

THE FIRST AMENDMENT

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THE FIRST AMENDMENT

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University of California, Berkeley School of Law



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This book is dedicated to my students—
past, present, and future.

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PREFACE

There is no standard way of teaching constitutional law in American law schools. Some schools have a year-long course covering all aspects of the Constitution. Others have a semester on structure of government and one focusing on individual liberties. At the law schools where I have spent most of my teaching career, there is a basic constitutional law course that does not cover the First Amendment and an upper-level elective on the First Amendment, focusing on both freedom of expression and the religion clauses.

My casebook, *Constitutional Law*, was written as to be able to be used in all of these different ways of teaching constitutional law. But since so many schools have the First Amendment as a separate course, it made sense to take these chapters and make them into a separate book. Over the years, many professors have asked me about doing this and I am delighted that Joe Terry at Wolters Kluwer enthusiastically agreed.

This book is Chapters 9 and 10 from *Constitutional Law*, Sixth Edition. I present the material here in two parts: Part I focuses on the First Amendment's protection of expression, and Part II examines the religion clauses. The only difference is that it includes cases from the October 2019 Term. *Constitutional Law* is complete through the October 2018 Term. This is particularly important in Part II on religion, which includes two major decisions from 2020.

I will continue to prepare a new edition of *Constitutional Law* every four years (and will do a new edition of *The First Amendment* at the same time) and a Supplement each year.

I welcome comments and suggestions from professors and students who are using this book.

Erwin Chemerinsky

February 2021

THE FIRST AMENDMENT

AMENDMENT I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

THE CONSTITUTION OF THE UNITED STATES

We the People of the United States, in Order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

Section 2. [1] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2] No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least One Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. [1] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

[2] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5] The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, judgment and Punishment, according to Law.

Section 4. [1] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of chusing Senators.

[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. [1] Each house shall be the Judge of the Elections, Returns and Qualifications of its own members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent members, in such Manner, and under such Penalties as each House may provide.

[2] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

[3] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. [1] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2] No Senator or Representative shall, during the time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. [1] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevents its Return, in which Case it shall not be a Law.

[3] Every Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. [1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2] To borrow money on the credit of the United States;

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4] To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6] To provide the Punishment of counterfeiting the Securities and current Coin of the United States;

- [7] To establish Post Offices and post Roads;
- [8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
- [9] To constitute Tribunals inferior to the supreme Court;
- [10] To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;
- [11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
- [12] To raise and support Armies, but no Appropriation of Money to that Use shall be a longer Term than two Years;
- [13] To provide and maintain a Navy;
- [14] To make Rules for the Government and Regulation of the land and naval Forces;
- [15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
- [16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
- [17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And
- [18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. [1] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2] The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[3] No Bill of Attainder or ex post facto Law shall be passed.

[4] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5] No Tax or Duty shall be laid on articles exported from any State.

[6] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

[7] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8] No title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. [1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any title of Nobility.

[2] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws be subject to the Revision and Controul of the Congress.

[3] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

Section 1. [1] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

[2] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[3] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the

States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the Greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

[4] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[5] No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[6] In case of the removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[8] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. [1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

[2] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, to the Courts of Law, or in the Heads of Departments.

[3] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the time of Adjournment, he may adjourn them to such

Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. [1] The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3] The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. [1] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same over Act, or on Confession in open Court.

[2] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress

may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. [1] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

[1] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[3] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII

The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth.

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

AMENDMENT I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II [1791]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III [1791]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII [1791]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X [1791]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI [1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII [1804]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the

President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII [1865]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged

in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV [1870]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI [1913]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT XVII [1913]

[1] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years, and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

[2] When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

[3] This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

AMENDMENT XVIII [1919]

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XIX [1920]

[1] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

[2] Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX [1933]

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successor shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case

of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT XXI [1933]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submissions hereof to the States by the Congress.

