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The Fundamentals of Freedom of Speech

Richard A. Epstein

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I approach the subject of freedom of speech, as I do much of constitutional law, as an outsider to the club. I have never taught constitutional law as a separate law school course. To be sure, I have written about constitutional law, but sometimes in a manner that many people find incomprehensible.[1] Nonetheless it seems to me that there is a certain virtue in ignorance, which Oliver Wendell Holmes has described as the best of law reformers.[2] The person steeped in the tradition often brushes over any lingering uneasiness with fundamental structures. He accepts the dominant categories of the discipline and immerses himself in the details of their application. The outsider is able to take a fresh look, and can ask whether the dominant categories under the received wisdom are indeed the correct ones.

Today's body of First Amendment law recognizes a fundamental distinction between content-based and content-neutral restrictions on the freedom of speech. Content-neutral limitations upon speech are directed chiefly to the time, place, and manner of speech. But there is no explicit tilt in the rules based upon who is speaking or what is said. Content-based rules are those in which the imposition of the legal restriction is dependent upon what has been said. What is striking about constitutionally permissible content-based restrictions is their extraordinary range. They cover huge bodies of law: speech that induces subversive and unlawful conduct, defamation, disclosures of confidential information, and obscenity.[3] My purpose here is a modest one: to show how the constitutional law regulating two kinds of content-based speech restrictions—those on speech that induces unlawful conduct, such as subversive activities (for example, the "clear and present danger" test) and those on defamation (for example, the "actual malice" requirement)—can be understood as a principled response

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1. *See, e.g.*, R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

2. O.W. HOLMES, THE COMMON LAW 78 (1881).

3. *See, e.g.*, G. STONE, L. SEIDMAN, C. SUNSTEIN, M. TUSHNET, CONSTITUTIONAL LAW 925-1360 (1986) (Chapter 7).

to the central intellectual challenges posed by the constitutional text. Stated otherwise, I want to reason *to* the received doctrine as a matter of principle, instead of treating that doctrine solely as a matter of settled law. In so doing, I hope to explain two things: first, why there is a core of good sense about modern First Amendment doctrine, and second, why the courts are correct when they show little deference to the legislature in its effort to regulate different forms of speech.

One characteristic feature of most modern constitutional law discussions is that they systematically shy away from what seems to be the first step in the inquiry: Why government? I do not see how it is possible to do constitutional theory without facing that question head on, particularly if—as I happen to think—the American Constitution embodies a coherent theoretical response to this issue—one that points in large measure to the type of government that we now have.

To answer, then, this general question, I shall go back to fundamentals. One such fundamental is not so much the idea of speech itself, but rather the idea of *freedom* of speech. I want to put forward the naive proposition that the purpose of government is to preserve the freedoms and liberties of all the individuals whom it governs. On this question of freedom there is a very powerful distinction between freedom and license. License says, "Do whatever you want to do, and the only way that anybody can stop you is to do what he wants to do first." Given this view of license, there is simply no place for any government at all. A regime of pure license returns us to the law of the sword and the right of the stronger. I do not think that it takes any great social imagination or any detailed game-theoretical structure to explain how faithful adherence to so simple a solution will result in a lot of innocent blood being spilled on the ground. The regime of pure license embodies the way in which we wish *not* to organize society.

The theory of freedom, in contrast, not only grants rights to individuals, but also insists that there are correlative duties that are associated with those rights. What is the content of those duties? If this were a straight discussion of political theory, I would probably answer that question by making an unabashedly consequentialist argument that we would want to create a set of rights and duties that are pretty close to those which are guaranteed by the Constitution. But that rather elab-

orate argument is quite beyond the scope of this Paper. Instead, responding to the demands of constitutional interpretation, I will address the narrower (but still very broad) question of what we mean by the term "freedom."

In looking for the sense of that term, I think that there is very little to be gained by reviewing much of the sordid history of government before 1789. All too often that history is a history of the *repression* of freedom of speech, which by sad example shows why we need a theory for the protection of speech. The Framers of the Constitution did not seek to imitate the worst excesses of the past. Instead, they embarked on an experiment that had little historical precedent. They were philosophical radicals who were trying to mold a new conception of government in a new land. To understand what they did and wrote, it is better to look back to the intellectual tradition developed by Hobbes, Locke, Hume, and their lesser contemporaries.

The basic conception of freedom that emerges from that tradition speaks to the complete freedom of action except where it involves the use of force and misrepresentation against other individuals. This account of freedom speaks directly to the relationship between private individuals; it does not have any explicit government component. It suggests that the function of government is to restrain the use of force and fraud not only by private parties, but also by those who are entrusted with the power to govern and armed with the monopoly of force that this power entails.

