FOREWORD

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I take great pride and pleasure in introducing this issue of Delaware Law School's *Widener Law Review*, with its fine contributions from Clay Calvert, John Culhane, Ashley Messenger, and Stephen Wermiel. I congratulate as well all of the Delaware Law students who have worked on the *Law Review* to solicit and edit these contributions.

We live in interesting times. We have a First Amendment as old as the Republic, and First Amendment conflicts as fresh and cutting as the daily tweets of the President of the United States. These articles, in their own way, demonstrate the extraordinary complexity of modern free-speech law.

Clay Calvert's excellent article on gag clauses and efforts to protect online consumer reviews from contractual censorship explores one complexity: the extent to which individuals may or may not sign their rights to free speech away with a simple screen-click agreeing to a website's terms and conditions.

John Culhane's masterly exploration of the *Masterpiece Cake* case explores what may be the most difficult Supreme Court case of the 2018-2019 term, and one of the most difficult cases in many years, posing powerful conflicts between core principles of free speech and religion and core values of equality and non-discrimination.

Ashley Messenger's article explores the intersection of the "right of publicity" with the First Amendment, an arena of First Amendment and tort law that was already complex and fascinating in physical space. Her article demonstrates how those complexities morph into even more imposing conundrums in the context of social media.

Stephen Wermiel reminds us that, one of the great architects of modern First Amendment law, Justice William J. Brennan, Jr., never touched a computer keyboard, posted on Facebook or Twitter, or read a text message. He challenges us to ponder what Justice Brennan's fundamental assumptions about the First Amendment's purpose and function mean in a world of discourse conducted largely in the ether of cyberspace.

Each of these contributors, in their own way, challenge us to ponder philosopher Marshall McLuhan's famous dictum: "The medium is the message."[1]

Well, is it? What if the medium is a wedding cake? A president's Tweet? A post on Facebook? A consumer review posted on an online site?

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[1] *See* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 8-13 (1964).

From the dawn of the Internet, American law has been vexed by how free speech theories and doctrines developed in physical space apply in the context of virtual space. What matters most, the *medium* or the *message*? As Steve Wermiel notes in his article, the Supreme Court conjured the question in its 2017 decision in *Packingham v. North Carolina*.[2]

In *Packingham*, the Court held unconstitutional a North Carolina law that made it a felony for a registered sex offender to gain access to a number of websites, including social media platforms like Facebook and Twitter. Justice Kennedy's opinion began with a passage likening the Internet, including social media, to the physical spaces traditionally treated as public forums in First Amendment public forum law:

> A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.
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> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, and social media in particular. Seven in ten American adults use at least one Internet social networking service. One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. According to sources cited to the Court in this case, Facebook has 1.79 billion active users. This is about three times the population of North America.[3]

Yet at the same time, the Court expressed caution. "While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions," the Court stated, "we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be."[4] Hedging its bets, the Court noted: "The forces and

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[2] 137 S.Ct. 1730 (2017).
[3] *Id*. at 1735 (internal citations omitted).
[4] *Id*. at 1736.

directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow."[5] *Packingham* may signal that, the Supreme Court's current working hypothesis is that free speech issues arising in virtual space should be governed as closely as possible by the same doctrines that apply in physical space.

I am not so confident, however, that the matter will prove so simple. If, as Stephen Wermiel suggests, it is difficult to imagine what a First Amendment pioneer such as Justice Brennan would make of today's world, how much more difficult it is to decipher what other pioneers, such as Justice Oliver Wendell Holmes, James Madison, or Thomas Jefferson would have thought.

The final paragraph of Justice Holmes' famous dissenting opinion in *Abrams v. United States*[6] remains to this day the single most poetic and resonant defense of freedom of speech in the American constitutional tradition. Yet Holmes was not indifferent to truth. The entire premise of his defense of freedom of speech was the belief that "the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."[7] Nor was Holmes an absolutist. His "clear and present danger test," as restated and intensified in *Abrams*, was a legal doctrine designed to draw limits.[8] Although the limits were highly protective of speech—he argued that we must tolerate even "the expression of opinions that we loathe and believe to be fraught with death"[9]—the limits nonetheless existed.

Freedom of speech, if treated as an *absolute*, would never endure in a society of ordered liberty. Absolute protection for all speech would replace the law of the land with the law of the jungle. Doctrinal tests distinguishing between expression and incitement to violence, or between defamatory falsehoods and derisive opinions, are central to the rule of law, and in turn central to the preservation of freedom of speech. The thoughtful drawing of those lines, particularly in cyberspace, is an ongoing challenge in our democratic constitutional experiment, and in Holmes' words again: "as all life is an experiment."[10]

In yet another famous dissent, Justice Holmes admonished that "[g]eneral propositions do not decide concrete cases."[11] The articles in this symposium edition of the *Widener Law Review* prove true Holmes' haunting admonition.

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[5] *Packingham*, 137 S.Ct. at 1736.
[6] 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[7] *Id.*
[8] *Id*. at 627-28.
[9] *Id*. at 630.
[10] *Id.*
[11] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).