AMENDMENT XXII [1951]

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which the Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

AMENDMENT XXIII [1961]

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXIV [1964]

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXV [1967]

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a Majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit

within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determined by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

AMENDMENT XXVI [1971]

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXVII [1992]

Section 1. No law, varying the Compensation for the services of the Senators and Representatives, shall take effect, unless an election of Representatives shall have intervened.

THE FIRST AMENDMENT

**PART
I**

**FIRST AMENDMENT: FREEDOM
OF EXPRESSION**

CHAPTER

1

INTRODUCTION TO FREEDOM OF SPEECH

The First Amendment states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Part II of this book considers the Religion Clauses. Part I focuses on the other provisions of the First Amendment, all of which concern aspects of freedom of expression.

A. HISTORICAL BACKGROUND

The First Amendment undoubtedly was a reaction against the suppression of speech and of the press that existed in English society. Until 1694, there was an elaborate system of licensing in England, and no publication was allowed without a government-granted license. Blackstone, in his famous commentaries on the law, remarked that “[t]he liberty of the press consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. . . . [To] subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.”¹ It is widely accepted that the First Amendment was meant, at the very least, to abolish such prior restraints on publication.

Speech in England also was restricted by the law of seditious libel that made criticizing the government a crime.² The English Court of the Star Chamber announced the principle that the king was above public criticism and that, therefore, statements critical of the government were forbidden. Chief Justice Holt, writing in 1704, explained the perceived need for the prohibition of

1. 4 William Blackstone, *Commentaries on the Laws of England*, 151-152 (1769) (emphasis in original).

2. A classic history of the First Amendment, which reviews this background, is Zechariah Chaffee, Jr., *Free Speech in the United States* (1941).

seditious libel: “If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it.”³ Truth was not a defense to the crime because the goal was to prevent and punish all criticism of the government; if anything, true speech was perceived as worse because it might do more to damage the image and reputation of the government. Professor Zechariah Chaffee said that “the First Amendment was . . . intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America.”⁴

The record for protection of freedom of speech in the colonies was mixed. There were fewer prosecutions for seditious libel than in England during the time period, but there were other controls, formal and informal, over dissident speech. Professor Leonard Levy said that each community “tended to be a tight little island clutching its own respective orthodoxy and . . . eager to banish or extralegally punish unwelcome dissidents.”⁵

Of the prosecutions that occurred for seditious libel, the most famous was the trial of John Peter Zenger in 1735 for publishing criticisms of the governor of New York. Zenger’s lawyer argued that truth should be a defense to the crime of seditious libel. Although the court rejected this argument, the jury was persuaded to disregard the law and to acquit Zenger.⁶

There is thus little doubt that the First Amendment was meant to prohibit licensing of publication such as existed in England and to forbid punishment for seditious libel. Beyond this, though, there is little indication of what the framers intended. Certainly nothing in the historical record sheds light on most of the free speech issues that face society and the courts in the early twenty-first century. Professor Rodney Smolla remarked that “[o]ne can keep going round and round on the original meaning of the First Amendment, but no clear, consistent vision of what the framers meant by freedom of speech will ever emerge.”⁷

In fact, ascertaining the framers’ intent is made more difficult by the fact that Congress in 1798—with many of the Constitution’s drafters and ratifiers participating—adopted the Alien and Sedition Acts of 1798.⁸ The law prohibited the publication of “false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame . . . ; or to bring them . . . into contempt or disrepute; or to excite against them . . . hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States.” The law did allow truth as a defense and required proof of malicious intent.

The Federalists under President John Adams aggressively used the law against their rivals, the Republicans. The Alien and Sedition Act was a major political

3. 14 Thomas Howell, *A Collection of State Trials* 1095, 1128 (1704).

4. Chaffee, *supra* note 2, at 21.

5. Leonard W. Levy, *The Emergence of a Free Press* 16 (1985).

6. See Vincent Buranelli, *The Trial of Peter Zenger* (1957).

7. Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* at 1-18 (1996).

