How the Supreme Court Made the Freedom of Speech More Free

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This paper argues that the United States Constitution's First Amendment guarantee of free speech is imperative to maintaining a free society, even if some members of that society find certain speech disagreeable or offensive. It contends that federal and state laws must obey the First Amendment's guarantee of content neutrality, or acceptance of all viewpoints, in order to be considered constitutional. By delineating the progression of Supreme Court precedent regarding controversial speech through four landmark cases, this paper argues that the Court's jurisprudence over the past half-century justly moved in a constitutional direction, because modern legal interpretation of the First Amendment has made free speech even freer than it was at the time of the First Amendment's ratification. Finally, this discussion asserts that while the modern view of free speech may not align with the Founders' opinions, it achieves their ultimate vision of an adaptable Constitution and a tolerant, open society.

"If there is a bedrock principle underlying the First Amendment," Justice Brennan declared in *Texas v. Johnson*, "it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[1] This succinctly captures the rationale behind the freedom of speech that the United States Constitution cherishes, and is consistent with the Bill of Rights' purpose to secure certain fundamental liberties from government infringement. Free speech is central to a tolerant, free society, in that it promotes the unfettered circulation of ideas, opinions, and ideologies. As Justice Holmes asserted in his *Abrams v. United States* dissent, the First Amendment's protection of free speech necessitates a free marketplace of ideas, through which the "competition of the market" filters opinions based on their truth value.[2]

Since the government has a constitutional responsibility to refrain from interfering with one's individual right to express his or her beliefs, it cannot pick and choose the opinions that are prohibited and those that are allowed. The liberty to speak one's mind without governmental intervention relies on the principle that "no official, high or petty, can prescribe what shall be orthodox in…matters of opinion," as Justice Jackson held in *West Virginia v. Barnette*.[3] The deliberate selection of acceptable and prohibited opinions makes for an intolerant, oppressive society in which those who disagree with the government are not allowed to use their voices. In his seminal work *On Liberty,* liberal philosopher John Stuart Mill argued that such censorship is tyrannical, because it presumes that the government is the infallible judge of what is right and acceptable. In their decisive break with tyranny, the Framers of the Constitution channeled Mill's doctrine, purposefully protecting the freedom of speech from "the vicissitudes of political controversy."[4]

Over the last half-century, the Supreme Court of the United States has adopted a broader standard of what speech is protected under the First Amendment in cases such as *Brandenburg v. Ohio, Texas v. Johnson, R.A.V. v. St. Paul,* and *Snyder v. Phelps*. In these four landmark rulings, the Court held that various instances of controversial political and religious speech—and expressive conduct—receive First Amendment protection. Although the Supreme Court has ruled innumerable times on the freedom of speech, these cases are particularly groundbreaking in that they represent the Supreme Court's authorization of four major categories of speech: political speech, symbolic speech, religious speech, and protest speech. In a remarkable instance of judicial incrementalism, the Court gradually expanded the scope of the First Amendment by striking down laws that limited speech based on its content, delivery, and intent. Because a decrease in restrictions translates to an increase in freedom, the Supreme Court effectively moved judicial doctrine toward the First Amendment's unqualified guarantee of free speech. An analysis of these four cases will ultimately prove that the high court employed just and prudent reasoning in its decisions, as they advanced the freedom of speech.

The dissenting justices in these cases opined that the Supreme Court has gone off the deep-end in protecting speech that is, in their view, "highly damaging," through deciding these four cases. However, in each of these cases, those arguing for the government's prohibition of the speech in question did not prove that the speech directly and immediately caused legitimate harm to another individual or group. If the freedom of speech is truly free, the government cannot prohibit it—except in rare occasions in which "…the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion," as

Justice Brandeis argued in *Whitney v. California*.[5]

Of course, in order to fulfill its duty to protect the general welfare, the government must maintain a right to prohibit those instances of speech that will almost surely bring about legitimate damage—such as Justice Holmes' notorious example of yelling "Fire!" in a crowded theater.[6] The government's adoption of a standard other than the protection of public safety in limiting the freedom of speech, however, is a violation of the First Amendment's requirement that laws are content-neutral, or accepting of all viewpoints. It follows that the government cannot outlaw speech just because it offends another individual, as doing so would create a right to be free from offense—a highly subjective standard that would prohibit a great deal of controversial speech.

