

Critiquing Free Speech

First Amendment Theory and the Challenge of Interdisciplinarity

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Introduction

Mainstream First Amendment theory is under assault. Free speech should be protected, liberal theorists¹ have proposed, for a number of important reasons, including democratic self-governance, self-realization, respect for individual autonomy, the search for truth, and a variety of other reasons.² While these classical free speech justifications still have significant influence, free speech theory is nonetheless in a state of great ferment. The notion that government should extend to individuals the greatest possible rights of free expression (long nearly a truism among scholars in law, communication, and related disciplines) has become subject to significant challenges. The old consensus of expanding free expression rights has been challenged in a series of critiques by feminist legal scholars, critical legal theorists, communitarian theorists, critical race theorists, literary theorists, and

¹ *Liberalism* here and throughout this book refers broadly to the political tradition that advocates protection of individual rights, equality before the law, and similar values. It should be noted that liberalism in this sense—with roots in the thought of Locke, J.S.Mill, and many others—is embraced by many on both the political left and right in the United States.

² Rodney Smolla, *Free Speech in an Open Society* 3–17 (1992).

others.³ Some of these critics argue that the theoretical assumptions that underlie free speech theory, assumptions that extend back to Milton, Locke, Kant, and others, are no longer tenable.⁴ Traditional liberal theory's picture of "atomistic" individualism is unconvincing, the critics contend, in light of the socially constituted nature of human beings. Moreover, the critics suggest that certain forms of speech that are largely immune from regulation under current First Amendment doctrine, including hate speech and pornography, should not be protected because of their detrimental social impact.⁵

These critiques arise out of a shift that has occurred globally within legal theory; that is, the increasing use of vocabularies and paradigms from other disciplines to study law. Interdisciplinarity has become a transforming force within legal studies. Not only do legal scholars borrow from other disciplines, but scholars in other disciplines—including political science, communication, philosophy, economics, history, psychology, sociology, literary studies, and critical and cultural studies—not infrequently study law. In recent decades, the pace of interdisciplinary legal study has accelerated considerably. In the heyday of legal formalism in the late 19th and early 20th centuries, legal scholars assumed the autonomy of law from all other disciplines. Now, however, that autonomy is in serious doubt.⁶

³ See Kathleen M. Sullivan, *Free Speech Wars*, 48 S.M.U.L.Rev. 203 (1994).

⁴ E.g., Linda C. McClain, "Atomistic" Man Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. Cal. L. Rev. 1171 (1992).

⁵ E.g., Catharine A. MacKinnon, *Only Words* (1993); Mari J. Matsuda et al., *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993).

⁶ On the relationship of law and other disciplines generally, see Laura Kalman, *The Strange Career Of Legal Liberalism* (1996); Charles W. Collier, *Interdisciplinary Legal Scholarship in Search of a Paradigm*, 42 Duke L.J. 840 (1993); Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 1991 Duke L.J. 191 (1991); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992); Lawrence M. Friedman, *Popular Legal Culture: Law, Lawyers, and Popular Culture*, 98 Yale L.J. 1579 (1989); Edward Rubin, *Law and Society & Law and Economics: Common Ground, Irreconcilable Differences, New Directions: Law and the Methodology of Law*, 1997 Wis. L. Rev. 521 (1997); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 Mich. L. Rev. 1835 (1988); Brian Z. Tamanaha, *The Internal/External Distinction and the Notion of a "Practice" in Legal Theory and Sociological Studies*, 30 Law & Soc. Rev. 163 (1996); Ernest J. Weinrib, *Legal Formalism: On the Imminent Rationality of Law*, 97 Yale L.J. 949 (1988).

There are obvious advantages to legal interdisciplinarity. Legal scholars can develop important insights about law by delving into social scientific and humanistic disciplines that intersect with legal studies. Historical scholarship can help illuminate the intentions of those who drafted constitutional provisions. Literary studies can yield insights about the interpretation of legal texts. Economic analyses can help identify the consequences (both intended and unintended) of various legal rules. Psychological studies can answer important empirical questions about the prejudicial effects of pretrial publicity on jurors or the competence of individuals to stand trial. Various critical and cultural approaches can, among other things, critique the biases and blind spots of existing legal rules. Many other fields of scholarship have the potential to enrich the study of law.

Nevertheless, interdisciplinarity is not an unalloyed good. Much of the recent wave of interdisciplinarity seems to have been deployed to argue for greater limits on free speech rights. Stanford legal scholar Kathleen Sullivan has dubbed these new interdisciplinary challenges to First Amendment verities “free speech wars.”⁷

It goes without saying, of course, that First Amendment theory—that body of philosophical and (less frequently) empirical reflection on the nature, purposes, and value of free speech—was always, and already, interdisciplinary. Legal scholars, political and moral philosophers, historians, and many others have, over the years and particularly in the 20th century, contributed to First Amendment theory. This book’s focus on interdisciplinarity is directed toward more recent interdisciplinary incursions into the field from communitarians, feminist legal scholars, critical legal scholars, lawyer/economists, literary theorists, and others. It cannot be stressed enough that the critiques of these thinkers presented here are, in nearly all cases, not aimed at the substantive *ends* the theorists seek (such highly desirable goals as gender equity, an end to racism, stronger bonds of community, and the like) but only at the theoretical *means* they wish to employ to reach these goals. Sometimes, as the saying goes, the cure is worse than the disease.

