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# COMMENTS

## Pragmatism Versus Purposivism in First Amendment Analysis

Richard A. Posner\*

In *The First Amendment's Purpose*,<sup>1</sup> Jed Rubenfeld sets against the “cost-benefit balancing” approach to free speech issues,<sup>2</sup> with me as spokesman,<sup>3</sup> an approach that forswears balancing in favor of inquiry into legislative or regulatory purpose (“purposivism”). From certain “paradigm cases”<sup>4</sup>—by which he means constitutional interpretations today uniformly accepted as valid—he infers three things: The First Amendment<sup>5</sup> forbids all regulation intended to limit the expression of opinion (“no one can be punished for expressing himself on a matter of opinion”<sup>6</sup>), regardless of consequences. It forbids no regulation of expression, again regardless of consequences, that is not so intended. And it allows all false *factual* assertions to be punished.

The contrast between Rubenfeld’s approach and the pragmatic approach to free speech and other legal issues, an approach that I have defended,<sup>7</sup> is stark, and provides the stimulus for this paper. I shall assume in what follows that the reader has read his article.

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\* Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. I thank Michael Boudin, Frank Easterbrook, Lawrence Lessig, David Strauss, Cass Sunstein, and Adrian Vermeule for their very helpful comments on a previous draft.

1. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001).

2. *Id.* at 785; see also *id.* at 767-68, 781, 791. He equates balancing with cost-benefit analysis; I discuss this equation in the text below.

3. See, e.g., *id.* at 779-82, 832. See Richard A. Posner, *The Speech Market*, in RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 62 (2001) for the fullest statement of my position. That piece was, however, published after Rubenfeld’s article.

4. Rubenfeld, *supra* note 1, at 821-22.

5. By this I mean to include the First Amendment’s application to state action in the name of the due process clause of the Fourteenth Amendment.

6. Rubenfeld, *supra* note 1, at 770.

7. See, for example, POSNER, *supra* note 3, and the following books of mine: THE PROBLEMS OF JURISPRUDENCE (1990), OVERCOMING LAW (1995), THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999), and, most recently, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS, 168-75, 185-89 (2001).

I must explain at the outset what I mean by “pragmatism,” “pragmatic adjudication,” and “the pragmatic approach to free speech.” Pragmatism is a complex philosophical movement<sup>8</sup> the core of which is a challenge to the preoccupation of the central philosophical tradition of the West, from Plato to Kant and Russell and Carnap, with establishing the foundations of knowledge—the conditions under which scientific, moral, and political beliefs can be said to be true. Pragmatists believe that the task of establishing such foundations and so validating our beliefs as objective is either impossible or uninteresting, and in either case not worth doing. The test for knowledge should not be whether it puts us in touch with an ultimate reality (whether scientific, aesthetic, moral, or political) but whether it is useful in helping us to achieve our ends. The human mind developed not to build a pipeline to the truth but to cope with the physical environment in which human beings evolved, and so be tested not by its correspondence with “reality” but by the consequences of believing or disbelieving it.

Pragmatism doesn’t lead in a straight line to a philosophy of adjudication. But it encourages a mindset that is skeptical of any such philosophy that casts the judge in the role of a quester after certainty who employs to that end tools as close to formal logic as possible. It encourages the thought that the object of adjudication should be to help society to cope with its problems, and so the rules that judges create as a by-product of adjudication should be appraised by a “what works” criterion rather than by the correspondence of those rules to truth, natural law, or some other high-level abstract validating principle.

This approach is easily derided as unprincipled, ad hoc, and “political”; but it is these things only if it is thought to entail the disregard of the systemic as well as immediate consequences of judicial decisions, which no pragmatist judge worth his salt believes. Indeed, a pragmatist would choose to be a formalist judge if he thought formalism in adjudication would produce on the whole better social consequences than attempting to weigh up the likely consequences of each decision. I happen not to think formalism is a workable judicial philosophy, however, and though it would take me too far afield to argue that here,<sup>9</sup> I shall, in criticizing Rubinfeld’s approach, be urging the unworkability of a formalist approach to free speech, even one defended on pragmatic grounds.

The pragmatist who has decided to be not a formalist judge (at least in free

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8. Pragmatism is well described in Richard Rorty, *Pragmatism*, in 7 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 633 (Edward Craig ed., 1998). There is also an everyday sense of “pragmatic”—very close to “hard nosed.” To be pragmatic in the everyday sense is not to worry overmuch about moral scruples; it is to be “businesslike,” “no nonsense,” “practical.” There is some affinity between the everyday usage and the philosophy, but I will not try to explore it here.

