Introduction

Debates about free expression are a fixture of everyday discourse. Discussions of free speech issues abound, not just on college campuses and in law schools, but also in the workplace, in living rooms, around dinner tables, at social events, and in the popular media. Those conversations explore such issues as whether a professional football player has a right to protest during the national anthem, whether the government has the power to restrict the speech of people with extremist views, whether someone should be able to express dissent by burning the flag, whether "political correctness" results in objectionable self-censorship, whether campaign contributions should count as speech, and whether the media deserve the protections that the First Amendment provides or abuse those privileges in order to spread "fake news." Mainstream debates even delve into such exotic questions as whether the President has to let people with whom he disagrees participate in his Twitter feed and whether the First Amendment gives a baker the right to refuse to make a cake for a gay wedding that he opposes on religious grounds. Across all of these issues, people recognize that speech matters but also has consequences.

Unfortunately, these discussions often make little progress in advancing understanding. One of the principal reasons for this stalemate is that views of free expression tend to fall into two categories. And those two views see things very differently.

The first view, which we call "absolutism," reflects a strident antagonism toward any externally imposed limitation on an individual's freedom to say whatever he or she likes. Proponents of this view often use the language of liberty, as in the colloquial "it's a free country." They also often use the language of rights, as in the commonly invoked (and frequently misattributed) quotation: "I disapprove of what you say, but I will defend to the death your right to say it."

The absolutist view has merit and appeal. It has the virtues of clarity and commitment. It has a respectable intellectual pedigree, having been embraced by many historic champions of freedom. Indeed, as we will discuss, the Supreme Court

of the United States has over time taken a fairly absolutist view of free speech. This perspective has a point: freedom of expression brings with it serious challenges, but they pale in comparison to those that would follow if we empowered the government to dictate what a person may say or think.

Proponents of this view frequently claim support in the First Amendment and point to it as a source of authority. If the analysis proceeds no further, then the absolutist view can take on a descriptive character. "I have the right to say what I want because the First Amendment guarantees it."

This common framing of the absolutist view puts aside such questions as whether so expansive a principle makes any sense, whether it aligns with the other goals of a rational and compassionate society, and whether it has outworn its welcome and should be revisited – as laws in a constitutional republic can be. A critic could even accuse it of circular reasoning: "I have the right to do this because I have the right to do this." The absolutist view need not amount to mere description and circularity, but it often does.

Whatever the virtues of absolutism, it faces a serious challenge. If pressed, most absolutists will acknowledge that they are less absolute than they claim and that exceptions do and must exist. They will agree that no one has a right to threaten another with bodily harm or to commit blackmail, fraud, bribery, or extortion, even though speech plays a central role in each of those activities.

People who argue against absolutism often invoke the famous observation of Justice Oliver Wendell Holmes that no one has the right to cry "Fire!" in a crowded theater. The example is not a particularly good one, because the vast majority of speech does not result in certain, immediate, and dangerous panic. Still, it has become a comfortable and resilient cliché in these discussions and the central point holds: no workable principle of free expression can immunize *all* speech from government restriction.

That is where the absolutist's problems begin. After all, if a principle of free expression must give way to some exceptions, then why not this one, and that one, and this one? If the law bars the possession of child pornography, then why not also the possession of racist propaganda? If hate speech causes suffering and contributes nothing of value to public discourse, then why can't the law punish it just as it does threats and blackmail? If the First Amendment doesn't get in the way of an injunction against speech using someone else's trademark, then why does it get in the way of an injunction against speech that portrays women as inherently less intelligent or that denies the reality of the Holocaust? And so on and so on.

Absolutists find themselves with a dilemma. On the one hand, a civilized society cannot embrace a model of free expression that admits of no exceptions. On the other hand, at some point a principle riddled with holes ceases to be much of a principle at all. Absolutists justifiably worry about exceptions watering down the First Amendment until only a weak and ineffectual tonic remains. Still, they cannot defend a free speech principle that allows no compromises.

