University of Richmond Law Review

Volume 27 | Issue 3 Article 4

1993

Freedom of Speech as a Product of Democracy

Arnold H. Loewy

ARTICLES

FREEDOM OF SPEECH AS A PRODUCT OF DEMOCRACY*

*Arnold H. Loewy***

There are very nearly as many (if not more) rationales for freedom of speech as there are books and articles on the subject. Without attempting to canvass them all, I think that they can be divided into two generic theories. One theory suggests that freedom of speech is essentially teleological or consequentialist, *i.e.* it exists to serve some other goal, usually effective participation in the democratic process.[1] The other theory, which is deontological or normative, suggests that freedom of speech exists as an end in itself rather than as a means towards accomplishing something else.[2] Of course, these theories are not necessarily mutually exclusive.[3]

** Graham Kenan Professor of Law, University of North Carolina School of Law.; J.D., 1963, Boston University; LL.M., 1964, Harvard. The author would like to thank Mark Melrose, Mark Davis, and Mark Anders for their helpful research assistance, and Professors Michael Corrado, Donald Hornstein of the University of North Carolina law faculty, and several members of the University of Richmond law faculty for their helpful comments.

1. *See, e.g.*, FRANCIS CANAVAN, FREEDOM OF EXPRESSION: PURPOSE AS LIMIT (1984); ALEXANDER MEIKELJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1948, 1960); Lillion R. BeVier, *The First Amendment and Political Speech; An Inquiry into the Substance and Limits of Principle*, 30 STAN L. REV. 299 (1978); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Benjamin S. DuVal, *Free Communication of Ideas and the Quest for Truth: Towards a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161 (1972).

2. Two of the most prominent exponents of this theory today are Professors Edwin Baker and Martin Redish. *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

3. "Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means." Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). *See also* THOMAS I. EMERSON,

Under a strict consequentialist viewpoint, all speech that is not directly related to the claimed desired consequence is unprotected. For example, if the desired consequence is thought to be the temperate rational discussion of political issues, any speech that is not temperate, rational, and political would be unprotected.[4] Some of the more extreme deontological rationales, on the other hand, are attacked as being nothing more than a specific illustration of the generic concept of liberty.[5]

The theory advanced herein rejects the view that freedom of speech is simply another liberty. Like Professor Frederick Schauer, I agree that freedom of speech is special.[6] On the other hand, I do not believe that freedom of speech must contribute to other values, such as democracy, in order to be protected. Freedom of speech should be viewed as a product of democracy rather than as a servant to it. The best analogy is to the franchise. We hope that permitting all manner of citizens to vote (the uncouth barbarian no less than the highly educated political scientist) will bring us a more perfect government; whether it does or does not, our sense of basic fairness demands that we all have the opportunity to participate. By similar reasoning, freedom of speech cannot be subject to any kind of quality control analysis.

I. NEUTRALITY: THE DISTINCTIVE CHARACTERISTIC OF FREEDOM OF SPEECH

Before proceeding further, it is imperative that we understand the most important characteristic of freedom of speech, its absolute neutrality. Although sometimes described as a "liberal" doctrine, it is not liberal in the political sense of the term. Conservative speech is protected as thoroughly as liberal speech.

Two of the Supreme Court's best-known freedom of speech quotations chart the boundaries of the freedom. In one, Justice Jackson with characteristic eloquence announced for the Court: "If there is any fixed star in our constitutional constellation, it is that

---

TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966); FREDERICK F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989); STEVEN SHIFFRIN, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983).

4. *See* Bork, *supra* note 1; CANAVAN, *supra* note 1.

5. Professor Baker, *supra* note 2, is especially vulnerable to this criticism. *See, e.g.*, Frederick F. Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1212 (1983).

6. *See* Schauer, *supra* note 5.

no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ."[7] In the other, Justice Powell, for the Court, announced simply: "[T]here is no such thing as a false idea."[8] Taken together, these statements stand for the proposition that, as a matter of law, at least in the realm of ideas or opinions, there can be no official truth or falsity. Every idea or opinion, no matter how wrong-headed, can compete in the marketplace.