(1996); Ernest J. Weinrib, Legal Formalism: On the Imminent Rationality of Law, 97 Yale L.J. 949 (1988).

⁷ Kathleen M. Sullivan, Free Speech Wars, 48 S.M.U.L.Rev. 203 (1994).

Summary of Chapters

This book does not aspire to be an exhaustive treatment of First Amendment theory and interdisciplinary scholarship. Rather, it is a series of related, but distinct, essays that explore various aspects of that relationship—sometimes through the close examination of a particular theorist, in other cases by focusing on a group of thinkers whose ideas are closely connected.

Chapter 1 of the book will provide a general overview of mainstream First Amendment theory. The chapter will suggest that while classical First Amendment theory is not without its flaws, it is an important repository of values that we neglect at our peril.

Chapter 2 will examine how interdisciplinary thinkers may, by the very nature of their projects, engage in an unsatisfactory reductionism that ignores values implicit in the First Amendment. This chapter will focus on two scholars: economic theorist and federal judge Richard Posner and feminist theorist Susan H. Williams. The chapter will analyze each scholar's work and then proceed to use that work to make some fundamental points about the problems of free speech reductionism. This reductionism takes the form of a wholesale disciplinary "takeover" that omits irreducible constitutional values from its theoretical framework.

Chapter 3 will analyze and critique the work of First Amendment and literary theorist Stanley Fish. Fish has asserted, in the title of a famous essay, that "There's No Such Thing as Free Speech." The chapter will suggest that Fish's deconstructive approach to the First Amendment has important failings.

Chapter 4 will explore the work of a number of important theorists, predominantly communitarian thinkers, who problematize the conception of the "self that engages in free expression or partakes of other individual rights. A number of communitarian theorists have suggested that liberal "rights" regimes place too much emphasis on the individual and not enough on the community from which the individual is "socially constituted." The chapter will analyze these critiques, noting that they may provide valuable additions to our understanding of free expression. Nonetheless, the chapter will suggest that the "liberal" picture of a relatively autonomous self still has many attractive features, normatively if not descriptively.

Chapter 5 will explore the work of a group of legal scholars I call "new realists." New realists, drawing on interdisciplinary critiques developed by an earlier group of scholars, the Legal Realists of the 1920s and 1930s, seek to modify current First Amendment law through their scholarship. They claim that private action, no less than action by

government, can give rise to First Amendment violations. This approach would fundamentally alter free speech jurisprudence by converting the First Amendment from a “shield” against government censorship to a “sword” that requires active government intervention in the marketplace of ideas. The chapter will point out key analytical difficulties with this approach and suggest that, while new realist claims have some merit, it may not be wise to extend them as far as their proponents might wish.

Chapter 6 will focus on the current intense debate over whether the techniques of moral philosophy should be imported into constitutional and First Amendment jurisprudence. The proponents, led by noted theorist Ronald Dworkin, contend that recourse to moral philosophy is not only desirable, but unavoidable as we contemplate the meaning of our Constitution. A number of critics disagree, concerned that importing philosophical methods into judging leaves judges with too much discretion and is fundamentally at odds with the rule of law. The chapter will examine this debate and suggest that it may be impossible to avoid some variety of normative thinking about constitutional issues. Nonetheless, constitutional thinkers should apply these techniques carefully and remain thoroughly grounded in more traditional styles of legal reasoning.

Chapter 7 will summarize the findings of the book and, based upon the earlier chapters, offer some thoughts on the extent to which First Amendment theory should avail itself of the wisdom of other disciplines. The chapter will sketch the outlines of a theoretical approach that can benefit from interdisciplinary insights while remaining grounded in constitutional reality.

CHAPTER

1

Classical First Amendment Theory

The legal scholar now confronts a dizzying array of competing disciplines and approaches. Law has become a sort of meeting ground for academic ideas and trends. And because it has become an interdisciplinary crossroads—affected and infected by so many different influences—law has become, as perhaps never before in American history, one of the most absorbing intellectual subjects.

—J. M. Balkin¹

The United States Supreme Court has not singled out one overriding theoretical justification for free speech, although it has its favorites among the theories discussed in this chapter. Still, the Court has been quite eclectic in its use of these theories, leading theorist Thomas Emerson to make an observation some thirty years ago that is no less true today: “The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases.”² Some commentators have been vexed by the Court’s theoretical eclecticism, while others have viewed it as a strength of First Amendment jurisprudence.

