

First Amendment and the Government: Irreconcilable Enemies?

Introduction

Freedom of speech – arguably one of the core values underlying America’s democratic success – is purportedly among the country’s “most cherished values” and is inarguably one of the principles for which American democracy is so often cited.¹ And, if you were to confine yourself solely to the review of judicial opinions as a measure of the continuing vitality of the right to free speech guaranteed in the First Amendment,² you might feel fairly confident that this fundamental liberty remains robust and valued by the nation’s citizens and, perhaps more importantly, their political representatives. You would, however, be mistaken.³ The devotion shown by the courts to the free speech guarantee enshrined in the First Amendment is not shared by either by the executive or legislative branches. This essay asserts that freedom of speech, a foundational concept in American democracy, is not a principle embraced by those elected to serve as the nation’s representatives and leaders, but is, in fact, perceived as inimical to their very interests. This is because free speech, which is so often an avenue of complaint and even change, threatens the status quo and thus the position of those currently holding power.⁴

I. The Judiciary’s Role In the Protection of Free Speech

Although the courts have more recently in the twentieth century become champions of the First Amendment’s free speech guarantee, American history is still fairly littered with examples of government restrictions on its citizenry’s freedom of speech and the judiciary’s initial acquiescence to them. For instance, with the ink barely dry on the Bill of Rights, Congress would pass the Sedition Act of 1798, which essentially criminalized the publication of

¹ Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, at 49, col. 2. (hereinafter Rosenfeld, *Hate Speech*)

² U.S. CONST. amend. I, at 31, col. 2.

³ Most likely on both counts, but this paper is concerned with the latter case.

⁴ See *American Booksellers Association v. Hudnut*, at 26, col. 1.

“unfounded” criticism directed towards the United States government.⁵ Somewhat ironically, the “seditious libel” proscribed under the Act had been used by the newly-formed nation’s previous oppressor—the English monarchy—to suppress its own critics, which most likely would have included the authors of this Act.⁶

America’s track record on this issue would scarcely improve over the next one hundred fifty years. By the early twentieth century, at least twenty-one states had enacted legislation criminalizing a citizen’s advocacy of “violent means” to achieve change in the nation’s existing political structure.⁷ And fear of communism would drive mid-century America to adopt laws denying employment, as well as the privilege of holding public office, to any citizen who was a communist, a suspected communist, or even a one-time communist.⁸

Eventually, however, the judiciary, led by the Supreme Court, would intervene to protect a citizen’s right to criticize “foolishly and without moderation” the United States government and those serving in it.⁹ Although the Court may not have directly confronted the constitutionality of the Sedition Act itself, it did subsequently extend First Amendment protection to “seditious libel.”¹⁰ As for the state statutes criminalizing the advocacy of violence as a means of effecting social and political change, although the Supreme Court initially validated these acts, some forty years later it would eventually determine that such advocacy alone—without more—was not enough to justify suppression of speech that posed no imminent threat to the security of the individual state concerned.¹¹ And finally, in the late sixties, the

⁵ Sedition Act (1798), at 32, col. 2.

⁶ Rosenfeld, *Hate Speech*, at 53, col. 2.

⁷ *Brandenburg v. Ohio*, at 18, col. 2.

⁸ See e.g., *Keyishian v. Board of Regents of the University of the State of New York*, at 2, col. 2. (addressing the state of New York’s use of various statutes and administrative regulations to “prevent the appointment or retention of ‘subversive’ persons in state employment”).

⁹ *Cohen v. California*, at 15, col. 1 (quoting Justice Frankfurter).

¹⁰ *American Booksellers*, at 24, col. 2.

¹¹ *Id.*

nation's left would find safe harbor with the Court as it—albeit belatedly—rejected efforts by federal and state governments to restrict views and ultimately speech advocating alternative political systems such as communism and socialism.¹²

During the last forty years, the courts have increasingly expanded the protections offered to speech under the Constitution by narrowing the categories of speech that may be proscribed by the nation's various governmental entities.¹³ In doing so, the courts have rejected governmental efforts to sanction a citizen for emblazoning an expletive on his jacket as an expression of protest to the Vietnam draft,¹⁴ to ban the sale and distribution of pornography explicitly portraying the degradation of women,¹⁵ and to criminalize “hate speech” targeting historically-oppressed groups of citizens.¹⁶ Today, as reprehensible or egregious as the courts themselves may find the views expressed by a particular citizen or group, they strive to preserve that individual or group's right to free expression in defense of the higher principle reflected in the First Amendment.¹⁷

This judicial commitment to freedom of speech rests partially on the “free marketplace of ideas” principle.¹⁸ This is the conviction that a society that encourages the open exchange of ideas unfettered by governmental restrictions will eventually arrive at the “truth,”¹⁹ which, at least in theory, is the primary objective of any judicial inquiry. However, if government is permitted to censor the expression and dissemination of ideas, then society risks stifling the

¹² *American Booksellers*, at 23-24, col. 2 and 1; *see also* Rosenfeld, *Hate Speech*, at 49, col. 2.

