manuscript at 30).

50. *See id.* (manuscript at 35–37) (discussing Sorrell v. IMS Health Inc., 564 U.S. 552 (2011)).

51. *See id.* (manuscript at 11–15).

52. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).

Thomas and Justice Ginsburg might well have questioned that decision, as Professor Bhagwat assumes, because they view its technological pessimism as baggage the Court should jettison in the name of technological optimism.[53] On the other hand, those two Justices might want to liberate old, safe media from FCC regulations to beat back scarier, more fraught new media; or they might view constitutional indulgence of ancient FCC regulations as impeding the development of more effective strategies for restricting mass media speech; or they might want to inter the First Amendment's differential treatment of broadcasting simply because they doubt whether technology should affect speech regulations one way or the other. Any of those possibilities would render the "Candide" tag misleading.

Those problems come with the territory, but it's a territory rich in intellectual promise. Professor Bhagwat, or somebody, should run with the approach he develops here to craft a fulsome profile of the individual Justices' orientations in multiple dimensions of free speech jurisprudence. Such a project could replicate his examination of the Justices' attitudes about technology to examine their attitudes about, for example, different political and other institutional structures, or different sorts of social movements. It could even cut across doctrinal categories, symbiotically extending the value of Professor Bhagwat's insight to other fields. That work could yield a book of its own, or a massive database. I feel a little bit better about my failure to account adequately for the Justices' distinctive identities when I realize how hard it would be to do the job as carefully and well as Professor Bhagwat has begun to do it here.

E. Living in the Future

Managed Speech does not say much about new media. The word "Internet" appears only eighteen times in the book's more than 250 pages.[54] That may seem like an astonishing oversight in a book about free expression published in 2017. The book, however, says little about new media because the Roberts Court has largely avoided First Amendment issues that implicate distinctive features of new media. In a case that struck down a ban on selling violent video games to minors, Justice Scalia heaped surprising praise on interactive gaming.[55] Otherwise, we have mostly heard crickets. The Court almost told us something about First Amendment protection for

53. *See* Bhagwat, *supra* note 46 (manuscript at 13–15).
54. *See generally* MAGARIAN, *supra* note 1.
55. *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 798 (2011).

big data, only to stumble past that opening.[56] Another case featured an Internet wrinkle that the Court chose to smooth over.[57] In cases about online threats[58] and fleeting televised expletives,[59] the Court avoided First Amendment issues altogether. Only after *Managed Speech* went to press, more than a decade into John Roberts' tenure as Chief Justice, did the Court hand down a First Amendment decision, *Packingham v. North Carolina*,[60] that concentrates on Internet speech.

Danielle Citron and my colleague Neil Richards argue with great force that *Packingham* indulges a brand of "magical thinking" about the Internet that impedes sensible thinking about twenty-first century expressive freedom.[61] They make a powerful case for why we should care about the Internet's distinctive free speech problems and how we might begin to address those problems. The Internet is where speech happens now, but it is also where speech increasingly struggles against severe constraints that defy the classic First Amendment template of government censorship.[62] The Internet's expressive architecture, Professors Citron and Richards argue, creates resource disparities and enables, indeed encourages, numerous forms of censorship by powerful private actors. Professors Citron and Richards emphasize what seems to me a crucial and underappreciated principle: protecting expressive freedom means fighting against concentrations of power, whether governmental or private, that threaten expressive freedom.[63] I contend throughout *Managed Speech* that the Roberts Court puts managerial constraints on public discourse both by letting the government regulate some speech and by letting some powerful speakers avoid governmental limits on their autonomy. Professors Citron and Richards reach a similar conclusion as to digital expression.

Professors Citron and Richards argue that the state action doctrine necessarily restricts the capacity of constitutional judicial review to address online speech constraints.[64] By their account, the main thing First

56. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011) (implying without actually deciding that the First Amendment protects data flows as speech).

57. *See* Snyder v. Phelps, 562 U.S. 443, 449 n.1 (2011).

58. *See* Elonis v. United States, 135 S. Ct. 2001 (2015).

59. *See* FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2318 (2012) (holding that the FCC's "fleeting expletive" rule gave regulated media insufficient notice of what the rule prohibited); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 520 (2009) (finding the rule neither arbitrary nor capricious under the Administrative Procedure Act).