Before critiquing some of the contributions of the new interdisciplinarians, it may be helpful to sketch briefly what this book refers to as “classical” First Amendment theory, which I am defining as those

¹ J.M.Balkin, *Interdisciplinarity as Colonization*, 53 Wash. & Lee L. Rev. 949, 970 (1996).

² Thomas I. Emerson, *The System of Freedom of Expression* 15 (1970).

works that emerged out of a shared Anglo-American, liberal (as that word is used in political philosophy) perspective. Strictly speaking, of course, the First Amendment is a purely American invention, and its text encompasses rights other than free speech. Moreover, much discussion of freedom of speech is philosophical in nature rather than merely descriptive of existing constitutional rights. Nonetheless, because the term *First Amendment theory* is widely adopted in the disciplines of law and communication, it will be used here. *Classical* may strike some readers as slightly pretentious, but because *traditional* has a whiff of the pejorative, *classical* it shall be.

This chapter will review a number of important contributions to First Amendment theory. This review is necessary both to establish a baseline for the chapters that follow—to encapsulate, in brief, the tradition against which the interdisciplinarians are reacting—and to underscore the importance of freedom of speech in the estimation of a number of outstanding thinkers. Although its detractors sometimes seem to outnumber its supporters these days, it is hoped that this brief overview will suggest that classical First Amendment theory, while imperfect, is still a vital and important resource.

Marketplace Theory

The marketplace of ideas theory, so named because of Justice Oliver Wendell Holmes's famous passage in *Abrams v. United States*,³ represents one of the most powerful images of free speech, both for legal thinkers and for laypersons. Marketplace theory is often traced to English poet (and censor) John Milton's powerful 17th-century defense of unlicensed printing in the *Areopagitica*:

Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter?⁴

Milton's optimism about truth routinely overcoming falsehood seems misplaced after the horrors of the 20th century, and the scope of his tolerance famously did not extend beyond his fellow Protestants, but

³ 50 U.S. 616(1919).

⁴ John Milton, *Areopagitica and Of Education* 50 (George H.Sabine ed., Harlan Davidson 1987) (1644).

his is an important beginning nonetheless.⁵ The notion of a transcendent, nonrelative “truth” has, of course, itself been contested of late, as will be discussed in more detail later.

Marketplace theory grew in sophistication as a result of British philosopher John Stuart Mill’s 1859 defense of free speech in “On Liberty.”⁶ Mill noted that when government (even when aligned with the popular will) sought to silence an unpopular opinion, three possible conditions obtained. First, the unpopular opinion could conceivably be true. Even though those who seek to silence the opinion could, in good faith, believe it to be false, they are not infallible. Mill reminds us that many of our greatest certainties are liable to overturned at some point:

Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions, now general, will be rejected by future ages, as it is that many, once general, are rejected by the present.⁷

One of the chief merits of human beings, Mill argues, is that they are able to listen to criticisms of their opinions and modify those views where necessary.

If the unpopular opinion thus turns out to be correct, suppressing it would have been a terrible mistake. It would have been more terrible, Mill maintains, because Milton was wrong:

But, indeed, the dictum that truth always triumphs over persecution, is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes. History teems with instances of truth put down by persecution. If not suppressed for ever, it may be thrown back for centuries.⁸

⁵ For an account of the argument that Milton does not truly deserve his modern role as “herald” of free speech, see Francis Canavan, *Freedom of Expression: Purpose as Limit* 42–45 (1984).

⁶ John Stuart Mill, *On Liberty* (Crofts Classics 1947) (1859).

⁷ *Id.* at 18.

⁸ *Id.* at 27–28.

Second, Mill suggests, the unpopular opinion might, in fact, be false, and the received opinion in the society, true. Even in that case, the unpopular opinion should not be suppressed, Mill argues. He suggests instead that doing battle with incorrect opinions is the only way an educated person can be quite sure of her premises. Without deep knowledge of competing opinions and the cultivation of the ability to defend one's own views, the received opinion is held as dead dogma only. An educated person must, Mill maintains, hear opposing arguments, not from those who would refute them, presumably by setting up straw persons or otherwise diluting the force of the arguments, but from their most ardent and articulate defenders. The educated person

must know them in their most plausible and persuasive form; he must feel the whole difficulty which the true view of the subject has to encounter and dispose of; else he will never really possess himself of the portion of the truth which meets and removes that difficulty. Ninety-nine in a hundred of what are called educated men are in this condition; even of those who can argue fluently for their opinions. Their conclusion may be true, but it might be false for anything they know...."⁹

In fact, Mill suggests, if fluent opponents should prove unavailable, it would be necessary to invent them. The devil's advocate is a critical component in the search for knowledge.

