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COMMENTARIES

LOW VALUE SPEECH REVISITED

*Cass R. Sunstein**

The first amendment protects speech. But what activities qualify as "speech"? The distinction between speech and conduct usefully orients the inquiry, but it is incomplete. Some "conduct" has all or almost all of the characteristics that qualify speech for special protection; consider picketing, marching, perhaps draftcard-burning. Some "speech" has few such characteristics. Consider conspiracies to fix prices, consumer fraud, a letter discharging someone from employment on racial grounds, or a threatening telephone call. A large task for first amendment doctrine is to develop criteria for deciding what is constitutionally protected "speech"—criteria that enable judges and others to decide what activities are protected by the guarantee of freedom of speech.

Such criteria might well help judges to distinguish between "high-value" and "low-value" expression as well. Instead of entirely excluding some categories of expression from the universe of speech, judges might conclude that some expression may be regulated on the basis of a less stringent demonstration of harm than is ordinarily required. An approach of this sort would have the advantage of forcing government to justify the imposition of restraints on speech that lies somewhat afield from the core concerns of the first amendment—or so, at least, I shall be arguing.

I.

In order to undertake the task of distinguishing between speech and nonspeech, or between high- and low-value speech, several things should be relatively clear.

(1) An approach that distinguishes between constitutionally protected speech and other activities should not be taken to devalue those other activities, or even to suggest that they are less important than speech. Food, work, love, and friendship are all important; but eating,

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working, falling in love, and making friends do not usually count as speech.[1] In order to interpret the first amendment, it is necessary to decide what activities possess the characteristics of "speech" that call for special constitutional protection. That fact does not mean that activities without such characteristics are less valuable or less worthwhile.

A central point here is that the Constitution singles out speech for special protection, and in deciding what counts as speech, those entrusted with the task of interpretation must bring to bear the best available theory to account for that constitutional commitment as well as for the decided cases.[2] The decision to accord particular protection to "speech" may be controversial as a matter of first principles; that decision will, for some, seem an anachronistic holdover from Enlightenment rationalism, or rooted in naive understanding about the nature of communicative processes. But for those charged with interpreting the Constitution, an effort to challenge the decision to single out speech for special protection, or to adopt theories that fail to distinguish speech from other activities, would be irresponsible.

(2) The derivation of meaning is a shared process in which both reader and text play important and interrelated roles. But for constitutional purposes, a test for "speech" that depends solely or primarily on the derivation of meaning by some or many members of the audience,[3] rather than on the nature and properties of the materials at issue, will be unsuccessful. A trip to Europe, a sale of commodities, a sip of coffee, a visit to a brothel, a purchase of beachfront property—none of these is plausibly "speech," at least in the absence of unusual circumstances; but those who watch or participate will derive some sort of meaning from all of these activities. To be sure, government might interfere with such activities for reasons that raise serious constitutional concerns;[4] but to acknowledge that point is not to endorse the far more doubtful proposition that activities become speech, or high-value speech, by virtue of the fact that observers derive meaning from them. Such a test would disable courts from sensibly distinguishing between those activities that are and those that are not protected by the first amendment.[5]

(3) If distinctions are to be drawn between categories of speech in terms of their centrality to the purposes of the free speech guarantee, it need not follow that government will be permitted to ban all "low-value" speech. One might, for example, conclude that some forms of expression

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[1] Of course government efforts to regulate the "speech" that might be involved in these activities would raise first amendment questions.

[2] It is important to recognize that the effort to develop the best theory is not untethered; it must of course take account of the constitutional tradition and of the relevant cases.

[3] *See* Alexander, *Low Value Speech*, 83 NW. U.L. REV. 547 (1989).

[4] *Id.* at 553 (discussion of rock formation banned because government considers its "message" to be dangerous).

[5] *See* STONE, SEIDMAN, SUNSTEIN & TUSHNET, CONSTITUTIONAL LAW 1201-02 (1986).

may be regulated only on the basis of an exceptionally powerful showing of harm; that others may not be regulated unless the government is able to meet a less severe but still significant burden; and that still others are not speech at all and may be regulated so long as the regulation is "rational." Indeed, an approach of this sort is followed in current law. To say that some speech is low-value—for example, libel of private persons—is emphatically not to say that it is automatically subject to government regulation.

(4) It is impossible to develop a system of free expression without making distinctions between low and high value speech, however difficult and unpleasant that task may be. Consider the alternatives.

(a) To distinguish between high- and low-value "ideas"[6]—quite apart from harms—would be inconsistent with the generally salutary constitutional commitment to the prohibition of regulation of speech on the basis of its viewpoint.[7] At least as a general rule, government ought not to be in the business of saying which ideas should be heard and evaluated by the citizenry.[8] Of course some things that qualify or might qualify as "ideas" should be regulable; both child pornography and private libel might well contain "ideas." But it is far more sensible to look at the issues of harm and value, rather than to authorize government to distinguish among ideas on their merits.

