**Chicago-Kent Law Review**

Volume 78
Issue 2 *Symposium: Law and Cultural Conflict*

Article 6

June 2003

# Free Speech and Conflicts of Rights: Commentary on Robert F. Nagel, "A New Methodology for Constitutional Cases?" and Steven J. Heyman, "Ideological Conflict and the First Amendment"

Susan J. Brison

# FREE SPEECH AND CONFLICTS OF RIGHTS:

# COMMENTARY ON ROBERT F. NAGEL, "A NEW METHODOLOGY FOR CONSTITUTIONAL CASES?" AND STEVEN J. HEYMAN, "IDEOLOGICAL CONFLICT AND THE FIRST AMENDMENT"

SUSAN J. BRISON*

Both Robert Nagel and Steven Heyman acknowledge that, in some cases, free speech rights conflict with other—equally weighty, or perhaps even weightier—rights, and I could not agree more. To take just a couple of current controversies: Professor Nagel concurs with Justice Stevens that the issue in *Hill v. Colorado*[1] is whether the so-called "bubble law" reflects an appropriate balance between the First Amendment rights of the abortion protestors and "the state's legitimate interest in 'the avoidance of potential trauma to patients'" seeking to use health care facilities.[2] (Using more explicit rights-talk, one might recast the state's interest as one in protecting the right of patients not to be unjustly harmed by being traumatized en route to medical treatment.) And Professor Heyman argues that, in the case of violent degrading pornography, the free speech right in question clashes with women's fundamental right to be recognized as human beings.[3]

In both cases, the authors argue that the right in conflict with the free speech right is weightier than—and should take priority over—

* Associate Professor of Philosophy, Dartmouth College.

1. 530 U.S. 703 (2000).

2. Robert F. Nagel, *Six Opinions by Mr. Justice Stevens: A New Methodology for Constitutional Cases?*, 78 CHI.-KENT L. REV. 509, 511–12 (2003) (citing *Hill*, 530 U.S. at 715).

3. Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531, 578 (2003).

the free speech right. In both cases, their positions are at odds with the general trend of the Court's traditional First Amendment jurisprudence, and rightly so, in my view. However, both Nagel and Heyman are more sanguine than I am about the possibility of resolving these conflicts by means of some consistent First Amendment doctrine. I would argue that no such doctrine can be found.

In "A New Methodology for Constitutional Cases?," Robert Nagel starts out sounding as if he has come to praise Justice John Paul Stevens for his iconoclastic approach to standard First Amendment doctrine, finding, in Stevens' majority opinion in *Hill v. Colorado*, a "potentially attractive reconceptualization of free speech discourse."[4] But he ends up burying Stevens in a heap of invective, accusing him of being "opportunistic rather than iconoclastic,"[5] of drawing on "a harshly judgmental and intolerant strain in American political life,"[6] and of "impos[ing] a form of severe and suppressive judgmentalism,"[7] which replaces "the superficial rigor of doctrinalism" with "nothing more than the ad hoc imposition of personal moral preferences."[8]

In Nagel's view, not only are Stevens' opinions in the cases he discusses inconsistent, but what might have seemed, in *Hill*, to be "a step toward a more thoughtful and realistic methodology in free speech cases"[9] is revealed in *Boy Scouts of America v. Dale*[10] (among other cases) to be merely "the overconfident imposition of highly debatable personal preferences."[11] It is not just that Stevens' dissent in *Dale* is wrong, according to Nagel, but it is wrong in a deeply revealing and disorienting way, like the proverbial thirteenth chime of a crazy clock that throws everything that came before into question.

So what went wrong between *Hill* and *Dale*? As I see it, nothing. I find no inconsistency between Stevens' opinions in these two cases. Nagel's conclusion is one possible interpretation of what is driving Stevens' opinion in *Hill*, *Dale*, and the other cases discussed; but the principle of charity in interpretation requires us, before accepting it, to check to see whether, on some other, more plausible, construal, his

4. Nagel, *supra* note 2, at 514.
5. *Id.* at 523.
6. *Id.* at 526.
7. *Id.* at 529.
8. *Id.* at 526.
9. *Id.* at 515.
10. 530 U.S. 640 (2000).
11. Nagel, *supra* note 2, at 529.

position is, in fact, consistent across these cases. I will focus my discussion on Stevens' opinions in *Hill* and *Dale*, since the alleged inconsistency in Stevens' positions is portrayed most starkly by Nagel in these cases.