Mill acknowledges the argument that not all people need to engage in such mental labors. If a knowledgeable elite can marshal the intellectual firepower necessary to support the received opinion, perhaps the masses need not be bothered. They can simply accept the received wisdom, secure in the knowledge that someone, somewhere, can defend it against all comers. In the course of a discussion that reveals Mill's rather nasty anti-Catholic bias, he argues that without uninhibited free discussion, broadly practiced within the society, the received opinion itself is diminished. Without the almost structural relationship between an idea and its competitors, the idea itself loses some key portion of its significance: "Instead of a vivid conception and a living belief, there remain only a few phrases retained by rote; or, in any part, the shell and husk only of the meaning is retained, the finer essence being lost."¹⁰ Mill gives the example of religious doctrines,

⁹ *Id.* at 36.

¹⁰ *Id.* at 39.

which gain meaning in their struggle against rival theological conceptions, but gradually fade and die when they achieve victory. Mill suggests that 19th-century Christianity is in exactly this sort of senescence—received as true by professing Christians, but rarely practiced with any rigor when its tenets conflict with the customs of a believer's country or class. The early Christian Church, on the other hand, had a much more vigorous grasp of doctrine because of its struggle against real enemies.

Mill admits that genuine human progress necessarily involves the overcoming of disagreements and the acceptance of an increasing number of truths that have no extant rivals. Still, he argues that some means of challenging received views, even if contrived, is necessary for true learning. Mill cites the dialogues of Plato as an early and skillful example of this genre.

Finally, Mill considers the possibility that the unpopular opinion that is sought to be suppressed is neither entirely true nor entirely false, but some mixture of the two, and that it shares this condition with the received opinion it challenges. Popular opinion, he points out, is often only partially true, or a limited or distorted version of the truth. Unpopular opinions—Mill calls them “heretical” opinions—often contain parts of the truth suppressed by the received opinion. In a more contemporary vernacular, unpopular opinions point to “marginalized” truths or portions of truth. Mill cites Rousseau's challenge to the Enlightenment *philosophes'* worship of civilization and progress: “The superior worth of simplicity of life, the enervating and demoralizing effect of the trammels and hypocrisies of artificial society, are ideas which have never been entirely absent from cultivated minds since Rousseau wrote; and they will in time produce their due effect....”¹¹ Mill's point, of course, is not that the Noble Savage is to be preferred to doctrines of progress and civilization, but simply that the Enlightenment view was somewhat one-sided and found a useful corrective in Rousseau's thought.

Mill thus urges that the third condition—the partial truth of the received opinion and its rival—points toward the necessity of free discussion. Only by competition between the two can the truth in each be discovered. He admits that true partisans are unlikely to be moved by the free airing of alternative views, and in fact may become even more dogmatically entrenched in their views when confronted with the opinions of their ideological enemies. Nonetheless, Mill argues, the grain (or more) of truth contained in the unpopular opinion can be grasped by

¹¹ *Id.* at 47.

more judicious listeners only in the open combat between it and the received view.

Mill purported to show that whether an unpopular view is true, partially true, or entirely false, it should not be suppressed. While many thinkers continue to acknowledge the power of Mill's insights, suitably amended, numerous other commentators have questioned his entire enterprise. Some critiques have focused on the hyper-rational character of Mill's hypothetical public. The assumption that rationality will characterize many, or even most, hearers in the debate between unpopular opinions and received views seems wildly optimistic to some. Again, the intervening century—along with work in such fields as psychology and communication theory—has cast some doubt on the rationality of the average citizen. If the average listener is either irrational or a slave to some socially constructed worldview that inhibits free and rational mental processes, Mill may be in error. Moreover, postmodernism and related movements have problematized the claims of reason *itself* to be anything more than a local, parochial, and historically situated faculty, often fatally infected by existing power relations.

Defenders of marketplace theory generally assert that reason, while imperfect, is the best tool humanity has, and that while people may accept false ideas over true ones in the short run, truth will emerge over the long run. One problem, of course, is that the long run can be quite long (as Keynes put it, in the long run we are all dead) and that false ideas can do great harm in the here and now. Another problem, as theorist Frederick Schauer pointed out, is that even if a populace is not likely to accept some false idea, great harm can nevertheless be produced by the false idea's side effects: "By side effects I mean those consequences that are not directly attributable to the *falsity* of the views expressed. People may be offended, violence or disorder may ensue, or reputations may be damaged. It is foolish to suppose that the expression of opinions never causes harm."¹² Marketplace theorists have generally assumed, with little empirical evidence, that the benefits of an unregulated marketplace of ideas far outweigh such side effects.

Millean marketplace theory probably first became instantiated in American law through the unlikely person of Justice Oliver Wendell Holmes. Holmes, in good pragmatist fashion, was highly skeptical about the existence of objective truth. Nonetheless, Holmes believed that such provisional truth as human beings could achieve was attained through the open competition of ideas. In a memorable formulation,

¹² Frederick Schauer, *Free Speech: A Philosophical Enquiry* 28 (1982).