¹³ *R.A.V. v. City of St. Paul*, at 27, col. 2 (observing that the Court had gradually contracted the scope of the exceptions not entitled to free speech protection).

¹⁴ *Cohen v. California*, at 15.

¹⁵ *American Booksellers*, at 23, col. 1.

¹⁶ *R.A.V.*, at 31, col. 2.

¹⁷ *Id.*

¹⁸ Rosenfeld, *Hate Speech*, at 50, col. 2; *see Keyishian*, at 3, col. 2 (suggesting that the classroom, in particular, exemplifies the First Amendment “marketplace of ideas” principle); *Roberts v. Haragan*, at 5, col. 2 (federal district court quoting the Supreme Court for the same proposition); *R.A.V.*, at 28, col. 2 (discussing the prospect of governmental suppression of ideas from the “marketplace”).

¹⁹ Rosenfeld, *Hate Speech*, at 50, col. 2; *see Keyishian*, at 3, col. 1.

development of “broader enduring values”²⁰ by relying upon the fallible authority of the government to determine and approve what constitutes a valid principle or idea and what does not.²¹

Another perhaps more pragmatic justification for protecting freedom of speech is what might be called the “safety-valve” principle. Under this view, by zealously protecting free speech, the judiciary will actually save the government from itself because citizens will have the opportunity to voice their complaints and the government will have the corresponding opportunity to address those complaints, thereby avoiding a possible violent backlash from a public with no outlet for its frustrations.²²

Finally, courts may simply rely on the notion that the very nature of this democracy—a government that is of, by, and for the people—demands that the assessment and valuation of ideas be left to the people themselves.²³ It is only in this way, the courts might argue, that “a more capable citizenry and more perfect polity” will be achieved, reflecting the freedom of choice upon which American democracy is founded.²⁴

The Legislative Role in the Suppression of Ideas

As the legislation discussed in the previous section suggests, the legislative branch has historically been far less sympathetic to the exercise of free speech. This should not be all that surprising. The fact that the authors of the Bill of Rights specifically identified freedom of speech as an inviolable right to be free from governmental suppression reflects their recognition that the temptation to control and restrict speech might prove overwhelming to the government

²⁰ *Cohen*, at 14, col. 2.

²¹ John Stuart Mill, *Liberty of Thought and Discussion, On Liberty*, at 47; Rosenfeld, *Hate Speech*, at 50, col. 2; *see Keyishian*, at 3, col. 1.

²² *Keyishian*, at 2, col. 2 (quoting *De Jonge v. Oregon*).

²³ *American Booksellers*, at 23, col. 2.

²⁴ *Cohen*, at 14, col. 2.

and, therefore, it was necessary to explicitly preserve that freedom within the very document creating this new government. Of course, since the legislative body is entrusted with the making of laws, such a prohibition would naturally be aimed at this branch of the government. Thus, the very language of the First Amendment anticipates the threat to free speech posed by Congress and specifically prohibits the enactment of laws by that body aimed at its suppression.²⁵ (The First Amendment's guarantee of free speech would subsequently be extended by the courts through the vehicle of the Fourteenth Amendment to state legislative bodies²⁶ and their various governmental subdivisions.²⁷)

Still, even the explicit guarantee of free speech established in the First Amendment would not deter Congress (or a number of state legislatures) from enacting a statute that would restrict the public's freedom of speech.²⁸ The underlying rationale for this and subsequent governmental restrictions would be fear—fear that words would translate to action and ultimately lead to the destruction of the institutional government. The Sedition Act of 1798 was premised on what appears to have been the genuine concern that unfounded, malicious criticism of the government would undermine the confidence of the citizenry and essentially lead to the collapse of the government as an institution.²⁹

The state statutes of the early twentieth century prohibiting advocacy of the overthrow were most likely attributable to the relatively recent communist revolution in Russia, prompting fears that such violence might overtake the United States as well. Certainly, the Soviet Union's own aggressive expansionism, the successful communist takeover in China and the explicit

²⁵ U.S. CONST. amend. I, at 31, col. 2.

²⁶ *Chaplinsky v. State of New Hampshire*, at 10-11 (quoting an unknown source).

²⁷ See *Burk v. Augusta-Richmond County*, at 3; *Blair v. City of Evansville*, at 15; *R.A.V.*, at 27; *American Booksellers*, at 26.

²⁸ See *supra* notes 5–8 and accompanying text.

