THE IRONY OF FREE SPEECH

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may have to act to further the robustness of public debate in circumstances where powers outside the state are stifling speech. It may have to allocate public resources—hand out megaphones—to those whose voices would not otherwise be heard in the public square. It may even have to silence the voices of some in order to hear the voices of the others. Sometimes there is simply no other way. The burden of this book is to explore when such exercises of the state’s power to allocate and regulate are necessary, and how they might be reconciled with, indeed supported by, the First Amendment.

The First Amendment—almost magisterial in its simplicity—is often taken as the apotheosis of the classical liberal demand that the powers of the state be limited. It provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” The Supreme Court has read this provision not as an absolute bar to state regulation of speech but more in the nature of a mandate to draw a narrow boundary around the state’s authority.

The precise location of this boundary has varied from age to age and from Court to Court, and even from Justice to Justice, but its position has always reflected a balance of two conflicting interests—the value of free expression versus the interests advanced by the state to support regulation (the so-called countervales). Sometimes the accommodation of conflicting interests has been achieved through the promulgation of a number of categories of speech that may be subject to regulation. For example, the state has been allowed to regulate “fighting words” but not the “general advocacy of ideas.” In other cases, the Court engaged in a more open and explicit
balancing process in weighing the state’s interest against that of free speech. The rule that allows the state to suppress speech that poses a “clear and present danger” to a vital state interest might be the best example of this approach. In either instance, the Court has tried, sometimes more successfully than others, to attend to both value and countervalue and to seek an accommodation of the two.

In trying to guide the Court in this process, Harry Kalven, Jr.—in my eyes the leading First Amendment scholar of the modern period—pleaded with the Court to remember that freedom of speech is not “a luxury civil liberty.” In a more jocular mood, he expressed the same sentiment in saying, “Honor the countervales.” Kalven was an ardent defender of liberal values, always in favor of limiting the state, yet he felt that in its resolve to protect speech, the Court should not in any way trivialize the interests of the state. At the end of the day, speech might well win, indeed, speech should win. But not, Kalven insisted, before the Court gave a sympathetic hearing to what the state was trying to accomplish. The Court must begin by attending to the state’s interests and treating them as fully worthy of respect.

The 1960s was an extraordinary period of American law, a glorious reminder of all that it might accomplish. The decade was best known for progress made in racial equality and the reform of the criminal process, but it was also marked by a number of notable free speech victories. When, in his book *A Worthy Tradition*, Kalven celebrated the evolution of First Amendment doctrine over the course of the twentieth century as an example of the law working itself pure, he was referring above all to the free speech decisions of the Warren Court in the 1960s. Although I am sympathetic to this reading of the sixties, I cannot help but wonder whether the free speech decisions of that era represented a fair test of Kalven’s faith that speech would win even if the Court honored the countervales.

Take the Court’s repeated willingness to protect the protest activities of the Southern civil rights movement. In those cases, the Southern states defended their actions in curbing free speech on the ground that they were attempting to preserve order. The Supreme Court listened to that defense with some measure of seriousness, but the plea on behalf of maintaining order was impeached by the racial policies the states were pursuing in the name of that value. Order did not just mean order, but order that preserves segregation. Then, in the years following the Watts riots in Los Angeles in 1965 and the emergence of the black power movement, the claims of order became somewhat distinct from the program of preserving segregation. In that context the countervales, order, could be engaged more sympathetically, but at the risk that free speech would not prevail. For example, in *Walker v. City of Birmingham*, a majority of the Justices upheld a criminal contempt citation against Dr. Martin Luther King Jr. and his followers for parading in defiance of a restraining order, even though the state court had not given him an adequate opportunity to attack that order on free speech grounds. The case arose in 1963, but the Justices spoke in the different circumstances of 1967 and were guided by the events that they saw before them then.

In truth, most of the Warren Court’s First Amendment docket involved cases in which the countervales advanced by the state was neither particularly alluring nor compelling, and for that reason the Court’s decisions in favor of free speech generated widespread support. Examples are such landmarks as *New York Times v. Sullivan* (1964), *Brandenburg v. Ohio* (1969), and even, if it can be included within the reaches of the Warren Court, the *Pentagon Papers* case (1971). Like the
early civil rights protest cases, these decisions are indeed important free speech victories, in that an opposite result would have been a profound setback for the cause of freedom. But at the same time we should recognize that these cases were not a true test of Kalven’s faith that free speech would prevail.