We call the chief view that competes with absolutism the "relativist" view. In sum, relativists believe that the principle of free expression should yield as necessary to accommodate other countervailing interests and values. Proponents of relativism often use language of balancing and proportionality. This approach has found support in other countries; for example, the European Court of Human Rights often assesses the right to freedom of expression by balancing it against other rights, like privacy and dignity.

Most relativists will acknowledge that free expression matters. But they will also resist the absolutist's view that it matters so much that other considerations become marginal or irrelevant. Relativists believe that we need to weigh free expression against other things that we think are important, like protecting people against discrimination, providing redress for hateful speech, preserving public safety, maintaining sexual decency, affording individuals a zone of privacy, safeguarding personal reputation, and so on. They also believe that, in this weighing process, we should not put so heavy a thumb on free expression's side of the scale.

Proponents of the relativist view in this country sometimes claim a basis in laws other than the First Amendment, like the Equal Protection Clause of the Fourteenth Amendment, which guarantees equality under the law regardless of characteristics like race. Indeed, legal scholars have quarreled over which of these two constitutional principles should have primacy when they conflict. In the United States legal system, the First Amendment generally has prevailed, particularly in recent years, though not invariably.

Often, however, relativists base their views less in the law than in appeals to countervailing values, consequential harms, and common sense. "Why do people who want to overthrow the government have any rights under the Constitution they propose to usurp?" "Why should we allow neo-Nazis to hold public rallies that cause emotional injury and contribute nothing worthwhile to the exchange of ideas?" "Why must we permit a speaker on our campus who wants to express views that will deeply offend our students and make them feel unsafe and unwelcome here?" These questions have genuine moral force and implicitly ask whether existing First Amendment doctrine has gotten things right or has gone too far.

Proponents of the relativist view maintain that protection for free expression afforded by current United States law is excessive and unjustifiable. They say that First Amendment doctrine has lost sight of other compelling interests and has lost touch with our deeply held intuitions about what makes for a fair, just, welcoming, open, and healthy society. They contend that our laws need to provide greater protection against speech that every sensible person understands causes harm.

And that is where the relativist's problems begin. It is one thing to speak out against an idea or an expression of it. But it is something else altogether to translate that disapproval into a law that is clear, understandable, appropriately tailored, and reaches *only* the speech that our society wants to prohibit.

Laws come with benefits but also with costs. Relativists have struggled to translate their (legitimate) concerns and (honorable) impulses into laws where the good done clearly outweighs the damage. Unfortunately, to use Justice Frankfurter's memorable phrase, some of these efforts "burn the house to roast the pig."[1] Courts repeatedly have struck down laws against hate speech for just that reason: they go too far in what they constrain and the expressive casualties are too great.

Furthermore, regardless of their skepticism about free expression, relativists understand the importance of due process. To comply with basic notions of fairness, a law must put someone on reasonable notice of what it does and does not proscribe so he or she can act accordingly. It turns out, however, that defining a category of prohibited speech with that level of clarity presents extraordinary challenges.

The Supreme Court's prolonged (and arguably still unsuccessful) struggle to define "obscenity" offers a case in point, but numerous examples exist. For instance, many people would sympathize with the impulse to pass a law that punishes speech "promoting cruelty toward animals," but writing such a law in terms sufficiently clear to satisfy due process proves unexpectedly difficult. The simple phrase just quoted seems clear enough on its face, but if it appeared in a statute how would someone know whether the prohibition included an instructional bow-hunting video, or a documentary about bullfighting, or a pamphlet advocating for the declawing of housecats, or an advertisement for dog shock collars?

It might seem as though absolutists and relativists should not struggle as much as they do to find common ground. After all, to some extent their positions are simply a matter of degree. Absolutists must acknowledge that things other than speech also count and, therefore, they must allow for exceptions. Relativists cannot wholly dismiss the importance of free expression and, therefore, they must admit that regulating it poses unique difficulties. One would think that debates over free expression would routinely find their way toward shared territory and would progress accordingly. It has not worked out that way.

