

# Normative Value Theories for Speech and Press Freedoms

## Introductory Comments

First Amendment law and theory are essentially products of the twentieth century. More specifically, they have their origins in the World War I era, emanating from prosecutions under the federal Espionage Act, which prohibited activities disruptive of the war effort, and under state seditious libel laws punishing socialism, anarchism, and syndicalism.

When challenges to these federal and state laws reached the Supreme Court, the justices faced the vexing responsibility for the very first time of giving meaning to the First and Fourteenth Amendment freedoms of speech and press. Both the Court and legal commentators developed theories of the normative values of speech and press to explain why and when expression should have greater immunity from government regulation than most other forms of human conduct.

Among the most historically honored theories of free speech value is the “search for truth” rationale. One of its earliest articulations 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. The “search for truth” rationale was the focus, as well, of John Stuart Mill’s classic defense of libertarian principles in *On Liberty*.

*On Liberty* set the groundwork for the American variant of the “search for truth” rationale, more commonly known as the “marketplace of ideas” rationale. Probably the most celebrated expression of the “marketplace of ideas” rationale for the protection of free 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. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. 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.

A second theory of First Amendment value, the “self-governance” rationale, is associated most strongly with the thought of Alexander Meiklejohn. The “self-governance” rationale was explained most forcefully in Meiklejohn’s University of Chicago lectures, collected and published in the book *Political Freedom: The Constitutional Powers of the People*.

Meiklejohn’s “self-governance” rationale was the springboard for a more inclusive theory of First Amendment value, labeled the “self-realization” rationale, developed by the modern libertarian, Professor Martin Redish of Northwestern Law School in Chicago.

This assignment examines the “search for truth” or “marketplace of ideas” rationale, the “self-governance” rationale and the “self-realization” rationale for constitutional protection of free expression. Among the more important considerations for analysis are:

- What types of expressive activity are protected under each rationale? What commonalities and differences are there among the rationales in terms of the categories of and justifications for protected speech?
- What forms of governmental control of expressive activity are viewed as legitimate under each rationale? What commonalities and differences are there among the rationales in terms of permissible governmental regulations?
- In what respects are the rationales alike or different in defining public and private threats to the rights and interests of free expression?
- Is there any room under a particular normative value theory to distinguish between media technologies – for example, to permit different levels of constitutional protection for print and electronic media?