Lecture Notes

# Chapter 5: Foundations of Freedom of Expression

## Annotated Chapter Outline

1. Free Expression in the Constitution
   1. After some tinkering with Madison’s language, Congress eventually agreed on the version we know today:
      1. “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”
   2. These four liberties—speech, press, assembly, and association—are the major sources of free expression in the Bill of Rights.
   3. Benjamin Franklin said when asked about the meaning of free press, “Few of us, I believe, have distinct ideas about its nature and extent.”
   4. Historians suggest that the expression guarantees were a response to two repressive practices in England.
      1. The first was a licensing system under which nothing could be printed in England without prior approval from the government.
      2. The second was the doctrine of seditious libel law, which outlawed criticism of the government and government officials, including and perhaps especially the king.
   5. In the years immediately following adoption of the Constitution, the government was weak and vulnerable, the economy was in disarray, Europe continued to pose a threat, and the ruling Federalist Party was the target of much political criticism.
      1. In response, Congress passed one of the most restrictive laws in American history, the Sedition Act of 1798.
      2. This statute made it a crime to write, print, utter, or publish malicious material that would:
         1. Defame the federal government, the president, or the members of Congress.
         2. Bring them into disrepute.
         3. Excite the hatred of the people against them.
      3. Many were critical of the Sedition Act.
      4. James Madison and Thomas Jefferson, in particular, expressed their belief that the law violated the Constitution.
      5. The act expired in 1801, however, and the Supreme Court never had the opportunity to evaluate its validity.
   6. Against this historical backdrop, it is hard to know whether, as it is sometimes presumed, the First Amendment was designed to eliminate seditious libel laws.
2. Justifications for Protecting Expression
   1. Three justifications for protecting expression have moved to the fore.
   2. First is the idea that free expression aids in the discovery of “truth.”
      1. The point of the First Amendment is “to preserve an uninhibited marketplace of ideas”—a competition of ideas—in which truth will ultimately prevail.
      2. One problem is that this justification assumes “truth” must emerge from a competition among different ideas.
         1. Some “ideas” or “beliefs” are simply facts.
      3. Another problem is that even for ideas tested and ultimately adjudged false, a long marketplace competition can produce “irreversible harm.”
      4. Finally, some scholars assert that the very idea that the marketplace always and ultimately produces truth is doubtful.
   3. A second justification centers on the importance of expression for the maintenance of a democratic system of government.
      1. The self-governance rationale privileges political speech on the theory that democracy thrives when there is open, unfettered discussion, including criticism of government officials.
      2. Many commentators bristle at the idea that political speech is the only expression deserving of protection under the amendment.
   4. A third rationale for free speech, sometimes called “self-fulfillment,” is almost the polar opposite of the self-governance justification.
      1. “[E]very [person]—in the development of their own personality—has the right to form [their] own beliefs and opinions. And, it also follows, that [they have] the right to express these beliefs and opinions. Otherwise they are of little account. For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self.”
      2. Some commentators ask why the liberty to communicate freely should receive more protection than any other human activity from which people derive benefit or satisfaction.
3. Setting the Stage for Free Expression in the Supreme Court
   1. During the nation’s first century, the Court faced no significant disputes over freedom of expression.
   2. That changed with the outbreak of World War I in 1914 and the 1917 communist revolution in Russia.
      1. The Espionage Act of 1917 prohibited any attempt to “interfere with the operation or success of the military or naval forces of the United States . . . to cause insubordination . . . in the military or naval forces . . . or willfully obstruct the recruiting or enlistment service of the United States.”
      2. The Sedition Act prohibited the uttering, writing, or publishing of anything disloyal to the government, flag, or military forces of the United States.
   3. Some groups and individuals thought these laws constituted intolerable infringements on civil liberties guarantees contained in the First Amendment.
      1. Some were blatantly pacifist.
      2. Others were pure civil libertarians.
      3. Finally, there were individuals who hoped to see the United States undergo a socialist or communist revolution.
   4. These various interests brought legal challenges to the repressive laws and pushed the Supreme Court into the freedom of expression realm for the first time.
4. Free Expression and the Incitement of Lawless Action
   1. Expression cases dealt mainly with the questions of whether and to what extent the government can prevent speech on the ground that it may:
      1. Incite unlawful activity.
      2. Advocate the forcible overthrow of the government.
      3. Otherwise jeopardize the nation’s security.
   2. On the one hand, democratic government assumes that citizens and their leaders will make informed policies by considering competing ideas.
   3. On the other hand, a primary task of government is, in the language of the Constitution, to “insure domestic Tranquility.”
   4. Initial Attempts: The Clear and Present Danger Test
      1. For nearly five decades, the Court struggled to devise a constitutional standard that would evaluate the competing values of liberty and security.
      2. *Schenck v. United States (1919)*
         1. Its initial response was *the clear and present danger* test developed.
         2. See Table 5.1.
         3. This test requires consideration of:
            1. The content of the expression.
