

1-1-2018

Freedom of Speech Remains Superior to All Other Alternatives

David L. Faigman

Follow this and additional works at: https://repository.uchastings.edu/hastings_constitutional_law_quarterly

 Part of the [Constitutional Law Commons](#)

Recommended Citation

David L. Faigman, *Freedom of Speech Remains Superior to All Other Alternatives*, 45 HASTINGS CONST. L.Q. 225 (2018).
Available at: https://repository.uchastings.edu/hastings_constitutional_law_quarterly/vol45/iss2/1

This Foreword is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Constitutional Law Quarterly by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Foreword

Freedom of Speech Remains Superior to All Other Alternatives

by DAVID L. FAIGMAN*

The words “Congress shall make no law . . . abridging the freedom of speech” is a cornerstone of American constitutional democracy. Although the notion that human freedom depends on a free discussion of ideas was not original to our Constitution, it has become a central tenet of modern times. In *On Liberty*, John Stuart Mill argued that many ideas long believed to be true have come to be understood as false; only free expression has the power to awaken ideas from the “deep slumber of . . . decided opinion[s].”¹ Justice Louis Brandeis well-captured this fundamental principle in *Whitney v. California*, observing that the founders

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.²

But the Free Speech Clause is premised on faith in human progress. Hegel put it this way: “The history of the world is none other than the progress of the consciousness of freedom.”³ Faith in speech as spurring

* Chancellor and Dean and John F. Digardi Distinguished Professor of Law, University of California, Hastings College of the Law.

1. JOHN STUART MILL, *ON LIBERTY* (1859).
2. *Whitney v. California*, 274 U.S. 357, 375 (1927).
3. GEORGE WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF HISTORY* (1900).

progress, which itself is closely aligned with intellectual advancement, contemplates a linear progression from the primitive to the enlightened. Martin Luther King, Jr., famously quoted Theodore Parker's observation that "the arc of the moral universe is long, but it bends toward justice."⁴ The theory, then, is that speech is the mechanism that bends the moral universe in the direction of justice.

But that moral arc is neither self-defining nor inevitable. And speech has as much potential to bend that arc toward injustice as it does toward justice.

Indeed, I fear that the times we live in fundamentally challenge that faith in human progress, a time when the enlightened promise of free speech is enveloped by the dark shadows of ignorance and iniquity.

A first principle of free speech is that we should welcome the clash of ideas. Only when ideas are fully debated in the marketplace can truth or wisdom emerge. But this past year, as we saw in Charlottesville, Virginia, this principle can be perverted when applied in times of open-carry laws that allow one side in the debate to be armed. How can ideas be fully debated when one side is carrying semiautomatic weapons? The Bill of Rights is torn asunder when supposed Second Amendment rights effectively silence the foremost guarantee of a free society.

Similarly, albeit not as stark in its presentation, the Russian government appears to have coopted our media in its attempt to influence the 2016 presidential election. The modern platforms on which speech sits—Facebook, Twitter, Instagram, etc.—permit false claims and fake news to proliferate at blinding speeds. This is a marketplace, to be sure, but one in which it is no longer the content of the ideas that holds sway, but the speed and volume of their transmission.

Russian meddling in elections is only the tip of the internet iceberg threatening the historical understanding and value of free speech. Two concerns in particular are likely to occupy courts' First Amendment jurisprudence for some time to come. The first is its ready use to advance the goals of terrorists and the question of the limits to which government can legitimately go to shut down speech advocating, if not inciting, violence.

The second, though more mundane, concerns the fact that the internet can be a most inhospitable environment, with trolls anonymously harassing and defaming others into silence. This is a marketplace in which innuendo, gossip, and slander are slung around like mud, with comparable results.

4. Martin Luther King, Jr., Baccalaureate Commencement Sermon at Wesleyan University (June 7, 1964).

Despite the challenges presented by our modern times to the ideals associated with the guarantees of free speech, none have suggested alternatives to this basic premise of our constitutional democracy. Perhaps free speech, which serves to preserve democracy, also embodies the virtues and vices of that form of government. To quote Winston Churchill, “it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.”⁵ Likewise, however much we might lament the coarseness and cruelties sometimes associated with free speech, as a principle, freedom of speech remains superior to all those alternatives tried from time to time.

5. Winston Churchill, Speech in the House of Commons (Nov. 11, 1947).
