

FREEDOM OF SPEECH

INTRODUCTION

The First Amendment to the U.S. Constitution reads, in pertinent part: “Congress shall make no law . . . abridging the freedom of speech.” Although the First Amendment mentions only protection against abridgements by Congress, as incorporated through the Fourteenth Amendment Due Process Clause, freedom of speech is also protected against abridgements by state and local governments.

In his celebrated article, “The Bill of Rights,” 35 *New York University Law Review* 865, 874, 879 (1960), Supreme Court Justice Hugo Black argued that the First Amendment’s command is clear and absolute:

The phrase “Congress shall make no law” is composed of plain words, easily understood. [The] language [is] absolute. [Of] course the decision to provide a constitutional safeguard for [free speech] involves a balancing of conflicting interests. [But] the Framers themselves did this balancing when they wrote the [Constitution]. Courts have neither the right nor the power [to] make a different [evaluation].

Nonetheless, the First Amendment’s protection of speech is clearly not as absolute as Justice Black suggests. For example, it is likely that a municipal government can enact a constitutional

ordinance that makes it a criminal trespass to force one's way without permission into the dining room of a private social club in order to make a political speech with a loudspeaker. If it is constitutional to punish such speech activity, then the command of the First Amendment is not absolute, but will depend on the particular context. At that point, the operation of the First Amendment turns on two essential terms: "the freedom of speech" and "abridge."

The Definition of "the Freedom of Speech" and "Abridge"

How are we to arrive at an understanding of the meaning of "the freedom of speech" for purposes of the First Amendment? What is to count as "speech"? In this regard, consider Point for Discussion (c) "What Counts as Speech?" in the Text at 1001c-1002a:

What speeches and pamphlets have in common is their use in conveying a message. Does this mean that every act that conveys a message counts as speech? Music often conveys a message, as do symbolic acts, such as bowing one's head and holding one's right fist above the head, or even the burning of a flag or a draft card at a protest rally. These acts have an obvious expressive content. And, as we will see, the First Amendment is principally concerned with expression. But many other acts that do not seem principally expressive – such as the assassination of a political leader – also make a statement, and sometimes are committed in large part for that

purpose. Surely such acts are not immune from punishment simply because they contain an expressive element.

The answer to the question “What counts as speech?” will turn on the purposes, functions, or objectives that are to be served by “the freedom of speech” to be protected. Analysis of the purposes, functions, or objectives for speech requires an understanding of the normative values to be furthered by the freedom of speech. Are the normative values of the First Amendment tied primarily to the prevention of governmental censorship, such as the licensing schemes imposed by colonial governments before the American Revolution? Or is speech also to facilitate meaningful political choices by the democratic electorate? Or to promote an individual’s rational search for truths, whether political, religious, or social? Or to enable a person to reach individual self-realization?

The answer to the question “What normative values are served by the freedom of speech?” relies, in part, on the conditions under which speech will further the purposes, functions, or objectives that are normatively valued. This requires a set of instrumental or operational parameters for the freedom of speech that examines its:

Source: The origin of the speech, including the character and motivations of the speaker

Content: The substance of the speech

Mode: The channel of communication and character of presentation of the speech, including its time, place, manner, and medium of transmission

Effect: The consequences of the speech

Even after we understand the meaning of “the freedom of speech,” we must arrive at an understanding of the meaning of “abridge” for purposes of the First Amendment. Because speech is not to be protected absolutely, we must have a concept of the tolerable and intolerable governmental impairments or enhancements of speech. In what situations may a competing state interest override the freedom of speech or prefer the speech of some at the expense of the speech of others?

