

A Framework for Thinking about Freedom of Speech, and Some of its Implications

T. M. Scanlon

In these remarks I will revisit the account of rights in general and freedom of expression in particular that I have offered in earlier work,¹ and I will consider how this account applies to some current problems about freedom of expression, including problems concerning expression on the internet.

An Account of Rights

How do we decide what rights there are, and what they cover? I have argued that rights are limits on discretion of certain agents to act or not act that are justified on the ground that they are necessary to protect important interests, and that provide this protection at acceptable cost to other interests. Thinking about rights thus has (a) an *evaluative* element (identifying the interests at stake) and (b) an *empirical* element (identifying the consequences of various ways of protecting those interests). These elements lead to (c) normative conclusions about the limits on discretion that justified because they are needed to adequately protect the relevant interests in the light of these facts, and do so at tolerable cost to other interests. These are moral conclusions about the ways that various individual or institutional agents may or must act.

The empirical element in a right involves various claims about how individuals and institutional actors will behave in the absence of the constraints that the right imposes and about what the effects those constraints will be. These effects will depend on the

¹ Including “Rights, Goals and Fairness,” “Freedom of Expression and Categories of Expression,” and “Content Regulation Reconsidered” in my *The Difficulty of Tolerance* (Cambridge: Cambridge University Press, 2003).

powers that various actors have under these conditions and on how they will be motivated to use these powers.

he this dependence of rights on empirical facts may be seen as both a strength of the view I am proposing and as the basis of a potential objection. The strength is that it allows for the possibility that the content of rights will change as conditions change. The potential weakness is that it makes rights dependent on background conditions that give actors their powers to act and determine their motivations, conditions that may themselves be objectionable. Rights, on this view, may therefore seem to be objectionable compromises with bad situations that ought themselves to be changed.² The response is that a concern with rights does not involve endorsing these conditions as legitimate, or preclude criticism of them and efforts to bring change. Claims about rights are just claims about what is necessary to protect certain interests under certain conditions.

As claims about what is *necessary* under these conditions, claims about rights involve judgments of degree—judgments about what is needed in order to *adequately* protect certain interests. Not everything that would promote these interests is required by a right. (The right to freedom of expression, for example, does not require every measure that would enhance fulfillment of the various interests that this right is supposed to protect.) What is the basis of these judgments of degree? How do we decide how much is “enough?” My view is that this is a matter of weighing the force of competing reasons.

² See, for example, Marx’s observation that ...

(An alternative view would hold that the boundary is set by an idea of what people have a right to that is independent of these empirical considerations.)

An Example: The Right to Privacy

People have good reasons for wanting to shield parts of their lives from the scrutiny of others. Rights to privacy are norms that enable individuals to avoid such scrutiny, and do this at tolerable cost to other interests. The reasons that support rights to privacy are varied. Some are purely personal, such as reasons to avoiding embarrassment and to preserve the possibility of intimacy. Other reasons are more commercial, such as reasons for wanting to be able to control financial information, or to protect trade secrets. Reasons of both of these kinds depend on the kind of society in which the individuals live—on its social customs and norms and its forms of economic organization.

Some of the reasons supporting rights to privacy are reasons of the right holders—the individuals whose privacy is in question.³ But these are not the only relevant reasons. Reasons of individuals other than right-holders are relevant not only as “costs” of privacy rights but also as positive reasons for protecting individuals from scrutiny. For example, all of us may benefit from rights of privacy that enable creative activity by others.

It is important to distinguish between *privacy* (the protection from scrutiny that there is reason for individuals to have) and the *right* to privacy, which is a set of norms that are supposed to provide this protection. The “constraints” that these norms specify are varied in form, including different Hohfeldian elements.⁴ Some are claim rights, e.g. that other individuals leave one’s property, or not peek in to one’s windows or hack into

³ These reasons have a central place in Joseph Raz’s account.

⁴ Famously distinguished by Wesley N. Hohfeld in *Fundamental Legal Conceptions*.

one's email records. Others are powers to determine which others are entitled to observe one or scrutinize one's life in various ways, by giving or withholding permission. Other privacy rights are best seen as immunities, e.g., from government powers to authorize a search of one's house, or of one's email or phone records.

The place of government in the right to privacy is complex. As I have just said, some important privacy rights are limitations on governmental powers. Many of the norms comprising the right to privacy, however, concern simply relations between individuals and other private actors, although individuals may also have claim rights against governments, that they protect privacy in certain ways, by enforcing their claims against other individuals and private institutions.

Different sets of norms can provide adequate protection for our interests in privacy in different ways. There are, for example, different ways of ensuring that individuals have adequate opportunity to communicate with others in a confidential manner. Claims about what "the right to privacy" entails may be claims about what the laws and prevailing non-legal norms that play this role in a society at a given time allow and forbid (presupposing that these norms are justifiable.) Or they may simply be moral claims about what such laws and norms *ought* to be like in order to provide adequate protection of this kind.