60. 137 S. Ct. 1730, 1737 (2017) (striking down a ban on access to online social media by registered sex offenders).

61. Danielle Keats Citron & Neil M. Richards, *Four Principles for Digital Expression (You Won't Believe #3!)*, 96 WASH. U. L. REV. (forthcoming 2018) (manuscript at 3).

62. *See id.* (manuscript at 6–9).

63. *See id.* (manuscript at 14–19).

64. *See id.* (manuscript at 28–29).

Amendment law needs to do for online free speech is avoid interfering with sensible legislative regulations. I am not so sure. I have long doubted whether the legal categories of "public" and "private," on which the constitutional state action principle depends,[65] can bear that weight.[66] *Managed Speech* criticizes the Roberts Court for manipulating the public-private distinction to promote social and political stability.[67] Our best defense against that sort of manipulation may be a good offense. For example, we might reconceive First Amendment law not merely to permit but rather to compel structural regulations such as net neutrality, in order to prevent the kinds of private encroachments on expressive freedom against which Professors Citron and Richards so persuasively warn.[68]

Relegating First Amendment doctrine to a posture of opposing socially beneficial speech norms concedes too much both substantively and rhetorically to forces, including a majority of the Roberts Court, who cannot see—or do not mind—private power's threat to expressive freedom. Professors Citron and Richards wisely urge the translation of "First Amendment values" into the online speech arena.[69] What First Amendment values can we translate, though, if all we think the First Amendment itself can do is protect entrenched power? Professors Citron and Richards are surely right that constitutional doctrine cannot do all or most of the work needed to secure expressive freedom online.[70] Even so, reforming the doctrine to help rather than hurt the cause seems to me an essential part of any agenda for doing that work.

F. In Flanders Fields . . .

Chad Flanders brings his acuity as a political theorist to bear on *Managed Speech*, a book that reflects my limitations as a legal scholar.[71] Professor Flanders appears to make four main criticisms of my analysis. The first two concern the aspect of First Amendment doctrine that excludes certain speech categories from constitutional protection: (1) I am wrong to criticize First Amendment categoricalism (in Chapter One of *Managed Speech*), because keeping a fixed list of unprotected categories is a good way to

65. *See id.* (manuscript at 29 n.110).

66. *See generally* Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101 (2004).

67. *See* MAGARIAN, *supra* note 1, at 230–31.

68. *See generally* Gregory P. Magarian, *Forward Into the Past: Speech Intermediaries in the Television and Internet Ages*, 70 OKLA. L. REV. (forthcoming 2018).

69. Citron & Richards, *supra* note 61 (manuscript at 47–48).

70. *See id.* (manuscript at 46).

71. *See* Chad Flanders, *A Half-Hearted Defense of the Categorical Approach*, 96 WASH. U. L. REV. (forthcoming 2018).

ensure a speech-protective baseline; (2) I am wrong to criticize the Roberts Court's novel invocation of tradition to explain and justify categorical speech exclusions, because history is a good way to constrain judicial discretion, certainly a better way than my proffered alternative of openly considering the normative values that support or oppose any given categorical exclusion. Professor Flanders' other two criticisms concern my dynamic diversity prescription for First Amendment law: (3) Dynamic diversity is underdeveloped at a practical level because it does not give courts a doctrinal methodology for deciding cases; (4) Dynamic diversity is underdeveloped at a theoretical level because it does not explain why we should prefer change to stability.

To help in answering these criticisms, let me briefly model how I believe the Supreme Court, or any Justice, confronts a First Amendment dispute. The Court first considers which parts of the vast corpus of First Amendment doctrine, set forth in the Court's precedents, fit the facts of the dispute. The Court then makes a sincere attempt to apply the relevant doctrine to the dispute. However, the Court's application of the doctrine to the facts, the Court's determination about which doctrine fits the facts, and the substance of the doctrine itself all reflect normative preferences about deep political problems. One of those problems, whose importance I emphasize both in criticizing managed speech and in promoting dynamic diversity, is how to maintain a proper balance between preserving stability and enabling change in the context of First Amendment law. The Court, through its opinions, explains its decisions to the public and to other political actors in conventional doctrinal terms. However, even as the Court's decisions track doctrine, they also effectuate the Court's normative preferences. The Court usually presents its decisions to the public with conscious honesty, but theory and doctrine always interact uneasily beneath a decision's surface.