This requires a methodology for weighing competing state interests. Among the possibilities are the following:

Virtual absolutism: virtually absolute protection for all speech that furthers the First Amendment’s normative values

Categorical approach: virtually absolute protection for certain categories of speech that further the First Amendment’s normative values

Definitional balancing: reaching presumptions about First Amendment protection by balancing a category of speech against a competing category of state interests

Ad hoc balancing: determining outcomes on a case-by-case basis by balancing a specific speech activity against a particular competing state interest

Theories of Normative Value

The Supreme Court and First Amendment scholars have developed theories of the normative values of speech that explain why expression should have greater immunity from government regulation than most other forms of human conduct. Among the most recognized theories of normative value for the freedom of speech are the “search for truth” or “marketplace of ideas” rationale, the “self-governance” rationale, and the “self-realization” rationale.

Search for Truth or Marketplace of Ideas Rationale:

One of the earliest articulations of the “search for truth” or “marketplace of ideas” rationale was that of John Milton in his powerful political tract, *Areopagitica*, which he published in 1644 to urge the British Parliament to repeal its scheme of press censorship. Milton observed:

Although all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously

by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; and who ever knew Truth put to the worse, in a free and open encounter? . . . For who knows not that Truth is strong, next to the Almighty; she needs no policies, nor strategems, nor licensings to make her victorious.

Probably the most celebrated expression of the “search for truth” or “marketplace of ideas” rationale for the protection of the freedom speech in American constitutional law is the statement of Mr. Justice Oliver Wendell Holmes in his dissenting opinion in *Abrams v. United States* (1919):

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Certainly, there are challenges that may be raised to the “search for truth” or “marketplace of ideas” rationale as a theory for constitutional protections of speech:

- Truth and rationality are held forth as values in themselves: But is truth always a “good?” What about the stability or continuity of society when a popular consensus accepts a particular belief as useful?
- Circularity in the process of defining truth: Knowledge survives in the marketplace because it is true, but truth is discoverable because it survives in the marketplace. If truth is objective and can be discovered, why shouldn't the marketplace be closed down once the truth is found? If truth is relative and we are never certain whether it can be discovered, then the marketplace rationale is entirely circular or self-validating, and can never be justified by external means.
- Assumes the capacity of reason to decipher truth in the distorted communication of the marketplace: Reason may be distorted by social or cultural conventions that restrict experience, or reason may be deceived by the packaging of ideas in the marketplace. In this regard, consider Baker, “Scope of the First Amendment Freedom of Speech,” 25 *University of California at Los Angeles Law Review* 964, 974-78 (1978):

[The] hope that the marketplace leads to truth, or even to the best or most desirable decision, [is] implausible. [First, experience as well as discussion contributes to understanding. Thus,]

restrictions on experience-generating conduct are as likely as restrictions on [debate] to stunt the progressive development of understanding, [but the marketplace theory gives no] constitutional protection [to] experience-producing conduct. [Second, the marketplace theory assumes] that people [use] their rational capacities to eliminate distortion caused by the form and frequency of message presentation. [This] assumption cannot be accepted. Emotional or “irrational” appeals have great [impact].

- Assumes meaningful access to the marketplace for all competing viewpoints: When the government does not regulate the “marketplace of ideas” to ensure equality of access and a balancing of viewpoints, there is a great potential for “market failure” in the discovery of truth. Limited “rental space” is apportioned solely on economic buying power.

“Self-Governance” Rationale:

A second theory of First Amendment normative value, the “self-governance” rationale, is associated most strongly with the work of Alexander Meiklejohn. In his book, *Political Freedom* (1960), Meiklejohn writes:

[I]n that method of self-government, the point of ultimate interest is not the words of the speakers, but the minds of the hearers. The final aim of the meeting is the voting of wise decisions. The voters, therefore, must be made as wise as possible. The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about. And this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented to the meeting. Both facts and interests must be given in such a way that all the alternative lines of action can be wisely measured in relation to one another. . . .

What is essential is not that everyone shall speak, but that everything worth saying shall be said. . . .

[T]hough citizens may, on other grounds, be barred from speaking, they may not be barred because their views are thought to be false or dangerous. No plan of action shall be outlawed because someone in control thinks it unwise, unfair, un-American. No speaker may be declared “out of order” because we disagree with what he intends to say.