In describing the government's role in freedom of speech, I have employed the term "neutrality." Neutrality is a benign-sounding term. Indeed, in another context, the Court has described it as "wholesome."[9] But, "wholesome neutrality" is not the only term that could describe the government's role. Other less benign terms such as "agnostic" or even "amoral" could describe the government's role as well. And so, we must ask ourselves why we should have a constitutional provision that requires the government to act amorally.

II. Skepticism or Tolerance

Much of the most recent freedom of speech literature has questioned whether skepticism or tolerance best explains freedom of speech.[10] Most of those that have spoken of the dichotomy have opted for tolerance.[11] In their view, some ideas are unquestionably false, and we ought not pretend that they might be true. By being tolerant of these ideas, however, government teaches the value of tolerance, thereby imbuing its citizens with a sense of its importance.[12]

---

7. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

8. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

9. *See, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963) (discussing establishment of religion).

10. *See, e.g.*, Lee C. Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America (1986); David A.J. Richards, Toleration and the Constitution (1986); Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 Mich. L. Rev. 1564 (1988); Suzanne Sherry, *An Essay Concerning Toleration*, 71 Minn. L. Rev. 963 (1987); Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. Cal. L. Rev. 649 (1987).

11. Of the sources listed in *supra* note 10, Professor Gey is the only exception.

12. This theme is especially apparent in Dean Bollinger's writings. *See, e.g.*, Lee C. Bollinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory*, 80 Mich. L. Rev. 617, 630 (1982).

There are several things wrong with this analysis. First, many, if not most, ideas that need constitutional protection are not *ideas* that we should tolerate. At most, we should permit them to be said, but not tolerate their substance. More importantly, the educative function is anathematic to the First Amendment. By allowing speech, the government does not say that the particular speech is good for us — only that it would be worse to allow government to decide what is *not* good for us. As Justice Jackson put it:

> [I]t cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. Nor would I.[13]

Does this mean that amorality, or moral relativism is basic constitutional dogma? I think not. We can know as citizens that much which is uttered or printed is at the least morally bankrupt. We do not, however, endorse those hateful words by permitting them to enter the marketplace. Put differently, the legal disability described by Justice Jackson does not mean that government cannot know falsity when it hears it; it simply means that the government is under a legal disability to do anything about it. Once we stop thinking about freedom of speech as an endorsement of the speaker, much of the argument for suppressing evil speech disappears. We can then understand the government's duty towards such speech to be legal, not moral, skepticism.

I do not mean to suggest that tolerance is not part of the first amendment. Indeed, with disgusting regularity, we have to tolerate revolting ideas that we really wish would go away. However, tolerance is not the reason for freedom of speech; it is merely a necessary by-product of that freedom, and an unfortunate one at that. The reason for freedom of speech is the absolute legal disability of government to distinguish that speech which is good for us from that speech which is not.

---

13. Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (citation omitted).

A perfect paradigm is the attempted Nazi march in Skokie, Illinois, a Chicago suburb inhabited by a large Jewish population, including a substantial number of Holocaust survivors.[14] Dean Lee Bollinger, an advocate of the "tolerance" theory of the first amendment, contends that *Skokie* was a close case, but that even there principles of tolerance should uphold the Nazis' right to speak.[15] I disagree. If there were a principled line between tolerable and intolerable speech, the Nazis would surely be on the intolerable side of it. The reason that the Nazis were protected is that there is no such line. Because there is no such line, the Nazis could not have been close to it. Therefore, upholding their right to speak in *Skokie* should have been an easy, albeit painful, decision in much the same way that upholding the right to burn the flag was painful for Justice Kennedy.[16]

Why does the populace feel such a keen desire to do something to prevent Nazi speech or flag burning? I think that the answer lies in the counter-intuitive nature of freedom of speech.[17] We know that the speakers are wrong, and we cannot help equating permission with endorsement. At least, we want to draw a line between ordinary hateful speech, and beyond-the-pale hateful speech. The problem is that no such line can be drawn. Unless all ideas are protected, no ideas are protected. This is not just a "slippery slope" argument.[18] I am not suggesting that Nazis should be protected in *Skokie* because I am worried about the next case. The point is that a society that prevents its government from separat-

---

14. *See* National Socialist Party of America v. Skokie, 434 U.S. 1327 (1977) (Stevens, Circuit Justice 1977) (denying stay); National Socialist Party of America v. Skokie, 432 U.S. 43 (1977) (per curiam); Collin v. Smith, 578 F. 2d 1197 (7th Cir.), *stay den.*, 436 U.S. 953, *cert. den.*, 439 U.S. 916 (1978).