According to my view, there is no such thing as balancing *rights*. What are often described as cases in which there is a conflict between rights that we need to balance against one another are better understood as cases in which the costs of protecting certain interests in the way that one right is currently understood as doing is unacceptably costly in terms of interests that the other right is supposed to protect. For example: the right to

privacy, understood in a certain way, may make it impossible to ensure that persons accused of crimes get a fair trial. If this is so, the conclusion to be drawn is that this way of understanding the right cannot be correct. That right needs to be understood in a more limited way in order to be defensible in the light of its costs.

My view in a slogan: interests are balanced, rights are redefined. Insisting on this may sound pedantic, but I believe that it is helpful in understanding what is going on in such cases and in avoiding a mysterious idea of the weights of different rights.

Here is a summary of points made so far that will be relevant to freedom of expression:

It is important to distinguish between rights and the interests that these rights are supposed to protect, which may have the same, or similar names, such as ‘privacy.’

These interests are varied, and are not only interests of the right-holders.

The norms that constitute a right, and protect the interests in question, take a variety of forms, including claim rights, powers, and immunities. These norms may or may not be matters of law, and they can involve “government” in different ways.

An (illusory?) alternative account of rights

On an alternative view, our thinking about what rights people have involves recognizing certain judgments about rights as “intuitively” correct. These include judgments about particular cases that are or are not violations of rights, and judgments about the correctness of general truths about rights (such as, in the case of freedom of expression, the idea that restrictions of speech on the basis of its content are impermissible.) We then decide new cases by making judgments of similarity with these

“fixed points,” or sometimes by adjusting our understanding of these fixed points in order to arrive at the most coherent overall account.

My view, by contrast, *interprets* these intuitive judgments about rights as (at least provisional) judgments about the limits on discretion to act that are required to adequately protect the relevant interests. These judgments are “provisional” in the sense of being always open to revision *on this basis* rather than on the basis of “coherence” with other judgments taken simply as judgments about rights. I do not prefer this view because I am, in general, skeptical of appeals to “intuitive” judgment. My view makes claims about rights rest on “intuitive” judgments about the relative strength of reasons. My claim is that looking “behind” or “beneath” what seem to be intuitive truths about rights offers the most plausible overall account of the content of these rights and their importance. I will return to this contrast between approaches to rights in the following discussion of freedom of expression.

The Right of Freedom of Expression

The evaluative element of the right of freedom of expression includes three broad categories of interests: interests that individuals have, as potential speakers, in having opportunities to make their views known, interests that individuals have as potential audience members in having access to the expressive activities of others, and interests that individuals have as bystanders who are affected by these expressive activities. Each of these categories includes many diverse reasons.

The interests of potential speakers, or participants, include interests in participating in electoral politics, in seeking to influence government policy in other ways by, for example, criticizing the conduct of public officials, and interests in expressing

their values and generally participating in the cultural and intellectual life of the society, perhaps seeking to influence its character.

Audience interests include interests in having access to information needed to make political decisions and to make personal decisions, interests in being aware of the views of one's fellow citizens in order to decide how to interact with them, and interests in having access to culture and ideas.

It is natural to think of bystander interests primarily as interests in avoiding costs, such as noise, pollution, public disorder and loss of personal privacy, which count as potential reasons for tighter restrictions on expression. But bystanders also have important interests that are threatened by limits on expression, such as interests in having a well-functioning democracy, and interest in the benefits of scientific, moral and cultural progress.

The empirical element in the right to freedom of expression consists of facts about what is likely to happen without certain proposed restrictions on expression, and what is likely to happen with such restrictions. The content of the right of freedom of expression is a set of moral conclusions about norms that are necessary and feasible means of protecting the various important interests in expression.

In order for a consideration to be adequate grounds for restricting expression, the interests involved must be *generalizable*: everyone's interests of a given kind must count, and the question is what the result would be of taking all of those interests to count in favor of restrictions on expression. It seems to me to follow, for example, that offense *in*

general cannot be a ground for restricting expression. Too many things offend people. So an adequate ground for restricting expression would have to be narrower.⁵

The requirement of generalizability should be distinguished from a related requirement that grounds for restricting expression must be *institutionalizable*: there must be a way of defining the power of individuals certain positions to restrict expression on these grounds that is justifiable *given how it is likely to be exercised, perhaps imperfectly*. This requirement seems to play a role, for example, in the idea that governmental officials should not have the power to restrict expression of political topics on grounds of its falsity, because their understandable partiality and defensiveness against criticism of their policies, makes their judgments unreliable.

It follows from the fact that judgments about freedom of expression always have an evaluative component that such judgments can never be “value neutral.” They always rest on judgments, often controversial, about the relative importance of various interests. This lack of “neutrality” should not be seen as embarrassment for freedom of expression or for this account of it.⁶ Freedom of expression involves no general claim to value neutrality. Where it may seem to involve such claims, such as the claim I made in the

⁵ Jeremy Waldron argues, for example, that laws restricting “hate speech” are justified not on the ground that people find such speech offensive, but on the more specific ground that it undermines what he calls the dignity of those concerned: their secure sense of being accepted as full members of society, entitled to all of the rights that this involves. See Waldron, *The Harm in Hate Speech*. This justification for restricting expression would not be subject to the problem just mentioned. But there remains the question of whether a general ban on any expression that questions certain individuals’ status as citizens would unjustifiably foreclose discussion of central questions of justice.

