First Amendment Essays

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Is There Such A Thing As Too Much Free Speech?

From its beginning, the First Amendment speech guarantee has rested on two fundamental boundaries: speech versus conduct and liberty versus utility. Free speech primarily protects the individual's liberty to freely speak his or her mind. The boundaries of speech and liberty have rarely been breached, and when a breach has occurred, it has been very limited in its implications.[1]

Until now, that is.

Over the past fifteen or so years, the Supreme Court has significantly broadened the definitional scope, or coverage, of the speech guarantee. It has breached the line between speech and conduct and the central premise of speech as an individual liberty. In the process it has transformed speech freedom from one aimed at protecting individuals into a protection for corporations[2] and government,[3] too. When it comes to speech, the Rehnquist and Roberts courts' opinions have been "the more the merrier."

In 1994, Stanley Fish, a peripatetic and controversial scholar then at Duke, published a book titled, *There's No Such Thing as Free*

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1 *E.g.*, United States v. O'Brien, 391 U.S. 367 (1968); Texas v. Johnson, 491 U.S. 397 (1989).

2 *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

3 *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009).

Speech: And It's a Good Thing, Too.[4] It was the *free* part of free speech that he challenged. His claim was that as speakers we are trapped by our politics and predispositions; what we say inside the safe realm cannot be called free. Speech that might rightly count as free—speech outside of the dominant domain at a point in time, like hate speech or obscene art or blasphemy—often doesn't count as speech. It is instead outside the domain of acceptable discourse, indeed often illegal. Thus, there is no such thing as free speech.

Taking the opposite stance, Justice Scalia in 2003 penned a spirited separate opinion in *McConnell v. Federal Election Commission*, which challenged the McCain-Feingold campaign finance act.[5] There, he famously wrote that in American democracy "there is no such thing as *too much* speech."[6] For Justice Scalia, it seems, speech is a political and individual good in and of itself, a largely benign force—not, as Fish would have it, because it doesn't rattle the cage, but instead because it does. Justice Scalia is neither an absolutist nor a pure libertarian. There are limits: trees and polar bears, he has said, have no free speech rights;[7] speech that is imminently coupled with illegal conduct can be prohibited. But beyond that, he sees a free world of opinion, and ideas, even hateful ones, falling outside of Fish's speakable domains.

The question Fish and Scalia raise is the meaning of the term "speech" and its relation to "speaking." It is a matter, in short, of the First Amendment's *coverage*, not its standard of protection. And it is the amendment's coverage that the Court has recently focused on and, in the process, expanded dramatically and fundamentally.

But might the Court be wrong to extend First Amendment protections to conduct not typically thought of as "speech" and to sources not ordinarily thought of as "speakers"? Is it possible to have too much free speech?

Yes.

For purposes of this essay I will focus on five recent decisions of the Supreme Court. The first is *Hurley v. Irish-American Gay*,

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4 STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING, TOO, (1994).

5 McConnell v. Fed. Election Comm'n, 540 U.S. 93, 247–64 (2003) (Scalia, J., dissenting).

6 *Id.* at 259.

7 Citizens United v. Fed. Election Comm'n, 130 S. Ct 876, 928 (2010) (Scalia, J., concurring).

Lesbian and Bisexual Group of Boston, Inc.[8] In *Hurley*, a private parade organizer for the St. Patrick's Day-Evacuation Day parade in Boston excluded a gay and lesbian group's participation in the parade. The Supreme Court held that the organizer had a First Amendment right to exclude, notwithstanding Massachusetts law, because forced inclusion would affect the "message" of the parade. But what was the organizer's intended message for the parade? What was the source of the message? As it turns out, the Supreme Court held that the organizer did not have to have a message that it intended to communicate through the parade. The "message" of the parade came from the event itself, the audience, and the function of a parade as a social ritual. In short, there was no "speaker." There was just meaning perceived by members of the audience. This was enough to qualify as "speech" under the First Amendment—as long as, Justice Scalia would later say, it doesn't include trees or polar bears.[9]