15. *See* Bollinger, *supra* note 12, at 632-33.

16. The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. . . . [T]he flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the cost to which those beliefs commit us. It is poignant but fundamental that the flag protects those who would hold it in contempt.

Texas v. Johnson, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring); *see also* Arnold H. Loewy, *The Flag Burning Case: Freedom of Speech When We Need It Most*, 68 N.C. L. REV. 165 (1989).

17. *See* EMERSON, *supra* note 3, at 17; Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

18. *See* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

ing good and bad ideas for it cannot allow that government to suppress bad ideas, even in cases like *Skokie*.

III. MARKETPLACE OF IDEAS

Since Justice Holmes' famous dissent in *Abrams v. United States*,[19] the Court has justified the government's disability to suppress bad ideas on the "marketplace of ideas" theory.[20] Under this theory, all ideas have the right to be tested in the marketplace without being subjected to any government screening for plausibility. In recent years, the marketplace theory has become a popular whipping-post among commentators. One line of attack is that, for a variety of reasons such as poverty and inarticulateness, all ideas do not have equal access to the marketplace.[21] This attack misperceives the government's duty; its role is simply to refrain from interfering with the marketplace, not necessarily to facilitate it.[22] In the realm of free speech, *laissez-faire* is still acceptable policy, or at least more acceptable than actively interfering with some of the market participants.

Another attack on the "marketplace" theory is that while it seeks to separate truth from falsity, it denies that truth can be ascertained. If we cannot find the truth, why bother to keep looking for it?[23] This argument fails to separate philosophical truth or falsity from government-endorsed truth or falsity. Without a doubt, individuals can be satisfied to a moral certainty that some ideas are good (true) and others are bad (false). Indeed, virtually an entire society may, and should condemn as evil much that passes for free speech. But, it cannot be condemned as false, and hence beyond the pale, by the government. So viewed, the "marketplace" theory is not internally inconsistent. It serves societal and individual efforts to ascertain truth, but from the perspective of government prohibition, the concept of truth or falsity is a legal impossibility.

---

19. 250 U.S. 616, 624 (1919).

20. *Id.* The philosophical underpinnings of the concept itself probably date back at least as far as John Stuart Mill. *See* JOHN STUART MILL, ON LIBERTY (1962).

21. *See* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984); Baker, *supra* note 2.

22. Of course, there is nothing in the first amendment that precludes government from expanding market access to speakers that otherwise would be unable to participate. For example, a city could build its own "Hyde Park" and permit anybody to speak in it free of charge.

23. *See* MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 46 (1984).

Professor Alexander Bickel attacks the "marketplace" theory at a more fundamental level, arguing that not all ideas deserve to compete. After quoting Holmes' famous observation, "[I]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, [the only] meaning of free speech is that they should be given their chance and have their way[,]"[24] Bickel observes: "If in the long run the belief, let us say, in genocide is destined to be accepted by the dominant forces of the community, the only meaning of free speech is that it should be given its chance and have its way. Do we believe that? Do we accept it?"[25] Bickel certainly does not.