Holmes expressed this view in his powerful 1919 dissent in *Abrams v. United States*, which is worthy of quoting at length:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.¹³

Holmes' view was that whatever emerged from the marketplace simply was "truth," provisional though that truth might be. Truth was not some preexisting property that inhered in certain statements; on the contrary, truth, in a Jamesian, pragmatist sense, was *produced* by the marketplace. This skeptical and relativistic view of truth is one that we will meet again in these pages.

Other critiques of marketplace theory have focused on the analogy between it and laissez-faire economics, which, of course, gives the theory part of its intuitive appeal (at least to some). Much as Adam

¹³ *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting) (1919).

Smith's invisible hand was claimed to produce the optimal production of competitively priced goods and services, marketplace speech theory seems, to some, to assume a similar mechanism that produces truth. Some theorists have suggested a kind of "market failure" analysis by noting that, in the real world, certain dominant groups control the mass media and tend to exclude viewpoints that challenge the status quo.¹⁴ Legal scholar Jerome Barron was an early advocate of the view that the marketplace is skewed away from nonmainstream ideas and that there should be a right of access to the mass media for individuals and groups advocating such ideas.¹⁵ Much as antitrust law operates to break up anticompetitive practices in the economic markets, perhaps courts should abandon the myth of the perfect marketplace of ideas and enforce reforms to ensure that nonmainstream groups and ideas have a sufficient voice to allow the marketplace to function properly. Of course, recent developments toward the demassification of communication, such as the rise of the Internet, may at least partially undercut the thesis that the communication channels are monopolized by a powerful elite bent on silencing "different" voices.

Marketplace theory can also be criticized because of its tendency to elevate communal values over individual ones. If the only value of unimpeded communication is its contribution to overall social welfare, it becomes quite easy to justify restrictions on speech in a sort of cost-benefit analysis that overlooks the value of the speech as pure self-expression. This exclusive focus on collective welfare can result in a speech regime that privileges the perspective of the hearer over that of the speaker.

Marketplace theory, while flawed, has great value as one justification for the protection of free speech. The core insight of marketplace theory—fallibilism—leads us to exercise great caution before silencing viewpoints with which we disagree. Because the urge to censor such viewpoints seems a powerful, and perhaps universal, human drive, marketplace theory can act as a stabilizing force against it.

¹⁴ For a good discussion, see C. Edwin Baker, *Human Liberty and Freedom of Speech* 37–46 (1989). Baker ultimately rejects the adoption of market failure theories as First Amendment doctrine.

¹⁵ See Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 *Harv. L.Rev.* 1641 (1967).

Self-Government Theory

Alexander Meiklejohn, perhaps the leading proponent of the self-government theory, argued that the freedom of speech guaranteed by the First Amendment was the means by which democracy functioned. For unless self-governing citizens had access to information and opinions relevant to issues about which they must ultimately make decisions, the democratic experiment could not succeed. The speech protected by the First Amendment, Meiklejohn argued, was speech aimed at enhancing citizen participation in political issues. “We the people who govern, must try to understand the issues which, incident by incident, face the nation,” he wrote. “We must pass judgment upon the decisions which our agents make upon those issues. And, further, we must share in devising methods by which those decisions can be made wise and effective, or, if need be, supplanted by others which promise greater wisdom and effectiveness.”¹⁶

Meiklejohn, however, had a relatively narrow view of freedom of speech. It was not, he contended, a right of each citizen to express her views on whatever matters she pleased. Instead, it was a collective right that applied only to information germane to democratic decision making. Thus, in Meiklejohn’s scheme, it is only speech for public purposes that deserves absolute protection under the First Amendment. Purely private speech is subject to regulation under a much weaker standard.

Meiklejohn used the metaphor of a New England town meeting to illustrate his theory. At the town meeting, participants must speak under rules that guarantee the relevance of their comments. The town meeting is not Hyde Park Corner, Meiklejohn noted, but is instead an institution devoted to advancing the public’s business through the moderated discussion of public policy. So it is with free speech under the First Amendment. As Meiklejohn famously put it:

The First Amendment, then, is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. Nor can it give assurance that everyone shall have opportunity to do so....What is essential is not that

¹⁶ Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 255 (1961)

everyone shall speak, but that everything worth saying shall be said.¹⁷

Meiklejohn distinguished his self-governance theory from the marketplace of ideas theory by noting that the latter was a means to identify truth, while the former was “a device for the sharing of whatever truth has been won.”¹⁸ This distinction can hardly be considered as hard edged as the quoted statement suggests, however. Many commentators have noted that there is at the least some overlap between the two approaches, although, of course, the marketplace metaphor has significantly broader application across a range of human enterprises.

Meiklejohn and his epigones¹⁹ have been subject to significant criticism because of the relative narrowness of the theory’s protection of speech. One early critic, famed First Amendment theorist Zechariah Chafee, Jr., in referring to the Framers, argued that “these politicians, lawyers, scholars, churchgoers and philosophes, scientists, agriculturalists, and wide readers used the phrase [the freedom of speech or of the press] to embrace the whole realm of thought.”²⁰ Meiklejohn himself eventually broadened his notion of political speech to include the expression of artistic, scientific, and cultural ideas as well as political ones, although the former were always in the service of the latter. He came to argue that the First Amendment protects “[f]orms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express.”²¹ Still, for many critics, this concession was inadequate, since it seemed to condition protection for great works of art or science solely on their usefulness to voters.²² It seemed a bizarre rationale to protect William Shakespeare or James Joyce primarily because their writings might assist someone in

¹⁷ Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 25 (1948).