⁶ As claimed, for example, by Stanley Fish in *There’s No Such Thing as Free Speech: And It’s a Good Thing, Too*, and various other writings. For criticism of Fish along similar lines, see Joshua Cohen, “Freedom of Expression, in *Philosophy & Public Affairs* 22 (1993), p. 210-211.

previous paragraph about governments' not having general powers to ban speech on grounds of falsity, these are relative to specific decision-makers and themselves grounded in evaluative claims, about what is necessary in order for certain interests to be adequately protected.

Such value-based judgments of role-relative (partial) neutrality involve no inconsistency. But they do require what might be called a kind of double-mindedness. That is, they allow and even require individuals in certain roles to distinguish between their overall judgments about whether a certain claim is correct, or a good thing to have expressed, and their views about whether it is within the powers of their role to take certain steps to prevent it from being expressed.

It is common in the law review literature to distinguish three theories justifying the First Amendment: a marketplace of ideas theory, an autonomy-based theory, and a theory based on democratic participation. According to the first, the aim of the First Amendment is to protect open discussion, from which true beliefs will emerge, and this aim is best served by limited intervention. The remedy for false or misleading speech is "more speech" rather than regulation aimed at curtailing false views. According to the second, "autonomy" view, the aim of the First Amendment is protecting the ability of speakers to express whatever messages they choose. Regulation of speech is objectionable because it interferes with this fundamental form of individual freedom. The third view is the idea that the First Amendment exists to protect and promote a system of political engagement. This view provides some justification for regulating expression when this will enhance the quality of public deliberation (as in the fairness doctrine at

issue in *Red Lion*.) But even on this view, governmental regulation of speech is seen as a threat because it is likely to be politically partisan.⁷

Seen from the perspective of the view I am proposing, each of these theories involves a combination of evaluative and empirical claims. They each specify certain interests that freedom of speech is supposed to promote or protect, and they each make claims about what is required in order to do this. In my view, these theories should not be seen as competing alternative accounts of freedom of expression. There is, for example, no reason to choose between the aims of promoting true beliefs, enabling individual self-expression, and providing good conditions for democratic deliberation. All of these are among the interests with which freedom of expression is plausibly concerned. The “market place of ideas” theory appears to focus on what I called above interests of audiences and bystanders. The autonomy-based theory appears to focus exclusively on interests of speakers. Democracy-based theories are sometimes presented as focusing on the interests of audiences—of citizens needing information about how to vote.⁸ But a democracy-based theory could recognize interests of participants, interests of audiences (citizens needing information in order to decide how to vote) and the interests of bystanders in having the benefits of a well-functioning political system. Even in this broader form, however, such a theory would focus on only some of these interests—those connected in one way or another with the political process—leaving out other interests of speakers, audiences and bystanders for which freedom of expression is important. So

⁷ This description of the three alternative theories is taken from Nabiha Syed, “Real Talk about Fake News: Towards a Better Theory for Platform Governance,” *Yale Law Journal Forum*, October 9, 2017, but it is, I believe, quite common.

⁸ Alexander Meiklejohn’s classic statement of the view seemed to have this character. See his *Political Freedom* (New York: Harper & Row, 1960).

each of these views presents a selective picture, focusing on part of the whole story, and focusing also on particular empirical claims. There is therefore no reason to see them as alternatives one needs to choose between. Each is talking about part of the truth.

These theories may, however, more plausibly be seen not as competing theories of freedom of expression but as describing approaches taken by the Supreme Court in interpreting the First Amendment. It may well be that the various opinions of members of the Court reflect selective and partial accounts of freedom of expression as a moral idea. What this reminds us, for the purposes of our present discussion, is that in thinking about problems and possibilities posed by expression on the internet, for example, we should not limit ourselves to the jurisprudence of the First Amendment, but should think about freedom of expression as a more general moral idea.

The Content of the Right to Freedom of Expression

The content of the right of freedom of expression is generally understood to be mainly negative: it rules out certain kinds of restriction on expression and certain powers to restrict it, particularly the power of the state to do so.⁹ This feature of our general understanding of this right has a natural historical explanation. Ideas of freedom of expression arose in response to specific threats, particularly the threat of state censorship. In addition, this right has achieved recognition in the fundamental laws of many countries, and has frequently taken the form of constitutional restrictions on state power. Our first amendment, for example, says “Congress shall make no law ... abridging the

⁹ Owen Fiss discusses and questions this common understanding of the first amendment in “Why the State?”

freedom of speech, or of the press,” thus embodying both this negative character (ruling out “abridging”) and the focus on the state (“Congress.”)