To illustrate his point, Bickel related this story:

> [A] crowd gathered in front of the ROTC building at a university some years ago. At this university, as elsewhere, some members of the faculty and administration had undertaken to discharge the function of cardinal legate to the barbarians, going without the walls every so often to negotiate the sack of the city. On this occasion, with the best of intentions, members of the faculty joined the crowd and participated in the discussion of whether or not to set fire to the building. The faculty, I gather took the negative, and I assume that none of the students in the affirmative could have been guilty of inciting the crowd. The matter was ultimately voted upon, and the affirmative lost — narrowly. But the negative taken by the faculty was only one side of a debate which the faculty rendered legitimate by engaging in it.[26]

From this, Bickel concludes: "Where nothing is unspeakable, nothing is undoable."[27]

The error of Bickel's analysis, of course, is his equation of permission and endorsement. To illustrate the magnitude of his error, let us posit a university of which Bickel were the autocratic president. I assume that at such a university, it would be impermissible to debate the burning of buildings. Who would take that limitation seriously? The "barbarians?" The faculty? I assume that the barbarians would continue to debate burning the building (or al-

---

24. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT, 72 (1975), quoting Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting). Bickel brackets and underscores "[— *the only* —]" to highlight what he deemed to be the unsoundness of the Holmes perspective. *Id.*

25. *Id.*

26. *Id.* at 73.

27. *Id.*

ternatively they might just burn it). The faculty, on the other hand, would take the debate limitation rule more seriously. Consequently, the "affirmative" probably would have prevailed, and the building would have been burned. Thus, the rule making building burning unspeakable would have made it more, not less, doable.

However, one cannot defend the right to preach noxious doctrines, exclusively on the ground that they cannot persuade. Good ideas have not always won out over bad in the marketplace of ideas.[28] However, the entire Constitution, of which the first amendment is only a part, is an important fail-safe against implementation of the worst ideas. For example, Klansman Clarence Brandenburg's belief that "the nigger should be returned to Africa [and] the Jew returned to Israel"[29] could not be implemented under the equal protection and due process clauses, even if he were able to persuade a majority that he were correct. Of course, there is a theoretical possibility that he could be so persuasive that we as a country would suspend civil rights and allow mass deportation or genocide. It is a possibility, however, that must be discounted by its improbability. Furthermore, anybody that persuasive would have long since persuaded us to abolish Bickel's proposed law against advocating genocide.

None of this should suggest that freedom of speech is risk-free. I would hate to count the number of harebrained schemes that have been enacted into law during my lifetime. Many of these schemes were fueled by half-baked passions that reasoned analysis was unable to overcome. I also have little doubt that there have been some horrible crimes committed by people who were inspired by bad speeches or worse books. The difficulty is that the only cure for this problem is allowing the government to punish hateful ideas, and surely that cure is worse than the disease. "That at any rate is the theory of our Constitution."[30]

---

28. *See, e.g.*, Frederick Schauer, *Speech and "Speech" — Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 915-16 (1979); Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1130-32 (1979); Baker, *supra* note 2, at 974-81.

29. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

30. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

IV. ENTERTAINMENT AS SPEECH

It is sometimes suggested that entertainment cannot contribute to the marketplace of ideas, and therefore should not be constitutionally protected.[31] Although not all entertainment is speech,[32] that which is speech (such as books, plays, and movies) is entitled to full constitutional protection. The reasons for so holding were developed in a classic, but too often forgotten, Supreme Court opinion, *Winters v. New York*.[33]

In *Winters*, New York sought to punish a bookseller for selling magazines containing collections of criminal deeds with pictures and stories "so massed as to become vehicles for inciting violent and depraved crimes against the person."[34] The State argued that because of the nonideological character of the magazines, they were not constitutionally protected. The Court rejected this argument in a remarkably succinct and perceptive five sentences:

> We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.[35]

Justice Frankfurter's dissent from this analysis is worth considering:

> Wholly neutral futilities, of course, come under the protection of free speech as fully as do Keats' poems or Donne's sermons. But to

---

31. *See* Bork, *supra* note 1 at 24-29; Meikeljohn, *supra* note 1, at 86-87.

32. The Court has held motion pictures, (Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)), and dancing, (Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); *but cf.* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (holding that *nude* dancing may not enjoy full First Amendment protection)), to be constitutionally protected speech. Sports like horse racing and prize fighting, which are banned in a number of states, (*e.g.* GA. CODE ANN. § 10-1-550 (1989) (horse racing); S.C. CODE ANN. § 52-7-10 (Law Co-op. 1992) (prize fighting)), presumably are not speech. I would guess that the Court would say the same about wrestling, although I do not think I would want to write the opinion explaining why professional wrestling as it is choreographed today is not speech, while dancing is.