¹⁸ Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 75 (1965).

¹⁹ See, e.g., Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1 (1971).

²⁰ Zechariah Chafee, Jr., Book Review of Meiklejohn’s “Free Speech,” 62 *Harv. L.Rev.* 891, 896 (1949).

²¹ Meiklejohn, *supra* note 16, at 255.

²² Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* 48 (1990).

choosing a Democrat over a Republican in some obscure congressional race. Moreover, Meiklejohn's maneuver highlights the unrestrained proliferation of protected speech, which tends to undermine the plausibility of a rationale based exclusively on democracy. As Rodney Smolla pointed out: "If laws get passed on all aspects of culture, then it is vital that freedom of speech extend to all aspects of law."²³ Thus, the ultimate, and almost inevitable, extensions of the theory tend, in the end, to undermine its explanatory power.

Self-government theory has also been criticized because it casts free speech in a democracy into a purely instrumental role. For thinkers of a less consequentialist bent, free speech has intrinsic value for human beings that cannot be ignored.

Checking Value Theory

A theoretical perspective closely related to Meiklejohn's approach is Vincent Blasi's "checking value" theory of the First Amendment. Blasi's approach, while recognizing the importance of numerous other rationales for free speech, emphasizes the role of free speech in checking the abuse of official power. "The central premise of the checking value," Blasi wrote, "is that the abuse of official power is an especially serious evil—more serious than the abuse of private power, even by institutions such as large corporations which can affect the lives of millions of people."²⁴ Official power is particularly a concern given government's monopoly on the sanctioned use of violence. This monopoly on violence suggests that only the force of public opinion and outrage can act as an effective check on the abuse of official power.

The checking value posits that government officials will carry out their duties more fairly and effectively if their activities are closely watched and reported upon. Blasi's theory takes an essentially pessimistic view of how human beings react when given the reins of governmental power. The corrupting effect of power is assumed to be a constant. The theory thus regards free speech as both an *ex post* constraint on corrupt government functionaries and as an *ex ante* disincentive to corruption. The tangle of illegal activities known collectively as "Watergate," which was subsequently exposed by some

²³ Rodney S. Smolla, *Free Speech in an Open Society* 15 (1992).

²⁴ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 *Am. Bar Found. Res. J.* 521 (1977).

brilliant journalism, is often cited as a prime example of the checking value in action.

Checking value theory is a useful way to conceptualize free speech, but, as Blasi freely admitted, it is hardly exhaustive. As an exclusive theory, it has some of the same drawbacks as self-government theory—it focuses too much on political speech and, in doing so, elides many other important values of free expression.

Individual Autonomy Theory

Unlike the largely instrumental theories discussed earlier, the individual autonomy theory holds that free speech is an important component of individual liberty, regardless of its products. First Amendment theorist Vincent Blasi has noted that in individual autonomy theory, free expression is “valuable in and of itself because it figures prominently in our vague notions of what it means to be human.”²⁵ Autonomy supporters often argue that a democratic society requires freedom of speech—not simply for the Meiklejohnian goal of promoting self-governance, but because freedom of speech is a fundamental liberty that a democratic (and properly limited) government must not infringe. Freedom of speech contributes to individuals’ opportunities to develop their rational faculties and to make critical decisions about the pursuit of a good life. As scholars Robert Trager and Donna L. Dickerson note:

As humans, we need to be able to think about not only all of the possibilities of life available to us, to imagine the future and reflect on the past, but we also need to be able to express openly those possibilities through words, clothing, dance, decoration, architecture, music, art, literature.²⁶

This need to both express oneself and to hear the expression of others can be said to contribute to ordinary happiness (although not all human beings in fact experience the link between expression and happiness, and indeed some people might prefer the comfort of simply following plans laid down by others) or to a more complex, Aristotelian notion of

²⁵ *Id.* at 544.

²⁶ Robert Trager and Donna L. Dickerson, *Freedom of Expression in the 21st Century* 101 (1999).

happiness as realizing one's potential through growth and development, even should ordinary happiness escape one.²⁷

Numerous political theorists from John Locke to John Rawls have recognized the importance of some dimension of individual autonomy, whether expressed in terms of natural rights, contractarianism, or some other theoretical framework. As Kent Greenawalt points out, autonomy theory in the realm of free speech has both consequentialist and non-consequentialist variants. Consequentialist autonomy theory stresses the development of individual judgment and personality through the free discussion of ideas. Human beings cannot develop their humanity or, in a slightly different formulation, achieve self-realization²⁸ under a regime that restricts freedom of thought and expression. Nonconsequentialist autonomy theory often emphasizes, as Greenawalt put it, the claim "that the government should always treat people as if they were rational and autonomous by allowing them all the information and advocacy that might be helpful to a rational, autonomous person making a choice."²⁹ Under the latter theory, even if freedom of speech does not, in fact, further human development, attempts to limit communication are illegitimate. This normative position would undermine, for example, attempts by social scientific theories about human social and cognitive processes to weaken the theoretical justification for free speech by calling into question the empirical accuracy of the "self-realization" approach.