(b) It would not be plausible to base first amendment doctrine on distinctions among the audiences for speech, or to treat some categories of citizens as more trustworthy than others.[9] There are no readily available criteria for making such distinctions; and any effort at distinguishing among audiences would be easy to abuse. Class or racial biases are especially likely dangers in a judicial assessment of which audiences could hear what kinds of speech; and even if biases of this sort could be avoided, others would undoubtedly intrude. Outside of unusual settings, all audiences should be treated the same.

(c) The most plausible alternative to an inquiry into value would be to look at the question of harm alone.[10] On this view, the question is whether the speech causes sufficient harm to permit regulation, and it does not matter what "value" the speech has. An approach of this sort would have the advantage of simplicity. It would also avoid the signifi-

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6 *See* Alexander, *supra* note 3.

7 *See* Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983). On some of the difficulties with the requirement of content neutrality in the context of pornography, see C. MACKINNON, FEMINISM UNMODIFIED (1987); Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589.

8 In some cases, of course, the risk of a hostile audience reaction is relevant to the constitutional question.

9 *See* Alexander, *supra* note 3 at 548.

10 Alexander favors this approach, *supra* note 3 at 554. *See also* Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 51 (1982).

cant difficulties, and the risks of abuse, involved in assessing the value of different kinds of expression.

Such an approach would, however, impose intolerable pressures on constitutional doctrine. Consider the enormously wide range of the category of "speech," covering, for example, libel of public and private actors, pornography, political speech, commercial speech, conspiracies, bribes, threats, contractual agreements, public debates. If the question of value is put to one side, there are only two possibilities for doctrinal development, and both of them are unacceptable. The first would be to impose a relatively weak burden of justification on government, in order to allow it to regulate such harmful activities as misleading or false commercial speech, child pornography, and libel of private citizens. By hypothesis, a system looking at harm alone would have to extend that weaker burden across the board, and thus to all categories of speech. This route would, however, be singularly difficult to defend, since it would allow for public regulation of a wide range of speech—including misleading or false political speech, or libel of public officials—that, by general agreement, ought not to be subject to government control. In short, the less stringent burden properly placed on governmental efforts to regulate some forms of speech should not be extended to (for example) political debates.

The second possibility would be to adopt for all speech a quite stringent justification requirement, one that would forbid regulation that is currently accepted, on the theory that the quite severe burden applied to political speech should be extended to (for example) commercial speech. Such a system would be equally vulnerable, for it would fail to draw lines that ought to be drawn. It is difficult to maintain that false commercial speech, libel of private figures, conspiracies, or child pornography ought to be immunized from governmental control—as in all likelihood they would be if the stringent burden properly imposed on governmental efforts to regulate political speech were extended to all categories of expression. In these circumstances, the most likely outcome of a doctrinal refusal to look at the "value" side would be that judgments about value would be made tacitly, and the articulated rationale for decisions would not reflect an assessment of all factors thought relevant by the courts.

These conditions suggest that it would be exceptionally difficult to develop free speech doctrine without distinguishing between categories of speech in terms of their centrality to the first amendment guarantee. The most powerful argument in favor of distinguishing between high- and low-value speech is that the alternatives turn out, on reflection, to be intolerable.

To say this is not to deny that there are serious dangers in denominating some speech as low-value. Judges may err; impermissible factors may enter into the determination; there are risks of abuse; as we will see, it is hard to develop good criteria for making the relevant distinctions.

But if it is even plausible to make distinctions between high- and low-value speech, such an approach appears preferable to the alternatives.

II.

The fact that distinctions between different categories of expression—in terms of their centrality to the purposes of the first amendment—are unavoidable need not be a reason for alarm; some of the polar cases are quite easy. Speech that is intended to contribute to governmental affairs, broadly defined, unquestionably belongs in the category of high-value speech; speech that consists of unintelligible syllables does not. Intuitions of this sort are probably sufficient to resolve a broad range of cases, and perhaps to provide a workable basis for approaching the bulk of first amendment problems.

Unfortunately, however, there will be hard cases as well, and it is difficult to develop a simple test for distinguishing between high- and low-value speech that accounts either for judicial decisions or for widely held understandings and intuitions. In these circumstances, one might base the inquiry on the decided cases, which seem to point to a somewhat unruly set of considerations. These include (1) the relevance of the speech to a principal purpose of the first amendment, the effective democratic control of public affairs; (2) the cognitive or noncognitive character of the speech, which goes to one of the central goals of free expression, which is to permit the free communication of ideas; (3) the purpose of the speaker—an idea with roots in the writing of Mill[11]—which may or may not be to communicate a message; and (4) the possibility that the speech belongs in a category in which government is unlikely to be acting for constitutionally impermissible reasons or to be producing constitutionally troublesome harms.