Practically speaking, the protection of free speech ultimately advances public safety. There is much greater potential for danger if the government prohibits radical speech instead of allowing it, because suppressing thought and opinion "breeds repression; that repression breeds hate; that hate menaces stable government."[7] In other words, the freedom of speech often precludes the need for violent extremism and rioting, destruction that is objectively more harmful to society than peaceful protest. The free expression of even the most prejudiced and controversial opinions serve the social purpose of avoiding violence: "It lets off steam; it allows natural tensions to express themselves incrementally; it can siphon off conflict through words, rather than actions."[8] As Justice Jackson articulated, governments that eliminate dissent must face the danger with which angry, suppressed dissenters retaliate.[9]

Now that we have established the fundamental logic behind free speech in the United States, we can understand why the Supreme Court justly applied the principle to protect controversial speech in four epochal cases from the last few decades. The first case is *Brandenburg v. Ohio* (1969), which overturned the conviction of a Ku Klux Klan leader for allegedly advocating violence in a rally speech, during which he suggested that his organization might need to take action if the government continued to deny white supremacy through the enactment of civil rights laws. The Supreme Court correctly recognized the fact that Brandenburg's advocative speech did not directly spawn "imminent lawless action," nor was it "likely to incite or produce such action."[10] This case declared unconstitutional an Ohio law that prohibited the advocacy, teaching, and publishing of material that encourages violence. Because such advocacy—like that of Brandenburg—in no way directly or tangibly threatens public safety, the Supreme Court rightly decided that this speech was protected under the First Amendment.

Although the lower court sustained the conviction and the law on the grounds that advocacy alone has the potential to threaten violence, the Supreme Court drew the line between protected advocative speech and unprotected speech that actually incites violence. The Court in effect recognized that anti-advocacy laws, such as the one in Ohio, unconstitutionally elevate the advocacy of a crime to commitment of the crime itself. The Ohio law punished speech for effects that it did not produce, nor that it was likely to produce. Justice Douglas articulated that the only prosecutable speech is that which is "inseparable" from "the acts actually caused." Except for those rare instances, it is unconstitutional for the government "to invade that sanctuary of belief and conscience."[11]

Another Supreme Court case that expanded protected speech under the First Amendment was *Texas v. Johnson* (1989), which overturned a conviction for burning the American flag as a form of public

protest. It may not seem evident why the Court would consider the action of burning a flag as an issue of free speech. However, as Justice Brennan explains, certain expressive conduct falls under the protection of the First Amendment. Conduct that contains "intent to convey a particularized message" and great "likelihood…that the message would be understood by those who viewed it" is speech for the purpose of the First Amendment because of its communicative value.[12] The Court held that burning the American flag was expressive conduct because it clearly conveyed a political statement. On the grounds that burning the flag was expressive conduct protected under the First Amendment and did not create legitimate harm to other individuals, the Supreme Court justly decided *Texas v. Johnson*. The Court fairly deemed the law prohibiting desecration of the American flag unconstitutional: the law's establishment of an orthodox belief and compulsory reverence of a national symbol are the very contradiction of the content neutrality guaranteed by the First Amendment.

Gregory Lee Johnson with his lawyer William Kuntsler during the *Texas v. Johnson* trial. *Courtesy of Wikimedia Commons.*

The dissent in *Texas* argued that it was a legitimate exercise of state police power to declare the protection of a symbol of national unity and that Johnson's burning of the American flag "had a tendency to incite a breach of the peace."[13] However, the flag burning produced no disturbance of the peace, no threats to disturb the peace, and no direct insult to a particular individual. The Court justly recognized that it is unconstitutional to criminalize the potentially violent effects of free speech if there is absolutely no indication that the speech will provoke violence. The dissent also asserted that allowing flag burning symbolizes the tarnishing of American values. However, Justice Brennan points out that one of the principles that the American flag represents is the freedom of speech itself, so the *Texas v. Johnson* decision actually strengthened the flag's cherished place in American society.[14]