9. It is argued at length in—is in fact the main theme of—my book *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 7.

speech cases<sup>10</sup>) but a pragmatic one reads the relevant language of the First Amendment (“Congress shall make no law . . . abridging the freedom of speech, or of the press”) but finds nothing very helpful there so far as deciding the actual cases that arise nowadays is concerned. (That is an important qualification, to which I’ll return: There is a core of settled meaning to the First Amendment; but settled principles are rarely litigated.) The key term, “freedom of speech, or of the press,” is neither defined nor self-explanatory. So the pragmatist goes foraging in the historical background of this part of the Constitution but again finds nothing that will resolve the modern cases. He then examines the rich case law interpreting the speech and press clauses and finds that it owes little to the language or background of the relevant clauses, or to the various theories that political and legal theorists have advanced concerning the proper scope of freedom of expression. Instead the constitutional law of free speech seems on the whole, though certainly not in every respect, to be a product of the judges’ (mainly they are United States Supreme Court Justices) trying to reach results that are reasonable in light of their consequences.

I am not trying to prove that pragmatism is *the* theory of the First Amendment but merely to suggest that a pragmatic approach is not foreclosed by the language or background of the amendment or the case law applying it. This is important because some of the systemic consequences to which a good pragmatist judge will attend are the uncertainty about legal obligation and the cynicism about the judicial process that are bound to arise if judges make no effort to maintain continuity with established understandings of the law and to observe the correlative limits on judicial creativity. The point is not that the judge has some kind of moral or even political duty to abide by constitutional or statutory text, or by precedent; that would be formalism. It is merely that continuity and restraint in the performance of the judicial function are important social goods, and any judge proposing to innovate must consider not only the benefits of the innovation but also the costs in injury to those goods.

Another systemic consequence of judicial decisions cuts the other way but is no less worthy of consideration. Judges have to worry that if they buck public opinion too strongly, the political (or, rather, more political) branches of government will clip the judicial wings. Prudence, mistaken for cowardice or lack of principle, is likely to rein in the most aggressive assertions of judicial power. (And so judges are most aggressive when they are dissenting, because they don’t have to live with the consequences of the positions they’re asserting—there are no consequences.) The pragmatist judge will not fool himself into thinking that the sheer power of legal logic will carry the country with him on matters on which it feels strongly. He will be cautious in spending down his political capital.

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10. Holmes, whose overall stance, and specifically his stance in free speech cases, was pragmatic, was nevertheless rather a formalist when it came to contract cases.

Concern with consequences both systemic and immediate implies a comparison of good and bad consequences, and therefore a “balancing” of them; and if good consequences are relabeled “benefits” and bad ones “costs,” then pragmatic adjudication is a form of cost-benefit analysis, and Rubenfeld has labeled me correctly after all. This is a natural though not inevitable endpoint of a judicial philosophy that takes its cues from pragmatism. But a number of qualifications are necessary in order to prevent misunderstanding:

(1) “Costs” and “benefits” must not be understood in exclusively or even (in the First Amendment setting) primarily monetary terms. Indeed, because the image of balancing costs and benefits exaggerates the precision that is attainable in the First Amendment area, and tends to suppress the other qualifications that I have indicated, I prefer to call the approach that I espouse to free speech issues the “pragmatic” approach rather than the “balancing” or “cost benefit” approach.

(2) A related point: Quantification is rarely feasible and even more rarely undertaken when courts consider the consequences of free speech and of its regulation.

(3) Long-run rather than short-run costs and benefits are the proper focus—a point I’ll come back to.

(4) Costs and benefits need not be balanced anew in every case if the cost-benefit analysis of a class of cases has crystallized in a rule that the judges have merely to apply. This is related to my earlier distinction between systemic and immediate consequences of a decision.

(5) And thus (following from (4)) the balancing of costs and benefits by the judge takes place at the margin, outside the core of settled doctrine—not everything is up for grabs in every case. It would not do for the Supreme Court to say, “While we recognize that freedom of speech has great social value, we can’t find any convincing evidence that the value added of having judges enforce it justifies the costs entailed, since we observe that peer nations like the United Kingdom have a reasonable amount of free speech without constitutional limitations on Parliament’s power to censor. Therefore we shall no longer consider First Amendment claims justiciable.” The pragmatic judge is constrained by the settled features of the legal framework, whatever he thinks of them.

The last two points—that pragmatism doesn’t necessarily imply balancing at retail and that any such case-by-case balancing is proper only outside the settled core of doctrine—are particularly important to bear in mind in order to prevent a too-quick collapse of pragmatism into case-by-case balancing. As I said earlier, a pragmatist might reject the use of balancing tests in First Amendment cases because he thought the consequences of using them were on balance bad, maybe because they give judges too much discretion. I think on the contrary that the balancing approach has considerable merit in First Amendment cases outside the heartland of settled law, but this is not an entailment of the pragmatic approach. It is unclear whether Rubenfeld

appreciates this distinction; consequentialism, case-by-case balancing, and cost-benefit analysis may be all one to him.