In *New York Times v. Sullivan*, the Court curbed the state’s capacity to protect reputation, but in fact the reputational interest in jeopardy was that of public officials, who, in the Court’s view, necessarily assumed certain risks to their reputation when they entered the political fray. In *Brandenburg v. Ohio*, the Court protected the advocacy of illegal conduct and tightened up the “clear and present danger” test, but it did so in a context devoid of any true danger; the case involved a sparsely attended Klan rally in an isolated farm in Ohio. In the *Pentagon Papers* case the Court refused to give the Attorney General the injunction he sought against the publication of a Department of Defense document that was said to threaten national security. Kalven marveled at the fact that this decision was handed down even when the nation was at war. But there was less to the countervailing claim of national security advanced by the Attorney General than first met the eye. Although the document in question was based on classified documents and was itself classified as “Top Secret,” in truth it consisted of nothing more than a historical study of our involvement in Vietnam up until 1968. Moreover, the war was unpopular in many quarters; most of the study was in the public domain by the time the Court spoke; and though the Court did in fact deny the government an injunction against further publication, a majority of the Justices made clear that the government could protect a legitimate interest in secrecy by use of the criminal law.

The situation is, however, entirely different with three of the free speech issues that dominate public discussion today—hate speech, pornography, and campaign finance. They strain, indeed shatter, the liberal consensus because the countervalues offered by the state have an unusually compelling quality. These contemporary issues are a truer test of Kalven’s faith in the ability of free speech to prevail over the countervalues.

IN A MOST decisive manner, the American constitutional order and its governing political philosophy were reshaped by *Brown v. Board of Education* and the transformations that followed. Whereas the liberalism of the nineteenth century was defined by the claims of individual liberty and resulted in an unequivocal demand for limited government, the liberalism of today embraces the value of equality as well as liberty. Furthermore, contemporary liberalism acknowledges the role the state might play in securing equality and sometimes even liberty. Admittedly, *Roe v. Wade* and its condemnation of the criminalization of abortion have given new vitality to the claims of individual liberty, but never, I would insist, to the exclusion of equality. Indeed, as most commentators and a number of the Justices now recognize, *Roe v. Wade* is not fully explicable as a matter of constitutional theory unless some account is taken of equality and the consequences that criminalizing abortion would have upon the social status of women.

This transformation of the constitutional order and of liberalism itself was not the work of the Supreme Court alone. In the 1960s all branches of government coordinated their efforts and produced such singular measures as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968. In the ensuing decades, as the Court and the presidency moved to the right, the leadership role fell to Congress. The momentum toward equal treatment continued even during the Reagan and Bush years and resulted in the
The Stifling Effect of Speech

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THE SILENCING EFFECT OF SPEECH

This page contains a discussion on the silencing effect of speech, particularly in the context of women's rights and the legal framework. The text explores the historical and contemporary challenges women face in exercising their right to free speech, highlighting the role of legislation and societal norms in fostering an environment where women's voices often go unheard.

The page begins by addressing the importance of acknowledging the difficulties and disparities women face when attempting to exercise their right to free speech. It underscores the need to recognize the barriers that women encounter, both within the legal system and in broader societal contexts. The discussion delves into the mechanisms that perpetuate these silencing effects, examining how different legal frameworks and practices can either support or hinder women's ability to speak freely.

The text also touches on the broader implications of these silencing effects, noting their impact on women's ability to participate fully in public life and the democratic process. It highlights the need for a more inclusive and equitable approach to law and policy that recognizes and addresses the specific challenges faced by women in exercising their right to free speech.