One of the most thoughtful autonomy theorists is C.Edwin Baker, who has advocated what he calls a "liberty theory" of free speech. As Baker describes the theory: "The liberty model holds that the free speech clause protects not a marketplace, but rather an arena of individual liberty from certain types of governmental restrictions. Speech or self-expressive conduct is protected not as a means to achieve a collective good but because of its value to the individual."³⁰ Baker's liberty theory seeks to protect noncoercive expressive activities that are freely chosen by the speaker and that operate only through free acceptance by some listener.

Autonomy theory is often justified with hypothetical social contract arguments, in which free and autonomous agents planning government structures would not be willing to cede control over either their own expression or that of others to government. This argument, often based

²⁷ See Schauer, *supra* note 12, at 49.

²⁸ See, e.g., Martin Redish, *Freedom of Expression: A Critical Analysis* (1984).

²⁹ Kent Greenawalt, *Free Speech Justifications*, 89 *Colum. L.Rev.* 119, 150 (1989).

³⁰ Baker, *supra* note 14, at 5.

on something akin to John Rawls's imagined "original position," has undeniable intuitive appeal but nonetheless has been subject to strong criticism. For example, Kent Greenawalt argues that

at this preliminary stage autonomous people might well agree to foreclose some inputs for themselves which they would ideally like to have in some situations. That sacrifice might be an acceptable price for preventing some inputs from other people who are not rational and autonomous when they receive the communications or who, though autonomous, may commit antisocial acts.³¹

Thus, while one might enjoy such violent Hollywood spectacles as *Good Fellas* or *The Matrix*, the awareness that others would view such fare and thereby be influenced to commit acts of violence might result in a willingness to enter into a social contract that limits freedom of expression to some (perhaps significant) degree.

Autonomy theory is related to, but at least partially distinguishable from, what might be called "equality theory." Under this variant, which often has a Kantian flavor, the individual's freedom of expression is critical, but based less upon the priority of liberty *qua* liberty or upon the goals of self-realization and more upon the moral imperative of recognizing citizens' equality, dignity, and moral agency. As Ronald Dworkin expresses this imperative:

Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions. We retain our dignity, as individuals, only by insisting that no one—no official and no majority—has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.³²

Dworkin points out that this moral imperative is applicable, not only to the citizen as listener, seeking to form her own opinions, but to the citizen as speaker, seeking to communicate her view of justice, truth, or the good life, no matter how offensive that view might be to some.

³¹ Kent Greenawalt, *Speech, Crime, and the Uses of Language* 115 (1989).

³² Ronald Dworkin, *Freedom's Law: The Moral Reading of the Constitution* 200 (1996).

Dissent Theory

Law professor Steven Shiffrin has argued that the other dominant theories of the First Amendment fail to capture its true essence, which lies in the protection of dissent for its own sake. In his book *The First Amendment, Democracy and Romance*,³³ Shiffrin invokes the tradition of such nonconformists as Ralph Waldo Emerson and Walt Whitman to argue for a “romantic” conception of free speech, which emphasizes the continual need to shatter established forms and orthodoxies. The First Amendment thus serves as an ongoing antidote against conformity and closure in the realms of politics and culture. As Shiffrin eloquently expresses his thesis:

If an organizing symbol makes sense in first amendment jurisprudence, it is not the image of a content-neutral government; it is not a town hall meeting or even a robust marketplace of ideas; still less is it liberty, equality, self-realization, respect, dignity, autonomy, or even tolerance. If the first amendment is to have an organizing symbol...let it be the image of the dissenter. A major purpose of the first amendment...is to protect the romantics—those who would break out of classical forms: the dissenters, the unorthodox, the outcasts. The first amendment’s purpose and function in the American polity is not merely to protect negative liberty, but also affirmatively to sponsor the individualism, the rebelliousness, the antiauthoritarianism, the spirit of nonconformity within us all.³⁴

Shiffrin argues that other free speech theories, such as the marketplace of ideas or the self-government model, fail to achieve the necessary comprehensiveness—they always leave out part of the picture or wind up favoring one type of speech over another. The dissent theory, on the other hand, is capacious enough to include those other visions, and can thus serve as a “repository” of free speech values. Moreover, he points out, during the periods of greatest repression of speech—such as the recurrent “red scares” of the 20th century—it is always dissent from political orthodoxy that is the first casualty of those who would destroy freedom of speech. If dissent were the organizing symbol of free speech, such outcomes might be less likely. Attention to the dissent

³³ Shiffrin, *supra* note 22.