Ideas of this sort account for a wide range of fully plausible results. If the first amendment is designed above all to promote democratic control of government, commercial speech, for example, is far afield from its central purpose. Advertisers are not attempting to communicate a political message,[12] and government is likely to be regulating commercial speech for legitimate reasons.[13] Similar ideas account for the characterization, as low value speech, of bribery, private libel, and obscenity. At least in general, all of these fall in the low-value category by reference to the four criteria. Application of factors of this sort is inevitably unruly, and makes the decision uncomfortably ad hoc; but perhaps this is the

11 *See* Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149.

12 In some cases, of course, they might be; and some kind of political message may be implicit in advertisements. In the first case, constitutional protection should attach at the highest level; in the second case, the fact of an implicit message is an insufficient reason to accord such protection. *See* Sunstein, *supra* note 7, at 607-08.

13 It is possible, however, that restrictions on commercial speech will be sought by well-organized private groups seeking to cartelize the industry.

best that a system of free expression can do in light of the overwhelming likelihood that a less complex inquiry will produce significant errors.[14]

If it is necessary to develop a more concise and unitary test—one that is sensitive to the historic functions of the first amendment—perhaps speech should qualify as high-value if it expresses a point of view on a question of public importance.[15] Under this approach, expression—whether speech or conduct—that sets out an intelligible position on a public subject is protected. On this view, *Cohen v. California*,[16] for example, was rightly decided. Political speeches, whatever their content—draftcard burning; racist or misogynist tracts—all these qualify for protection, unless there is an exceedingly powerful demonstration of harm. But ordinary conspiracies, contracts, bribes, threats, publication of the names of rape victims, commercial speech[17]—and pornography[18]—can usually be regulated on the basis of a lesser showing of harm. Of course there will be hard intermediate cases, and some situations will pose unusual difficulty. But it is inevitable for, and thus no embarrassment to, a sensible system of free expression that it is unable to avoid that problem.

III.

In general, government may not regulate speech because it disap-

14 *See* Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987); Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212 (1983).

15 This test works well as a sufficient condition for protection; it is less satisfying as a necessary condition.

It would follow from this approach that music and art are, at least as a general rule, more likely to be regulable than political speech. In the genuinely troublesome cases, however, government will in all likelihood be attempting to control those forms of expression for impermissible reasons, in which case the constitutional proscription will be triggered.

16 403 U.S. 15 (1971). It is irrelevant here that the word "Fuck" was used during the political message; the method of communicating was one of the central features of the message. One cannot prohibit the use of expletives while holding the "message" constant.

17 I collapse some quite complex issues here. Government efforts to regulate all of these forms of speech might in some settings raise serious constitutional questions. For purposes of this brief essay, I am speaking of general regulation of all these forms of speech, regulation that is widely accepted.

18 The principal point here is that most pornography does not express a point of view on an issue of public importance, any more than does a prostitute or a rape or a sexual aid. In this respect, pornography is critically different from a misogynist tract, which consists of a direct appeal on an issue of public importance, one that engages cognitive capacities. With respect to both value and harm, the fact that pornography is essentially a sexual aid substantially strengthens the case for regulation. *See* Sunstein, *supra* note 7, at 606.

It is not an argument in favor of the constitutional protection of pornography that pornographers tend to be misogynists and that pornography tends to inculcate misogyny; the act of pimping, or of engaging a prostitute, may involve the same characteristics as pornography, but it is not by virtue of that fact qualified to the highest protection accorded to political speech. Of course regulation of some forms of sexuality may raise serious constitutional questions under the due process and equal protection clauses. *See, e.g.*, Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988). But it is doubtful that the control of pornography, as defined in Sunstein, *supra*, would do so.

proves of a point of view;[19] and a severe burden of justification is properly imposed on government whenever it attempts to regulate speech that bears on political affairs, broadly understood. But the constitutional commitment to free expression, and to the protection of dissent, cannot plausibly be taken to disable the government from controlling all activities that might qualify as speech. If taken to an extreme, the generally salutary antipathy to "censorship" would protect those who defraud consumers; who conspire, threaten, and bribe; who disclose to unfriendly countries plans to develop military technology; who use children to produce pornography; who disclose the names of rape victims; and who spread knowing falsehoods about private citizens. And if judges are unwilling to distinguish between high- and low-value speech, government will be unable to control these forms of expression without simultaneously lowering the burden of justification and thus endangering other speech that belongs at the center of constitutional concern. To draw such distinctions is not a simple task; but it is a task that a well-functioning system of free expression cannot refuse to undertake.

[19] For the basic defense, see Stone, *supra* note 7. *See also* Sunstein, *supra* note 7, on some of the complexities here.