33. 333 U.S. 507 (1948).

34. *Id.* at 513.

35. *Id.* at 510.

> say that these magazines have "nothing of any possible value to society" is only half the truth. This merely denies them goodness. It disregards their mischief. As a result of appropriate judicial determination, these magazines were found to come within the prohibition of the law against inciting "violent and depraved crimes against the person," and the defendant was convicted because he exposed for sale such materials. The essence of the Court's decision is that it gives publications which have "nothing of any possible value to society" constitutional protection but denies to the States the power to prevent the grave evils to which, in their rational judgment, such publications give rise.[36]

On the surface, there is much to lend support to Frankfurter's analysis. If indeed the magazines have no possible value to society, why, given their potential for harm, shouldn't New York be able to proscribe them? The answer is that the Court did not say that these magazines have "nothing of any possible value to society;" it said: "*[W]e can see* nothing of any possible value to society in these magazines."[37] The distinction is crucial. The Court, unlike Frankfurter, was unwilling to limit freedom of speech to its own ability to perceive value. Rather, it imposed an absolute bar on a judge's power to condition entry into the marketplace on a preliminary showing of merit. Thus, because the line between informing and entertaining is too elusive to draw, even entertainment cannot be kept from the marketplace simply because its value is imperceptible to the judiciary.[38]

V. Democratic Theory and the Absolute Freedom to Advocate Ideas

Having begun this essay by analogizing freedom of speech to the right to vote, it is now appropriate to focus on the differences. Whatever else may be said about the franchise, it most assuredly is not absolute. The right to vote is denied to convicted felons, to

---

36. *Id.* at 528 (Frankfurter, J., dissenting).

37. *Id.* at 510 (emphasis added).

38. One could argue that a play, book, or movie should be protected even if we knew to a certainty that it had no ideological value. *Cf.* Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, The Sublime and the First Amendment*, 1987 Wis. L. Rev. 221. Because, as *Winters* tells us, we cannot know to a certainty that any particular play, book, or movie lacks ideological value, we need not resolve this argument. 333 U.S. at 510.

those under eighteen, to non-citizens, to newly-arrived residents,[39] and to those who failed to register in a timely manner. Indeed, were it not for several constitutional amendments, the franchise would be even more regularly denied.[40] Even those who can vote have severely circumscribed choices. In the absence of write-in possibilities, which are not universally permitted, the voter may well perceive her choice to be between Tweedle-Dee and Tweedle-Dum. Why then should the right to advocate ideas be so absolute?

The difference between the franchise and the freedom of speech is that freedom of speech is a more baseline right. The franchise needs to be limited to citizens because it is the ultimate determinant of how we are to be governed. Free speech is a step (or several steps) removed from the electoral process. Speech sets nothing in concrete; at best, it brings a new idea into the marketplace. An alien or a ten-year-old can contribute to the marketplace of ideas. If we do not like what he has to say, we can reject it out of hand. He has not infected the electoral process by his possibly disloyal or immature thought process. This distance from ultimate decision-making justifies extending freedom of speech to more people than receive the franchise.

There are other distinctions between speech and voting that underscore the baseline position of free speech in the democratic process. Elections are single-shot activities that become *res judicata* once held. At that point, we have, at least tentatively, charted a governmental course. The marketplace of ideas, on the other hand, is ongoing; it never closes. It keeps working, seeking to influence people's thinking for future elections, or for a myriad of other purposes.[41] For this reason, there is no need to regulate the number or quality of participants.

Furthermore, the potential harm from ill-considered speech is less than the harm from ill-considered voting. Once the speech is

---

39. *Compare* Dunn v. Blumstein, 405 U.S. 330 (1972) (invalidating a one year residency requirement) *with* Marston v. Lewis, 410 U.S. 679 (1973) (upholding a fifty-day requirement).