With that model in place, I can situate and respond to Professor Flanders' four criticisms. As to the first, that I wrongly criticize the categorical methodology in First Amendment law, I throw myself on the mercy of a force for which Professor Flanders professes great respect: history. As I explain in *Managed Speech*, categorical First Amendment doctrine, while it retains some utility, represents an early, now rather musty evolutionary stage in First Amendment law's development.[72] After repeatedly defending the concreteness and reliability of First Amendment categories against the encroachment of "free-floating balancing,"[73] Professor Flanders belatedly acknowledges the reality that renders his defense mostly irrelevant: "The

72. *See* MAGARIAN, *supra* note 1, at 5–6.
73. Flanders, *supra* note 71 (manuscript at 9).

categorical approach may seem to occupy only a small part of First Amendment real estate. And it does only a limited amount of work."[74] Quite right, which makes even half-heartedly defending categoricalism a curious crusade at this late date. First Amendment balancing, a subject about which Professor Flanders' brief musings around content-neutral speech regulations only scratch the surface,[75] occupies most of the real estate and does almost all of the work. We live in a balancing world now; how well we like that world does not much matter.

About my critique of the Roberts Court's distinctive reliance on tradition to situate and justify what remains of categorical First Amendment doctrine, Professor Flanders and I genuinely disagree. He acknowledges that tradition is uncertain and at least somewhat subjective, but then he insists that tradition is concrete, "something that we do not decide but have to look for."[76] I think Professor Flanders misses some quite concrete reasons to reject tradition as a basis for jurisprudence. First, judges are generally neither competent nor trustworthy historians.[77] Second, and more important, tradition's false, or at least imperfect, aura of objective truth carries great hazards for the process by which the Supreme Court justifies its decisions to the public. Professor Flanders portrays judicial decision-making as a hermetic process that can cabin judicial discretion, thereby exorcising all normative content. I think judicial decision-making is an inevitably normative process where what ultimately matters is public acceptance of the Court's decisions as legitimate. The appearance of objective truth for which Professor Flanders praises the Roberts Court's appeal to tradition looks to me like a democratic pitfall. My proposed alternative, a substantive analysis of the normative values at stake in deciding whether some category of speech deserves First Amendment protection,[78] has the democratic virtues of honesty and transparency. Let the Court tell us why it really reaches its results, and let us decide whether we find those results legitimate.

As to dynamic diversity, Professor Flanders largely answers his own complaint that the theory does not function directly as doctrine. "[D]ynamic diversity . . . operates, or seems to operate, in the same conceptual space as managed speech. It is a theory about speech and the regulation of speech. [It] does not and cannot tell courts, at least not directly, how [they] should decide cases."[79] Indeed. Dynamic diversity represents my ideal of what

74. *Id.* (manuscript at 20).
75. *See id.* (manuscript at 21).
76. *Id.* (manuscript at 17).
77. *See* MAGARIAN, *supra* note 1, at 13–14.
78. *See id.* at 31.
79. Flanders, *supra* note 71 (manuscript at 7–8) (footnote omitted).

First Amendment doctrine should look like. How the doctrine might come to look that way would involve the complicated process, sketched in my model of First Amendment adjudication above, through which normative theory always drives doctrine. Professor Flanders is importantly right that transposing theory into doctrine, or even charting the relationship between theory and doctrine, is hard and messy. That difficulty, however, in no way sets managed speech apart from any other normative theory. If Professor Flanders ultimately means that we should not be talking about normative theory in connection with legal doctrine, then I respectfully but firmly disagree, for the same reason I oppose tradition as a specious justification for categorical First Amendment doctrine: the normative content of law is inevitable, and we need to deal with it in plain view.