8. 1 Stat. 596, Act of July 14, 1798.

issue in the election of 1800, and after he was elected president, Thomas Jefferson pardoned those who had been convicted under the law. The Alien and Sedition Act was repealed, and the Supreme Court never ruled on its constitutionality. However, in *New York Times v. Sullivan*, in 1964, the Court declared, “Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”⁹

Not surprisingly, then, Supreme Court cases dealing with freedom of expression focus less on the framers’ intent than do cases involving many other constitutional provisions. There is relatively little that can be discerned as to the drafters’ views other than their desire to prohibit prior restraints, such as the licensing scheme, and their rejection of the crime of seditious libel.

B. WHY SHOULD FREEDOM OF SPEECH BE A FUNDAMENTAL RIGHT?

Inevitably, the courts must decide what speech is protected by the First Amendment and what can be regulated by the government. Although the First Amendment is written in absolute language that Congress shall make “no law,” the Supreme Court never has accepted the view that the First Amendment prohibits all government regulation of expression. Justice Hugo Black took the absolutist view of the First Amendment,¹⁰ but he is virtually alone among Supreme Court justices.¹¹ Indeed, the Court expressly declared that it “reject[ed] the view that freedom of speech and association, . . . as protected by the First and Fourteenth Amendments, are absolutes.”¹²

No matter how appealing the absolute position may be to the First Amendment’s staunchest supporters, it is simply untenable. Even one example of an instance where government must be able to punish speech is sufficient to refute the desirability of an absolutist approach. For example, perjury laws or laws that prohibit quid pro quo sexual harassment (“sleep with me or you are fired”) both punish speech, but no one would deny that such statutes are imperative.

Line drawing is inevitable as to what speech will be protected under the First Amendment and what can be proscribed or limited. Moreover, lines must be drawn as to where and when speech will be allowed. Even an absolutist view surely would not permit spectators to yell out while a court is in session and prevent the judge from hearing the proceeding. Lines also must be drawn in defining what is speech. Justice Black attempted to make his view plausible by distinguishing between speech and conduct, allowing the government

9. 376 U.S. 254, 276 (1964).

10. See, e.g., Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 874, 879 (1960) (“The phrase ‘Congress shall make no law’ is composed of plain words, easily understood. The language is absolute. . . . [T]he framers themselves did this balancing when they wrote the [First Amendment]. . . . Courts have neither the right nor the power to make a different judgment.”).

11. Justice William O. Douglas also took this view at times. *Konigsberg v. State Bar of California*, 366 U.S. 36, 56 (1961) (Black, J., dissenting, joined by Douglas, J.).

12. *Konigsberg v. State Bar of California*, 366 U.S. at 49.

to regulate the latter, but not the former. This distinction, too, requires line drawing as to when nonverbal communication should be regarded as speech.

Because even for originalists there is little guidance from history or the framers' intent as to the meaning of the First Amendment, the Supreme Court inescapably must make value choices as to what speech is protected, under what circumstances, and when and how the government may regulate. Such analysis is possible only with reference to the goals that freedom of speech is meant to achieve.

There thus is a voluminous literature debating why freedom of speech should be regarded as a fundamental right. The issue is important in general in understanding freedom of expression, but is also crucial in appraising specific First Amendment issues and how they have been handled by the Supreme Court.

There is not a single, universally accepted theory of the First Amendment, but rather, several different views as to why freedom of speech should be regarded as a fundamental right. To a large extent, the theories are not mutually exclusive, although the choice of a theory can influence views on many specific issues. The four major theories, reviewed below, are that freedom of speech is protected to further self-governance, to aid the discovery of truth via the marketplace of ideas, to promote autonomy, and to foster tolerance. Justice Louis Brandeis offered an eloquent explanation for why freedom of speech is protected that includes all of these rationales. He wrote:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They 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 American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.¹³

1. *Self-Governance*

Freedom of speech is crucial in a democracy: Open discussion of candidates is essential for voters to make informed selections in elections; it is through speech that people can influence their government's choice of policies; public officials are held accountable through criticisms that can pave the way for their replacement. Alexander Meiklejohn wrote that freedom of speech "is

13. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

a deduction from the basic American agreement that public issues shall be decided by universal suffrage.”¹⁴ He argued that “[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”¹⁵ Professor Vincent Blasi argued that freedom of speech serves an essential “checking value” on government.¹⁶ He wrote of the value that free speech serves in checking the abuse of power by public officials and said that through speech voters retain “a veto power to be employed when the decisions of officials pass certain bounds.”¹⁷

There is little disagreement that political speech is at the core of that protected by the First Amendment. The Supreme Court has spoken of the ability to criticize government and government officers as “the central meaning of the First Amendment.”¹⁸ Some commentators have argued that political speech should be the *only* speech protected by the First Amendment. Robert Bork is perhaps the foremost advocate of this position and argued that the “notion that all valuable types of speech must be protected by the first amendment confuses the constitutionality of laws with their wisdom. Freedom of nonpolitical speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives.”¹⁹

The Supreme Court never has accepted this view that the First Amendment protects only political speech. Indeed, the Court has declared that the “guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government.”²⁰ In part, this is probably because of the difficulty of defining what is political speech. Virtually everything from comic strips to commercial advertisements to even pornography can have a political dimension. In part, too, the refusal to narrowly limit the First Amendment in this way reflects the importance of freedom of speech about other topics ranging from scientific debates to accurate commercial information in the marketplace.

2. *Discovering Truth*

Another classic argument for protecting freedom of speech as a fundamental right is that it is essential for the discovery of truth. Justice Oliver Wendell Holmes invoked the powerful metaphor of the “marketplace of ideas” and wrote that “the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”²¹ The argument is that truth is most likely to emerge from the clash of ideas.

14. Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 27 (1948).

15. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 255.

16. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found. Res. J. 523.

17. *Id.* at 542.

18. *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964).

19. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 28 (1971).

20. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

21. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

John Stuart Mill expressed this view when he wrote that the “peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation—those who dissent from the opinion, still more than those who hold it.”²² He said that an opinion may be true and may be wrongly suppressed by those in power, or a view may be false and people are informed by its refutation. Justice Brandeis embraced this view when he said that the “fitting remedy for evil counsels is good ones” and that “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”²³

The marketplace of ideas rationale for freedom of speech has been subjected to powerful criticism by scholars.²⁴ Critics argue that it is wrong to assume that all ideas will enter the marketplace of ideas and even if they do, some may drown out others because some have more resources to have their voices heard. Professor Laurence Tribe observed that “[e]specially when the wealthy have more access to the most potent media of communication than the poor, how sure can we be that ‘free trade in ideas’ is likely to generate truth?”²⁵ Professor Jerome Barron said that “if ever there were a self-operating marketplace of ideas, it has long ceased to exist.”²⁶

Moreover, critics of the marketplace metaphor argue that it is wrong to assume that truth necessarily will triumph over falsehood; history shows that people may be swayed by emotion more than reason. Professor Edwin Baker argued that “the belief that the marketplace leads to truth, or even to the best or most desirable decision, is implausible.”²⁷ He said that it assumes that people will use “their rational capabilities in order to eliminate distortion caused by the form and frequency of message presentation. . . . This [assumption] cannot be accepted. . . . People consistently respond to emotional or irrational appeals.”²⁸ Moreover, even if truth ultimately prevails, enormous harms can occur in the interim. Professor Harry Wellington powerfully made this point when he wrote: “In the long run, true ideas do tend to drive out false ones. The problem is that the short run may be very long, that one short run follows hard upon another, and that we may become overwhelmed by the inexhaustible supply of freshly minted, often very seductive, false ideas. . . . [M]ost of us do believe that the book is closed on some issues. Genocide is an example. . . . Truth may win, and in the long run it may almost always win, but millions of Jews were deliberately and systematically murdered in a very short period of time. . . . Before those murders occurred, many individuals must have come ‘to have false beliefs.’”²⁹

However, the response to these criticisms is to concede the problems with the marketplace of ideas, but to argue that the alternative—government determination of truth and censorship of falsehoods—is worse. The

22. John Stuart Mill, *On Liberty* 76 (1859).

23. *Whitney v. California*, 274 U.S. at 375, 377 (Brandeis, J., concurring).

