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THE DISAPPEARING FIRST AMENDMENT

The standard account of the First Amendment presupposes that the Supreme Court consistently has expanded the scope of free speech rights over time. This account holds true in some areas, but not in others. In this illuminating work, Ronald J. Krotoszynski, Jr. acknowledges that the contemporary Supreme Court rigorously enforces the rules against content and viewpoint discrimination for those who possess the wherewithal to speak but when citizens need the government's assistance to speak – for example, access to public property for protest – free speech rights have declined. Instead of using open-ended balancing tests, the Roberts and Rehnquist Courts have opted for bright line, categorical rules that minimize judicial discretion. Opportunities for democratic engagement could be enhanced, however, if the federal courts returned to the Warren Court's balancing approach and vested federal judges with discretionary authority to require government to assist would-be speakers. This book should be read by anyone concerned with free speech and its place in democratic self-government.

Ronald J. Krotoszynski, Jr. teaches and writes about constitutional law, administrative law, First Amendment, and comparative constitutional law, with a particular focus on the First Amendment and freedom of expression. He is the author of three books, including *Privacy Revisited* (2016), *Reclaiming the Petition Clause* (2012), and *The First Amendment in Cross-Cultural Perspective* (2006). He has published works in leading law reviews and is the co-author of two casebooks, *First Amendment: Cases and Theory* (3rd ed. 2017) and *Administrative Law* (4th ed. 2017).

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The Disappearing First Amendment

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For my father, Ronald J. Krotoszynski, Sr.

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Preface

The Free Speech Clause has enjoyed quite a good run and presently has a rather remarkable – and robust – scope of application. Since the firm ascendency of the Holmes-Brandeis vision of the First Amendment in the mid-twentieth century,[1] the First Amendment has been something of a growth stock. Over time, and with great predictability, the Supreme Court has expanded the First Amendment's scope of coverage. This is particularly true of the Free Speech Clause and the unenumerated right of free association; admittedly, this proposition holds somewhat less true for the First Amendment rights of assembly, petition, and press.

In light of these considerations, one would stand on firm jurisprudential ground to posit that, as a general matter, the scope of expressive freedom in the United States has moved in a single direction – toward an ever broader scope of potential application. The Free Speech Clause has come to encompass more varied kinds of speech (commercial speech, sexually explicit speech, offensive speech, intentionally false speech) and even conduct (for example, selling data related to the prescription practices of physicians in Vermont) with the passage of time. However, there is another story to be told – a story of doctrinal evolution followed by doctrinal retrenchment. And this story reflects a very different trend line involving the consistent diminution of certain First Amendment rights over time.

Of course, other legal scholars have shown how First Amendment rights in some specific areas have declined, rather than expanded, with the passage of time. Steven Gey, for example, called attention to the shrinking public space available for speech activity in the mid-1990s. Erwin Chemerinsky has posited that the Roberts Court is not a "free speech" court at all, citing the Roberts Court's decisions invalidating campaign finance reform measures, withdrawing First Amendment protection from government employees who speak out about a matter of public concern, and the imposition of new limits on the First Amendment rights of faculty and students at the nation's public schools, colleges, and universities.

[1] For a history of the First Amendment before the Supreme Court came to accept the Holmes/Brandeis understanding, see David M. Rabban, Free Speech in Its Forgotten Years (1997).

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So too, Helen Norton and Mary-Rose Papandrea have written lucidly, and repeatedly, about the federal courts' failure reliably to protect the speech rights of government workers. Caroline Mala Corbin and Claudia Haupt have all called attention to the growing problem of government compelled speech (particularly for those in licensed professions). Tim Zick has demonstrated how the protection afforded to transborder speech activity has contracted over time. Joseph Blocher, Danielle Citron Keats, Gia Lee, and Lyrissa Lidsky have cautioned about the potential distortionary effects of misattributed government speech on the process of democratic deliberation. Robert Post and Owen Fiss have written quite persuasively and lucidly on growing threats to academic freedom and the formation of collective knowledge.

I have benefited greatly from the important work of these academic colleagues and fellow First Amendment travelers. These names – accompanied by a good number of citations and quotations, both above and below the line – will appear in the pages that follow.

So, what does this book bring to the table? How does it add to our understanding of the areas and ways in which expressive freedoms in the United States have declined, rather than expanded, over the years? In other words (and stated more directly): Why should anyone bother to read this book?

The Disappearing First Amendment does something new – it offers a novel overarching thesis for why speech rights have contracted, rather than expanded, in some, but not all, areas of First Amendment jurisprudence over time under the Burger, Rehnquist, and Roberts Courts. On a first look, the areas in which First Amendment rights have declined seem to be entirely unrelated to each other: access to public property for speech activity, access to private property for speech activity, the speech rights of government employees, the speech rights of faculty and students in public schools, colleges, and universities, transborder speech, newsgathering and reporting activities, professional speech, and limitations on government speech. A common thread exists – a thread that links these disparate areas of First Amendment law, theory, and practice.