Pragmatic adjudication in free speech cases has meant, for example, that judges who in the 1950s believed that the nation was endangered by Communist advocacy of violent revolution did not think themselves compelled by the vague language of the First Amendment—vague because, as I said earlier, the critical term “freedom of speech” is not defined—to prevent Congress from punishing that advocacy;<sup>11</sup> the value of such advocacy seemed a good deal smaller than the danger it posed. (We now think the value was zero.) This example should engender skepticism about Rubenfeld’s descriptive claim that “at its historical core” free speech forbids censoring political dissent even where “such dissent could genuinely lead to violence.”<sup>12</sup> When the danger posed by subversive speech passes, the judges become stricter in their scrutiny of legislation punishing such speech. They know that such legislation may curtail worthwhile public debate over political issues. Hence, when the country feels very safe the Justices of the Supreme Court can without paying a large political cost plume themselves on their fearless devotion to freedom of speech and professors can deride the cowardice of the *Dennis* decision. But they are likely to change their tune when next the country feels endangered.<sup>13</sup> The word “feels” is important here. The country may have exaggerated the danger that Communism posed. But the fear of Communism was a brute fact that judges who wanted to preserve their power had to consider.

Similarly, if “respectable” society is united in being deeply offended by pornography, the judges are unlikely to try to thwart the government’s efforts to suppress it, even if they privately scoff at Comstockery. Offensiveness is not the only consequence that judges will or should consider in deciding how far the First Amendment protects pornography, and it is not a constant. As people become more blasé about sexual expression, judges who value the arts and feel incompetent to make qualitative distinctions, or are unwilling to allow legislatures to place tighter restrictions on popular than on elite culture, will curtail the regulation of pornography. They will allow complete prohibition only of its very most offensive forms (today that is mainly child pornography), and will allow only limited regulation of the less offensive ones—for example

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11. *Dennis v. United States*, 341 U.S. 494 (1951), *aff’d* 183 F.2d 201 (2d Cir. 1950) (L. Hand, J.). Hand’s opinion for the court of appeals vividly evokes the Communist menace as then perceived. With the wisdom of hindsight, it is apparent that nothing very terrible would have happened had the Smith Act, the statute criminalizing conspiracy to advocate the overthrow of the U.S. government by force or violence upheld in *Dennis*, been invalidated. But that was not clear at the time.

12. Rubenfeld, *supra* note 1, at 792. Though he emphasizes prior restraints (that is, censorship), his reference in this discussion to seditious libel and to nuisance laws indicates that he anathematizes ex post punishment as well.

13. This sentence was written before the September 11, 2001, terrorist attack on the United States.

regulation in the form of zoning restrictions,<sup>14</sup> limitations on live performances ("nude dancing"), and restrictions on public display and access by children.<sup>15</sup> The ostensible justification for these restrictions, it is true, is the "secondary effects" that establishments which offer erotic materials or entertainment are thought to engender, such as prostitution and disorderly conduct, rather than their offensiveness. But the ostensible justification cannot be taken seriously. Politically unpopular speech has secondary effects too, namely a heightened risk of public disorder; yet the Supreme Court has made clear that government cannot, by banning unpopular speakers in order to prevent disorder, allow a "heckler's veto."<sup>16</sup> To permit such a veto would encourage the hecklers and so allow free speech to be drowned out. The proper response is to punish the hecklers; and similarly one might suppose that the proper response to illegal conduct stimulated by erotic displays would be to punish the illegal conduct.

Rubinfeld defends his own approach to free speech issues ("purposivism") in part by criticizing balancing as unworkable. He puts the hypothetical case of a speeder who seeks to justify speeding as a protest against a speed limit that he thinks too low. Since, as Rubinfeld points out,<sup>17</sup> conduct can be expressive, the pragmatist

would have to try to measure the value of driving at high speed as an expressive activity, then balance this value against the pertinent harms, and then ask whether the state could successfully address these harms while letting some or all people drive a little faster on some or all highways at some or all times.<sup>18</sup>

But Rubinfeld has committed the fallacy of making simple decisions seem difficult by decomposing them into their elements (as in Zeno's Paradox). One can make a trip to the bathroom or tying one's shoelaces seem as difficult. We'll see that reconstructing legislative purpose is likely to be more difficult than comparing costs and benefits in the speeding case. *That* case is an easy one for the pragmatist, who need only point out that to recognize a justification

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14. Rubinfeld's statement that "with the arguable exception of commercial speech, *all* protected speech, from pornography to political dissent, is treated formally alike in First Amendment law," *id.* at 824, is incorrect. Pornographic bookstores can be zoned into special "red light" districts. *See, e.g., City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 49–52 (1986). Similar "content based" zoning of purveyors of political speech would be unconstitutional.

15. Rubinfeld says that he would allow government to keep sexually explicit material from children, Rubinfeld, *supra* note 1, at 830, but he doesn't explain how this position squares with his overall approach.

16. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992); *Terminiello v. City of Chicago*, 337 U.S. 1, 4–5 (1949). I take it that Rubinfeld would agree, since, while the concern behind the ban is not to restrict the expression of unpopular views but merely to economize on police expense, the purpose is to restrict speech, with economy being merely a desirable consequence, as well as the ultimate motive, of the ban. The distinction is a fragile one, however, as I'll suggest later.

