Protecting Free Speech from Itself

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Toni Massaro & Helen Norton, *Free Speech and Democracy: A Primer for 21st Century Reformers* (Dec. 15, 2020), available on SSRN.

There has been a long-standing belief that more speech produces more freedom, and that a governmental regime is democratic to the extent that governmental control of speech is minimized. Recent developments have called these beliefs into question, however. Justice Brandeis may have said that sunlight is the best of disinfectants, but Donald Trump has given disinfectants a bad name, and cast doubt as well on their metaphorical referents through his unceasing falsehoods and his flirtation with or embrace of Russian internet disinformation. He is out of office, but his shenanigans are in fact examples of much more extensive dilemma that remains with us today. In a recent article I like lots, Toni Massaro and Helen Norton confront this dilemma and offer possible responses.

The problem, as the authors note, is that speech has been weaponized by a toxic mixture of new technology and extreme partisanship. The internet in particular, as a source of information that people increasingly rely upon, is less a marketplace of ideas and more a means of inducing people to buy into defective reports and harmful attitudes, by overwhelming them with input or misleading them with subliminal messages. Instead of addressing this problem, a conservative Supreme Court has weaponized free speech doctrine by treating government efforts to regulate defective products and harmful substances as an intrusion on the free speech rights of those who sell these products and substances in the actual marketplace. By thus overlooking serious threats to speech and instituting counter-productive protections, the Court has created a serious mismatch between real dangers and existing doctrine.

Professors Massaro and Norton respond to this situation by recommending what they call “tweaks” rather than “topples” – delimited doctrinal adjustments as opposed to comprehensive revisions. Their choice is based on the incremental character of judicial reasoning and the widespread reverence for current free speech protections. In fact, I think the authors undersell their recommendations. These can certainly be implemented incrementally, but they are based on important conceptual considerations that point toward new understandings of the way speech functions in the context of our modern world.

One recommendation is to shift our speech-oriented solicitude from the rights of speakers to the rights of listeners. As Robert Post has pointed out, First Amendment doctrine depends on relationships; without listeners, speech is only noise. If one reads too much John Stuart Mill, the image of speech that one will have in mind is discussion or debate among relatively equal parties. In the modern world, however, there is an asymmetry between the two. In part, this is because speech – that is, the ability to reach listeners – costs money. In part, it is because the speech that reaches listeners makes money, either directly by influencing ordinary people in their capacity as consumers or indirectly by influencing them in their capacity as voters. The result is that the wealthy speak and ordinary people listen. Professors Massaro and Norton propose that free speech doctrine should be tweaked to provide more protection to listeners. Instead of being so solicitous of professionals’ right to speak – or not to speak on religious grounds – the doctrine should protect those who consult these professionals and want to obtain necessary, truthful information. Instead of freeing the expenditure of money from campaign finance regulation, the doctrine should recognize that the essential freedom is the ability of voters to hear each candidate’s position and reach informed judgments.

Two other recommendations that Professors Massaro and Norton advance are to rethink the scope of state action to which the Free Speech Clause applies, and to rethink the concept of neutrality that defines a good deal of its substance. Here again, the operation of the internet raises crucial questions. While the authors acknowledge the value

of the autonomy that the state action doctrine provides, they question its dichotomous rigidity. Internet providers may be private for certain purposes, but their ubiquity and influence suggest that inclusiveness requirements might be imposed on them by courts. Similarly, Professors Massaro and Norton acknowledge the force of neutrality arguments, but recommend that content-sensitive regulation may be constitutionally permissible if it is designed to avoid misleading communications such as robot-generated messages that appear to come from individuals.

The example of racist speech at private universities provides a further illustration of the authors' argument. This may be one context where the public-private dichotomy on which the state action doctrine is based breaks down, given universities' essential role in our increasingly knowledge-based economy, the proportion of their research that is supported by government grants, and the extent to which higher education is provided by government in most Western nations. Their private status could be challenged through exceptions to state action doctrine such as entanglement or public function, but such doctrinal tweaks might well be grounded on a more basic re-evaluation of the doctrine as it applies in particular contexts such as racist speech. Regulation of racist speech is content-based, and thus not neutral, but the "Court's sometimes platitudinous claims to neutrality are descriptively inaccurate" for many of its decisions. In this case, doctrinal tweaks allowing content-based regulation might be supported by the more general recognition that universities, by virtue of constitutional decisions and federal legislation, are communities that explicitly welcome students of different races, ethnicities and religions. In this sense, they embody particular commitments, and the speech that they allow might be regulated on the basis of those non-neutral commitments.

All of this, of course, is controversial. Professors Massaro and Norton certainly do not deny the importance of free speech or the dangers of allowing government to regulate it. They remind us, however, that legal doctrine, no matter how well-established and revered, does not justify itself but rather must be justified by the purpose that it serves. New circumstances can sunder a previously secure connection between a given doctrine and its purpose. Modern modes of communication and increasing political polarization constitute such circumstances. They demand that we rethink free speech doctrine to ensure that it continues to serve its underlying purposes.

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