Even as a constitutionally recognized legal right, freedom of expression is not solely negative. It requires, for example, that the state provide police protection for speakers threatened by hostile mobs. The Supreme Court’s interpretation of the first amendment has, however, been mainly negative and centered on state action. Even if there are good reasons of constitutional text and institutional competence for this constitutional to have this character (and I am not convinced that this is so) it remains true as I have just said that we should not identify the right of freedom of expression with the jurisprudence of the first amendment.¹⁰

There are good reasons for regarding interference with expression by the state as particularly threatening. First, in regard to expression on political matters, especially criticism of governmental actions and policies, state officials are obviously partisans, hence likely to use their powers to regulate expression in a biased way that threatens speaker, audience and bystander interests. In addition, as in cases of state censorship, state regulation takes the form of an outright ban on certain kinds of expression, the effects can be comprehensive in their effects.¹¹ Opportunities for expression of that kind are completely blocked. By contrast, restrictions on expression by non-state actors—journal or newspaper editors, for example—will in many cases leave open other avenues

¹⁰ A point made by Jack Balkin, among others. See Balkin, “The First Amendment in the Second Gilded Age” p. 6, and other work cited there.

¹¹ Not all governmental regulation has this character, however. As Justice Stevens pointed out in his dissent in *Citizens United*, the restrictions on campaign-related expression that were at issue in that case did not amount to a *ban*, by which I think he meant that these restrictions left other avenues for effective expression of the same messages.

for speakers to get their message out. This is not to deny that there may be cases in which restrictions by non-state actors are threatening exactly because they do not leave open sufficient effective alternatives. The point is just that the distinction between restrictions by the state and restrictions by non-state actors is not fundamental. Facts about partisanship and comprehensiveness of effects are more basic.

There is thus no reason in principle why freedom of expression, as a moral right, should not apply against private actors such as corporations as well as against the state. As in the case of the right to privacy, freedom of expression may require norms limiting the conduct of non-state actors insofar as their actions and powers constitute a threat to the relevant interests. The question (not an easy one) is how such norms might be formulated. In addition, there are factors other than interference by state or non-state actors that threaten the crucial interests at stake in freedom of expression. For example, the kind of access to information that the Freedom of Information Act promotes citizens' interests in assessing public policies and making political decisions in an important way. Access of this kind could even be said to be essential to these interests. Two conclusions could be drawn from this. One is that freedom of expression (at least as a moral right and perhaps even as a constitutional right) requires access to government-held information. The other is that in thinking about the need to protect interests served by the right of freedom of expression, we should not focus only on that right (even the moral right), but should instead think more broadly about what is required in order for these interests to be adequately fulfilled.

Even if the right of freedom of expression includes claim rights to positive benefits as well as immunities from interference and claim rights to be protected against

interference, this right should not be thought of as a positive moral *right to speak*. There can be cases in which the state lacks the power to forbid a person from engaging in a certain form of expression and in which it would be wrong for others to interfere with the person's action, but the act of expression would nonetheless be wrong. The Danish cartoons of Mohammed and the cover of *Charlie Hebdo* might be examples of this.

I return now to the question, mentioned earlier, of how the way of thinking about freedom of expression differs from alternative approaches. One familiar approach holds that thinking about freedom of expression begins with certain intuitive fixed points and simply “applies” these or draws conclusions from them based on similarity or analogy. I will consider a few examples to illustrate how the approach I am recommending would differ in its treatment of these ideas.

The Buckley Formula

Take first the infamous formula from the majority opinion in *Buckley*: “The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”¹² As Justice Stevens pointed out in his dissent, is easy to come up with counter examples to this general claim. He mentions time limits on speeches on the floor of the legislature.¹³ It seems clear on the view I am proposing that some restrictions of this kind are not only compatible with the right of freedom of expression but in fact required by it. They are restrictions on the discretion of some to act that are necessary to protect important interests of others (and not only interests of other would be speakers but audience

¹² *Buckley v. Valeo*, 424 U.S. at 48-49.

¹³ Stevens dissent, p. 51.

interests and bystanders interests as well.) The underlying empirical assumption is that these restrictions are required because without them the voices of other speakers would be crowded out, to the detriment of the interests of these speakers, of those who would hear them and of others who would benefit from there being a full discussion.

Another underlying empirical assumption is that in these cases there is a way of restricting the speech of some in order to prevent this “crowding out” that does not open the door to partisan manipulation of the debate, which would threaten all of these interests. Time limits fill the bill in this respect (as long as there is no bias in who is able to get into the queue.)

The approach I am proposing is not a big departure from the “intuitive” understanding of the ideas in question. Indeed, what I am trying to do is to identify the factors that make claims such as the *Buckley* formula intuitively plausible. But making these factors explicit—bringing out the underlying assumptions about interests at stake and empirical facts about when they are threatened—makes a significant difference. It seems very plausible to me that one of the aims of the majority in *Citizens United* was to reject the idea, recognized in *Austin* that the problem of “crowding out” could serve as a ground for restrictions of expression. Simply appealing to the *Buckley* formula as an axiom, without exploring the underlying factors on which its superficial plausibility depends, provided a way of doing this.