17. *See also* POSNER, *supra* note 3, at 88.

18. Rubinfeld, *supra* note 1, at 787.

based on the speeder's alleged desire to protest the speed limit would emasculate speed limits while doing only a very little to promote the expression of useful ideas, since there are plenty of other ways of expressing disagreement with a speed limit. The analytically similar case of conscientious objection to military service is stronger for a freedom of conscience defense, not only because we know that some people really do have strong feelings against participating in a war (however just), but also because very few people actually claim such exemptions; the stigma that attached to "draft dodgers" (whatever their motives), when we had a draft, was a potent deterrent.

The academic tactic of studied obtuseness, of making the easy seem difficult in order to score a point, is also on display when Rubinfeld remarks "that no one can pretend to know whether *the freedom of speech itself is worth its costs*,"<sup>19</sup> so that if we were serious about costs and benefits we would have to be agnostic about whether there should be any right of free speech at all. An absurdly overextended concept of freedom of speech might indeed not be worth its costs, and even a much narrower concept might not be worth its costs in particular conditions that fortunately do not obtain in the United States today. But something like the existing concept, applied in the conditions prevailing in the United States today, is clearly worth its modest costs. If pragmatism endorses what may seem an unbecomingly timid judicial response to public concern with offensive or dangerous speech, at the same time it justifies our national commitment to freedom of speech by rejecting the Platonic view that government can establish a pipeline to truth and having done so censor with a good conscience. The pragmatist emphasizes the tentative, always revisable character of our "true" beliefs. But philosophy is not needed to show that a democratic political system, a scientific and technological culture, college and university education, electronic media, a diverse religious culture, and a diverse popular and elite artistic culture cannot prosper without freedom of inquiry and expression. (The dependence of political democracy on freedom of the press is particularly clear, as Tocqueville long ago remarked.)<sup>20</sup> If one doesn't know *that* much, one doesn't know enough to write an article about the First Amendment. But of course Rubinfeld does know that much; he's just pretending not to.

A better argument against balancing is that measures that have a really big impact on speech are regularly ignored by the courts, which, however, pounce on tiny ones. For example, the price of third-class mail, which is set by the government, has a significant effect on the costs of magazines; entertainment taxes have a profound effect on the film and theater markets; the telephone excise tax affects the frequency of phone calls, some of which at least involve the exchange of ideas and opinions; the deductions from income tax allowed to

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19. *Id.* at 793.

20. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 172-74 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chicago Press 2000) (1835).



authors affect the number of books—so for that matter does the fact that authors' royalties are subject to income tax. The examples could be multiplied indefinitely. In contrast, most of the cases that have vindicated freedom of speech in recent years have been faintly ridiculous, or at least distinctly marginal, involving as they have pornographic art and entertainment, old-fashioned street demonstrations, scatological insults, commercial billboards, and indecent Web sites. But this pattern is not a refutation of pragmatism or a vindication of purposivism. The government has to tax, and to force it in the name of the First Amendment to exempt all activities that involve the production or dissemination of ideas and opinions would constitute an enormous subsidy to those activities. It would be absurd, for example, to exempt authors and TV anchors from federal income tax on the ground that the exemption would lead to an increase in expressive activity (which it would). The direct regulations of speech often have a smaller effect on the speech market, but the bad consequences of prohibiting such regulations are immensely smaller.

What is true, and is a shortcoming of the pragmatic approach, is that the costs of freedom of expression are often more salient than the benefits, and their salience may cause the balance to shift too far toward suppression. People are often deeply offended by hearing their religious, moral, political, or even aesthetic beliefs challenged; and offense is a cost. But it is also, as stressed by John Stuart Mill in *On Liberty*, an unavoidable concomitant of social progress, which depends on the continual overthrow of orthodoxy. This point is also implicit in the pragmatic attitude toward truth as revisable and inquiry as experimental, and in the pragmatist Charles Sanders Peirce's specific point that only doubt leads people to question their beliefs. Doubt is the engine of progress, but because people hate being in a state of doubt they may prefer to silence the doubters rather than to alter their beliefs. (So here is another direct connection between pragmatist philosophy and free speech doctrine.) And because the cost of heterodox speech is immediate and its benefit deferred, the benefit may be slighted. All this must be kept steadily in mind by judges called upon to uphold the suppression of expression in the name of protecting people from being offended.

Yet judicial decisions invalidating regulation have the unfortunate consequence (very disturbing to a pragmatist) of stifling experimentation and so depriving society of experience with alternative methods of dealing with perceived social problems. This is true even when the regulation is of speech, and so the pragmatist is likely to be troubled by an approach to free speech like Rubinfeld's that would banish from judicial consideration the likely consequences of the judges' decisions, thus shutting their minds to arguments that some novel regulation of expression might on balance have very good effects provable only through experimentation. If the First Amendment told judges not to consider effects, then a due respect for the pragmatic benefit of judicial self-restraint would counsel the judges to swallow hard and ignore

them. But nothing in the First Amendment in any intelligible sense commands such abstention from reality, and the case law, far from treating free speech as an “absolute,” recognizes a host of permissible restrictions of it—I list a few later. And while the risk of judges’ overweighing the costs of free speech is a real one, as I have indicated, because the costs tend to be immediate and the benefits remote, I don’t know on what basis this risk can be pronounced greater than the risk of stifling beneficial government regulation; and when in doubt, prudent judges asked to declare regulation unconstitutional will hold back to avoid potentially debilitating clashes with the other branches of government.