Four years later, the Supreme Court declared unconstitutional a Minneapolis law prohibiting the erection of symbols that spawn anger "on the basis of race, color, creed, religion, or gender" on public or private property in *R.A.V. v. St. Paul* (1992).[15] This case overturned the conviction of white teenagers who burned a cross on the front lawn of the only African American family in their neighborhood. Justice Scalia argued that a law barring the use of certain "fighting words" was unconstitutional because it "prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[16] In other words, the law in question selectively forbade speech motivated by racial, religious, or gender discrimination solely on the basis of its content. This is a blatant violation of the First Amendment's guarantee of content neutrality, as it infringes upon distinguishable categories

of speech, so the Court justly decided *R.A.V. v. St. Paul*. Justice Scalia clarifies that the government may prohibit speech "because of the action it entails, but not because of the ideas it expresses."[17] In practice, this means that the government can ban defamation because it directly and tangibly harms another individual, but the government cannot ban certain speech topics without discriminating against certain viewpoints and thus violating the First Amendment. This law unconstitutionally allowed the expression of hostility "on the basis of political affiliation, union membership, or homosexuality," but not race, religion, or gender, which is clearly an arbitrary distinction.[18]

The dissent counters that the law's purpose was to protect certain minority groups from injuries caused by offensive symbols, and that it was within Minneapolis' police powers to protect minority groups from risks, harms, and fear. In other words, the law declares that particular classes of individuals have a right to be free from threats, and this right trumps one's explicit constitutional right to free speech. Justice Scalia maintains that the only thing distinguishing the injury produced by "prohibited fighting words" from "allowed fighting words" was the content of the particular ideas behind them. The First Amendment protects all ideas, not just the ones that the government deems acceptable.

Westboro Baptist Church protestors. *Courtesy of Wikimedia Commons.*

The final case in this discussion is *Snyder v. Phelps* (2011), in which the Supreme Court upheld the right of the Westboro Baptist Church to protest near the funeral of a soldier who was killed in Iraq. The picketers held placards arguing that soldiers' deaths in the war were God's punishment for immoral American society, that homosexuality was a sin, and that Catholicism was sacrilegious. Although the Church expressed controversial ideas that many people, including the Snyder family, found painfully offensive, Justice Roberts argued that their speech was protected by the First Amendment because the Westboro Baptist Church's speech concerned public affairs and was expressed in the public forum of a sidewalk. He pointed out that the Church's audience was the general public and that its members did not intend to offend particular private individuals. Although the speech may be disturbing to some, if not most, members of society, the Supreme Court rightly concluded that the public discussion of public affairs is "more than self-expression; it is the essence of self-government."[19]

If the Supreme Court had ruled in favor of Snyder, it would have sanctioned the prohibition of speech based on its content, which is contrary to the First Amendment's guarantee of content neutrality. The opinion states that "Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself."[20] Because the picketers were peaceful, protested a considerable distance away from the funeral, and refrained from "shouting, profanity, and violence," their speech was rightly protected under the First Amendment. Justice

Roberts cites the practical concern for allowing even "outrageous" speech "breathing room," recognizing the reality that forcing contentious speech underground would likely radicalize it and spawn legitimate violence.[21] Justice Alito's dissent, on the other hand, holds that the First Amendment does not protect the intentional infliction of emotional distress, especially at a time of emotional sensitivity. But this argument creates a right to be free from offense that trumps the First Amendment guarantee of free speech, which is patently unconstitutional. Additionally, as the opinion points out, no evidence in the record proved that the Westboro Baptist Church intentionally or specifically aimed their protest at the Snyder family. Although the picketing was admittedly jarring, the Supreme Court appropriately decided that even strikingly controversial speech—as long as it does not directly incite violence—is protected under the First Amendment.

Because the Founders enshrined the freedom of speech in the absolute first amendment to the United States Constitution, we know that they highly valued the protection of expression from the arbitrariness of governmental authorities. The fundamental purpose of the Bill of Rights was to protect the citizens of the newborn United States from the abuses they had endured under the monarchy from which they had just declared independence. The freedom of speech signaled the Founders' decisive break with Great Britain's use of "prior restraint," or restriction of opinions before they were spoken or published. Although the Founders made a point to protect the freedom of speech, they generally believed that this right was not absolute. For example, John Adams believed that false speech should not receive protection under the First Amendment. Benjamin Franklin stated that speech that defames or affronts another individual should be unprotected, and that he would exchange his "Liberty of Abusing others for the Privilege of not being abused myself"—in other words, claiming a right to be free from offense.[23] During the Founding Era, the First Amendment only applied to responsible and truthful speech.