Although *Hill* and *Dale* address very different sorts of conflicts, they both pit a free speech right against a right not to be unjustly harmed by the speech in question. In *Hill*, the conflict is between the right to free speech and the right not to be unjustly harmed by being traumatized en route to medical treatment, while in *Dale* the conflict is between the right to freedom of expressive association and the compelling state interest "in eliminating the destructive consequences of discrimination from society," or, framed in terms of individual rights, the right not to be unjustly harmed by being deprived of "the advantages and privileges 'of any place of public accommodation.'"[12] And, as Stevens notes, in his dissent in *Dale*, up until that case, the Court had "never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law."[13] In both cases, Stevens argued, rightly, in my view, that the free speech right is less weighty than the right not to be unjustly harmed by others' expressive conduct. (Incidentally, or perhaps not, in both *Hill* and *Dale*, Stevens deferred to the judgment of the state legislature.)

Nagel takes Stevens to task for not even acknowledging what Nagel considers to be the genuine conflict of legitimate interests at stake in *Dale*. But I would argue that it is not Stevens' position that shifts from *Hill* to *Dale*. Rather, Nagel's analysis of the former case shifts in the course of his article. In his initial discussion of *Hill*, Nagel construes the interest at odds with the abortion protesters' free speech rights to be, as Colorado framed it, "the state's legitimate interest in 'the avoidance of potential trauma to patients'" seeking to use health care facilities.[14] In his discussion of *Dale*, however, Nagel construes the right at odds with the free speech right in *Hill* as "the right to be left alone"[15] and he asserts that "the relevant interest was that the patients did not want to associate with the protesters. . . ."[16]

12. *Dale*, 530 U.S. at 663 (Stevens, J., dissenting) (citing N.J. STAT. ANN. § 10:5-4 (West Supp. 2000)).

13. *Id.* at 679 (Stevens, J., dissenting).

14. Nagel, *supra* note 2, at 511–12.

15. *Id.* at 517.

16. *Id.* at 524.

He labels this a "strong privacy interest"[17] and likens it to the interest on the part of the Boy Scouts to avoid associating with homosexuals. As Nagel construes the conflict in *Dale*, "the Boy Scout organization wished to cut off an uncomfortable association while Dale insisted on continuing that association."[18] Nagel takes Stevens to task for not finding it "at least plausible" that "the members of the Scouts organization might feel—and might be entitled to feel—an acute sense of unease in the presence of an unwanted, persistent participant. . . ."[19]

But what the members of the Scouts might *feel* (or be entitled to feel, if, indeed, that makes sense) is not what is at issue here. The law's reach does not extend to the unexpressed inner states of citizens. That the Scouts, some anyway, can—and do—feel unease in the presence of homosexuals is not in dispute. What is at issue is whether they can discriminate against homosexuals solely on the basis of this unease, and this, Stevens' dissent persuasively argues, they cannot (legally) do. The "right to be let alone" is not a right to be free from discomfort in all of one's associations. It is certainly not a right to achieve a feeling of comfort by means of the invidious discriminatory exclusion of others.

Steven Heyman points out, in "Ideological Conflict and the First Amendment," that cultural conflict is inevitable in the First Amendment area, since controversies over civil liberties at the time the Bill of Rights was drafted led the framers to cast the rights in terms of general principles, while avoiding particular divisive issues. I agree with his claims in this paper: that, given the First Amendment's lack of any clear and precise directives in certain controversial areas, conflict is inevitable; that resolving such conflicts involves contextualized and complex judgments about the nature of our society and about the substantive values at stake; and that constitutional interpretation is best seen as dialectical, with a major task of constitutional jurisprudence being that of developing a framework in which debate can take place.