The Warren Court decisions that pioneered protection for government employee speech, student speech, and its overall approach to requiring access to government property for speech activity all adopted open-ended balancing tests to weigh a would-be speaker's interest in the government's assistance in speaking, against the government's claim of a managerial necessity in withholding the requested support. These open-ended balancing tests created more speech net. On the other hand, however, the tests also certainly produced inconsistent results across the decentralized system of federal and state courts that would engage in the requisite balancing exercise. Consistency and predictability would suffer when different judges, facing cases with largely identical facts, rendered inconsistent decisions. Inconsistency in the context of free speech cases gives rise, at least potentially, to a risk of content, or even viewpoint, discrimination.

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By way of contrast, bright-line, categorical rules generally protect less speech on balance than more open-ended balancing tests but will produce more consistent results across the run of cases requiring judicial decision. For example, a rule that provides that a government employee's speech enjoys no First Amendment protection if it falls within the scope of her employment will generate more consistent results than a balancing exercise that weights the employee's interest in speaking against the government employer's interest in managing the workplace. In sum, a categorical approach to applying the First Amendment will often protect less speech net, but will ensure that litigants receive the same outcome on the same facts. To be somewhat more precise, many of the categorical rules that the Rehnquist and Roberts Courts have adopted in cases where a would-be speaker needs the government's assistance in order to speak actually protect less speech than the open-ended balancing tests that they replaced.

As a normative matter, one can make the case for consistency and predictability over more net speech. After all, fundamental fairness (justice) arguably requires that judges render the same decision in cases presenting substantially identical facts.

In my view, however, the Warren Court has the better of this argument. If, as Alexander Meiklejohn so famously argued, it is essential to the process of democratic self-government "that everything worth saying shall be said,"[2] an approach that empowers more ordinary citizens to speak – and thereby to contribute to the process of democratic deliberation – should be preferred to an approach that generates predictable results but less speech. I will advance this argument, in a sustained way, over the course of the pages that follow.

Categorical rules will often tend to favor the rich and the powerful over the poor and the marginal; rules against speaker, content, and viewpoint-based discrimination all empower those with the means to speak to do so at will – and at whatever volume they wish. In this regard, Greg Magarian characterizes the Roberts Court's freedom of expression jurisprudence as reflecting and incorporating a "managed speech" approach that routinely favors the government and the powerful over the ordinary (much less the marginal).[3] Kathleen Sullivan objects to a "Lochnerian" vision of the First Amendment that presumptively treats any and all government interventions in speech markets as distortionary and misguided.[4]

These class-based critiques of the Roberts and Rehnquist Courts are not wide of the mark – the results in major contemporary First Amendment cases do tend to favor those with the wherewithal to speak over those who require the government's assistance to speak. I am not certain, however, that dislike for ordinary Americans, or a robust regard for the privileged, actually drives the Justices to reach these decisions. Rather than a conscious effort to link property and speech (admittedly a plausible

[2] Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 25 (1948).
[3] Gregory P. Magarian, Managed Speech: The Roberts Court's First Amendment 252–53 (2017).
[4] Kathleen Sullivan, Comment, *Two Concepts of Freedom of Speech*, 124 Harv. L. Rev. 143, 143–46, 155–63 (2010).

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explanation), I believe that a fear of transparent exercises of judicial discretion in First Amendment cases animates decisions that reject balancing in favor of categorical rules.

If the appearance of judicial discretion in First Amendment cases is distressing, any approach that incorporates "balancing" or proportionality analysis (to use the term more widely in vogue in the rest of the world[5]) forces judges to pick free speech winners and losers. Moreover, they must do so in a very open and transparent fashion. By way of contrast, bright-line, categorical rules hide judicial discretion more effectively – the rule produces the outcome (not the judge). Of course, this is nonsense – because the Justices of the Supreme Court are themselves responsible for both creation of a legal rule and also for its application, or non-application, in any given case, any judicial decision deciding a contested question of constitutional law involves, of necessity, an exercise of judicial discretion.[6]

The exercise of discretion is far less transparent when a judge cites and mechanically applies a categorical rule than when she engages in a balancing exercise. For conservative jurists, the appearance of consistency in First Amendment cases is a cardinal virtue in fashioning a doctrinal test for assessing the merits of constitutional arguments – and the obvious and transparent exercise of discretion is a mortal sin. The Warren Court, and to some extent, the Burger Court, were far more comfortable living with doctrinal approaches that self-evidently vested discretion with judges than the Rehnquist and Roberts Courts. And cases presenting demands for the government's assistance in exercising First Amendment rights will, of necessity, entail the adoption and application of balancing devices.