And the reason for this equality of status in the field of ideas lies deep in the very foundation of the self-governing process. When men govern themselves, it is they - and no one else - who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. . . . It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.

The “self-governance” rationale comes with its own set of serious challenges:

- Heightened protection is reserved primarily for expression necessary to political governance: Speech that would not commonly be classified as political might be as essential to informed political judgment as explicitly political speech activities.
- Promotes equality of expression in the political arena more than individual liberty of expression: The point of the freedom of speech is not the liberty of an individual to speak but the airing of all political information and opinion relevant to self-government.

- Recognizes the government's affirmative power and duty to enhance the diversity of expression in the political arena: Meiklejohn argued that Congress is empowered to "enlarge and enrich" that "freedom of mind which befits the members of a self-governing society." Among his preferred proposals, he suggested that Congress enact laws that would bring the citizenry "together in activities of communication and mutual understanding." Such affirmative measures appeared necessary because Meiklejohn believed that a *laissez-faire* economy and advanced electronic technology fostered and encouraged modern consumptive tendencies contrary to the classical mode of self-restraint.

“Self-realization” Rationale:

Meiklejohn’s “self-governance” rationale was the springboard for a more inclusive theory of First Amendment normative value, labeled the “self-realization” rationale. A contemporary libertarian, Professor Martin Redish of Northwestern Law School in Chicago, defended the “self-realization” rationale in a 1982 law review article entitled *The Value of Free Speech*:

The position taken in this Article is that the constitutional guarantee of free speech ultimately serves only one true value, which I have labeled “individual self-realization.” This term has been chosen largely because of its ambiguity: it can be interpreted to refer either to development of the individual’s powers and abilities ~ an individual “realizes” his or her full potential ~ or to the individual’s control of his or her own destiny through making life-affecting decisions ~ an individual “realizes” the goals in life that he or she has set.

[T]his first principle ~ individual self-realization ~ can be proven, not merely by reference to some unsupportable, conclusory assertions of moral value, but by reasoning from what we in this nation take as given: our democratic system of government. . . . [O]ur specific form of democracy logically implies the broader value, self-realization. [In conclusion,] all forms of expression that further the self-realization value, which justifies the

democratic system as well as free speech's role in it, are deserving of full constitutional protection.

The “self-realization” rationale gives rise to objections such as the following:

- The “self-realization” rationale challenges the First Amendment’s historical dichotomy between expressive conduct and non-expressive conduct: This criticism is ably made by Robert Bork, “Neutral Principles and Some First Amendment Problems,” 47 *Indiana Law Journal* 1, 25, as he observes:

[The self-fulfillment/autonomy rationale does] not distinguish speech from any other human activity. An individual may develop his faculties or derive pleasure from trading on the stock market, [working] as a barmaid, engaging in sexual activity, [or] in any of thousands of other endeavors. Speech [can] be preferred to other activities [on the basis of this rationale] only by ranking forms of personal gratification.

- The self-realization rationale is likely to embrace a full spectrum of expressive activities that have historically been denied First Amendment protection: Under his individual self-realization rationale, for example, Professor Redish would expand First Amendment protections for commercial speech and for obscenity.

- The self-realization rationale “equates the barest passions with the highest ideals.” In contrast to Alexander Meiklejohn, Martin Redish would force the government into an ethical relativism that denies the intrinsic value and superiority of any belief, opinion or action above any other.

Query: Assume that Washington State enacted a “hate speech” regulation prohibiting public advocacy of the Neo-Nazi doctrine that African-Americans, Asian-Americans, non-Christians and homosexuals are biologically inferior to heterosexual Christian Caucasians and that the American Constitution should not provide heightened judicial scrutiny for laws that explicitly discriminate against them. What arguments can be made from the various normative theories of value regarding First Amendment protection for such Neo-Nazi expression?