AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 7: The Republican Era – Democratic Rights/Free Speech

*Theodore Schroeder*, **The Meaning of Unabridged “Freedom of Speech”** (1909)[[1]](#footnote-1)

*Theodore Schroeder was born in Wisconsin near the end of the Civil War. He studied engineering and then the law at the University of Wisconsin. He launched his career in Salt Lake City, where he helped prepare Utah for statehood and became a fierce critic of the Mormon church. In 1900, he moved to New York City, where he did legal work for radical causes before eventually becoming a full-time writer and later turning his attention to psychoanalysis. He was the founder and primary advocate for the Free Speech League, which attacked government efforts to suppress “obscene” materials (including the writings of sex educator Margaret Sanger) and radical activists (including the anarchist Emma Goldman) during the first two decades of the twentieth century. When the American Civil Liberties Union formed during World War I, he refused to join because he thought the new organization was too interested in issues other than free speech.*

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The most barbarous edicts of the most outrageous tyrants usually speak to the abject wretches who are about to be sacrificed, a kind of paternal word of assurance that their persecutors are only promoting the public welfare. This question-begging talk about public welfare requiring the suppression of any idea, no matter what, is misleading because such statements rarely, if ever, express the real motive for suppressing or punishing public discussion, and seldom is anything other than a symptom of stupid sentimentalism, or the mere pretext or sham excuse for the tyrannous violation of constitutionally guaranteed rights.

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If the Constitution had said that “legislative bodies shall make no law abridging man’s freedom to breathe,” no one would have any doubt as to what was meant, and everyone would instantly say that of course it precluded government from passing any law which would prohibit breathing according to the mandate of a policeman, before trial and conviction, and that it would equally preclude the passage and enforcement of any law which would punish breathing, merely as such, upon conviction after the fact. No sane man could be found who would say that such a guarantee, to breathe without any statutory abridgement, only precluded the appointment of Commissioners who should determine arbitrarily what persons might be licensed to breathe and who should not be so licensed, and that it would still permit government to penalize all those who do not breathe in the specially prescribed manner, even though such criminal breathing had not injured anyone.

There is not the slightest reason to be given why “freedom” in relation to speech and press should be differently interpreted. The only explanation for having interpreted it differently is that people generally, and petty officials in particular, believe in unabridged freedom to breathe, but emotionally disbelieve in unabridged freedom of speech, and therefore, they lawlessly read into the Constitution’s meanings and exceptions which are not represented there by a single syllable or word, simply because they think, or rather feel, that the Constitution ought not to guarantee freedom of speech and of the press, for those ideas intensely displease them.

. . . . In common parlance, we all understand that a man is legally free to perform an act whenever he may do so with impunity, so far as the law is concerned. Thus no one would claim that another was legally free to commit larceny so long as larceny involved liability of subsequent criminal punishment. No one would say that the law leaves a man free to commit murder so long as we may legally resist the assailant by killing him in self-defense, and there is a law punishing murder. Likewise no man, who is depending purely upon the words of the Constitution, will ever say that we have unabridged freedom of speech and press so long as there is any law which prescribes a penalty for the utterance of anyone’s sentiments, merely as such utterance and independent of any actually accomplished injury to another.

On the other hand, it would seem equally certain, to the ordinary understanding, that there exists no legal abridgment of a man’s freedom to speak or write, if he were punishable for the abuse of that freedom, provided we only mean by “abuse” an actual and not a mere constructive abuse; that is, provided he is punished only for an actual, and not a constructive injury, resulting from his utterance. Manifestly in such a case he is not punished for the speech as such, but he is punished for an actual, ascertained, resultant injury, to someone not an undeceived voluntary adult participant in the act.

His utterance in that case may be evidence of his complicity in, or contribution to that actual injury, and punishment for an actual resultant injury is not the least abridgment of the right to speak with impunity, since manifestly it is not a punishment for mere speaking as such, the essence of the criminality – the criteria of guilt – being something other than the utterance of his sentiments. Manifestly in this view . . . the expression can only mean that every man under the law shall have the equal right and opportunity of every other man to utter any sentiment that he may please to utter, and do so with impunity, so long as the mere utterance of his sentiments is the only factor in the case. It does not exempt him from punishment as an accessory to murder, arson or other actual and resultant injury, but leaves it where he may be punished for his contribution toward and participation in bringing about these injuries, but not until they have become realities. . . . The chief abuse of free speech consists in punishing one for an utterance which actually did no material harm to anyone, no matter how outrageous it may seem to moral sentimentalists.

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. . . . [T]here never was a time when a censor assumed to pass upon oral speech, prior to its utterance. Unpopular oral speeches were only punished after utterance. The whole controversy over “freedom of speech” was a demand that speakers might be free from such subsequent punishment as well as previous restraint for those of their utterances which in fact had not actually injured anyone, and it was that controversy that the framers of our constitutions intended to decide for all time, by guaranteeing to all the equal right and opportunity, so far as the law is concerned, to speak one’s sentiments upon any subject whatever, including even treason and assassination, and with absolute impunity so long as no one was actually injured thereby, except by his voluntary and undeceived consent, as when the person is convinced to the changing of his opinion about some abstract doctrine of morals or theology, the acceptance of which his neighbors might deem a deterioration, and the new convert esteems it a moral and intellectual advance. If as I believe this is the inevitable interpretation of “freedom” in relation to “speech” and the meaning of “freedom” in relation to “press” must be the same, then we are irresistibly forced to the conclusion that many have been wrong in asserting that “freedom” in relation to the press means only the absence of a censorship prior to publication without enlarging those intellectual liberties which are beyond the reach of legislative abridgment. . . .

When we come to make an historical study of the meaning of “freedom of the press” we will at once discover that the personal elements disappear, to be replaced by humanistic considerations. Now it is not merely a question of prior restraint, of imprisonment or fines, but a question of intellectual opportunity – not only a question of the opportunity to speak, but of the more important opportunity of the whole public to hear and to read whatever they may choose, when all are free to offer. Now it ceases to be a matter of the personal liberty of the speaker or writer, and must be viewed as a matter of racial intellectual development, by keeping open all the avenues for the greatest possible interchange of ideas, without discrimination even against those of supposed evil tendency. In this aspect the most important feature of the whole controversy simmers down to this proposition, namely: that every idea, no matter how unpopular, so far as the law is concerned, shall have the same opportunity as every other idea, no matter how popular, to secure the public favor. Of course only those ideas which were unpopular with the ruling classes were ever suppressed. The essence of the demand for free speech was that this discrimination should cease. In other words, every inequality of intellectual opportunity, due to legislative enactment or arbitrary police interference, was and is an unwarranted abridgment of our natural and constitutional liberty, when not required by the necessity for the preservation of another’s equal right to be protected against actual material injury.

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. . . . I am led to affirm my concurrence in the following words from the pen of a former member of the English Parliament, the Hon. Auberon Herbert. He wrote:

“Of all the miserable, unprofitable, inglorious wars in the world [the worst] is the war against words. Let men say just what they like. Let them propose to cut every throat and burn every house – if so they like it. We have nothing to do with a man’s words or a man’s thoughts, except to put against them better words and better thoughts, and so to win the great moral and intellectual duel that is always going on, and on which all progress depends.”

The sentiments just quoted I believe to be expressive of the true meaning of our constitutional guarantees for an unabridged freedom of speech and of the press. . . .

1. Excerpt taken from Theodore Schroeder, *Free Speech for Radicals* (New York: Free Speech League, 1912). [↑](#footnote-ref-1)