Restrictions Based on the Identity of the Speaker

Another example, also from *Citizens United*, is the idea that it is impermissible to restrict expression based on the “identity” of the speaker. This seems, on the face of it, very plausible. The question is why. One thing it might mean is just that the interests

appealed to in defending or justifying a restriction of expression must, as I said above, be generalizable: the comparable interests of all parties must be taken into account and given equal weight.

But what are these interests and who has them? To begin with, there are the interests of natural persons that I listed above. One way of advancing these interests, particularly, but not only, the “speaker” interest in bringing one’s views to the attention of a wide audience, is to form organizations such as non-profit corporations with the purpose of doing this. Indeed, the special status of non-profits is an explicit recognition of this fact. This does not mean that non-profit corporations have interests, but only that regulation of their activities has to take into account the impact that it would have on the interests of the individuals, including the interests of those who form or join them and the interests of others (audience members and bystanders) whom they serve.

The special legal status of for-profit limited liability corporations is also justified on the ground that it serves various individual interests. It is very implausible to think that these entities have interests of their own that should count for the purpose of determining the content of the right of freedom of expression. It could be objectionable for the government to restrict commercial advertising by some firms in order to give a competitive advantage to certain firms favored by politicians. But this would not be because it was unfair treatment of the interests *of those firms* themselves. Rather, it would be objectionable because it was contrary to the interests that justify having such firms, chiefly the interests of consumers, for example because it prevented some consumers from having information that they have reason to want about the products of the firms whose advertising is restricted. Government regulation of some advertising in order to

improve the access of others would not have this objectionable effect if it were needed in order to improve the information available to consumers by preventing the messages of one firm to “crowd out” others. Governmental power to do regulate advertising might, however, be a threat to these interests if there were good reason to doubt that it would generally be used in this way.

Voices vs. Forums

I have been assuming that the interests that are relevant to freedom of expression are only interests of individuals (in some position or other.) This may seem too restrictive. In interpreting freedom of expression, it seems important to distinguish between entities that are voices expressing certain points of view and entities that are merely forums for the expression of views by others. In *Miami Herald v. Tornillo*, for example, the Supreme Court ruled out the application of fairness requirements to newspapers on the ground that newspapers are voices. Shopping centers and company towns, on the other hand, are properly viewed as forums. It seems plausible to say that an entity is a “voice” in the relevant sense just in case it has its own “speaker” interests in being able to express its views, whereas the free speech interests at stake in the regulation of a forum are just the interests of others who may make use of it. If this is correct, however, restricting the interests that are relevant to freedom of expression to interests of individuals might seem to obliterate this distinction, since both newspapers and shopping centers will be important only as enabling fulfillment of the interests of individuals.

To understand the distinction between a voice and a forum it is helpful to begin by clarifying the interests that may be involved. Individuals have interests in being able to express, potentially to a wide audience, what they believe and value, and they have

interests in being able to join with others to express, potentially to a wide audience, what they collectively choose. Audiences have parallel interests in having access to what such individuals or groups choose to express, and the value of this access depends on the fact that what is expressed is in fact the view of the relevant individual or individual. These speaker and audience interests can be threatened by restrictions on what are clearly forums. They could be threatened by a ban on speaking in a public park or by the closing down of the internet, even though the internet and a practice of allowing street corner speeches, are forums.

A form of permitted expression is a voice if the reason for allowing it lies in the interests of a particular speaker or group in having access to an audience, and in the corresponding interest of potential members of an audience in having access to the views of that individual or group. These interests would be threatened by regulation that would interfere with what is expressed being the views of that particular individual or individuals. By contrast, a practice that permits or facilitates expression by others is a forum if its value (for speakers, audiences and bystanders) does not lie in the interests of any particular person or group to have access to expression, or in the interests of audiences in having access to the views of some particular person or group, but rather in the interests of many potential speakers, and the interests of potential audiences in having access to the views of a variety of such individuals and groups.

This way of drawing the distinction fits with common sense. Individual speakers, newspapers and the publications of political candidates and parties, count as voices; street corners, town meetings, shopping centers, and many internet platforms count as forums. The significance of the distinction for the question of governmental regulation is this:

regulation of voices is objectionable if it interferes with the degree to which their content reflects the underlying decision-making processes on which its distinctive value depends: the decisions of the individual or of the group (e.g. the editors of the journal.)

Requirements to include alternative points of view, for example, are objectionable *if* they reduce the value of the content in this way. (Could requirements to include and respond to objections sometimes *not* do this?) Insofar as the distinctive value of a forum (for audiences) lies in part in its openness, a requirement of greater openness would not interfere with its value in this way.

The fact that those who control access to a forum make some decisions about what it contains (that they do some “curating” to use Klonick’s term¹⁴) does not turn it into a “voice” in the sense I have defined, unless this curating is important to the value of the content from the point of view of speaker, audience, or bystander interests. What this example brings out, however, is that the distinction between voices and forums is not sharp, but depends on the way in which the value of the content produced depends on the processes that lead to it, and on the ways in which potential regulation can diminish this value by interfering with these processes. Some entities can be both voices and forums (or have “voice-like” and “forum-like” aspects.) A scientific journal is in one way a voice, since its value for audiences depends in part on the fact that the editors enforce standards of quality relevant to the discipline. On the other hand, it is, or is like, a forum, insofar as its value depends on the fact that, within the standards just mentioned, it is

¹⁴ Kate Klonick, “The New Governors: The People, Rules, and Processes Governing Online Speech.”

open to debate between different enquirers, and does not simply represent a partisan point of view of the editors.