24. See, e.g., C. Edwin Baker, *Human Liberty and Freedom of Speech* (1989); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L.J. 1.

25. Laurence H. Tribe, *American Constitutional Law* 786 (2d ed. 1988).

26. Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1641 (1967).

27. Baker, *supra* note 24, at 12.

28. *Id.*

29. Harry Wellington, *On Freedom of Expression*, 88 Yale L.J. 1105, 1130, 1132 (1979).

marketplace of ideas may be terribly flawed, but allowing the government to decide what is true and right and suppress all else is much worse. Inevitably, government will censor to serve its own ends, such as by silencing its critics, and even a benevolent government will make mistakes as to what is true and false. Professor Nimmer thus remarked that “[i]f acceptance of an idea in the competition of the market is not the ‘best test,’ [what] is the alternative? It can only be acceptance of an idea by some individual or group narrower than that of the public at large.”³⁰

3. *Advancing Autonomy*

A third major rationale often expressed for protecting freedom of speech as a fundamental right is that it is an essential aspect of personhood and autonomy. Professor Baker said that “[t]o engage voluntarily in a speech act is to engage in self-definition of expression. A Vietnam war protestor may explain that when she chants ‘Stop This War Now’ at a demonstration, she does so without any expectation that her speech will affect continuance of the war . . . ; rather, she participates and chants in order to *define* herself publicly in opposition to the war. This war protestor provides a dramatic illustration of the importance of this self-expressive use of speech, independent of any effective communication to others, for self-fulfillment or self-realization.”³¹

Protecting speech because it aids the political process or furthers the search for truth emphasizes the instrumental values of expression. Protecting speech because it is a crucial aspect of autonomy sees expression as intrinsically important.³² Justice Thurgood Marshall observed that “[t]he First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression.”³³

This view, too, has been criticized. Robert Bork, for example, argued that there is no inherent reason to find speech to be a fundamental right compared with countless other activities that might be regarded as a part of autonomy or that could advance self-fulfillment. Bork said that the self-fulfillment/autonomy rationale does “not distinguish speech from any other human activity. An individual may develop his faculties or derive pleasure from trading on the stock market, working as a barmaid, engaging in sexual activity, or in any of thousands of other endeavors. Speech can be preferred to other activities only by ranking forms of personal gratification. One cannot, on neutral grounds, choose to protect speech on this basis more than one protects any other claimed freedom.”³⁴

Moreover, critics of this view maintain that it ignores the ways in which protecting freedom of speech for some can undermine the autonomy and self-fulfillment of others. In recent years, some have argued for restricting hate

30. Melville Nimmer, *Nimmer on Freedom of Speech* 1-12 (1984).

31. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 994 (1978).

32. See, e.g., Martin Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591 (1982) (arguing that self-realization should be regarded as the exclusive value of the First Amendment).

33. *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

34. Bork, *supra* note 19, at 25.

speech or pornography because of how such expression demeans and injures others.³⁵

4. *Promoting Tolerance*

Another explanation for protecting freedom of speech as a fundamental right that has received substantial attention in recent years is that it is integral to tolerance, which should be a basic value in our society. Professor Lee Bollinger is a primary advocate of this view, and he argued, “[W]hile free speech theory has traditionally focused on the value of the activity protected (speech), [an alternative approach] seeks a justification by looking at the disvalue of the [frequently intolerant] response to that activity. . . . [The free speech principle] involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.”³⁶ The free speech principle is thus concerned with nothing less than helping to shape “the intellectual character of the society.”³⁷

The claim is that tolerance is a desirable, if not essential, value and that protecting unpopular or distasteful speech is itself an act of tolerance. Moreover, such tolerance serves as a model that encourages more tolerance throughout society. But critics question why tolerance should be regarded as a basic value.³⁸ For example, critics argue that society need not be tolerant of the intolerance of others, such as those who advocate great harm, even genocide. Preventing such harms is claimed to be much more important than being tolerant of those who argue for them.