Free speech rights have contracted, rather than expanded, in areas where the decision of First Amendment claims requires open-ended balancing of the interests of would-be speakers, on the one hand, and the government, on the other. That is, in any case, the main thesis of this book. Whether or not the pages that follow adequately prove it out will be up to its readers to decide for themselves.

Having shown my hand, allow me to briefly outline how I intend to prove out my main thesis – which, restated and simplified, consists of three main points: (1) Judicial discretion in First Amendment doctrine has the potential to enhance, rather than degrade, the process of democratic deliberation essential to the process of democratic self-government; (2) the Warren Court understood this and, although not always in forceful or maximalist ways, worked to innovate in First Amendment theory and doctrine to enhance opportunities for ordinary citizens to engage in public debate; and (3) the Roberts and Rehnquist Courts consistently have favored certainty, predictability, and consistency over speech when deciding First Amendment questions. After an introduction and overview, set forth in Chapter 1, Chapters 2–8 prove out an empirical claim, namely that First Amendment rights

[5] *See* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015).
[6] *See generally* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995) (discussing a judge's role in creating, maintaining, and applying a legal rule in a particular case).

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have declined, rather than expanded, in some important areas implicating expressive freedom.

Chapter 9, which considers the importance of non-judicial actors to the scope and vibrancy of expressive freedoms, admittedly departs from the general approach of the area-specific seven chapters that precede it. The Warren and Burger Courts were not particularly successful in using the First Amendment to curb the pretextual use of admittedly constitutional discretionary police and prosecutor authority to squelch public discourse. To be sure, the Warren and Burger Courts weeded out breach of peace laws that facially targeted speech or made a hostile audience reaction the gravamen of a crime. They did not, however, find a reliable solution to the problem of the misuse of perfectly constitutional criminal laws, such as unlawful assembly, breach of peace, impeding pedestrian or vehicular traffic, and failure to obey a lawful police order. Nevertheless, Chapter 9 fits into the larger overall project of demonstrating how First Amendment rights, at least in some areas, have shrunk rather than grown over the years.

The Disappearing First Amendment also has a doctrinal objective. Even if the current three and four part tests do not empower judges to reliably facilitate, rather than impede, the exercise of First Amendment rights, the existing doctrinal tests could be refined and improved. Even if a return to the open-ended balancing tests favored by the Warren Court is an unrealistic proposal, we can and should make existing doctrinal rules function in more free speech-friendly ways when possible. Accordingly, each substantive chapter offers some concrete ideas and suggestions for modest reforms that would enhance the scope and vibrancy of First Amendment rights in the contemporary United States.

The empirical and doctrinal critiques, however, are in the service of my larger, normative thesis, which is that play in the joints works to facilitate more speech, and in a mass participatory democracy with universal suffrage, more speech is not merely a good thing, it's an essential thing. The 2016 election, with many voters believing blatant falsehoods, demonstrates the critical importance of a freely-operating and vibrant political marketplace of ideas that successfully engages our body politic in the process of democratic deliberation. For example, claims that Pope Francis endorsed Donald Trump for president and that Hillary Clinton ran a child sex-slave ring out of a Washington, DC pizzeria, influenced more than a few voters. With a margin of only 72,000 votes, in three states (Michigan, Pennsylvania, and Wisconsin) out of over 126 million ballots cast deciding the outcome of the Electoral College, it is entirely plausible that false speech, in conjunction with Russian trolling in support of Donald Trump, led to Trump's Electoral College victory. Voters who credit blatant, objective falsehoods – for example, that climate change does not exist – will go on to cast badly misinformed ballots. Democratic self-government will suffer as a result.

The 2016 presidential election clearly proves – if proof were needed – that democratic discourse is crucial to the proper functioning of a democratic polity.

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The process of democratic deliberation benefits when more voices, rather than fewer voices, are heard. The First Amendment, properly understood and applied, should provide a constitutional basis for imposing affirmative duties on the state to enable ordinary citizens to be heard and seen – and to engage in a meaningful way with each other about the candidates, the issues, and the values that our government should both reflect and respect. Whatever the faults and limitations of the Warren Court's efforts to use the First Amendment as a source of affirmative duties on the government to facilitate the speech of private citizens, the Warren Court was actively and creatively engaged in trying to identify and sustain the conditions that make effective and successful democratic self-government possible.

Our democracy needs a First Amendment that empowers more people to speak to and with each other – and to do so with greater frequency. In a mass participatory democracy, more speech and more speakers are better than less speech and fewer speakers. The imposition of positive, or affirmative, obligations on government to facilitate private speech will require balancing – and balancing will require judges to embrace discretion. For better or worse, enabling ordinary voters to engage in the process of democratic discourse will require judges to render difficult decisions in close cases.

