1

Instrumental Value Arguments for Free Speech

Hard cases raise hard questions. Take, for example, *Snyder* v. *Phelps*.[1] That case involved picketing by protestors from the Westboro Baptist Church on public grounds near the funeral of Marine Lance Corporal Matthew Snyder, who died in Iraq in the line of duty. His father, offended by the demonstrators' signs, sued Westboro for intentional infliction of emotional distress and other claims. A jury awarded him millions of dollars in damages, but the Supreme Court found the speech protected and reversed the verdict.

The members of Westboro make up a small congregation based in Kansas. They believe that God hates the United States for its tolerance of homosexuality and punishes it through military losses and casualties. They convey their beliefs in virulent and uncompromising terms. For example, the picket signs they carried near Matthew's funeral included such slogans as "America is doomed," "God hates the USA," "Thank God for 911," "You're going to hell," and "Thank God for dead soldiers."

The Supreme Court acknowledged that Westboro's speech was hurtful and had added to the "already incalculable grief" of Matthew's father. It further recognized that, while Westboro thought America was morally flawed, "many Americans might feel the same about Westboro." And it conceded that Westboro's "contribution to public discourse" was probably "negligible."

The Supreme Court nevertheless found the speech protected. Furthermore, the Court did not treat Westboro's expression as if it occupied the borderlands of the First Amendment, having somehow crept across the line into safe territory. To the contrary, it located Westboro's speech right at the center of First Amendment protection. When the Supreme Court decides a case involving a close legal question, the vote is often five to four; in *Snyder*, it ruled in favor of Westboro by a vote of eight to one. The Court did not view *Snyder* as a hard case.

[1] Snyder v. Phelps, 562 U.S. 443 (2011).

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Cases like *Snyder* v. *Phelps* understandably lead people to ask why our constitutional doctrine gives such strong and expansive protection to freedom of speech, especially to speech that appears to contribute nothing worthwhile to public discourse. It is a valid question. The speech at issue in that case had nothing to recommend it. And *Snyder* is just one of many cases where courts have protected speech that seems obviously to have little or no merit and to do much more harm than good.

Some answers to the question of why we give broad protection to free expression depend on the idea that speech is a good in itself. We look at those arguments in Chapter 2. We call those "intrinsic value" arguments.

The arguments we examine in this chapter make a different point. They contend that we afford such extensive immunity to speech because of other values that it serves. In other words, the theories we look at here focus on freedom of expression as an essential tool in achieving something else. We call these "instrumentalist" theories.

The most widely acknowledged and durable of the various instrumentalist theories argues that free expression is valuable because it provides a means to help us (both as individuals and as a society) discover the truth. Finding the truth, in turn, enables us to do lots of things that we think are very important: make better decisions about our lives; provide better guidance and counsel to others; be better parents and partners and citizens; offer better contributions to debate within our deliberative democracy; achieve better government; and so on. As the Supreme Court declared in *Bose Corp*. v. *Consumers Union*, the First Amendment "presupposes that the freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole."[2]

The most famous and enduring articulation of the truth-finding theory comes in the dissenting opinion filed by Justice Oliver Wendell Holmes in *United States* v. *Abrams*.[3] We should note at the outset that the majority decision in *Abrams* reflects a very different approach to free speech than we have today. Indeed, viewed through our current lens, the outcome in *Abrams* seems almost unthinkable.

In that case, five individuals printed and circulated pamphlets that were critical of President Woodrow Wilson, condemned capitalism, and urged workers to join in a general strike. By contemporary standards of public discourse, these materials seem like garden variety political hyperbole that is unlikely to result in much of anything, let alone to threaten national security. Today, we encounter on a regular basis speech that is more toxic and incendiary.

In our current legal and political environment, the notion that the defendants could go to prison for making such statements is incomprehensible. Nevertheless,

[2] Bose Corp. v. Consumers Union of the United States, 466 U.S. 485, 503 (1983).
[3] Abrams v. United States, 250 U.S. 616 (1919).

the defendants were criminally charged under the federal Espionage Act, convicted, and sentenced to twenty years of incarceration. A strong majority of the Supreme Court – seven justices – upheld this result.

Justice Holmes crafted an opinion that has so carried the favorable judgment of history that people who refer to it sometimes forget that it was a dissent. Even First Amendment scholars occasionally struggle to remember who wrote the majority opinion. Ironically, the author was Justice John Hessin Clarke, who usually voted with Holmes and whose record generally reflected a progressive point of view. In this case, Clarke and Holmes dramatically parted company.