            2. The context in which the words are uttered.
            3. The consequences of those words.
            4. When those consequences may occur.
         4. Schenck was accused of attempting to obstruct military recruiting and enlistment.
         5. Under Holmes’s test, there was no constitutional barrier to punishing Schenck’s speech.
         6. Holmes’s opinion was also a politically astute compromise.
            1. On the one hand, the clear and present danger test was a rather liberal interpretation of expression rights.
            2. On the other hand, the justices recognized that free speech rights were not absolute, and they found room within the clear and present danger test to uphold the conviction of an unpopular opponent of the war effort.
   5. Bad Tendency Test and Incorporation
      1. ***Abrams v. United States (1919)***
         1. *Abrams* concerned the plight of five well-educated Russian immigrants, all of whom were adherents of anarchist, revolutionary, or socialist philosophies.
         2. They had published and distributed leaflets criticizing President Wilson’s decision to send troops into Russia and calling for a general strike to protest that policy.
         3. The government charged Abrams and the others with intent to “cripple or hinder the United States in the prosecution of the war.”
         4. The trial court found them guilty of violating the 1918 Sedition Act and sentenced them to prison terms of fifteen to twenty years.
         5. Unlike *Schenck*, however, the Court did not concern itself with whether there was a “dangerous probability” that their speech would cause political mayhem.
            1. Instead, Clarke’s majority opinion used a standard known as the *bad tendency test*.
            2. The Court asked whether the speaker would have known that it could be harmful.
         6. The majority’s failure to gauge the likely effect of Abrams’s speech drew the ire of Justice Holmes.
            1. It was in his dissent that Holmes articulated the “marketplace of ideas” rationale for free speech.
            2. He believed that the Court extended to the government far too much power to censor criticism.
      2. *Gitlow v. New York (1925)*
         1. *Gitlow* involved a state prosecution.
         2. State criminal syndicalism laws made it a crime to advocate, teach, aid, or abet in any activity designed to bring about the overthrow of the government by force or violence.
         3. This case’s sweeping incorporation ensured that states had to respect the guarantees contained in the First Amendment.
         4. But the Court also limited expression by moving further away from the clear and present danger approach and embracing the bad tendency test.
      3. ***Whitney v. California (1927)***
         1. Charlotte Whitney was active in a number of socialist organizations and a founding member of the California Communist Labor Party.
         2. In 1919 she was arrested and later sentenced for a violation of the state syndicalism law.
         3. On appeal to the Supreme Court, Whitney attorneys argued that the California act violated the free speech clause of the First Amendment, but the justices upheld Whitney’s conviction.
         4. The Court’s ruling allowed the punishment of mere membership in a subversive organization without requiring proof of any concrete criminal actions to overthrow the government by illegal means.
   6. Preferred Freedoms Doctrine
      1. ***United States v. Carolene Products Co. (1938)***
         1. This case concerned a federal ban on the shipment of a certain kind of milk.
         2. What appeared to be an obscure footnote, now commonly called “Footnote Four,” carried important implications for civil liberties claims.
         3. Its words suggest that when a government regulation appears on its face to be in conflict with the Bill of Rights, the usual presumption that laws are constitutional should be reduced or waived altogether.
         4. Footnote Four’s approach became known as the preferred freedoms doctrine.
   7. Aftermath of World War II: Competing Tests and a Divided Court
      1. ***Thomas v. Collins (1945)***
         1. President Roosevelt appointed new members who had a more supportive view of civil liberties.
         2. As Justice Rutledge explained, the Court now recognized “the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment.”
         3. Speech restrictions would be upheld only in the face of a true “clear and present danger.”
      2. By the early 1950s the Court began to turn back toward more speech-restrictive interpretations of the First Amendment.
      3. Two new tests emerged, both inherently leading to more speech-restrictive results than the preferred freedoms approach.
         1. The first of these, called *ad hoc balancing*, was based on the notion that the values of liberty and order must be wisely balanced.
         2. Under this approach, courts consider disputes on a case-by-case basis, asking whether the interests of the individual or the interests of the government should prevail.
         3. The second alternative was the *clear and probable danger test*.
         4. This test followed the general structure of the clear and present danger test except for the temporal element.
      4. ***Dennis v. United States (1951)***
         1. Chief Justice Vinson described the clear and probable danger test: “In each case courts must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”
         2. The Court used the test to affirm the conviction of eleven Communist Party leaders for advocating the overthrow of the government by force and organizing a party for that purpose.
   8. Today’s Standard
      1. By the end of the 1960s the Court had devalued many of its Cold War rulings.
      2. *Brandenburg v. Ohio (1969)*
         1. The justices articulated the Court’s current—and its most protective—standard for judging speech that advocates illegal behavior.
         2. The test the Court adopted has two important elements, both of which must be satisfied in order to punish speech.
            1. The advocacy must be “directed to inciting or producing imminent lawless action.”
            2. The advocacy is “likely to incite or produce such action.”
         3. The Court declared that not even a probable harm was enough; the harm would actually have to occur (or be at the point of occurring).