Heyman argues that "many First Amendment problems should be understood as conflicts between free speech and other rights—rights that are rooted in the same values as free speech itself."[20] His view of free speech is that it is a fundamental right "rooted in respect

17. *Id.* at 525.
18. *Id.* at 524.
19. *Id.* at 525.
20. Heyman, *supra* note 3, at 534.

for persons and their capacity for autonomy or self-determination"[21] as well as in the values of democratic self-government and the pursuit of truth. I have argued that defenses of free speech that attempt to ground it in a right to autonomy or in the value of democratic self-government or the value of truth fail to provide support for a *special* right to free speech, distinct from a general principle of liberty.[22] Heyman acknowledges that "the same principles that justify free speech also give rise to other fundamental rights," such as personal security, privacy, and reputation.[23] But why stop there?, I would ask him. Why not say these values ground a general right to liberty (as expressed in Mill's harm principle)?[24] One could go even further and argue that "respect for persons and their capacity for autonomy and self-determination" also grounds positive rights to food, shelter, clothing, education, medical care, and other necessities. But if the right to free speech is grounded in a *general* right to autonomy, what makes speech special? Why suppose speech deserves greater protection than nonspeech conduct even when it is harmful?

Well, there is, as a matter of contingent historical fact, a right to free speech embedded in our Constitution. I argue that there is no sound philosophical basis for it. But what follows from that? Does it follow that in cases of conflicts of rights, the other right (to equality, to security, to privacy, etc.) takes priority if *it* is philosophically justified? But what grounds these *other* rights—or are they also mere historically contingent artifacts? I would argue that they, like a general principle of liberty (constrained by the harm principle), are also grounded in our autonomy. The moral imperative of respect for autonomy requires the government to protect (and foster) certain political and legal rights, and I would add, socioeconomic ones as well. The right to free speech is one of those, but it is simply part of a general right to liberty.

My view is not that there is no right to free speech, but rather that there is no *special* right distinct from a general right to liberty. But perhaps there is a special right in the sense in which some people use the term; some of those opposed to legislation protecting the

21. *Id.* at 567.

22. I argue against the autonomy defense of free speech in Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312, 312–39 (1998). I argue against the argument from truth and the argument from democracy, as foundations for the right to free speech, in SUSAN J. BRISON, SPEECH, HARM AND CONFLICTS OF RIGHTS (forthcoming).

23. Heyman, *supra* note 3, at 569.

24. JOHN STUART MILL, ON LIBERTY (Hackett 1978) (1859).

rights of women, racial minorities, and homosexuals object that such laws grant these "favored" groups special rights, that is, rights not possessed by the rest of us. But minority rights are not special rights in this sense. Rather, special legislation is needed because the rights of people in these groups just happen (as an historically contingent fact) to be more threatened. So, if society were different (if we already had achieved substantive equality, eliminated prejudice, etc.), we would not need to give the rights of people in these groups special protection. I think it makes sense to consider the right to free speech to be a special right in this latter sense. Free speech is *not* a special right in the sense that there is something special about speech itself, as opposed to all other human conduct, that requires us to grant it favored status. Rather, it just so happens that, of all the rights considered to fall under the rubric of a general right to liberty, the right to free speech has been (and continues to be) more vulnerable to governmental invasions than the others—though perhaps not *all* the others: the right to freedom of religion certainly falls into this category as well. It is not a coincidence that both free speech and freedom of religion are protected by the First Amendment, since both had historically been threatened by governments. It does not follow, though, that speech is "special" (more central to autonomy) any more than it follows that religion is "special" (more central to autonomy) than other human pursuits, such as scientific, literary, and artistic ones—or that religious affiliations and practices are more central to autonomy than, say, sexual affiliations and practices.

My own view is that the moral imperative of respect for autonomy requires the government to protect (and foster) certain political and legal rights (and, I would add, socioeconomic ones as well). The right to free speech is one of those, but it is simply part of a general right to liberty. But my skepticism about there being a justifiable special right to free speech is an extreme one that puts me outside the mainstream of currently acceptable academic positions on free speech. So it is undoubtedly a virtue of Heyman's approach that he disagrees with me on this score.