I am not in total disagreement with Rubenfeld. The purpose, even the motives, behind a regulation of expressive activity may indeed be relevant—to assessing its consequences. We often and rationally infer the probable consequences of an action from evidence of a desire by the actor to produce them. People generally don’t undertake a course of action without reason to believe that it will accomplish their purpose in undertaking it. Mixed motives are a serious problem in assessing legislative motive, as I’ll note later, but there may well be cases in which the motive for a particular restriction of expression is sufficiently clear to influence the constitutional analysis.<sup>21</sup> And while I am in a concessive mood, let me concede as well that there is a substantial basis for pragmatic anxiety about doctrines that are so loose that they give judges *carte blanche* to decide cases any which way they want without inviting criticism that they are deviating from the previous course of decisions. This illustrates my earlier point that pragmatism doesn’t dictate a particular form of legal doctrine. The pragmatist has nothing against rules; often they are a pragmatically superior method of regulation to an “all relevant factors” standard. The case for rules is strengthened in the area of free speech by the considerable risk that censorship creates of empowering the censors to ban the expression of opinions they happen not to like. But there is a difference between a presumption against censoring or punishing speech and a blanket rule, such as that “in the eyes of the Constitution, there is no such thing as a low-value opinion.”<sup>22</sup> There are indeed valueless, noxious, and dangerous opinions, such as the opinion of a madman, which he disseminates over the Internet, that it is the duty of all true believers to kill prostitutes; and why should the law be *completely* helpless against that opinion?

After more than two centuries of Supreme Court decisions, moreover, it is difficult to argue with a straight face that categorical rules of constitutional law occasionally laid down by the Court constrain judicial discretion (especially the discretion of the Justices themselves, who cannot be prevented from overruling, or distinguishing to death, precedents they don’t want to follow) more than the

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21. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996) (an earlier, more tempered version of Rubenfeld’s argument).

22. Rubenfeld, *supra* note 1, at 826.

explicit balancing approaches that the Court sometimes follows, for example in determining whether a search is reasonable, or in balancing the right to a fair trial against the media's interest in reporting on trials, or—coming closer to the subject at hand—in adjudicating time, place, and manner restrictions on speech and expressive conduct.<sup>23</sup> A common effect of substituting a rule for a standard is that considerations that the standard required to be weighed become sub rosa factors determining the scope of the rule and its defenses. Think of the different layers of scrutiny that the Supreme Court requires courts to give restrictions on freedom of expression in traditional public forums, designated public forums, limited public forums, and nonpublic forums; would the results be any different had the Court been content with a standard directing judicial attention to the successively greater costs, as one proceeds down the forum chain, of allowing unrestricted access to public property for expressive activity?<sup>24</sup>

Delusive exactness is a traditional pitfall in the design of legal doctrines, and one that Rubenfeld's approach does not avoid, as when he argues that a Florida city's ordinance forbidding begging should have been deemed unconstitutional because it "target[ed] certain speech acts," namely requests for handouts.<sup>25</sup> "Speech acts" cannot be targeted? Does this mean that threats cannot be punished? How about offers to fix prices? To sell illegal drugs? Promises to commit murder for hire? Harassing phone calls by importunate creditors? Phone calls by heavy-breathing sexual harassers? Rubenfeld would allow punishment of some conspiratorial speech, speech that is part and parcel of forbidden conduct,<sup>26</sup> and this may take care of some of these examples, but not the last two. Although he says that telephone harassment laws can be upheld by analogy to laws forbidding breaking and entering, the analogy could also be used to forbid begging when it is perceived, as it so often is, as harassment. He contrasts soliciting handouts with soliciting votes, which he thinks a paradigmatic case of privileged conduct. But it is not. Paying people to vote is forbidden, as is soliciting votes at the entrance to polling places on election day.

Rubenfeld wants to prohibit both too little and too much. Suppose that a major city, concerned solely with traffic congestion, noise, and the crowding of sidewalks and public parks, banned all activities from the streets, sidewalks, and parks that involved accosting strangers or interfering with their freedom of movement, including vending, picketing, begging, parading, demonstrating,

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23. See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (employing balancing analysis in reviewing a time, place, and manner regulation).

24. See *Chicago Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695, 703 (7th Cir. 1998) (Posner, C.J.) (discussing the "sliding-scale approach" suggested by Justice O'Connor's concurring opinion in *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992)); POSNER, *supra* note 3, at 71.