At this point it should be possible to see the close relationship between the common law of torts and constitutional protections.[4] The tort law is concerned with control over private behavior in, if not a state of nature, then at least a situation in which no person claims any special status, privileges, or immunities by virtue of being in public service. The Constitution deals with the limits upon the use of power by those in public places. It suggests that in a government of law rather than of men, ordinary citizens do not lose their ordinary civil rights, even against the state.

Those civil rights in turn are defined by the ordinary common law. The general theory of tort, however, does not provide comfort to the common architectural distinction, made

4. Set out in some detail in R. EPSTEIN, *supra* note 1, at 35-56 (Chapter 4).

popular by many First Amendment theorists, between freedom of speech (or expression) and freedom of action.[5] Quite the contrary, the tort analysis of freedom cuts at right angles to any such absolutist constitutional doctrine. To amplify, under the general tort law, there is no difference in principle between tortious behavior that involves speech and tortious behavior that involves action. The basic idea of freedom is that you may do what you will, but you may not use force and misrepresentation against another. The first part of the prohibition, on force, involves restrictions on conduct; the second, on misrepresentation, involves restrictions on speech. It follows that there are some actions that are fully protected and some actions that are wholly wrong. The same is true in the area of speech. Some speech is fully protected and other speech is wholly unlawful. The purpose of a theory of the *freedom* of speech is to divide speech into its two distinct classes, only now the stakes are raised because we undertake a common-law analysis at the constitutional level. This analysis of freedom can be made in its most vivid and visceral sense by taking the libertarian formulation of freedom and showing how it squares with both the protection of and limitations upon private speech.

The core libertarian restriction on private individuals is that they are not allowed to use force against the person and property of another. It looks as though the restriction is directed against conduct, not words; at first blush, the First Amendment appears to stand off to one side. Yet every good libertarian understands that the phrase "use of force" is something of a term of art. The use of force also comprehends the *threat* of the use of force. That threat of force turns out, of course, to be a speech act—an illegal speech act at that. No theory of freedom of speech should have as its end the protection of threats of the use of force: "Your money or your life" is not constitutionally protected speech.

Having said that, a theory of freedom of speech must (like the law of torts) figure out the appropriate line between the threat of force and ordinary forms of political persuasion, which stand in stark opposition to such threats. That line is surely not easy to draw, especially in cases where certain words that seem innocent on their face may contain implied threats of

5. *See, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

force of major magnitude. The inconclusive debate over labor picketing[6] offers but one illustration of how intractable the necessary distinction between force and persuasion can be in practice, and right in the middle of a most difficult and controversial context.

Yet suppose that we can identify the kinds of speech that do contain threats of the use of force. There is still a second stage in the analysis that asks: Given the threat of force, what is the remedy—do we give injunctive relief to its potential victim before it occurs, or do we allow the harm to run its course before the state intervenes? This remedial question is one that the constitutional guarantee of freedom of speech necessarily raises. By the same token, it is also a question that the text does not explicitly answer. There are, moreover, serious perils to any possible answer. In suppressing threats of force too quickly, it is easy to place a substantial damper upon ordinary efforts of persuasion. In waiting too long to suppress the threat, serious harm may come to pass, while the state may be unable to identify the wrongdoer or to exact compensation from him once he is found.

This question over the choice of remedies is critical in much of private law. It is the centerpiece in the debate over when people are allowed to abate or enjoin a (current or potential) nuisance. The choice of remedy has generated an enormous amount of unresolved controversy in the decided cases and academic literature.[7] I am not going to resolve that conflict here. What I will suggest is that the choice of remedies for threatened nuisance has—necessarily has—its exact constitutional parallel in the law that addresses the regulation of speech that induces either violence or subversive activity. Here the cases all show the judicial effort to figure out how prior restraint depends upon the probability, severity, and immediacy of the harm, given the alternative institutional controls that might be used to restrain it.

The right remedial mix is very hard to find. It is somewhat easier to explain why that inquiry has proved so intractable over the years. Probability and severity of loss are continuous

6. For my views, see Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1375-79 (1983).

7. *See, e.g.*, Calabresi & Malemed, *Property Rules, Liabilty Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

parameters whose values can vary in tiny increments. It is always possible to find various combinations of probability (P) and severity (S) that bring cases close to the margin. The high risk of loss could be combined with the low severity of injury, and vice versa. If the total loss is measured by probability times severity ($P \times S$), and the acceptable level of loss is some figure k, then there are an infinite number of permutations of ($P \times S$) that are in the neighborhood of k. When other elements (for example, immediacy) are added back into the equation, the results only become more confused. The marginal cases do not disappear. The problems here do not lie in the vagueness of language. Quite the opposite. They are solely the product of uncertainty about future states of the world.

