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# FOREWORD: The Free Speech Record of the Roberts Court

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# The Free Speech Record of the Roberts Court

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By definition, catalogues are backward-looking. By collecting and presenting a body of work—of an artist or a court—a catalogue invites us to reflect on what the creator of that body has accomplished. But, at least for an extant entity—a living artist or a court that continues to sit—a catalogue also provides an opportunity to anticipate the future work of the entity whose oeuvre up to now is being surveyed.

The *Brooklyn Law Review*'s April 9, 2021 symposium on Ronald Collins's and David Hudson's magnificent catalogue of the Supreme Court's free speech jurisprudence under the leadership of John Roberts[1] issued both types of invitations. Mr. Collins's and Professor Hudson's meticulous presentation, not just of the results of the Roberts Court's free speech cases, but of the inner details of those decisions—including, among many other variables, the voting lineups among the justices, the doctrinal approaches they took, and even the most prominent Supreme Court litigators arguing those cases—provided a myriad of pointillist dots from which an observer, stepping back, can perceive a broader image of the Court's free speech jurisprudence.[2] Their careful and detailed presentation provided fertile territory for the participants in that symposium to survey the past and contemplate the future.

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† Stanley A. August Professor of Law, Brooklyn Law School. Thanks to the editors of the *Brooklyn Law Review* for their excellent work both in convening the symposium for which this essay is the introduction and for editing the papers submitted for publication as part of it. Thanks are also due to Ronald Collins and David Hudson for their painstaking work in cataloguing the free speech record of the Roberts Court, work that formed the impetus for this symposium.

[1] Ronald K.L. Collins & David L. Hudson, Jr., *The Roberts Court—Its First Amendment Free Expression Jurisprudence: 2005-2021*, 87 BROOK. L. REV. 5 (2021).

[2] For another analogy between law and the artistic concept of pointillism, see William D. Araiza, *After the Tiers:* Windsor*, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367 (2014).

The published contributions to this issue illustrate the rich and lively discussion that symposium generated. Beyond the Collins and Hudson catalogue[3] and the transcript of the discussion generated by the symposium itself,[4] this issue of the *Brooklyn Law Review* includes several thoughtful presentations of themes highlighted by that catalogue and the accompanying discussion. Professor Geoffrey Stone's essay,[5] reflecting his introductory symposium remarks, considers the doctrinal structure the Roberts Court encountered when the current chief justice took his seat in 2005. His essay incisively examines the building blocks the Court used over the course of the twentieth century to create what he characterizes as the "sensible and reasonably effective set of principles for sorting First Amendment issues and for reaching reasonably sound and predictable outcomes"[6] that existed when the Roberts Court began its work.

Robert Corn-Revere's article[7] also looks backward, but does so to compare the critics of the Roberts Court's speech-protective jurisprudence with past opponents of free speech claims. Mr. Corn-Revere finds parallels between current critics of the First Amendment's alleged "weaponization" and "*Lochner*ization" and earlier generations of opponents of particular free speech claims, from the nineteenth-century anti-obscenity crusader Anthony Comstock and Fredric Wertham, who vociferously attacked comic books in the 1950s for their violence and gore, to more recent advocates of legal limits on pornography and hate speech. After discussing the views of such advocates, as well as those who see in the First Amendment a political struggle over power rather than a profound principle about freedom, Mr. Corn-Revere concludes his article with a provocative series of statements with the form "You might be a censor if . . . ." His retrospective look at past opponents of speech claims, when combined with his warnings about current censorship, lay important groundwork for future debates about the Constitution's free speech guarantee.

My colleague Joel Gora's contribution to this issue[8] similarly looks both backward and forward. He revisits the

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[3] *See* Collins & Hudson, *supra* note 1.

[4] Transcript, *The Roberts Court and Free Speech Symposium*, 87 BROOK. L. REV. 289 (2021).