Balancing exercises, by their very nature, are messy and will not yield consistent results on a predictable basis. In other areas of constitutional law, however, the Supreme Court has learned to live with discretion and the indeterminacy that accompanies it. For example, the main test for ascertaining the adequacy of procedural due process considers the citizen's interests, the government's interests, and the probability of improving the accuracy of factual determinations if the government provided additional process.[7] The *Mathews v. Eldridge* test has all of the infirmities of an open-ended balancing test; it does not, and cannot, produce consistent results on a reliable basis. However, it has the virtue of permitting judges to consider, in any given context, whether the procedures the government used could have been, and should have been, more robust to ensure a factually accurate determination of the claimant's interest in life, liberty, or property.

We should not expect, or demand, perfect play from judges. But open and honest wrestling with how best to accommodate First Amendment claims with the government's legitimate managerial needs constitutes an unavoidable task.[8] We also have learned to live with "play in the joints" in the context of mass benefits programs. The government is not going to decide every claim correctly – but we can live with a certain number of blown calls if, in the vast run of cases, the government usually reaches the correct decision.[9]

Concerns about stealth content and viewpoint discrimination should make us worry a bit about *too much* play in the joints in First Amendment jurisprudence. But

[7] Mathews v. Eldridge, 424 U.S. 319 (1976).
[8] *See* Robert C. Post, Constitutional Domains: Democracy, Community, Management (1995).
[9] *See* Jerry Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims (1983).

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in the wider world, where proportionality analysis is quotidian, judges seem to be able to balance private interests, government interests, and general concerns about fairness and means/end fit without endangering the institutional legitimacy of the courts. If Canada's Supreme Court and the German Federal Constitutional Court can balance in free speech cases, without bringing their work into disrepute, then the Supreme Court of the United States should be able to embrace balancing, and the discretion inherent in it, as well.

In sum, and for the record, I do not suggest that the Warren Court was perfect or that the Supreme Court's efforts since Chief Justice Earl Warren left the bench have been terrible. That kind of simplistic "Warren good/Roberts bad" analysis would do very little, if anything, to advance or improve our understanding of how expressive freedoms should work in a polity dedicated to maintaining an ongoing project of democratic self-government. I do believe, and will argue in the pages that follow, that the Warren Court was more willing to innovate, to create, to bend First Amendment rules and theory to support the process of democratic self-government, than its successors have proven to be.

The Warren Court's willingness to engage with difficult questions related to maintaining a public discourse of the quality and depth capable of supporting self-government for the long-term constituted a signal virtue of its (admittedly imperfect) efforts. If our governing institutions derive their legitimacy through the imprimatur of "We the People," provided at regular intervals via the ballot box, that imprimatur can only be as meaningful as the process that informs the act of voting. Accordingly, the quality, scope, and vibrancy of democratic deliberation are essential inputs to a meaningful electoral process.

In sum, the First Amendment should certainly stand as a bulwark against ham-fisted government efforts to suppress particular speakers, ideas, or ideologies that the government dislikes. But, properly understood and applied, the First Amendment also should serve as a basis for imposing duties on the government to empower, rather than impede, citizens who wish to speak and to participate in the ongoing democratic dialectic that informs the act of voting on election day.

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the law faculties at the University of Alabama School of Law, Cornell Law School, University of California Hastings College of the Law, Emory University School of Law, Indiana University-Indianapolis McKinney School of Law, Lewis & Clark Law School, Ohio State University Moritz College of Law, University of Oregon School of Law, Santa Clara University School of Law, Seattle University School of Law, Syracuse University College of Law, Texas A & M University School of Law, University of Texas School of Law, University of Washington School of Law, University of Utah S. J. Quinney College of Law, and University of Windsor School of Law for helping me to refine my claims and arguments.

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Finally, portions of *The Disappearing First Amendment* first appeared in print as:

(1) Ronald J. Krotoszynski, Jr., *Whistleblowing Speech and the First Amendment*, 93 Indiana Law Journal 267 (2018) (Chapter 4).
(2) Ronald J. Krotoszynski, Jr., *Transborder Speech*, 94 Notre Dame Law Review 473 (2018) (Chapter 6).
(3) Ronald J. Krotoszynski, Jr., *Our Shrinking First Amendment: On the Growing Problem of Reduced Access to Public Property for Speech Activity and Some*

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Suggestions for a Better Way Forward, 78 Ohio State Law Journal 779 (2017) (Chapter 2).

It bears noting that the material drawn from these earlier published works has been revised and expanded for inclusion in this book.

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