



## Freedom of Expression and Speech

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Greg Sidak has written a brief and elegant meditation on the difference between freedom of expression and freedom of speech.<sup>1</sup> He reminds us that speech has at least this distinct advantage: it tends by its nature to be more precise than mere expression. Ambiguous “speech,” as expression tends to be, carries with it most of the costs and fewer of the benefits of what one might term its equivalent in speech. Burning the American flag is one thing, but its near-equivalent in speech—“I contend that this flag is a symbol of oppression, not freedom . . . !”—is something else. Few thoughtful Americans would say that speech of this sort should be banned, at least not in most imaginable circumstances, but some at least claim flags should be protected from intentional, fiery destruction.

Sidak is correct to point out this difference, but there are many differences within the category of speech itself that make it only too susceptible to regulation. There are also categories of expression that ought to be robustly protected. A brilliant constitutionalist could perhaps capture these distinctions abstractly in words (or perhaps expressions), but I doubt it.

Some speech needs to be prohibited or at least limited, but hardly anybody agrees on what. A favorite example of recently defeated Democrats is corporate speech, like that practiced by the nonprofit corporation Citizens United.<sup>2</sup> The basic idea of defenders of the Federal Election Commission’s position in that Supreme Court case is that corporations, unlike most natural individuals, wield vast economic power, and so can speak more loudly than individuals can, so it is unfair, and even dangerous to our political system, to give them the same protections as natural individuals have. An opposite

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<sup>1</sup> J. Gregory Sidak, *Some Economics of Flag Burning and Jimi Hendrix*, 1 CRITERION J. ON INNOVATION 563 (2016).

<sup>2</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

position is naturally held by Republicans, and is roughly that corporations are just legal fictions that spread their cloak of limited liability (among other advantages) around natural persons, who cooperate with one another to say their message, much as a chorus sings an anthem. The chorus might be called “The National Cathedral Chorus” and even sport an “Inc.” after its name, but its canticles are still composed of individual voices. To keep them from speaking jointly would be to force them as individuals to speak so quietly that they could not be heard, which violates the point of protecting speech in the first place. Besides, some things can only be said as a group.

Not everyone who opposes federal regulation of corporate-made movies about presidential candidates, of course, supports this position. It is but one of the grounds for opposing regulation. The view that all speech, or at least all remotely political speech, should be unregulated, is that it makes public debate robust, so that the public square becomes a laboratory of truth, with good ideas driving out bad. This is the liberal ideal: the “marketplace of ideas.” This marketplace should be left unregulated for the same reasons that other marketplaces should be. Public choice economics tells us that any effort to regulate this marketplace will inevitably devolve into efforts to oppress the competition against those who control the regulators. This seems, obviously enough, to be the motivation behind the criticisms of the *Citizens United* case. The newspapers and labor unions, though corporate in form, would presumably not be regulated were *Citizens United* overturned.

But there is a conservative take, best introduced by an apocryphal story. In a law school class on the First Amendment, a group of law professors and students traveled to a nearby “adult movie store.” They entered the shop and, in addition to seeing the seedy clientele standing about, were immediately assaulted by the distinctive odor that permeates some of the lower-rent examples of this sort of establishment caused by customers who had paid for vigorous, short term rentals. One old conservative professor on the field trip turned to his liberal colleague, who wore an appalled expression on his face, smiled and said, “Welcome to the marketplace of ideas.”

Before liberals discovered the advantages of suppressing free speech, it was mostly a conservative game. Conservatives opposed free “obscene” speech as instances of public indecency. The widespread availability of pornography was supposed to lead to the end of civilization as we knew it, and arguably it has had that effect. At any rate, technology in the form of the Internet soon enough delivered a universal pornographic cornucopia to families across the world, so much so that even *Playboy.com* has decided to put clothes back on its models. The conservatives were not necessarily wrong about pornography, but their resistance was futile.

The question is, does banning the burning of the American flag constitute another futile gesture of resistance, or does it build a bulwark of sand

that might resist a least a few of the incoming tides? Of course, allowing flags to be burned would assuage consciences liberal and (some) conservative alike that even such an acting-out was respected, despite its inflammatory and almost certainly incoherent message. Yet if expression must pass even some minimum measure of coherence, many a soapbox orator, that sturdy paragon of free-speech exerciser, one suspects, could be shut down by the police, even supposing the police could judge coherence. Probably many forms of expression that do not rise to the level of coherent speech must be allowed under any free-speech principle worth its salt. Coherent political speech should be at the top of the list and enraged rioters breaking windows much nearer the bottom of things protected under this principle. The top should be protected and the bottom not, and while judges must earn their keep making finer distinctions, the rest of us have every right to remain skeptical.