[5] Geoffrey R. Stone, Introductory Remarks, *The Roberts Court and the First Amendment: An Introduction*, 87 BROOK. L. REV. 133 (2021).

[6] *Id.* at 143.

[7] Robert Corn-Revere, *The Anti-Free Speech Movement*, 87 BROOK. L. REV. 145 (2021).

[8] Joel M. Gora, *Free Speech Still Matters*, 87 BROOK. L. REV. 195 (2021).

article he wrote for Brooklyn Law School's 2016 symposium on free speech[9] and updates its analysis to account for the speech and religious freedom cases decided since then. Professor Gora finds much to applaud in the Court's First Amendment record since his last article (although he notes several losses for free speech claims during that period). However, he expresses concern about the continued academic and political criticism of what he views as the Court's generally pro-free speech jurisprudence. More broadly, he worries about what he considers the increased enthusiasm for silencing disfavored speech, implemented through the conduct of government, powerful private institutions such as corporations, social media platforms, and educational institutions, or simply the informally coordinated work of large numbers of individuals. In response to what he views as such threats, Professor Gora argues that "What we need is to establish, or perhaps reestablish, a 'culture of free speech.'"[10]

Like Mr. Corn-Revere's and Professor Gora's articles, my own contribution to this symposium issue also uses the opportunity of Mr. Collins's and Professor Hudson's catalogue[11] to look both backward and forward. My article[12] examines several free speech opinions handed down over the last decade to consider yet again the longstanding debate between categorical rules and more context-specific standards in free speech jurisprudence.[13] The issues in those cases—ranging from the applicability of the content-neutrality rule, to the rigor of the scrutiny applicable to content-based discrimination, to the threshold question of whether the speech in a given case is governmental and thus exempt from First Amendment scrutiny altogether—triggered analyses that, in my view, render categorical speech rules imperfect methodologies for protecting free speech. While such rules may have a useful role to play in free speech law, the requirements of transparent and credible reasoning suggest that contextual considerations should play a more explicit role in the Court's analysis. Looking forward, my article, referring to the case considering whether specialty

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[9] Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63 (2016).

[10] *See* Gora, *supra* note 8, at 243 (quoting Robert Tracinski, *We Need More than the First Amendment, We Need a 'Culture of Free Speech'*, DISCOURSE MAG., (June 14, 2021), https://www.discoursemagazine.com/ideas/2021/06/14/we-need-more-than-the-first-amendment-we-need-a-culture-of-free-speech/ [https://perma.cc/B2JE-YCCS].

[11] *See supra* note 1.

[12] William D. Araiza, *The Law of License Plates and Other Inevitabilities of Free Speech Context-Sensitivity*, 87 BROOK. L. REV. 247 (2021).

[13] *See*, *e.g.*, Collins & Hudson, *supra* note 1, at 59.

license plates constitute government speech,[14] concludes that "Perhaps . . . we should . . . develop judicial doctrine governing the law of license plates[ a]nd many more doctrines like it."[15]

As this brief introduction makes clear, the essays and articles in this issue examine the Roberts Court's free speech jurisprudence from a variety of perspectives. That variety, and the richness of the debate they reflect, flow in large part from the complexity generated by the speech clause's seemingly simple command that "Congress shall make no law . . . abridging the freedom of speech."[16] The project of making sense of that complexity requires, first and foremost, an understanding of what the Court has actually decided, and how they went about reaching those decisions. The Collins and Hudson project that inspired this symposium provides enormous assistance in coming to that understanding. For that reason, it was a fitting subject for the *Brooklyn Law Review*'s symposium and is a fitting centerpiece for the essays and articles that fill this issue.

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[14] *See* Araiza, *supra* note 12, at 277–81, 282–83.

[15] *Id.* at 250 (footnote omitted); *see also id.* at 287.

[16] U.S. CONST. amend. I; *see also* Stone, *supra* note 5, at 133–34 (noting that one of the foundational moves the twentieth-century Court made regarding the speech clause was to reject an absolutist reading of the Amendment).