Finally, Professor Flanders reads me wrong when he asks why dynamic diversity favors "political and social change *as such.*"[80] Again his own critique contains the seed of the answer he's seeking. "[I]t is not clear," he writes, "why we should only favor dynamic diversity when it comes to speech, as opposed to supporting [it] when it results in *action.*"[81] My case for dynamic diversity holds that societies need to maintain a healthy balance between stability and change; that law necessarily gives governments great authority to maintain stability in the realm of action; that the realm of speech therefore carries the primary opportunities to bring about change; and accordingly that First Amendment law, in setting the normative terms of constitutional speech protection, should take special care to protect people's freedom to advocate change.[82] I do not argue for dynamic diversity in the realm of action because dynamic diversity is specifically a theory about speech, rooted in the crucial distinction between speech and action that necessarily (though problematically) undergirds the whole project of constitutional speech protection.

With that foundation in place, I can answer Professor Flanders' specific question about why dynamic diversity endorses the Roberts Court's First Amendment protections for animal cruelty videos[83] and violent video games,[84] even though (he posits) government efforts to ban those forms of speech may have embodied positive social change.[85] I favor the speech protections because I care, as a matter of First Amendment theory, about preserving opportunities to advocate change, not about whether change does

80. *Id.* (manuscript at 8) (emphasis in original).
81. *Id.* (manuscript at 8) (emphasis in original).
82. *See* MAGARIAN, *supra* note 1, at xvi–xx.
83. *See* United States v. Stevens, 559 U.S. 460 (2010).
84. *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011).
85. *See* Flanders, *supra* note 71 (manuscript at 5–6).

or does not happen. My substantive hope is that "good" established orders, whatever that might mean, will gain strength from interrogation in public discourse, while "bad" orders will fall before it. That hope partakes of the same epistemic skepticism Professor Flanders deftly articulates.[86]

Professor Flanders poses one question that has troubled me for a long time: "Is free and open speech the best vehicle for social change?"[87] Maybe, he suggests, the change-enabling role I want free speech to play in society is not optimized by dynamic diversity's prescription of maximizing the number of participants and range of ideas in public discourse. Political scientists have raised powerful objections to the premise that open public discourse drives democratic politics.[88] Likewise, legal academic communitarians[89] and critical race theorists[90] have long argued that public debate does not bring the social benefits that First Amendment advocates claim for it. Professor Flanders and I share a commitment to robust First Amendment rights, but he raises an important concern about the stability (pardon that term) of our commitment's foundations.

II. THERE IS GREAT DISORDER UNDER HEAVEN

When I finished the manuscript for *Managed Speech* in September 2016, I thought I had written a book about a judicial era that had reached its end. A new Court, with a Democratic president filling the vacancy opened by Justice Scalia's death, would consign Chief Justice Roberts to the unusual status of a rump chief. The Court's new center-left majority would make a receptive audience for my and others' ideas about what the book optimistically calls "the next First Amendment."[91] I also thought I had written a book for a continuous, steady, even boring political epoch. Our center-left government had proven, at a minimum, professional and competent; our next president, a consummate insider with an extraordinary governmental resume, would maintain the country on its well-charted course. In that political context, my call for dynamic diversity—a normative First Amendment theory that prioritizes facilitating change over maintaining stability—seemed salient and viable.

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86. *See id.* (manuscript at 2).

87. *Id.* (manuscript at 14 n.30).

88. *See* CHRISTOPHER H. ACHEN & LARRY M. BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT (2017).

89. *See* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984).

90. *See* Richard Delgado & Jean Stefanic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992).

91. MAGARIAN, *supra* note 1, at 243.

As events ran their course in November 2016 and beyond, it turned out that I had actually written a book about the first segment of a judicial era whose end likely will not come for a long time. We will not see "the next First Amendment" in the foreseeable future. Instead, the Roberts Court can continue to develop a First Amendment doctrine that advances and refines managed speech. It also turned out that I had written a book for a moment of political whiplash. A foreign power meddles with impunity in our national election.[92] Our unhinged president impulsively tweets nuclear threats.[93] Extremists—down to and including actual Nazis—spew their hate in public forums.[94] All of this sludge churns through an information environment that is constantly mutating into forms no one could have imagined just a few years ago. We feel grave anxiety and uncertainty about the future.