25. Rubenfeld, *supra* note 1, at 799.

26. *Id.* at 828.

soliciting, and haranguing. Provided there was no purpose to suppress or discourage the expression of opinions, such a ban would present no issue of free speech for Rubinfeld. Or suppose that a law was passed forbidding false statements of fact in presidential campaigns. The effect on political free speech would be devastating, but the law, provided it really was intended just to eliminate demonstrable falsehoods and not to stifle the expression of opinions, would pass constitutional muster with Rubinfeld. He flinches at one point, however, suggesting that a ceiling on all forms of campaign spending, not just spending on advertising and other forms of communication, though aimed at spending, not communicating, might well be unconstitutional because such a high percentage of campaign spending is on communication rather than, for example, security or transportation.<sup>27</sup> In fact, virtually all campaign expenditures are directly or indirectly for communication.

And flinch he should. Noting the analogy between a law that restricts freedom of expression though aimed at something else and a law that restricts religion though aimed at something else, he refers approvingly to *Employment Division v. Smith*.<sup>28</sup> That case purports to hold that the Free Exercise Clause of the First Amendment is not infringed by a law of general applicability not aimed at religion, even if the effect is to cripple religious observance. This cannot be right. It would imply that a state that decided to forbid the sale or consumption of alcoholic beverages could without violating the Free Exercise Clause refuse to make an exception for the use of wine in Catholic services. Whatever *Smith*, a parallel case involving the use of peyote by an Indian tribe in a bona fide Indian religious service, may *seem* to imply, we can be reasonably sure that the Supreme Court would invalidate a law that inflicted equivalent damage on a major religion.<sup>29</sup>

Rubinfeld's test also prohibits vastly *more* state action than can reasonably be justified. It implies that child pornography cannot be banned from prime-time television, although pornographers could presumably be forbidden to use actual children in making the pornography. Military censorship in a major war, if intended not only to prevent the spilling of military secrets but also to protect morale against defeatist enemy propaganda, would be forbidden, and punishing racist speech in prisons would be prohibited if intended not only to prevent violence but also to encourage enlightened attitudes. Cabinet officers presumably could not be fired for expressing opinions at variance with the President's. Nazis could not be forbidden to send postcards to Jewish survivors of Nazi concentration camps, expressing regret that the addressee had survived and promising to do better next time. Yet a similar postcard, denying that the

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27. *Id.* at 806.

28. 494 U.S. 872 (1990).

29. I offer this prediction confidently even though the Court's opinion is explicit that such a law would be constitutional, and though, as the opinion points out realistically, the major religions have enough political muscle to obtain the necessary exemptions from generally applicable laws. *Id.* at 890.

Holocaust had occurred, could on the logic of Rubinfeld's approach be forbidden as a demonstrably false statement of fact. Nazis believed that Germans, Jews, and Slavs were all separate races in a biological sense; this was false, and so the assertion of these beliefs could be punished. After striking all errors of fact from Nazi propaganda, however, very little is left; the fact/opinion dichotomy that Rubinfeld embraces<sup>30</sup> is devastating to continents of speech and empties his contention that Nazi opinion is privileged<sup>31</sup> of any practical meaning.<sup>32</sup> Political speech is suffused with falsehoods. To use law to cleanse it of them would be a quixotic undertaking—or if it did succeed, it could only be by stifling political speech. Politicians do not have the discipline or the education to avoid making false factual assertions, especially but not only when they are speaking extemporaneously.

I do not suggest that Rubinfeld would embrace all the implications of his position that I have listed. But I think that as a matter of logic he should.<sup>33</sup>

The most interesting and difficult of the illustrations that I have used to exhibit the logic of Rubinfeld's approach are those involving the expression of Nazi views. Since Nazi ideology poses no threat to American institutions or decencies in existing circumstances and since it is difficult to demarcate Nazi or "fascist" expression from other, more meritorious forms of reactionary or Romantic thought, it ought to be allowed, crazy factual claims and all, without which the Nazi would be quite speechless. But I would draw the line at targeted abuse, my example of sending taunting postcards to Holocaust survivors, where the quantum of offensiveness shoots up and a prohibition would not significantly inhibit Nazi expressive activity. The intermediate case is that of the Nazi march in Skokie, a largely Jewish suburb of Chicago that contained a number of Holocaust survivors for whom the march revived bitter

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30. See Rubinfeld, *supra* note 1, at 819–21. The Supreme Court has rejected the dichotomy for defamation cases, holding that a defamatory statement is not rendered privileged by being expressed as an opinion. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17–21 (1990). The Court pointed out that an expression of opinion often implies a factual assertion. The point is not limited to the defamation context. If, as Rubinfeld's analysis suggests, factual implications always rendered an opinion punishable, the First Amendment would provide little protection for political speech.

31. "Nazi opinions cannot be banned." Rubinfeld, *supra* note 1, at 826. But what about the factual assumptions on which those opinions rest?

32. And the distinction between fact and opinion is a good deal less clear-cut than Rubinfeld assumes. It is another example of the delusive precision of his approach.