³⁴ *Id.* at 5.

theory would also, Shiffrin argues, help promote progressive change in countless hierarchies of power: “Dissent does not invariably seek change, let alone desirable change, nor does it invariably combat power, let alone illegitimate power. My claim, however, is that the sponsoring and protection of dissent generally have progressive implications.”³⁵

Other theorists have urged the protection of dissent, often not for its own sake but in order to maintain social stability. Thomas Emerson, for instance, noted that one of the key justifications for freedom of expression is “achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus.”³⁶ In some formulations, the protection of dissent serves as a safety valve that allows the disaffected to express their frustrations with the status quo through either speaking or listening to “subversive” ideas, in the hopes that they will refrain from more violent expressions of discontent. Free speech is thus presumed to perform a cathartic function. One potential difficulty with this view is that empirical studies—at least in the area of violent material—have tended to dispute the cathartic benefit.³⁷

Tolerance Theory

Lee Bollinger has suggested that the value of the First Amendment goes beyond merely protecting speech. Instead, the First Amendment is a cultural ideal that creates the conditions for the development of a certain kind of citizen. In *The Tolerant Society*,³⁸ Bollinger argued that freedom of speech “involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.”³⁹ Intolerance is a powerful force in social life, and protecting free speech through the First Amendment helps to teach tolerance by exposing citizens to diverse views they might not otherwise be inclined to endure. Bollinger thus portrays the First Amendment as a pedagogical tool. Although he acknowledges that other First Amendment theories may have some

³⁵ *Id.* at 96.

³⁶ Emerson, *supra* note 2, at 7.

³⁷ See David K. Perry, Theory and Research in Mass Communication: Contexts and Consequences 158–71 (1996).

³⁸ Lee Bollinger, *The Tolerant Society* (1986).

³⁹ *Id.* at 10.

utility, Bollinger claims that his position suggests a major shift in free speech thought.

Bollinger's view, for all its obvious appeal, may claim too much. As one critique cogently pointed out, tolerance theory has rather limited explanatory or predictive power:

It is by no means clear that previous perspectives can be dismissed as passé, or that his new perspective can be usefully applied to the full range of first amendment problems. Is public access to criminal trials or pretrial proceedings a way of increasing our tolerance—and if so, our tolerance of whom: the police, the press, or criminals? And what of commercial speech—should we give it constitutional protection to increase our tolerance for hucksterism? In these and other areas of litigation, such as the expanding public forum area or campaign finance, Bollinger's tolerance theory seems to have very little to say.⁴⁰

In addition, even if Bollinger is right that freedom of expression encourages tolerance, this may be a desirable side effect of free speech rather than a defensible normative basis.⁴¹ The fact that toleration may follow from free speech does not necessarily suggest that it should be the normative focus of First Amendment theory.

Eclectic Theories

Some First Amendment theorists eschew “unified” theories of free speech. These theorists look with suspicion on foundationalist approaches to free speech and instead advocate approaches that recognize diverse values that support, but do not necessarily “undergird,” freedom of expression. Harry Kalven, Jr., for example, expressed skepticism about academic attempts at grand theorizing. Kalven, like a good common lawyer, preferred the case-by-case development of legal doctrine that remained thoroughly contextual to the airy abstractions of some theorists. Kalven's approach suggested that the development of First Amendment doctrine, particularly in the

⁴⁰ Daniel A. Farber and Philip P. Frickey, *Practical Reason and the First Amendment*, 34 *UCLA L. Rev.* 1615, 1625 (1987).

⁴¹ Greenawalt, *supra* note 31, at 29.

Supreme Court, is representative of a broader cultural tradition of free speech.⁴²

Likewise, some philosophical pragmatists have suggested that monistic theories of free speech are both incomplete and unconvincing and that, as well, they tend to require Ptolemaic contortions in analyzing actual cases in order to make the theory fit with actual or preferred results. As pragmatists Daniel A. Farber and Philip P. Frickey argued:

[W]e don't have a tower of values with free speech somewhere in the middle, and more basic values underneath. Instead, we have a web of values, collectively comprising our understanding of how people should live. Foundationalism errs in seeking to reduce the complex relationships among our values to a linear arrangement in which a few values have privileged status as fundamental.⁴³

Conclusion

The classical First Amendment theories presented in this chapter are certainly not without their problems, as I have tried to indicate. Nonetheless, they represent an important resource in our constitutional tradition—a resource we ignore at our peril. As mentioned earlier, recent interdisciplinary work in First Amendment theory has called the classical models into question. It is to the approaches of two of these interdisciplinary theorists that we now turn.

⁴² Harry Kalven, Jr., *A Worthy Tradition* (Jamie Kalven ed., 1988).

⁴³ Farber and Frickey, *supra* note 40, 1641 (1987).