The beating heart of *Managed Speech*, the essence of dynamic diversity, is my conviction that First Amendment law should enable challenges to all manner of social and political establishments by encouraging the broadest possible range of participants and ideas in public discourse. That vision grounds my critical view that the Roberts Court's First Amendment goes too far in letting established institutions, both governmental and private, control and often dampen the contributions to public discourse of ordinary voices, especially voices from the social, political, and economic margins. Since the apotheosis of Donald Trump, I have worried about—well, many things, but the one that matters in this forum is the possibility that post-2016 reality dooms the normative case for a First Amendment grounded in dynamic diversity.

Many people, including people with whom I agree about lots of important things, seem to yearn now for more stability, not less. They increasingly trust, for deliverance from our political hellscape, the same institutions whose empowerment *Managed Speech* laments.[95] Democrats lionize a vanquished F.B.I. director as a heroic avatar of resistance to presidential power[96] and the intelligence community in general as a crucial

92. *See* Matt Apuzzo & Sharon LaFraniere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, N.Y. TIMES (Feb. 16, 2018), https://www.nytimes.com/2018/02/16/us/politics/russians-indicted-mueller-election-interference.html.

93. *See* Michael Crowley, *Trump's North Korea Tweets Shatter Decades-Old Nuclear Taboo*, POLITICO (Jan. 3, 2018), https://perma.cc/5V9S-XX2B.

94. *See, e.g.*, Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html.

95. *See, e.g.*, Peter Beinart, *American Institutions Are Pushing Back Against Trump*, ATLANTIC (Feb. 15, 2017), https://perma.cc/9E8N-5UWQ.

96. *See* W. James Antle III, *James Comey Goes from Zero to Hero with Democrats*, WASH. EXAMINER (June 8, 2017), https://perma.cc/QZ2U-6DVV.

check against government excesses.[97] Liberals rely on the military and its leaders to resist the President's erratic will and keep us back from the nuclear brink.[98] Progressives concerned about diversity praise giant corporations as paladins of nondiscrimination[99] and cultural inclusion.[100] This solicitude for powerful institutions has a deep philosophical corollary: the extolling of objective truth in an age of "alternative facts."[101]

Longing for stability, institutional order, and objective truth makes sense amid the cursed earth of Trumpism. *Managed Speech* shows, however, that enlisting powerful institutions to maintain stability in public discourse puts dire constraints on expressive freedom. This symposium illustrates that dynamic. Prioritizing stability hardens societal antipathy toward Professor Zick's public protesters. It makes judicial biases against Professor Abu El-Haj's unions and Professor Kitrosser's government whistleblowers a lot tougher to dislodge. It greatly complicates the technological optimism of Professor Bhagwat's Candides and the progressive vision of digital speech drawn by Professors Citron and Richards. Like a lot of other people, I have learned hard, valuable lessons over the past two years about how low our political and civic culture can sink. Even so, I believe the challenges of this wretched moment affirm, rather than refute, the value of dynamic diversity.

No political term has lost more luster in the Trump era than "populism." It's the label many people like me—highly educated, socio-economically privileged, connected to formidable institutions—tend to slap on the Trumpist debasement of our politics and society.[102] A familiar account of the 2016 election holds that white working class voters rose up in a wave of torches and pitchforks that carried Donald Trump to the White House.[103] In fact, though, Trump mainly owes his election to ordinary Republican voters: most definitely white, but also relatively affluent.[104] Anxious left-liberals

97. *See* Alyona Minkovski, *Worshipping the Intelligence Community Is Not "Resistance,"* SALON (Nov. 14, 2017), https://perma.cc/8LKP-M9TD.

98. *See* Ezra Klein, *Trump's Recklessness Is Magnifying the Military's Power – and Independence*, VOX (Nov. 20, 2017), https://perma.cc/K5KC-4UTK.

99. *See, e.g.*, Ellen McGirt, *Google Searches Its Soul: Inside the Tech Giant's Effort to Get More Diverse—and to Change the Way We All See the World*, FORTUNE (Feb. 1, 2017), https://perma.cc/U8VP-KZLF.

100. *See, e.g.*, Yohana Desta, *The Year Disney Started to Take Diversity Seriously*, VANITY FAIR (Nov. 23, 2016), https://perma.cc/BB3H-5EY9.