To some extent, the cause for this intransigence lies in the fact that conversations about free expression are usually conversations about something else as well. People often differ deeply and irreconcilably about how much value to place on the something else they are discussing. Flag-burning provides an excellent example. Debates over whether an individual should have the right to burn the American flag as an act of protest tend rather quickly to become arguments over the importance of the flag, the people who have died defending it, and respect for the flag as a credential of patriotism.

In recent years, advocates of the rights of minority groups frequently have protested decisions to allow speakers who espouse racist and other discriminatory viewpoints on a college or university campus. Within this context, debates over free expression almost immediately shift to arguments over whether the school

[1] Butler v. Michigan, 352 U.S. 380, 383 (1957).

administration places sufficient importance on the concerns of the targeted group. What begins as a discussion of free speech swiftly transforms into a discussion of such matters as structural discrimination, group isolation, and institutional commitment. Those who take a skeptical view of First Amendment doctrine may even question why the discussion *began* as one about free speech rather than as one about the targeted group's concerns.

A book on free expression cannot change this dynamic. Free speech serves as a vessel. People always will argue over the relative value of its cargo. We obviously cannot rank in importance the infinite variety of subject matters under discussion and would not presume to try. So, to the extent public discourse about free expression cannot progress because the disputants fix themselves in immovable positions about the various underlying subject matters, we can offer little beyond Tolstoy's trenchant observation that "people have eternally been mistaken and will be mistaken" and so perhaps a bit of humility is in order.

We are firmly convinced, however, that there is another reason why conversations about free expression often prove unproductive. In our view, many people do not have four tools that are critical to an informed and useful discussion of free speech. The first is an understanding of the core values that underlie the protection of freedom of expression. The second is a working knowledge of the legal doctrine that the United States Supreme Court has developed over time and of the basic principles that have emerged from that doctrine. The third is a recognition of the problems and counterintuitive results that necessarily follow from our embrace of those values and principles. And the last is an acknowledgment of the grave risks that we take when we depart from those principles and abandon the values they serve.

In many conversations about free speech, the absence of these tools results in an unfortunate and unproductive reductionism in both camps: the absolutists think of free expression as just about everything while the relativists think of it as just another thing. Our public discourse around free expression has suffered greatly as a result. We think access to these four tools can help us do better. This book seeks to provide it, with a focus on United States law.

This book strives to help readers achieve a stronger, clearer, and more nuanced understanding of free expression. It seeks to foster a better comprehension of what's at stake when our laws limit free expression and also when they don't. Although the book traverses a variety of challenging fields – political philosophy, Supreme Court history, legal doctrine – we have labored to make it interesting and accessible to any intelligent reader.

We view this as a work of scholarship but especially of *public* scholarship, intended to facilitate conversations between thoughtful people about an important collection of questions: Why do we protect free expression? Do we afford it too much protection, or not enough? How has the Supreme Court thought about it for the past couple hundred years? What has the Court gotten right and when has it fumbled? How should we think about free expression when other important values

come into conflict with it? Should we create exceptions? For what kinds of speech? How should we fashion them? Can we create exceptions without inadvertently compromising protection for speech that we think matters? What free expression problems continue to challenge us? How might they be solved? Are they solvable at all, or are they an unavoidable consequence of a selection of certain values and principles? What do the approaches of other countries have to teach us about free expression? If the United States is exceptional in its protection of free speech, is that a source of pride, or trouble, or both?

We have a great deal of territory to cover in this book. Because we have written it for a broad audience, we have tried to pass through the terrain expeditiously and with a minimum of detours. We have forgone some fascinating side roads as a result, but we believe that, just as the perfect can become the enemy of the good, the comprehensive can become the enemy of the comprehensible.

This book has four parts.