33. Thus I don't understand his statement that his approach "is not intended to apply to the special contexts of government-owned property (for example, military bases) where the full set of ordinary First Amendment protections does not apply." Rubinfeld, *supra* note 1, at 798. On his account, what is special about government-owned property, including military bases? Likewise unexplained is his suggested distinction between "managerial" and "regulatory" functions of government, the former illustrated by the courts, in which speech is properly restricted, *id.* at 819, on pragmatic grounds, I would argue; but those grounds are not available to Rubinfeld, who is engaged here in adding epicycles in an attempt to stave off the collapse of his system.

memories and may have seemed an ominous portent of what might someday happen here. My court (before I joined it) held that the march was protected by the First Amendment.<sup>34</sup> I have no serious quarrel with the decision. It was easy enough for Jews to avoid the march (though not to avoid knowledge that it was taking place)—easier than in my postcard hypothetical. And where was the line to be drawn—could the Nazis march only in neighborhoods in which the percentage of Jews in the population was below a specified level? How would that level be determined?

I don't disagree with *all* the conclusions to which Rubenfeld's approach leads him. I agree that *Boy Scouts of America v. Dale*,<sup>35</sup> which upheld the right of the Boy Scouts to exclude homosexuals from membership on the ground that allowing them to join would interfere with the Scouts' First Amendment right to oppose homosexuality, was decided incorrectly. But our agreement is accidental, my criticism of the decision being based on the simple point that laws against discrimination would be ineffectual if discrimination that was based on opinion—which much, maybe most, discrimination is based on—were constitutionally privileged. Rubenfeld's analysis of the case unacceptably implies that an employer, while forced to hire blacks despite a sincere ideologically grounded hostility to them, would be free to make the workplace unbearable for them by subjecting them to his racist views. This is a form of harassment that under current law is punished (unconstitutionally, according to the logic of Rubenfeld's position) as being itself a form of racial discrimination.

The pattern of prohibitions and permissions implied by Rubenfeld's theory could not be made to sound sensible to a person who was not a lawyer. That's a pretty dependable way of identifying a legal doctrine or proposal that is unpragmatic. It lends a note of irony to Rubenfeld's description of his approach as "purposivism." The only purposes he considers are those of legislatures and other government agencies that want to restrict expressive activity. He never quizzes his own purpose, and thus leaves unclear why he wants to create the pattern of permissions and prohibitions that his approach implies. The pattern makes no common sense, but maybe it makes some special *legal* sense, something we pragmatists just are blind to. Rubenfeld evidently thinks so, arguing that his theory is not imposed by him, as it appears to be, but rather wells up from the cases he regards as paradigmatic. The pattern *is* the law, or at least is in the law, constituting perhaps a central tradition from which the Supreme Court has unaccountably strayed.

This is to equivocate between positive and normative analysis. In any event, someone permitted to choose from the multitude of free speech decisions three to be the fixed stars in the free speech firmament can have no difficulty justifying whatever doctrinal structure he likes; the technique of picking your

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34. *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

35. 530 U.S. 640 (2000).

best friends in a large, disorderly body of case law is facile. Someone who wanted to argue for a more limited right of free speech could take as paradigmatic not only *Dennis* but also the cases that hold that nonobscene nude dancing, libel and slander, breach of a settlement agreement that required that its terms be kept confidential, copyright infringement and plagiarism, threats, free speech by prison inmates and soldiers, advertising by casinos, obscenity, and foul language on prime-time television can all be punished without violation of the First Amendment. But Rubenfeld's approach doesn't work even on its own terms; it doesn't generate the outcomes he wants. His three paradigmatic cases (not cases really, but rather judge-made doctrines) are the absolute protection of political dissent, of religious speech, and of art. But cases privileging expression cannot support the half of his theory which says that the government has plenary authority to regulate expression when the purpose is not to suppress opinions. Moreover, the First Amendment has *not* been interpreted to protect political dissent, religious speech, and art absolutely. Pornographic art is regulable, and likewise political or religious speech that constitutes incitement, as when someone announces that it is his political or religious duty to kill the President. Political and religious speech, along with artistic expression, can also be limited in particular settings, such as prisons and the military—along with a multitude of other nonpublic forums. And what have political, religious, or artistic expression to do with begging, or for that matter commercial advertising, both forms of expression that Rubenfeld regards as protected by the First Amendment?