Holmes himself had not always been a great friend of the First Amendment. To the contrary, in *Patterson* v. *Colorado*,[4] he wrote an opinion upholding a newspaper editor's contempt conviction for printing articles and cartoons insulting the Colorado Supreme Court. In *Fox* v. *Washington*,[5] he wrote an opinion upholding the defendant's misdemeanor conviction for printing an article in praise of nudity. And in *Schenck* v. *United States*,[6] he wrote an opinion upholding the defendant's conviction – under the Espionage Act – for distributing a circular that was critical of military conscription and that encouraged resistance to the draft. We take a closer look at some of these cases in Chapter 6.

A substantial body of scholarship, including Thomas Healy's book, *The Great Dissent*, has explored how and why Holmes changed his mind.[7] Multiple factors appear to have had an influence: friends and fellow judges lobbied him; he studied the work of European legal and political philosophers; and he grew concerned with overzealous efforts by the federal government to stifle dissent. For our purposes, the critical fact is that, starting with *Abrams*, his position on free expression took an entirely different course, and, as a result, he wrote arguably the most important opinion in the history of the First Amendment.

The central passage in Holmes's dissent begins with a trenchant observation about human nature: "Persecution for the expression of opinions seems to me perfectly logical." Holmes acknowledged that when people have strong convictions they naturally want to embed their beliefs in law and to "sweep away all opposition." He pointed out, however, that today's certainties have an unsettling tendency to become tomorrow's absurdities. As Holmes poetically put it, "time has upset many fighting faiths." In sum, no matter how firm our beliefs, and our corresponding antagonism toward dissent, we must leave room for the possibility that we could be wrong. Our theory of free speech must leave room for it as well.

Holmes explained his theory through the use of a metaphor that courts and scholars have come to describe as "the marketplace of ideas." "The ultimate good

[4] Patterson v. Colorado, 205 U.S. 454 (1907).
[5] Fox v. Washington, 236 U.S. 273 (1915).
[6] Schenck v. United States, 249 U.S. 47 (1919).
[7] Thomas Healy, The Great Dissent (2013).

desired," he said, "is better reached by free trade in ideas [and] the best test of truth is the power of the thought to get itself accepted in the power of the market." In this model, we allow as many differing ideas as possible to compete for our allegiance. We analyze, debate, and deliberate over them. Through this process, we come to reject falsehood and embrace truth, and to cast off inferior opinions in favor of better ones.

Although Holmes gave us the most famous articulation of this theory, he did not originate it. John Milton's *Areopagitica* of 1644 and John Stuart Mill's *On Liberty* of 1859 had made essentially the same argument. Indeed, in later cases the Supreme Court cited both Milton and Mill in support of this conceptual construct.[8] Nevertheless, legal scholars have recognized the singular and canonical place of the *Abrams* dissent in First Amendment case law, contending that it "continues to influence our thinking about free speech more than any other document."[9]

Because of its confidence that the marketplace will (at least eventually) reject falsehood and bad ideas, this theory ends up protecting an extraordinarily broad range of expression. Thus, although we may find the speech at issue in *Snyder* to have no redeeming value whatsoever, the marketplace of ideas still allows it in. And why not? After all, the argument goes, sooner or later the competition among differing ideas will reveal worthless ones for what they are and will force them out of favor.

People sometimes argue that such worthless ideas contribute nothing to the marketplace and so should preemptively be excluded from it. On some occasions, the Supreme Court has allowed its own language to drift in this direction. For example, in explaining why the First Amendment does not protect some speech, the Supreme Court in *Chaplinsky* v. *New Hampshire*[10] declared that certain "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

This argument envisions ideas going through some sort of qualifying round before they can enter the competition. Only ideas deemed good enough get in. If objective criteria and omniscient decision makers existed to judge such a preliminary assessment, then perhaps that approach would make sense – although we will shortly encounter a theory that explains why it doesn't. But objective criteria are not available and subjectivity necessarily infects decisions about value. As the Supreme Court observed in *Cohen* v. *California*,[11] a case we consider at some length in Chapter 2, "one man's vulgarity is another man's lyric."

[8] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279 n. 19 (1964).
[9] Thomas Healy, The Great Dissent 7 (2013).
[10] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
[11] Cohen v. California, 403 U.S. 15 (1971).

Indeed, one of the primary strengths of the marketplace of ideas theory lies in its rejection of authoritative selection, where the government chooses the ideas that are worthy of entertaining. The notion of a qualifying round, however, builds exactly that dynamic into the marketplace. Under such a model, we would be allowed to embrace whatever ideas we liked – as long as they appeared on the government's preapproved menu.