²⁹ *American Booksellers*, at 24, col. 2.

promise to spread violent revolution throughout the world during this era created the pervasive climate of fear that would lead to the enactment of statutes punishing the espousal of communist views. Here again, just as in the early years of the American democracy, the legislative branches feared that the dissemination of such views might have led to their widespread acceptance, thereby bringing to fruition the communist threat in America.³⁰

In their defense, these legislative efforts to abridge the citizenry's freedom of speech appear to have been based on a genuine, if perhaps misguided, concern that stifling public debate of controversial and even repugnant ideas would lead to the demise of American democracy.³¹ Moreover, with the exception of a few demagogues during the Red Scare, it doesn't appear that these restrictions were aimed at the naked protection of personal political power, but rather the preservation of the *institutional* power of the government itself. Unfortunately, the same case cannot be made for the executive branch's own efforts to suppress free speech.

The Executive Branch: A More Targeted Approach to Free Speech Suppression

Perhaps because the executive branch is charged simply with enforcing those laws enacted by Congress, the framers of the Constitution believed that sufficient checks were in place to prevent the suppression of free speech by the government and, thus, placed no similar prohibitions on the presidency. It is also likely that they did not anticipate the capacity of the executive branch to control the flow of information and manage public opinion with the finesse and degree of sophistication with which it does. Where the legislative branch is able to exercise control over speech through the enactment of laws, the executive branch relies upon its

³⁰ *Id.*

³¹ And, ironically, they would have been right—but not from the forces they feared.

occupation of the field—the public stage—to shape public debate by silencing³² or otherwise restricting media access to its critics.³³

This agenda is not unique to the current administration, free speech is an ongoing threat to those in power whoever that may be.³⁴ As a general rule, those in power wish to retain that power. Doing so requires the attainment and maintenance of dominance in the “marketplace of ideas”—except that, for the executive branch, the relevant currency is not the “truth” but rather that of the vote. Ordinarily, dominance over competitors is achieved by effectively creating and packaging the more compelling message and ensuring that this message is received by its targeted audience. Undermining the effectiveness of that message will be competing messages offering “superior” alternatives or, more commonly, merely criticizing the dominant power’s own message as somehow flawed, incorrect or simply untrue. These competing messages arise from a variety of sources: power-seeking political alternatives, the press and even the consumer-voters themselves in the form of protest. In seeking to dominate this “marketplace of ideas,” a party in political power, however, can draw upon the apparatus of the state itself to suppress competing views. Under ordinary circumstances, particularly in a nation that purportedly cherishes its constitutional right to free speech,³⁵ this is difficult to achieve. Under extraordinary circumstances, however, that is not the case.

³² See Ari Fleischer, Press Briefing (Sept. 26, 2001) (noting that “[Americans] need to watch what they say, watch what they do. This is not a time for remarks like that; there never is” in response to television personality Bill Maher’s comment that the September 11th hijackers who martyred themselves could not be accurately described as “cowards”).

³³ See, e.g., *Blair v. City of Evansville*, at 15-17; James Brovard, *Quarantining Dissent: How the Secret Service Protects Bush from Free Speech*, at 43 (describing the process by which those opposed to the policies of the current administration are “quarantined” from public events and media view with some regularity) (hereinafter, Brovard, *Quarantining Dissent*).

³⁴ Apparently, this antipathy towards free speech is no longer limited to those in power as those corralled in the 2004 Democratic National Convention “free speech” gulag can attest. See Julie Hilden, *The Constitutionality of Police-Imposed Free Speech Zones*, at 41, col. 1.

³⁵ Rosenfeld, *Hate Speech*, at 49, col. 2.

In these post-911 “war on terror” times, it becomes far easier to justify restrictions on speech in the name of national security. Individuals protesting administration policies unrelated to the war on terror can easily be shunted off to isolated areas—hidden from both public and media view—in the name of security.³⁶ Those actually protesting the war will at minimum encounter the same treatment³⁷ and perhaps even worse.³⁸

Conclusion

Why does the judiciary more often seek to protect the public’s First Amendment right to free speech where its institutional partners do not? Perhaps it is because the courts do not have to rely upon public approval to remain in power and, therefore, need not resort to the suppression of their rivals. And, most certainly, less time spent reading polls means more time available to read the Constitution.

³⁶ See generally Blair, at 15-17; Brovard, *Quarantining Dissent*, at 43 (documenting the plight of Bill Neel who, while protesting Bush Administration economic policies, was carted off by the police for failing to remain in the secured “protest zone”).

³⁷ Brovard, *Quarantining Dissent*, at 43-44 (describing the arrest of anti-war protesters who refused to be cordoned off from the view of both the public and the media).

³⁸ *Id.* at 44, col. 2 (quoting a Homeland Security Department’s recommendation “that local police departments view critics of the war on terrorism as potential terrorists”).