40. The Fifteenth Amendment precludes franchise denial on the basis of race; the Nineteenth Amendment precludes denial on the basis of gender; the Twenty-Fourth Amendment abolishes poll taxes; and the Twenty-Sixth Amendment protects those as old as eighteen from age discrimination. Arguably, the Seventeenth Amendment, which provides for the direct election of U.S. Senators, is another franchise-enhancing amendment.

41. There is no reason to suppose that the First Amendment should be limited to pure political persuasion. *See, e.g.*, Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1148-51 (1983). *Contra* Bork, *supra* note 1.

made and the speaker leaves, we no longer have to take it seriously. Ill-considered votes, on the other hand, can seriously affect the way we live. With all of the talk about the pain caused by the Nazis in Skokie, they did no more than threaten to appear in their ugly uniforms.[42] In suburban New Orleans, on the other hand, white supremacist David Duke represented the citizenry in the Louisiana Legislature for several years.

There is one other important reason for granting absolute protection to the advocacy of ideas: the infinite opportunity for others to do the same. In almost every other choice that a legislature makes, if one liberty is granted, something else will be lost. For example, if animal research is limited, some loss in curing and preventing disease will occur. If it is not limited, animals will suffer. Similarly, if the right to choose abortion is limited, reproductive liberty and bodily autonomy will be compromised. If they are not limited, fetuses will be killed.[43] Choices have to be made. We cannot have it both ways. With freedom of speech, on the other hand, allowing bad speech does not limit the opportunity for good speech.

I am not suggesting that the first amendment guarantees people the right to advocate whatever they wish, "whenever and however and wherever they please."[44] Such advocacy may constitute an intolerable invasion of privacy, or unduly interfere with legitimate functions of the chosen locale.[45] I am suggesting, however, that the government may not interfere with the dissemination of an idea in order to totally silence the message. In this regard, the test for free exercise of religion is an appropriate analogue: "[free exercise] embraces two concepts —freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[46] Because there is no limit to the number of different ideas that people can advocate, the analogy to the freedom to believe is apt.[47]

---

42. Once they won the right to demonstrate, they chose to forgo the right in exchange for a permit to demonstrate in a Chicago park. *See* ARYEH NEIER, DEFENDING MY ENEMY 169-71 (1979).

43. *See* Arnold H. Loewy, *Why* Roe v. Wade *Should Be Overruled*, 67 N.C. L. REV. 939 (1989).

44. *See* Adderley v. Florida, 385 U.S. 39, 47-48 (1966).

45. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

46. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

47. One could argue that freedom to believe should be absolute only when the belief is uncommunicated, reasoning that it would be hypocritical to punish an uncommunicated be-

One might argue that the analogy is not apt because an uncommunicated belief can cause no harm, whereas advocacy can. The answer is that the only harm that unlimited advocacy can cause is that which was contemplated by creating the freedom in the first place. People may be offended by a Nazi spouting his ugly ideology, or his speech might induce someone to act violently. These, however, are risks inherent in the First Amendment. In short, allowing unlimited advocacy can cause no harm that can legitimately be counted as harm.

By focusing on democratic theory, I do not mean to denigrate the other values served by the First Amendment. I have little doubt that freedom of speech is good for personal self-fulfillment,[48] personal self-development,[49] aiding the democratic process,[50] checking our government officials,[51] providing for orderly change,[52] and harmlessly letting off steam.[53] But, above all else, the characteristic of freedom of speech that distinguishes it from other rights is the government's absolute disability to control entry into the marketplace of ideas.

---

lief. The *Cantwell* Court clearly did not intend for "believe" to be defined so narrowly. Rather, it drew the distinction between the right to express a belief, which was absolute, and the right to express it in a particular time, place, or manner, which was not. 310 U.S. at 304.

48. *See* Baker, *supra* note 2.

49. *See* Redish, *supra* note 2.

50. *See* MEIKELJOHN, *supra* note 1.

51. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

52. *See* EMERSON, *supra* note 3, at 11-15.

53. *See* SCHAUER, *supra* note 3, at 79-80.