The marketplace of ideas theory has its weaknesses. This would not have come as news to Oliver Wendell Holmes. Holmes was not a dreamy-eyed idealist who failed to understand how imperfectly the world actually works. Nor was Holmes guilty of indulging in the exact state of mind he criticized at the beginning of his opinion – an unquestioning belief in the infallible rightness of his position. To the contrary, toward the end of his *Abrams* dissent he observed: "That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment."[12]

Opinions differ about how well the experiment has gone. Adherents claim that the marketplace of ideas theory remains our best justification for freedom of expression, despite the counterintuitive results we see in cases like *Snyder*. Critics have argued in turn that the theory incorporates a number of false assumptions and, as a result, has not yielded the results its architects envisioned.[13]

A comprehensive catalog of objections to the marketplace of ideas model lies beyond the scope of this book, but we can identify some of the principal criticisms. The theory assumes that all ideas have equal access to the marketplace; in fact, substantial barriers to entry can exist, particularly in the case of minority viewpoints. The theory assumes that participants in the marketplace want to find the truth; in fact, human beings often have other agendas. The theory assumes that those who *do* seek the truth have the intelligence and rational capacity to sort through the choices; in fact, good critical-thinking skills often seem in short supply in public discourse. The theory assumes that ideas and information arrive at a manageable pace and in manageable quantities; in fact, many people (particularly today) feel inundated with more inputs than they can process. And, finally, the theory assumes that these all-welcoming, truth-seeking, reason-applying, critical-thinking, deluge-managing individuals will act in a manner consistent with what the marketplace tells them; in fact, all too often they don't.

One of the difficulties in productively moving arguments forward regarding free speech now becomes evident. Advocates for free expression often invoke, whether knowingly or not, a marketplace of ideas ideology and framework. Skeptics can sensibly respond, however, that this theory doesn't align with their experience. At

[12] Holmes expressed a similarly reality-bound viewpoint on the very first page of his book THE COMMON LAW (1881), where he declared that "The life of the law has not been logic; it has been experience."

[13] *See, e.g.*, Leonard M. Niehoff and Devva Shah, *The Resilience of Noxious Doctrine: The 2016 Election, the Marketplace of Ideas, and the Obstinacy of Bias*, 22:2 MICH. J. RACE & L. 243 (2017) and authorities citied there.

one point in his *Areopagitica*, John Milton asks: Who has ever known truth to lose to falsehood when they have been put "in a free and open encounter?" Many of us would raise our hands and say: "I have."

Nevertheless, defenders of the marketplace of ideas theory have some fairly powerful rebuttals to critics. They point out that the alternative to a free marketplace is a restricted one, where the government decides which thoughts and facts people can share and receive. And, they contend, the evils of government regulation of speech are even greater and graver than those we encounter with the marketplace of ideas. This argument has powerful practical and moral force.

In his majority opinion in *West Virginia State Board of Education* v. *Barnette*,[14] a case we will cite and quote with some frequency, Supreme Court Justice Robert Jackson declared that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." The marketplace of ideas model may falter from time to time, but it at least keeps that star fixed in place. A statement often attributed to Winston Churchill (he was actually quoting someone else) holds that "democracy is the worst form of government except for all those other forms that have been tried"; we might say the same of the marketplace of ideas. If you do not like how it works, wait until you try totalitarianism and government censorship.

Over the years, additional instrumentalist theories have emerged that similarly support protecting an expansive range of speech, even speech that many people find offensive and meritless. First Amendment scholar Lee Bollinger sets forth one such theory in his book *The Tolerant Society*.[15] Because his theory offers a distinctive and helpful perspective, we explore it here.

As discussed above, one common rejoinder to the marketplace model contends that some ideas have little or no value but do real harm in the world. Their bad qualities plainly outweigh their good. Therefore, the argument goes, we should not allow such ideas the privilege of competing for our attention. This argument has some facial appeal, but, as noted earlier, it quickly raises important concerns about who gets to decide the relative worthiness of ideas and who gets to determine the criteria that will be applied.

Bollinger takes a different approach. He effectively assumes, for the sake of argument, that some speech exists that makes no meaningful contribution to the marketplace of ideas *and* that we can figure out which speech falls into that category. Perhaps neo-Nazis marching in a neighborhood of Holocaust survivors, an event that Bollinger considers at length in his book, provides an example. The provocative question he poses is whether such speech has value to us as a society even if it is ideologically bankrupt.

[14] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).
[15] Lee Bollinger, The Tolerant Society (1986).