The second case, *Boy Scouts of America v. Dale*, involved the Boy Scouts of America firing an assistant scoutmaster once it became known that he was gay.[10] Discrimination based on sexual orientation was illegal, so the Boy Scouts claimed that the law violated the Scouts' free speech. There was a problem with the Scouts' theory, though: the Scouts hadn't spoken a word, nor were they forbidden from speaking whatever they wanted. Instead, they argued, the discrimination law, if they obeyed it and didn't fire the Scoutmaster, would force them to appear to favor gays in the Scout ranks and thus to "speak" a message of approval or acceptance that they didn't want to express. Of course, they didn't want to state the opposite message of non-acceptance either. They just wanted to keep their mouths shut. Ultimately, the Boy Scouts' refusal to speak made them speakers, the Court held. But where is the speech? And more basically, where is the speaker, the individual intending to exercise the constitutional right to speak his or her mind? What the Court branded "speech" had a

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[8] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995).

[9] Apparently, fully independent computer programs may also be excluded from the "perceived meaning" as "speech" theory of First Amendment activity. *See* EUGENE VOLOKH & DONALD M. FALK, FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE SEARCH RESULTS (2012), *available at* http://ssrn.com/abstract=2055364; Frank Pasquale, *Automated Arrangement of Information: Speech, Conduct, and Power*, BALKINIZATION (June 25, 2012), http://balkin.blogspot.com/2012/06/tim-wus-opinion-piece-on-speech-and.html.

[10] Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

message, but no author. It emerged out of thin air, like the wind through the trees or the roar of the polar bear.

The third case, *Doe v. Reed*, involved a signature on a referendum petition under Washington State law.[11] The State decided to release the names of all signatories on an anti-gay marriage referendum petition. The problem with the plaintiff's First Amendment argument was that the signature was a vote—conduct and not speech. Since the beginning of the republic, voting has been open and public,[12] and in common experience, voting is an act, not speech to an audience. We have to sign our names on applications for drivers' licenses and countless other forms of government assistance. When public employees, like faculty, vote for or against a candidate or a new course, they do not have to do so in private.

But the Supreme Court held that the act of signing, or voting, was an "expressive" act protected by the First Amendment. Like the Scouts' refusal to speak, the decision to vote is speech even though not intended as such; indeed, in *Doe*, like the Boy Scouts case, the speaker quite explicitly did not intend to speak or wish to speak. Does a person's mere act constitute speech if others give it meaning? Then surely the same can be said about trees or polar bears, right?

The Supreme Court's fourth case involved a decision by a city in Utah to place a monument with the Ten Commandments in a public park, but its refusal to do so for Summum, a very small religious sect, and its monument.[13] Why? Because city officials didn't like Summum and disagreed with its ideas. Normally, when government decides not to allow someone to speak simply because it doesn't like the ideas, the First Amendment enters the fray with full force. Government can't do that. But in the *Summum* case, the Supreme Court approved the city's decision because the decision about what goes in a public park is just one instance of a new doctrine called "government speech."

When government speaks—which it does a lot—it is immune under the First Amendment speech guarantee from any limitation based on excluding a private speaker because it doesn't like his or her ideas, or from restricting government programs and funds for private speakers because the government doesn't approve of their speech. This immunity from First Amendment challenge applies, thankfully,

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11 Doe v. Reed, 130 S. Ct. 2811 (2010).

12 The secret ballot is a state law matter only. *Id.* at 2834 (Scalia, J., concurring).

13 Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009).

only when the government is speaking, as opposed to regulating. But that's a pretty slippery line to draw. Who decides whether the government's restriction of private speech is protected by the government speech doctrine? Why, the government, of course.