Although Rubenfeld states in his article that he will not try to ground free speech doctrine in philosophy, he attributes his paradigmatic cases to a questionable philosophical theory about the triumph of science in the domain of fact. By a logic that he does not explain and is not transparent, the fact that science has accustomed us to draw a sharp distinction between verifiable fact and unverifiable political, religious, moral, and aesthetic opinion has, he believes, led judges to give greater constitutional protection to the latter domain of thought and expression than they did *before* its hopelessly unscientific character was recognized. There is an echo of logical positivism, which divides experience into tautologies (such as "no bachelors are married"), which are true by definition; verifiable facts, the truth value of which can be determined empirically; and everything else. Tautologies are the province of logic, dictionaries, and mathematics, verifiable facts the province of science, and everything else the province of emotion. Political, religious, moral, and aesthetic statements are emotive; they have no truth value at all.<sup>36</sup> The implication for First Amendment doctrine, the implication that Holmes, who anticipated elements of logical positivism, drew, is that censorship makes no

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36. The classic statements remain A.J. AYER, *LANGUAGE, TRUTH AND LOGIC* (rev. ed. 1946), and, before him, DAVID HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* § 12, pt. 3, at 209-10 (Tom L. Beauchamp ed., Oxford Univ. Press 1999).

sense. As Plato in defending censorship clearly understood, censorship presupposes the ability of the censor to distinguish true from false political, religious, moral, and aesthetic opinions.

Neither Rubenfeld nor I wish to paddle in deep philosophical waters. Logical positivism in the strong form implied by his analysis is rejected by most philosophers today;<sup>37</sup> but that is neither here nor there. Holmes can be understood to have been making a simple pragmatic point: Censorship works best if there are objective criteria that the censor can use, as with the Food and Drug Administration's censorship of claims for the safety or efficacy of drugs, or the Securities and Exchange Commission's censorship (albeit post hoc, unlike the FDA's review of new-drug applications) of prospectuses for new issues of securities. But it doesn't matter, as Rubenfeld seems to believe, whether the criteria are "objective" because they are scientific in the sense of observer-independent, or objective merely in the sense of resting on a consensus of the relevant community. No scientific method is available to prove that child pornography, or movies of people engaging in sexual intercourse with animals, are "wrong." But everyone in this society whose opinion counts believes these things are wrong and should be prohibited, and that is all that is necessary to create an "objective" basis for prohibiting them, notwithstanding the First Amendment. Rubenfeld wants to banish these beliefs from First Amendment law, but he will not be able to do that until he (or someone) weans people from them. That is a task to which constitutional theory lends no assistance.

So the grounds of his approach, both philosophical and juridical, are shaky; and the pattern of outcomes that the approach generates is unappetizing and unmotivated. There is another thing seriously wrong with his argument: He underestimates the difficulty of discerning legislative motive.<sup>38</sup> That difficulty would be even greater if his proposal were adopted, because legislators would then "game" it by peppering the legislative history with assurances that their motives were pure and their purpose innocent of reference to opinion.<sup>39</sup> But

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37. Those rejecting logical positivism include pragmatists; indeed, within philosophy pragmatism is considered to have knocked science off the perch on which logical positivism had placed it. Rorty, *supra* note 8, at 637. This is an intramural battle; the outsider to philosophy is more likely to be struck by the affinities between logical positivism and pragmatism, especially in their shared skepticism about moral absolutes and other products of the kind of rationalism that one associates with Plato and Kant and, in law, with natural-law theories.

38. The objection cannot be elided, as Kagan, *supra* note 21, at 439, believes, by shifting the focus to the question whether, but for the impermissible motive, the legislation would have been enacted. My example in the text that follows illustrates the potential indeterminacy of the answer to that question.

39. Cf. Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 149 (2001) (proposing "a positive cycling model in which legislators and judges develop self-defeating expectations about the behavior of other actors in the lawmaking system, thereby causing a cyclical pattern of continuous mutual adjustment that never reaches a stable equilibrium").



the difficulty is great enough without regard to that possibility.

Rubinfeld argues that so long as bullfighting is banned out of concern for the welfare of the bulls rather than the "message" conveyed by bullfighting (of *macho* values, perhaps), the fact that it *has* a message which the ban therefore blocks is unproblematic under his approach. But in the real world, a ban on bullfighting would be supported by some legislators who wanted to kill the message,<sup>40</sup> by others who wanted to save the bulls, by others who had both objectives, and by others who had no view of the matter but were simply log rolling with the anti-bullfight legislators. The ban would have no single purpose. It is unclear what outcome "purposivism" yields in such a case.

There is still worse. For we must consider why this is a purpose case rather than a motive case. Remember that for Rubinfeld if the purpose of a regulation is to restrict expressive activity, the regulation is not saved by the fact that the motive is to accomplish some innocent end, such as saving money on police, or saving the lives of bulls. The bullfighting case as posed by Rubinfeld *seems* to be a purpose case rather than a motive case because the ban on bullfighting can be stated without any reference to expressive activity: "Don't kill bulls." But this can't be right, because there is no law against killing a bull (provided you own it). The ban is on killing bulls for a particular purpose, namely their use in an expressive activity that depends upon the killing. This seems like purposive discrimination against a disfavored expressive activity. Unless I am mistaken, Rubinfeldian purposivism implies that prohibiting bullfighting in the United States is unconstitutional.

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40. This point was made by Judge Easterbrook, discussing the same hypothetical, in his dissenting opinion in *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1127 (7th Cir. 1990), *rev'd*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).