Is There a Right of Freedom of Expression?

In this provocative book, Larry Alexander offers a skeptical appraisal of the claim that freedom of expression is a human right. He examines the various contexts in which a right of freedom of expression might be asserted and concludes that such a right cannot be supported in any of these contexts. He argues that some legal protection of freedom of expression is surely valuable, though the form such protection will take will vary with historical and cultural circumstances and is not a matter of human right.

Written in a clear and accessible style, this book will appeal to students and professionals in political philosophy, law, political science, and human rights.

Larry Alexander is Warren Distinguished Professor at the University of San Diego School of Law.

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Larry Alexander
University of San Diego

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Introduction

The title of this book asks a question. The aim of the book is to answer it.

Part One, the first three chapters, lays the foundation for the inquiry. Chapter One takes up two questions: What kind of thing is a "human right" and what kinds of activities come within the scope of freedom of expression? It provides an answer to the first question, and it eliminates some possible answers to the second.

Chapter Two focuses entirely on the second question. Its task is to exclude from freedom of expression all laws that incidentally affect what gets said, by whom, to whom, and with what effect – that is, laws that have "message effects" but that are not enacted *because* of their message effects, so-called Track Two laws. I conclude that the scope of freedom of expression is confined to laws passed with the purpose of affecting messages.

In Chapter Three, I digress somewhat to point out some curious consequences that follow from a jurisprudence focused on government's purposes in enacting laws rather than on those laws' effects. In particular, a focus on purpose may invalidate laws whose message effects are more benign than those of laws not enacted for their message effects and thus untouched by a right of freedom of expression.

Part Two is primarily concerned with laws enacted for the purpose of affecting messages. Chapter Four takes up laws intended to suppress messages that cause harms that the government is otherwise permitted to attempt to prevent (Track One laws). Some laws are aimed at messages that cause such harms immediately upon the messages' receipt by the audience – for example, laws penalizing revelations of secrets, breaches of confidences and contracts not to disclose, publication of "private" facts, infringements of copyrights and other intellectual property rights, threats of illegal action, and inflictions of offense or other emotional upsets. Other laws are aimed at messages that cause harm through inducing the audience to act in ways harmful to others or to itself – for example, laws against fraud, misrepresentation, libel, "fighting words," incitement, and solicitation. I conclude that with respect to all the Track One laws, no

principled lines exist to demarcate areas where a right of freedom of expression might apply – short of the extreme and unpalatable position of exempting all of Track One from regulation.

Chapter Five takes up another class of laws enacted to affect messages, namely, those that represent government speech or private speech that the government wishes to promote through monetary or regulatory subsidies (Track Three laws). The difficulty here is that once it is admitted, as it surely must be, that government must be permitted to speak on behalf of its policies, it becomes difficult to locate any line that would limit government speech or speech subsidies.

Chapter Six takes up some miscellaneous areas of freedom of expression: the expression and affiliations of governmental employees; protection of speakers from audience reprisals; regulation of broadcasting; freedom of expressive association, anonymous speech; and private regulation of speech. Each of these areas turns out to be analyzable in terms of one of the "tracks" identified in Chapters Two, Four, and Five.

Part Three takes up theoretical perspectives on freedom of expression. Chapter Seven surveys the standard theories, both consequentialist and deontological, that are offered to justify a right of freedom of expression – theories invoking the pursuit of truth, the maximization of autonomy, the promotion of certain virtues, a putative deontological right to assess reasons, and the requirements of democratic decision-making. I find all of the standard theories inadequate to the task.

Chapter Eight then analyzes and diagnoses the cause of the previous chapters' failures to justify a right of freedom of expression. The problem at the heart of the enterprise is that a human right of freedom of expression demands "evaluative neutrality" by the government. But evaluative neutrality cannot be normatively justified without producing a paradox: no normative theory can be evaluatively neutral regarding its own demands. It cannot be epistemically "abstinent" and thus fail to know what it otherwise must claim to know. I show how this paradox applies, not only to freedom of expression, but also to two other pillars of liberal theory, freedom of religion and freedom of association.

In the Epilogue, Chapter Nine, I conclude the book by asking what freedom of expression might look like if we were to abandon any attempt to ground it in some pre-political human right. I argue that there are always good consequentialist reasons to be wary of government suppression of expression, particularly those forms of Track One suppression aimed at expression that causes harm only when the audience acts harmfully in response to the message. Particular rights against such laws can be given indirect-consequentialist justifications; but such justifications and therefore the specific content of those rights will vary from place to place and from time to time. This is the most we can justify in terms of a right of freedom of expression.