However pervasive uncertainty might be, it is important not to lose heart totally, for just as there are many close cases, so too there are many easy ones. Indeed it seems to me that one of the great achievements of the Supreme Court in recent years is deciding that the original consensus of the Court in *Abrams*[8] and *Schenck*[9] was wrong, and that the classic dissent of Justice Holmes in *Abrams*[10] was correct. Although there is certainly dissonance at the margin, one ought not to assume that the confusion in the doubtful cases overwhelms the power of the rules to handle the many simple cases that are thankfully never litigated. Any sound theory requires that one balance the risks of over and under enforcement of the law in order to minimize their sum.[11] The strong presumption that the state should stay its hand until the danger of substantial harm is imminent is a good working solution to most cases, even if it is far from a panacea.

The second part of the libertarian maxim that intrudes upon the area of speech is that no one is allowed to lie. Of course, that simple observation means that the line between truth and falsity—to which *Gertz*,[12] for example, makes extensive reference—necessarily has important constitutional significance. The protection of freedom of speech does not entail any obvi-

8. Abrams v. United States, 250 U.S. 616 (1919).
9. Schenck v. United States, 249 U.S. 47 (1919).
10. 250 U.S. at 624 (Holmes, J., dissenting).
11. *See* R. EPSTEIN, *supra* note 1, at 126-45 (Chapter 10).
12. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

ous protection of speech that is false. It surely does not undo the common law of fraud or defamation.[13]

The implications of this core insight raise many of the problems that arise in the contexts of threats of the use of force. One central difficulty with the law of defamation (or for that matter two-party fraud) is that sometimes we do not know whether speech is true or false, and under some circumstances, we do not know whether it is capable of being true or false. When we consider speech about a large number of persons directed to a diffuse public audience, then the problem of the choice of remedy and the timing of relief again becomes just as critical as it was in the area of subversive activities. What about an injunction before the fact on the ground that once the speech is uttered, and the damage done, it becomes too difficult to recover for the harm? That question can arise in a thousand different contexts, but in the end it reduces to the same framework that was adopted above. The problem is to minimize two types of errors, those of under and over enforcement. There can be excesses in the one direction and excesses in the other, but the good sense of the Court rests in its ability to identify and dispose of the easy cases.

This general observation now can be tied back to the more general questions of governance. I think that the great success of the Supreme Court's First Amendment work—which is in sharp contrast to its abysmal failure to handle the questions of property, contract, and economic liberties generally[14]—is that the Court has created the right institutional framework. The Court has understood that freedom of speech (like the ownership of property) is always subject to depredations by special interests, and that just as a majority of fifty-one percent may vote to confiscate the wealth of forty-nine percent, so too it may vote to suppress the ordinary freedoms of speech enjoyed by minorities. With that spectre of the systematic suppression of dissent before its eyes, the Court has recognized that it cannot be deferential to legislative acts that entrench political majorities or well-positioned political minorities. If left unchecked, the political process could generate restrictions on freedom of

13. For my views on defamation and the First Amendment, see Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. — (1986).

14. For a short statement of my position, see Epstein, *The Active Virtues*, REGULATION, Jan.-Feb. 1985, at 14, *reprinted as* Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, 4 CATO J. 711 (1985).

speech that choke off the political process and insure the dominance of some controlling political faction.

Understanding what freedom of speech means has a substantial intellectual payoff. It allows us to put to one side all the historical debates, and to escape the vagaries associated with the discovery of "original intention." We can instead use the text, as informed by a general theory of freedom, to identify the inquiries that have to be addressed. We can make sensible stabs at answering them. We can, in a word, continue to walk the line between unthinking literalism and uninformed despair. There are some hard cases on the timing and choice of remedies. Nonetheless, the basic structures of the law are determinate enough to be the basis for intelligent judicial action.

This textual theory is extraordinarily important, for it allows judges to resolve the dilemma that has always divided members of the Federalist Society. It shows how it is possible to be both a "strict constructionist," as indeed I am with respect to these issues, and still believe that it is appropriate to have a very strong dose of judicial activism, or better, judicial activity that is constrained and informed by constitutional theory.