Overall, the page offers a critical perspective on the complex interplay between legal frameworks, societal norms, and the experiences of women, advocating for a more nuanced and empowering approach to free speech that truly respects and affirms the voices of all individuals, including women.
The silencing effect of speech

In the history of free speech, the state has sometimes de-

feated speech. Strong-minded people working to achieve a common purpose:

First amendment cases, strict and more a deficiency of authors and

minds, they can still make claim to the free expression. The

penalties are overly unsuitable and lack any expression of

thoughts on their behalf; but even when political ex-

pression is attacked, we do not see a way of communica-

tion. People sometimes view that the regulation of speech money

is expressed as activity and function, and no regulation is

money is speech of a public and political value as selling a book.

This understanding of what the state is seeking to accom-

serves to make the regulation of speech effective and

use; from the regulation in question can be seen as a

issue that moves beyond the battle between transcendental val-

more of the idea that there may be another way of expressing the

views, a liberty that is greater than the need for free speech. In

liberty; this regulation would not make all disaffection go

liberty, and they bring into a conflict between liberty and

liberty in this case, the argument has inordinately moved an idea's. In

the current context, the speech is regulated by the speech itself. In

speech, public expression is necessary to distinguish books to the

public. Regulations and restrictions necessary to distinguish books to the

and, restrictions must be taken of the face that the First Amend-

unto, to bring the ideas to the public are processed by the First

Amendment.
of the would-be victim each to speak his or her mind, when
the voice of the less affluent, may simply be drowned out.
the public will, in effect, hear only their messages. As a result,
the public discourse in the media and other public domains that
are the staple of media treatment of wealth and power are a
mismatch in the political arena. But also may be the effect
of silencing the door. "The rich may, for example, so dominate
clearer case, unlimited political expenditures not only political
women to sexual objects, subordinating and silencing them. If
the promotion of democracy, where is a worthy—\n
The Stifling Effect of Speech

It is asserted that these speech ends to diminish the victims' ability to respond to the will of their own people. Those who are supposed to remedy this situation must do so in a conception of democracy. In the case of the less affluent, when political power is put to other a worthy public

The Stifling Effect of Speech

What politicians have special and campaign reform, and

Conclusion

responsibilities that the tendency was more special, not more free. The principle of the real, the real is the
treatment of the government of how the government of the people, to be
not the case. The call for their actions...
the consumer culture. As a result, the consumer culture is not the primary
A full and open debate on issues of public
importance
the consumer culture—this is why we have—

Recognizing the problems presented by free speech,

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The silencing effect of speech

In an earlier period, a number of First Amendment scholars have recognized that the state's attempt to silence political speech is sometimes used to repress political dissent. In a famous case, the Supreme Court held that a state statute that prohibited the publication of certain political speeches was unconstitutionally broad. The Court noted that the statute's broad language, combined with the state's interest in maintaining order, created a substantial risk of chilling political speech. This case established the importance of protecting political speech from governmental interference.

In another case, the Court considered the constitutionality of a state law that prohibited the display of certain political posters. The Court held that the law was unconstitutionally vague, and that it violated the First Amendment's guarantee of free speech. The Court emphasized the importance of protecting political speech from governmental interference, and held that the law was overly broad and vague.

These cases illustrate the importance of protecting political speech from governmental interference, and the role of the courts in upholding the First Amendment's guarantee of free speech. The Supreme Court has consistently held that the government cannot interfere with political speech, and that such interference is a violation of the First Amendment.
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Second, in analyzing the principles of the courts in these

The courts declared the laws invalid on their face.

The courts determined that a certain number of public schools were not in compliance with the laws. The courts then noted that the laws were not applied uniformly across the state. The courts subsequently overturned the laws, stating that they were not constitutional.

First, a failure of theory can lead to a failure of inquiry.

This point can be made from the perspective of experience. The courts have made numerous decisions on the basis of their interpretation of the laws. However, these decisions have often been based on a lack of adequate evidence. The courts have not always considered the full implications of their decisions. As a result, the courts have often been criticized for their decisions.

The courts have also been criticized for their failure to consider the impact of their decisions. The courts have often failed to consider the impact of their decisions on the lives of individuals. The courts have also been criticized for their failure to consider the impact of their decisions on society as a whole.

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The art of the democratic society—quality and perhaps the
speech itself.

Art and the Activist State

The silencing effect of speech