101. *See, e.g.*, Josh Landy, *Can We Have Our Truth Back, Please?*, PHILOSOPHY TALK (Sep. 10, 2017), perma.cc/CM39-DADF.

102. *See, e.g.*, Jennifer Rubin, *Populism Is No Way to Govern, and Trump Is Proving It*, WASH. POST (Jan. 19, 2018), https://www.washingtonpost.com/blogs/right-turn/wp/2018/01/19/populism-is-no-way-to-govern-and-trump-is-proving-it/?utm_term=.1ffbaa2e7cdc.

103. *See, e.g.*, Nate Cohn, *Why Trump Won: Working-Class Whites*, N.Y. TIMES (Nov. 9, 2016), https://www.nytimes.com/2016/11/10/upshot/why-trump-won-working-class-whites.html.

104. *See* Zack Beauchamp, *What the Conventional Wisdom About Trump and Working-Class Whites Gets Wrong*, VOX (Nov. 22, 2016), https://perma.cc/TRV8-DKRQ; Nicholas Carnes & Noam

call out the crude Nazis and nativists who take up Trump's invitations to attack and demean our fellow Americans, but we say less about the role that business interests play every day in supporting and sustaining Trumpism. We form an easy picture of rubes duped by Russian-seeded pro-Trump propaganda, but we hold a much hazier image of willful, high-information Trump voters who knew exactly what they were doing on Election Day. We need to whip out our reality glasses.[105] Our society has not entered some new era in which crude barbarians trash beneficent institutions. Rather, we have simply entered a new stage in the continuing ascendance of powerful institutions that wallow in self-interest and radiate indifference or hostility toward the needs and aspirations of the vast majority.

I still believe in a species of democratic populism: a politics in which ordinary people and groups conceive and sustain humane institutions to serve the public interest. I am not a big Ben Franklin fan—given my left-wing civil libertarian bent, Thomas Paine is more my kind of Founder—but I love Franklin's description of our baby nation as "[a] republic . . . if you can keep it."[106] Constantly testing and questioning established truths and institutions is the seed work for keeping our republic. We sustain and renew our social order through our ongoing exchange of ideas. Truth is not a gift we gratefully accept from generous institutions; it's a resource we boldly mine with our intellectual curiosity and reason. Democracy is not a mansion we sometimes get to visit; it's our house, which we need to build, continuously, from the ground up. Today, more than at any time I can remember, our soceity's great hope lies in our facility for contentious discussion and our courage to challenge authority. First Amendment law must embody the wisdom of Fredrick Douglass: "Power concedes nothing without a demand. It never did, and it never will."[107]

Lupu, *It's Time to Bust the Myth: Most Trump Voters Weren't Working Class*, WASH. POST (June 5, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/05/its-time-to-bust-the-myth-most-trump-voters-were-not-working-class/?utm_term=.d5f9296a09f0.

105. *See* JOHN CARPENTER, THEY LIVE (Universal Pictures 1988).

106. Papers of Dr. James McHenry on the Federal Convention of 1787, *reprinted in* U.S. GOV'T PRINTING OFFICE, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 952 (1927). After recalling this quotation, I realized that I did not know to what alternative Franklin had contrasted "a republic." I began to worry that perhaps he had provided a template for specious arguments against democratic politics. *See, e.g.*, Walter E. Williams, *Why We Are a Republic, Not a Democracy*, DAILY SIGNAL (Jan. 17, 2018), https://perma.cc/HZT5-BKEU. Fortunately, Franklin turns out to have been contrasting republics with monarchies.

107. Frederick Douglass, *Speech Before the West Indian Emancipation Society* (Aug. 4, 1857), *in* PRINTED SPEECHES BY DOUGLASS, 1857 to 1859, 22 (1859).

CONCLUSION

I hope this essay conveys some sense of my profound appreciation for the work and ideas of all the symposium contributors. For whatever small ways *Managed Speech* has stimulated their thoughts about our shared passion for free speech, their contributions to this symposium have repaid me with usurious levels of interest. I am glad for the window my book has opened onto the state of First Amendment law, and I am grateful for the light my brilliant friends have poured back through that window.