Part I considers the core values that underlie protection for free expression. We review the most important and persuasive of the theories of the value of free expression that have been advanced. We begin with theories that treat free expression as an instrumental good – that is, as having value because it promotes something else, like truth-finding or informed participation in the democratic process. Then, we consider theories that treat it as an intrinsic good – that is, as having value in itself, for example because it constitutes a core component of human dignity and individual autonomy.

Part I also considers two other value-related ideas. The first is that free expression stands in close – but perhaps sometimes subtle – relation to other values and so can help shed light on their importance. To return to an example cited earlier, limitations on free expression raise concerns about due process that have much broader application. In this sense, free expression has not just instrumental and intrinsic value but instructional value as well. Our struggles with free expression can help us understand other things that matter a great deal to us.

The second point is that our society has come to embrace free expression as a public good that transcends existing legal parameters. In other words, our society finds the values that drive free expression so morally compelling that it applies them even when the law of the First Amendment does not require it. Thus, people often invoke freedom of expression as a value (or even as a "right") in circumstances where First Amendment doctrine does not control the outcome, such as when the entity seeking to limit the speech is a private one rather than a state or federal government actor.

It is tempting to dismiss those invocations of the First Amendment as simple misunderstandings of law. We believe, however, that they reflect something much more complex, deeper, and more interesting. As a society, free expression has moral force that works well beyond the limitations of legal doctrine. Our embrace of free

expression therefore is reflected not just in the law but also – and perhaps as importantly – in a layperson's "Everyday First Amendment."

The Everyday First Amendment provides guidance as to how members of our society should deal with each other as human beings. It is driven by a normative vision, not a legal one. This dynamic helps explain why debates about free expression prove so challenging: they are often less conversations about what *the law is* than they are conversations about *what we think is right* in a deep moral sense.

In Part II, we turn our attention to legal history. We discuss the evolution of the Supreme Court's thinking about free speech over three periods: prior to 1919, from 1919 to 1963, and from 1964 to the present. These three periods reflect a history of increased protection for speech – even speech that may seem highly logical to want to suppress. Along the way, we show how the extraordinarily protective principles that emerged over time relate to the values discussed in Part I.

Then, in Part III, we discuss in greater detail the basic principles that flow from this body of case law: a powerful hostility toward prior restraints and content-based regulations; a deep suspicion of laws that are vague; a grave concern about laws so broad that they reach speech we want to protect as well as speech we want to limit; and an imperative to afford breathing space to speech, such that we end up protecting some speech that may not deserve it in order to make sure we protect all the speech that does. We explain how these first principles advance the values explored in Part I of the book. And we show why these principles so commonly result in the invalidation of laws aimed at speech, including speech we may think of as having little or no merit or even as being corrosive to our society.

Finally, we consider some of the exceptions to First Amendment protection that the Court has identified. In the 1942 case of *Chaplinsky* v. *New Hampshire*,[2] the Court famously listed as such exceptions "the lewd and obscene, the profane, the libelous, and insulting or 'fighting' words." We show that over time the Court has interpreted these exceptions very narrowly and has extended substantial protection to a great deal of speech that people would intuitively think should fall outside the shelter of the First Amendment. The narrowing of these exceptions was, however, a natural consequence of the core values discussed in Part I and the basic principles discussed in Part III.

Part IV of the book explores some of the challenges that trouble our current First Amendment jurisprudence and our debates over free speech. These include such issues as campaign finance, speech in the education context, hate speech, and online speech. The legal and moral complexity of these issues has led to a good deal of confusion among members of the general public – and occasionally among Supreme Court justices.

In Part IV, we discuss why the core values and basic principles that underlie our free speech jurisprudence make these free expression issues so difficult. And we

[2] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

explain why departing from those values and principles to address current challenges (while understandably tempting) may lead us into even greater dilemmas.

In the pages that follow, we spend much of our time considering legal doctrine. Before getting there, however, we begin in the first chapters with a foundational question of political and moral science: Why do we protect free expression, anyway?

PART I

Core Values

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).