Content-based Regulation

It is frequently maintained that freedom of expression (or at least the First Amendment) holds that “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹⁵ So laws and policies that restrict expression on this basis are simply ruled out. The First Amendment “makes the choice for us” between “the angers of suppressing information and the dangers of its misuse if it is freely available.”¹⁶ By contrast, Lawrence Tribe writes,

Where government aims at the noncommunicative impact of an act, the correct result in any particular case ... reflects some ‘balancing’ of the competing interests: regulatory choices aimed at harms not caused by the flow of information as such are acceptable so long as they do not *unduly* constrict the flow of information and ideas. In such cases the first amendment does not make the choice but instead requires a ‘thumb on the scales’ to assure that the balance struck in any particular situation properly reflects the central position of free expression in the constitutional scheme.¹⁷

This familiar contrast seems to me exaggerated. Regulation of expression on the basis of its content is sometimes objectionable. But it is not always so, and it is a mistake to treat its impermissibility as an axiom in our thinking about freedom of expression, as becomes clear when we consider what reasons there might be for objection to regulation of this kind. Here I return to the points made earlier about the role-relative and partial character of the kind of “neutrality” about content that freedom of expression can require.

¹⁵ Justice Thurgood Marshall, writing for the majority in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972)

¹⁶ *Virginia Consumer Council*, 425 U.S. 748 (1976)

¹⁷ Lawrence Tribe, *American Constitutional Law* (Mineola NY: Foundation Press, 1978) pp. 581-582.

The contrast just drawn is in fact role-relative. It concerns the grounds on which *governments* can restrict expression. Even so restricted, the claim is overly broad. Laws against defamation, false advertising, and the disclosure of defense secrets all restrict expression on the basis of its content. The permissibility of such restrictions, and the limits on them, is determined by balancing the interests in question: weighing the costs of allowing expression of these kinds and the risks of empowering various parts of “government” to restrict such expression. The Supreme Court properly engaged in kind of balancing, for example, in *New York Times v. Sullivan*, in arriving at their conclusions about the limits on libel law that are required in order to protect important interests that freedom of expression is concerned with.

It may be said that decisions about how such balancing comes out are ones that “the First Amendment makes for us.” But if actual decision-makers in various roles are to be guided by an understanding of what the First Amendment, or freedom of expression more generally, requires or permits them to do, then they have to be able to think through this balancing process and arrive at conclusions about how it comes out. To say that the first amendment makes these decisions for us sounds to me like a way of acknowledging this need for balancing while trying to distance themselves from it, as a way of dealing with the “double mindedness” involved.

Role-related restrictions on content-based reasons, and resulting forms of double mindedness, are not limited to government. The role of journal editors, for example, may dictate that they should decide what papers to publish not simply on the basis of whether they believe what is said in them to be true, but rather on the basis of whether they are “good science”—that is to say, they arrive at their conclusions in a way that is in

accordance with the appropriate standards for the field. Whether violations of this role restriction would constitute violations of freedom of expression or not, the point is that these restrictions have a similar basis: they are constraints on the discretion of editors that are necessary in order for what they do to serve the interests of their field, and of the wider society, in the appropriate way.

I now turn to consider some recent questions about freedom of expression in the light of the framework I have described.

What Does Freedom of Expression Cover?

Attempts have recently been made to broaden the range of activities covered by freedom of expression as a way of ruling out certain government policies. Recent cases such as *Masterpiece Cakeshop v. Colorado Civil Rights Commission* and *Janus v. AFSCME* are examples.¹⁸

These cases raise the question of what determines the range of activities to which freedom of expression applies, and consequently the forms of regulation that it rules out. On the view I am proposing, this range is determined by the interests that are at stake: a form of regulation violates freedom of expression if it threatens these interests (and if the costs of ruling out this form of regulation are not unacceptable.) These interests are, on the side of speakers, interests in being able to communicate one's beliefs and values to others. (I suppose this includes, which may be relevant in these cases, an interest in not contributing to misleading others about what one's beliefs and values are.) On the side of audiences, the primary interest is in having access to others' expressions of their beliefs

¹⁸ I will discuss *Masterpiece Cakeshop* in some detail and add few observations about *Janus* in footnote 18.

and values. These interests determine what counts as “expression” in the relevant sense and, perhaps more important, what counts as interference with expression.

The first question in the *Masterpiece Cakeshop* case is whether a commercial baker’s selling a cake for a wedding should be seen as expressing the baker’s approval of the marriage, and thereby as involving one of the interests that I have just described. I am inclined to think that the answer to this question is that selling a cake does not express such approval, especially given that no particular design or message on the cake was specified. The Colorado Civil Rights Division and Commission had in three other cases held in favor of a baker who refused to make a cake containing images writing condemning same-sex marriage. Justice Kagan pointed out in her dissent that in refusing to do this the baker was not withholding services from anyone based on their religion or sexual orientation, thus distinguishing these cases from the case at issue in *Masterpiece Cakeshop*. But the Commission did recognize the baker as having an interest in not being required to make a cake with this message. So the present question is why this is not so in the *Masterpiece Bakeshop* case, or at least how the two cases are different.