Bollinger argues that it does. Under his theory, extreme speech is not just a useless irritant that we let into the marketplace because we can't come up with satisfactory protocols for keeping it out. Rather, extreme speech has value in how it can lead us to think and behave. Bollinger shifts attention from the value that lies in the speech itself to the value that lies in our learning how to manage our reactions to it. In his view, free speech helps us develop ways of thinking that push back against our natural intolerance and that carry with them substantial social benefits. Free speech – perhaps *particularly* speech at the extreme edges – makes ours a more tolerant, and therefore a better, society.

Other instrumentalist theories have taken a narrower approach, arguing for protection of particular forms of speech that advance specific values. One such theory contends that we must allow for free expression because of the indispensable role it plays in informed self-government. Just as the marketplace of ideas theory is inextricably linked with Oliver Wendell Holmes and *Abrams*, this self-governance theory is strongly associated with the philosopher and civil libertarian Alexander Meiklejohn and his book *Free Speech and Its Relation to Self-government*.[16]

In essence, the self-governance theory maintains that a right to free expression is a necessary part of a democracy. In a democratic system, the people ultimately exercise sovereign authority; government officials serve the electorate, not the other way around. The people need to share and receive as much information as possible so they can make informed decisions about which candidates to elect, which proposals to support, which reforms to advance, and so on.

Theories based on a narrower rationale than the marketplace of ideas or societal tolerance may have some appeal insofar as they make more modest claims about the speech the First Amendment protects. But the connection between the text of the First Amendment and the self-governance theory seems tenuous at best. On its face, the phrase "no law abridging the freedom of speech" sweeps much more broadly than does a model that protects only a discrete subcategory of expression that has political utility.

Furthermore, speech that furthers self-governance may turn out not to be much of a discrete subcategory after all. For the electorate to make informed decisions about taxation, environmental policy, armed conflict, and funding for the arts, it needs to know something about economics, science, military history, and the value of poetry and Impressionist painting. Trying to identify the point at which speech ceases to relate to self-governance poses substantial, maybe insurmountable, line-drawing problems.

Furthermore, the self-governance rationale does not dispose of many of the types of speech that we may feel most inclined to try to prohibit. People may find the speech of the Westboro Baptist Church at issue in *Snyder* worthless and morally obnoxious, but it clearly pertains to matters of public policy that the electorate must

[16] Alexander Meiklejohn, Free Speech and Its Relation to Self-government (1948).

decide. That's precisely why the Supreme Court held the speech protected. The same holds true with respect to the speech of neo-Nazis, white supremacists, and others whose political ideologies many people find odious but that remain political ideologies nevertheless.

Another narrower instrumentalist justification for free expression comes from First Amendment scholar Vincent Blasi. Blasi has written expansively on First Amendment theory, but one of his arguments focuses on a distinct power that the state has within our political system – the authority to use violence against human beings for a variety of ends, such as waging war and imposing capital punishment. In his view, free speech serves a critical "checking" function against the abuse of this dangerous monopoly.[17]

Blasi underscores the importance of having an assembly of well-financed, well-organized, and thoroughly independent watchdogs – the media – to serve this function. If Blasi's theory has merit, then the current state of journalism gives cause for grave concern. Today, some news outlets seem more like extensions of political parties than independent watchdogs, many media entities struggle to survive financially, and cuts to the staff necessary to support strong investigative journalism are common.

Many champions of free expression have declined to settle on only one justification, broad or narrow. Instead, they embrace multiple theories, some of which may have greater explanatory power than others in individual cases, depending on the speech and circumstances in question. This approach may lack the purity of one that clings to a single theory, but it allows us to draw on the rationale that best fits the situation at hand and it prevents us from making a fetish of any of them.

One of the most majestic of these expressions comes in Justice Louis Brandeis's concurring opinion in *Whitney* v. *California*,[18] which deserves quoting at some length:

> 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. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of

[17] Vincent Blasi, *The Checking Value in the First Amendment*, 2:3 AM.B. FOUND. RES. J. 521 (1977).

[18] Whitney v. California, 274 U.S. 357 (1927).

> punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Some of the arguments advanced here should sound familiar to you. In this passage, Brandeis touches on the themes of truth-finding and self-governance, as we have discussed.

But Brandeis offers a panoply of additional instrumentalist arguments in support of free expression as well. Freedom of speech, he contends, keeps us from becoming inert and ineffectual. It allows people to let off steam so they don't explode into violence out of the frustrations that come from repression. It empowers minority viewpoints against the "occasional tyrannies" of majorities. It gives us our most effective tool against the speech we hate: more speech.

Brandeis's opinion in *Whitney* is rich in ideas. And one could argue that it has grown in importance for another reason he probably would not have anticipated. That reason relates to his religious identity and the struggles he encountered as a result.