Although it is impossible to determine whether the Founders would have approved of modern Supreme Court decisions, and although the Founders split over the issue of free speech themselves, they most likely would have disagreed with the outcome of these cases. In light of the Founders' support of prohibitions on seditious libel (publishing information that brings the government into contempt), blasphemy (speech that insults religion), and speech that had a "bad tendency" (speech that supports illegal activity), they probably would have disapproved of speech that might hold the government or religion in contempt—such as advocating for violence against the government, burning the American flag, burning a cross, or protesting the United States' involvement in war.[24]

Several former and current justices on the Supreme Court and many American civilians believe that judges should always consider the original intent of the Founders when interpreting the Constitution. Justice Meese argued that the Founders deliberately chose every word of the Constitution, so "Any true approach to constitutional interpretation must respect the document in all its parts."[25] He held that since we know so much about the Founders' opinions, justices must use them to resolve the Constitution's textual ambiguities. However, James Madison—a Founder himself—felt that judges should not limit themselves to the Constitution's original intent, but rather consider the popular understanding of the Constitution, to make decisions.[26] The fact that the Founders themselves were divided over how their posterity should interpret the Constitution and over constitution-

al provisions makes exact original intent virtually impossible to follow. But this does not mean that the Founders' opinions do not matter. We should still aim to espouse the spirit of the Constitution to secure individual liberties and maintain a limited government—which expanding the protection of free speech achieves—but adopting the exact beliefs of the Founders fails to take modern reality into account.

As evidenced by the amendment provision and the intent that the Constitution would serve the nation for centuries to come, the Founders intended the Constitution to adapt to modern standards. Justice Brennan argues that justices should consider the transformative purpose of the Constitution and interpret the text in light of modern circumstances, while still paying homage to the spirit of the Founders' beliefs: "The Framers discerned fundamental principles through struggles against particular malefactions of the Crown; the struggle shapes the particular contours of the articulated principles. But our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours."[27] Because the protection of the freedom of speech was among those fundamental principles, the Supreme Court's broadening of free speech over the last half-century achieves the Founders' ultimate mission, despite that they may have opposed the impacts of these four decisions. Since the Founding Era, the Supreme Court has progressed from prohibiting speech carrying a "bad tendency," to banning speech that creates a "clear and present danger," to only banning speech if it "incites imminent lawless action." Because the modern interpretation of free speech has fewer restrictions than that of the Founding Era, the Supreme Court's current outlook on free speech aligns more closely with the text of the First Amendment than the Founders' own opinions did. Simply put, the Supreme Court's recent expansion of protected expression has made the First Amendment's guarantee of freedom of speech more free.

Endnotes

1 Texas v. Johnson, 491 U.S. 397 (1989).
2 Abrams v. United States, 250 U.S. 616 (1919).
3 West Virginia v. Barnette, 319 U.S. 624 (1943).
4 Ibid.
5 Whitney v. California, 274 U.S. 357 (1927).
6 Shenck v. United States, 249 U.S. 47 (1919).
7 Ibid.
8 Andrew Sullivan, "What's So Bad About Hate?" *The New York Times*, September 26, 1999.
9 *Barnette*
10 Brandenburg v. Ohio, 395 U.S. 444 (1969).
11 Ibid.
12 Texas.
13 Ibid.
14 Ibid.
15 R.A.V. v. St. Paul, 505 U.S. 377 (1992).
16 Ibid.
17 Ibid.
18 Ibid.
19 Snyder v. Phelps, 131 S. Ct. 1207 (2011).
20 Ibid.
21 Ibid.
22 Howard Gillman, Mark A. Graber, and Keith E. Wittington, *American Constitutionalism: Volume II: Rights and Liberties* (Oxford: Oxford University Press, 2012), 52.
23 Ibid., 121.
24 Ibid., 52.
25 Philip Shenon, "Meese says some judges practice 'chameleon jurisprudence,'" *The New York Times,* November 16, 1985.
26 Jack N. Rakove, "Mr. Meese, Meet Mr. Madison," *The Atlantic*, December 1986.
27 Justice William J. Brennan, Jr., "Speech given at the Text and Teaching Symposium, Georgetown University," *PBS*, accessed 29 June 2016, http://www.pbs.org/wnet/supremecourt/democracy/sources_document7.html.