There are several possibilities here. One is that there is an important difference between making a cake with a certain moral, political, or religious message expressed on it and making a generic wedding cake. The providing a cake of the latter sort, as a purely commercial transaction, is perfectly compatible with having any attitude, or no attitude about the propriety of the marriage that is being celebrated. It might be said that providing a cake with a written message, “as a purely commercial transaction,” is also compatible with any attitude or no attitude toward the marriage, just as printers need have no view about the truth of the books or pamphlets they print. But if a printer does have

such an attitude, if for example she believes that that it would be a very bad thing if a certain book were to be printed, then the printer should see this as a reason to refuse to print the book, and the fact that the printer does print it could fairly be taken as indicating that he or she did not see its publication as a very bad thing. And this is something that such a printer would have reason to want to avoid, especially if it were widely known who had printed the book.

But even if printers in such a case would have some reason, of the sort that freedom of expression is supposed to protect, to object to being required to print books that they disapproved of, it would not follow that the baker in *Masterpiece Cakeshop* would have such a reason. If the publication of a book would be a very bad thing this would be bad because of the wide distribution that this would give to certain false and destructive views, and the objection that the printer would have would be to facilitating this dissemination. Making a cake (even one with a message on it) for private consumption at a wedding party does not involve facilitating the wide dissemination of any ideas. So it is much less clear that interests of the sort protected by freedom of expression are at stake.

A third possibility is that a baker does have an interest of the sort that freedom of expression is supposed to protect in not providing cakes for weddings that he or she believes to be morally objectionable. Perhaps the reasons involved are not as strong as the reasons that a pastor for refusing to perform such weddings, or even those of a singer for refusing to sing, but they may nonetheless have some weight. The question then is whether these reasons are sufficient grounds for ruling out a policy that would forbid bakers who disapprove of same sex marriages from refusing to provide cakes for the

weddings of same sex couples. It would be a perfectly consistent position to say that bakers do have a reason of this kind but that it is not sufficient ground for objecting to such a policy given the fact of widespread discrimination against gays and lesbians. One reason for holding this might be that, given the relative weakness of the reason involved (as compared to that of the pastor), and given widespread discrimination against gays and lesbians, the reason is not generalizable: the range of providers who could have similar reasons is so wide that gays and lesbians would be deprived of access to great number of goods and services in the commercial market, which ought to be open to all.

There is, however, another way of understanding the case. Even if providing a cake for the wedding of a same sex couple would not involve an expression of approval of that marriage, of a sort that bakers have an important interest in not being compelled to make, *refusing* to provide such a cake, on moral or religious grounds, clearly is a way of expressing disapproval of such marriages. So a law or policy ruling out such refusal would interfere with individuals' interests in being able to express their values and beliefs.

This brings out a feature of the argument offered on behalf of the baker in the *Masterpiece Cakeshop* case. That argument tried to harness considerations of freedom of expression in support of the baker, and potentially others as well, by extending what counts as expression of the kind that the right of freedom of expression is supposed to protect—extending it from the clearest case of the pastor, to the less clear case of a singer, to the case of the baker, and potentially, to those who serve the cake, set the tables, and so on. The “refusal as expression” argument that I have just described achieves a similar effect through a different route, showing even if many of these forms

of involvement with a wedding are not themselves expressions of approval of the marriage being celebrated, refusals to perform any of these services clearly can be acts of expression. The strength of this argument lies in the fact that it avoids implausible stretching of the idea of expression and interests associated with it.¹⁹ But this brings with it a corresponding weakness that is even greater. Because it allows such a wide range of actions to be converted, through refusal, into a form of expression, it clearly fails the generalization test, at least when discrimination against gays and lesbians is widespread.

A law ruling out such acts of refusal would forbid these actions on the basis of agents' reasons for performing them, namely the sex of the persons who are being married. It would not, however, be a comprehensive ban on actions with a certain expressive content, since it would leave open many other ways of expressing disapproval of same sex marriage. The reasons for ruling out these particular acts would lie not in

¹⁹The argument of the majority of the Court in *Janus v. AFSCME* involves a similarly implausible extension of these interests. The majority argues that requiring public employees who are not members of the union to pay "agency fees" covering the costs of collective bargaining violates freedom of expression because it amounts to "compelled speech." But the "speech" involved is not addressed to a wide audience on some question of public concern but is only expression between negotiators in the course of bargaining. It therefore does not seem to involve the interests that freedom of expression is supposed to protect. Moreover, it seems odd to accept that union representatives have the power to strike bargains on behalf of non-union employees but object that requiring those employees to pay the cost of this representation is "compelled speech." The attempt by the majority to claim that what is said in these negotiations is addressed to matters of public concern because public funds are required to pay the wages agreed upon seems to concede the relevance of the distinction just made. But as Justice Kagan points out in her dissent, this claim is unconvincing. See 585 U.S. ____ (2018), p. 16 of Justice Kagan's dissent. The case illustrates the general point that when the idea of "expression" is understood in a way that is detached from the interests that the right freedom of expression is needed to protect, this right (or at least the First Amendment) can be used to rule out regulation that there is no reason to object to.

their expressive content but in the costs to gays and lesbians of allowing that content to be expressed in this particular way. Given these costs, such a law seems justified.