5. *Conclusion*

These four theories are not mutually exclusive.³⁹ None is sufficient to explain all of the cases, and none is without problems.⁴⁰ Yet all are important in understanding why freedom of speech is protected, in considering what expression should be safeguarded and what can be regulated, and in appraising the Supreme Court’s decisions in this area.

35. See, e.g., Mari Matsuda, *Public to Racist Speech: Considering the Victim’s Story*, 87 Mich. L. Rev. 2320 (1989); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982) (arguing for restriction of hate speech); Catharine MacKinnon, *Feminism Unmodified* 146-213 (1987) (arguing for restriction of pornography because of its harmful effects on women). Hate speech is discussed below.

36. Lee Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* 9-10 (1986).

37. *Id.* at 120.

38. See David Strauss, *Why Be Tolerant?*, 53 U. Chi. L. Rev. 1485 (1986).

39. See Rodney A. Smolla, *Free Speech in an Open Society* 14-17 (1992) (arguing for “multiple justifications” for freedom of speech); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212 (1983) (many values underlie the First Amendment; no need to reduce the First Amendment to a single theory).

40. See Ronald Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. Rev. 1405 (1987) (criticizing the foundational theories of the First Amendment).

C. THE ISSUES IN FREE EXPRESSION ANALYSIS

In examining the First Amendment's protection of freedom of expression, analysis is divided into five chapters. First, Chapter 2 examines ways of evaluating any government action restricting freedom of speech. For example, any law can be reviewed to determine whether it is content-based or content-neutral, a distinction that the Court has said is crucial in determining whether strict scrutiny or intermediate scrutiny should be used. Also, any law regulating speech is unconstitutional if it is unduly vague or overbroad. The Court additionally has said that prior restraints of speech are strongly disfavored and thus any government action restricting speech can be challenged if it constitutes a prior restraint. Finally, there is the basic question in evaluating any law as to whether it constitutes a restriction of speech; what government actions sufficiently burden expression as to trigger First Amendment analysis?

Second, Chapter 3 focuses on types of speech that are unprotected by the First Amendment or less protected. The Supreme Court has declared that some types of expression are unprotected so that they may be prohibited and punished. There are other categories of speech that are deemed less protected so that the government has more latitude in regulating them. These categories include incitement of illegal activity, fighting words and provocation of hostile audiences, obscenity and sexually oriented speech, defamatory speech, conduct that communicates, and commercial speech.

Third, Chapter 4 considers the places that are available for speech. Many First Amendment cases involve a claim of a right of access to government-owned property for speech purposes or present a challenge to restrictions on the use of public property for expression. The Supreme Court has drawn distinctions among types of government properties and has articulated rules as to when the government may regulate speech in each.

Fourth, Chapter 5 examines freedom of association. Although association is not expressly mentioned in the First Amendment, the Supreme Court has held that it is a fundamental right because of its close relationship to speech and assembly.⁴¹

Finally, Chapter 6 focuses on freedom of the press. Many issues concerning press freedom are discussed throughout this book. For example, prior restraint of the press—a crucial aspect of the Constitution's protection of the media—is discussed in Chapter 2. Chapter 6 considers the extent to which the First Amendment is a shield that protects the press from government regulation, such as from being taxed or forced to disclose information or being required to allow others to use it. That chapter also considers whether and when freedom of the press creates a right for the press to have access to government papers, activities, and facilities.

Part of what makes First Amendment analysis difficult is that many of these issues can be present in the same case, and there is no prescribed order for analysis. For instance, if the government were to prohibit sexually explicit displays in public parks, the law might be challenged as vague and overbroad; it might

41. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958).