In contemporary conversations about free expression, particularly on college campuses, members of minority groups sometimes object that many pro-free-expression arguments come from a position of privilege. This is an important insight. After all, talk about how truth will eventually prevail in the marketplace of ideas sounds great if you're not one of the people who has to bear the burden of falsehood's interim reign. And celebrating the characteristics that are cultivated by a tolerance of offensive speech sounds terrific if hate doesn't have you in its crosshairs.

A passage from Meiklejohn demonstrates the point. In *Free Speech and Its Relation to Self-government*, he declares that "To be afraid of ideas, any idea, is to be unfit for self-government. Any such suppression of ideas about the common good, the First Amendment condemns with this absolute disapproval." Surely, this constitutes an extravagant overstatement that unfairly discounts the concerns of minority groups.

An individual of a particular color, religion, or gender can (and perhaps even should) experience rational fear in the face of racism, anti-Semitism, and misogyny. That sensible reaction hardly disqualifies them from engaging in thoughtful and productive decision making in the service of self-governance. Nor does it suggest that the individual will find themselves irresistibly drawn toward censorship. To fear extremist speech is one thing; to try to suppress that speech through law is something else altogether.

Brandeis fully understood that freedom of expression does not come without costs. To the contrary, it demands substantial courage, particularly from those on whom it makes the greatest demands. Indeed, his opinion in *Whitney* includes repeated references to fear and courage:

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears . . . Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty.

Importantly, these words did not come from the easy armchair of someone who sat above the fray. Brandeis experienced virulent anti-Semitism throughout his life: in law school, in practice, and on the Supreme Court. To take just one example, his high court colleague Justice James C. McReynolds harbored such strident anti-Semitic views that he refused to speak to his Jewish colleague – for three years.[19]

When Brandeis extolled the value of freedom of expression, he did so fully understanding the challenges that this approach poses for those who find themselves on the receiving end of hate. He also understood that silence enforced through laws adopted by the majority threaten even greater dangers to those who lack such political power. We might see a connection here between Bollinger and Brandeis, a joint recognition that free speech presses us to become better people, more tolerant ourselves and also braver in the face of the intolerance of others. It is a prescription not easily fulfilled.

The theories explored above help clarify why contemporary conversations about free expression so often stall. An absolutist advocates for an approach consistent with the marketplace ideas: everyone should be able to say what they want and the best ideas and truest narratives will prevail. A relativist responds that it doesn't always work out that way and, besides, some ideas do not deserve a chance to compete. The participants arrive at a stalemate because their discussion turns on whether the speech in question expresses an idea of sufficient value to get a turn in the marketplace.

To keep the conversation going – and to cultivate a more appropriately elaborate free speech theory and First Amendment doctrine – we need to introduce additional concepts. We must recognize the difficulties inherent in declaring some ideas worthy of expression and others not. We need to understand that placing those judgments in the hands of the majority (where a democracy would locate them if we did not have a constitutional provision like the First Amendment) would inescapably lead to dreadful abuses. Indeed, the First Amendment exists to protect minority viewpoints, and history includes numerous critical instances of it doing so, from the

[19] *See* Scott Jaschik, *Centre Removes Name of Bigot from Building*, Inside Higher Ed. (Feb. 7, 2017).

early labor marches to the civil rights protests of the 1960s to the more recent demonstrations of the #MeToo and Black Lives Matter movements. Majority speech, in contrast, does not need the First Amendment, because the majority will not exercise its political power to restrain its own expression.

And still *more* concepts and *deeper* thinking are needed to move the conversation forward. We have to acknowledge that the expression of ideas that have no merit in themselves may advance other values. Such speech allows people to let off the steam that might otherwise fuel violence. It fosters the skill of clear and critical analysis that is necessary to explain why an idea should be rejected. It cultivates the socially and individually essential qualities of tolerance and courage.

At the same time, however, we have to recognize the corrosive power of certain speech. We have to acknowledge that the burdens of free expression fall more heavily on some groups and individuals than on others. In the end, we may conclude that the contributions free expression makes to our political and personal lives warrant the costs that it exacts. But an absolutist who will not pause to think seriously about who suffers those costs, and what we need to do to help and support them and show solidarity with them, will have little chance of persuading a relativist of the rightness of their position. Anyone who makes the First Amendment into a heartless and soulless commandment will struggle to defend it.

In this chapter, we have addressed instrumentalist arguments for free expression – arguments that support the principle because of other values that it serves. Over the years, courts and scholars have advanced a different kind of argument as well: an argument that free expression has intrinsic value. We turn to that argument next.