The final case is the *Citizens United* case.[14] There, the Court held that in political or public issue settings, corporations are speakers just like individuals. That is, corporations have the same liberty to speak under the First Amendment. But who is the corporation? Not, for these purposes, the shareholders or owners or investors or employees, but instead the artificial legally-created entity itself, abstracted from such parties and interests. As Chief Justice Rehnquist was wont to say, corporations have no mind or free will of their own. They are not people or individuals with liberty.[15] They are like polar bears. But his view didn't prevail. Corporations and other groups, as groups, now have a freedom to speak under the First Amendment that is every bit the same as that of liberty-bearing individuals.

The Supreme Court in these cases has breached the line between individual liberty and utilitarian value, and the line between speech—intended expression of meaning—and conduct. Corporations are now liberty-bearing speakers, and what was formerly their conduct—spending money on politics, for example—is now speech. The act of firing a person, sponsoring a parade, even voting, if given meaning by others, is speech. A government decision to reject a monument, or to grant or deny an applicant, is speech by government. These are changes at a fundamental level. They have consequences that transcend the current partisan dissatisfaction with corporations as big political spenders exercising their freedom.

Between Stanley Fish's claim that there really is no free speech and Justice Scalia's view that we can't get enough of it lie difficult and largely definitional puzzles that require us to ask what limits should apply to the Supreme Court in its singular capacity of creator, interpreter, and enforcer of the free speech guarantee. There are many potential costs involved in expanding the meaning of "speech" and the scope of its freedom: costs of assuming that free speech is a quantitative good, not, as Stanley Fish would have it, a qualitative one; costs in subverting principle; costs to the structural characteristics of government and the Constitution; costs to the

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14 Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

15 Pac. Gas & Electric Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting).

separation of powers; costs to the independence and scope of judicial power; costs to government's practical capacity to achieve important ends and formulate important policy.

The recent uproar following the Court's extension of First Amendment protection to corporate political speech has rested almost entirely on personal political, economic, and ideological grounds. This is, of course, fair enough in a democracy. But the fact is that we don't expect the Supreme Court Justices to make decisions based on our, or their, personal preferences. We would—or at least we should—be shocked if the Court were to announce that it would reconsider the case because of the overwhelming public sentiment against it. The Supreme Court is politically independent and it is a *constitution* that the Justices are interpreting,[16] one that binds all of government and all of the rest of us.

So when we explore the Court's First Amendment decisions, we must ask not whether the decisions rest on an interpretation of the Constitution with which we disagree, but instead whether the *way* the Court conducted itself in its search for meaning was fitting for the independent judicial branch and consistent with the larger constitutional expectations that should surround the power claimed by the non-elected, secure, intellectually elite, and independent judicial branch in a representative democracy. The Supreme Court is a unique institution in our democracy: independent, small, intellectually elite, charged with the power and duty to enforce law and the Constitution, and committed to openness, reason, prudence, and consistency in the exercise of its power. With the First Amendment especially, it is obliged as the almost single-handed creator, interpreter, and enforcer of freedom of speech to engage in full and independent reasoning from the constitutional text applied faithfully over time and based on principles that transcend any particular case. Its opinions, to be sure, are not always pretty. With nine fully independent minds, getting five votes to form a majority in difficult cases can be a challenge, as the existence of multiple concurrences and dissents often signifies. But the practice of multiple opinions is a piece of the Court's commitment to open public reason by each Justice. This is an expectation that cannot be breached by a branch whose stock in trade, constitutionally speaking, is principled and full reason.

My own conclusion about the Court's fidelity to its constitutional responsibilities is mixed. My aim, however, is not simply to supply

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[16] M'Culloch v. Maryland, 17 U.S. 316, 407 (1819).

my conclusion, but to arm the reader with the capacity to reach her or his own decisions. The issue, after all, is not strictly speaking a "legal" one. It's a constitutional one with which every citizen should be concerned, for it goes to the form of government we have in America and the way in which it should operate. This is a matter on which all of us can and should have informed opinions.

The Supreme Court's decisions have expanded the protection of the First Amendment, from speech by individuals, to conduct, to corporations, and to government. Doesn't that seem to turn the First Amendment upside down? Shouldn't the First Amendment be protecting us from them, not them from us?