Some Brief Remarks on Freedom of Expression and the Internet

We are faced with problems on two fronts. Wealthy individuals and corporations can dominate political discussion on television networks. The rise of the internet as a forum of discussion and a source of information might serve as a counter-weight to this, since access to the internet is inexpensive. But purveyors of hate, false news, and conspiracy theories are corrupting online discussions.

The corporations that own and manage internet platforms could curb these problems, to some extent, by limiting what can be said or shown on their platforms or by excluding some individuals and groups from access to these platforms. But the power to do this seems dangerous. These corporations, like others, are owned by wealthy individuals who have their own economic interests and political agendas. The power to exclude messages that undermine important interests in expression could also be used in ways that threaten these interests.

This risk might be reduced by generally accepted norms allowing exclusion on some grounds but not others. This is a standard role for norms of freedom of expression. One question is what form these norms might take. The norms that are appropriate for a given platform would depend on whether that platform is a voice or a forum, in the functional sense that I discussed above. In either case, appropriate norms might allow (or even in some cases require?) the exclusion of expression of some kinds, and in the case of forums they might rule out exclusion on other grounds.

Possible grounds for exclusion might be: inciting illegal activity (not merely advocating it but playing an organizing or facilitating role), causing psychological harm through personal insult and harassment, and making obviously false and misleading claims about important matters. This would involve powers to exclude expression “because of its content.” But this would not itself be an objection. As I have argued above, such powers to exclude would be compatible with freedom of expression provided that they were not a threat to speaker, audience, and bystander interests in expression.

Reasons for being able to incite illegal activity, or to insult or harass individuals, are weak or nonexistent, as compared with reasons for wanting to engage in good faith political argument. Reasons victims have to what protection against these harms seem strong by comparison, but these reasons must be generalizable, and tests incorporating them must be institutionalizable.

The institutionalizability of grounds for exclusion depends on how those who control internet platforms would be motivated to interpret and conform to these norms. A main source of worry is that they would be too influenced by their own ideological views, for example, too inclined to see speakers who express views they disagree with as inciting violence or harassing others, or insufficiently willing to see expression that they agree with as objectionable on these grounds.

Another important source of motivation is the economic interest of platform owners in maintaining and increasing the number of people who view their site. If potential viewers are attracted to a site because they regard it as a trusted source of information and views. This could provide motivational support for norms barring the exclusion of expression on ideological grounds. But if viewers are mainly looking for

sites that support and reinforce their own views, this economic motive could corrupt platforms as forums and push them to become voices.²⁰

Would such norms be rendered more reliable if they were backed up in some way by the law? Allowing criminal prosecution for wrongful exclusion or for false or harmful content would present a serious threat of governmental partiality. Allowing civil suits seeking recourse for wrongful exclusion or for harmful publication might be less threatening.²¹ Civil trials would offer greater transparency, although they would also provide venues in which speakers it would be desirable to exclude could “play the victim” and get even greater publicity for their views.

Concluding Remarks

I have set out a general framework for understanding claims about rights in general and freedom of expression in particular. This framework sees rights as sets of norms that are held to be necessary protections of certain interests. I have argued that it is important to distinguish between these rights (norms) and the interests of speakers, audiences and others, that are held to justify them, and important to make explicit the empirical conditions that make particular norms necessary and effective protections for these interests. I have used this broadly speaking “instrumentalist” framework as a way of understanding various “intuitive fixed points” that are frequently appealed to in arguments about freedom of expression, such as the distinctive importance of state action,

²⁰ The general point about how the preferences of potential viewers may shape the policies of platform owners is made by David G. Post in “Anarchy, State and the Internet: An Essay on Law-Making in Cyberspace,” *Journal of Online Law*, 1995, cited by Klonick, p. 1614.

²¹ Klonick (pp. 1604-1609) discusses the question of whether platforms should be given immunity from defamation suits.

objections to restricting the expressive opportunities of some in order to enhance those of others, and the supposed illegitimacy of content-based restrictions, and of restrictions based on the identity of the speaker.

This framework is, first and foremost, an account of moral claims about the rights we have. I have urged the importance of distinguishing between claims about the moral right of freedom of expression and claims about the First Amendment of the U.S. Constitution. It is also important to recognize that freedom of expression is not a panacea; it is only one mechanism for protecting the interests that it is needed to promote. Many other conditions are required, in order for these interests to be served adequately. Indeed, given certain background conditions—certain levels of inequality and certain constellations of firmly entrenched attitudes—may make it impossible to do this.