Free Speech and Election Law

Chief Justice Rehnquist and the Freedom of Speech

*By Richard W. Garnett**

With time or overuse, even the most spot-on insight can degrade to a tired cliché or shopworn truism. Still, Tocqueville was right: In the United States, sooner or later, almost every interesting or controversial question becomes a legal one. What's more, a present-day Tocqueville might add, by way of friendly amendment to his predecessor's original report, it seems that all of the *really* interesting or controversial problems are eventually packaged, often quite creatively, in freedom-of-speech terms. As a result, the First Amendment's Free Speech Clause now occupies much of the field when it comes to our simmering (and sometimes boiling) public debates on matters of law, policy, and morality. Indeed, this "free-speech takeover" of public (and private) discourse was one of the more striking and significant developments during Chief Justice William Rehnquist's long tenure on the Supreme Court.

Now, the point here is not merely to re-hash the observation, or the complaint, that certain forms of once-outcast, low-value expression have come to enjoy First Amendment status and protection. The free-speech takeover has been more dramatic, and more interesting, than just that. Today, in the courts of both law and public opinion, arguments about a huge range of human activities are constructed using First Amendment premises, precedents, and jargon. The Supreme Court's First Amendment doctrines have invited and also, in turn, been shaped by this general tendency to transpose conversations that matter into a free-speech key.

It is fair to say that, by and large, Chief Justice Rehnquist resisted, or at least regretted, this development. In 1976, for example, when the Justices switched course and extended the First Amendment's protections to commercial advertising, he chided his colleagues for second-guessing duly enacted economic regulations, insisting that "in a democracy, the economic is subordinate to the political."[1] Just a few years later, Rehnquist dissented from the Court's ruling striking down certain restrictions on election-related speech and spending by corporations, insisting that "a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law" and, therefore, does not necessarily enjoy "the right of political expression." And in *Texas v. Johnson*, the flag-burning case, he insisted—again in dissent—that, for purposes of the First Amendment, flag burning should be regarded as "the equivalent of an inarticulate grunt or roar" rather than an "essential part of any exposition of ideas."[2]

But it would be a mistake—or, at least, it would be an incomplete explanation—to chalk up Rehnquist's views in these and similar free-speech cases simply to an unyielding deference to the Constitution's original meaning, a law-and-order disposition, or lingering midwestern babbitry. Nor is it clear that, as Professor Geoffrey R. Stone has charged, Rehnquist's record cannot be explained or justified in terms of any "plausible" or "coherent theory of the First Amendment."[3] Actually, his work in this area reveals a careful and instructive appreciation for the fact that the expansion of constitutionalized free-speech rights and the accompanying translation, or reduction, of so many policy questions to free-speech problems have come at a cost.

To be sure, it is almost *always* costly to recognize and protect constitutional and human rights. These rights are guaranteed and celebrated in our law and traditions not because they are painless, but because we think they are *worth* the price to signify and advance our commitments to human dignity, civil liberties, and democratic government. It might seem a bit "chintzy", then, for Rehnquist, citing the costs of expansion, to have dragged his feet and lagged behind while the Court and the culture steadily pushed back the boundaries of free-speech rights. After all, what could be wrong with more expression, more rights, more freedom?

Just this, he might have said: "Sometimes, more is less." That is, the more that "free speech" purports to mean, the less meaningful the protections from government action that free-speech rights can provide. The more work we ask the freedom of speech to do, the less energetically and successfully it will be able to do it. Remember, as our notion of free speech expands, government actions will more often bump up against, burden, constrain, or even punish purportedly protected expression. If everything becomes speech, and if, as a result, nearly all state actions are governed by, and nearly all pursuits protected by, the First Amendment, then it should come as no surprise when the courts become unable or unwilling to enforce free-speech protections in a rigorous or demanding way.

In his First Amendment opinions, Chief Justice Rehnquist often highlighted a variation on this "more is less" concern: as the civic, social, and political territory controlled by the Free Speech Clause grows, the amount shrinks that is governed democratically and experimentally by the people and their representatives, or that is left under the direction of private persons, groups, and institutions. One implication of the free-speech takeover, Rehnquist warned us, is that difficult policy and other decisions depend increasingly—and, in his view, excessively—on judges' evaluation of the abstract weight or worthiness of the government's interests, and on their application of one or another First Amendment balancing "tests," rather than on deliberation, compromise, and trial-and-error by and among citizens and politically accountable public officials.[4]

It is true, then—but it should be neither surprising nor troubling—that one does not detect in Rehnquist's free-speech opinions any burning enthusiasm for increasing the scope of the First Amendment, either by expanding the notion of what counts as speech or by increased judicial sensitivity to possible burdens on that speech. The late Chief Justice consistently tried to avoid increasing the range of policy questions and political decisions that are subject to judicial review for compliance with the First Amendment. And, Rehnquist's reasonably consistent aversion to this result was of a piece with a theory of the First Amendment specifically, and of the Constitution generally, that is coherent, plausible, and normatively attractive.

In an insightful essay commenting on the Court's then-recent *Krishna Consciousness* decision[5]—in which the Justices concluded, among other things, that a public airport is, for free-speech purposes, a non-public forum—Professor Lillian BeVier suggested that the Court's public-forum doctrine was in "disarray" and noted the "deep division among the Justices about the underlying purpose of public forum doctrine."[6] She suggested that two models—an "Enhancement" and a "Distortion" model—were competing "to supply the underlying premise of the public forum right." The Enhancement Model, she wrote, "is concerned with how much speech takes place in society and with the overall quality of public debate. . . . It presupposes that the core mission of the First Amendment is to promote an idealized vision of the democratic process by promoting speech about public and, in particular, political issues." The less ambitious Distortion Model, on the other hand, "portrays the First Amendment as embodying nothing more than a set of constraints upon government actors. . . . According to the Distortion model, the essential task of First Amendment rules is to restrain government from deliberately manipulating the content or outcome of public debate."

Rehnquist's "relatively modest set of assumptions about the appropriate boundaries of the judicial task," put him squarely in the Distortion Model camp. For the Chief Justice, Professor Bevier might have said, the aim is not to interpret, expand, and deploy the First Amendment in order to achieve the quality and quantity of constitutionally protected speech that is regarded as optimal by the Court's Justices. Or, as Rehnquist himself put it nearly thirty years ago: "It should not be easy for any one individual or group of individuals to impose by law their value judgments upon fellow citizens who may disagree with those judgments. Indeed, it should not be any easier just because the individual in question is a judge."[7] The goal, instead, should be to police vigorously government attempts to misuse its regulatory and managerial powers to stack the deck against disapproved viewpoints, while at the same time minimizing the debate-skewing dangers associated with judicial review and preserving as much room as possible for politics, experimentation, and compromise. After all, he might have added, "however socially desirable the goals sought to be advanced. . . , advancing them through a freewheeling, non-elected judiciary is quite unacceptable in a democratic society."[8]

Professor Bevier's thesis explains a lot—at least, it does at first. At the same time, it must be conceded that some of Chief Justice Rehnquist's later votes and opinions in First Amendment cases might seem inconsistent with Bevier's claim that Rehnquist is working from a model that is skeptical of judicial review and deferential to politics. For example, Justice Rehnquist substantially retreated from—if not abandoned entirely—his strong position against First Amendment protection for commercial advertising. His vote and dissenting opinion in *McConnell v. Federal Election Comm'n*—involving the so-called Bipartisan Campaign Reform Act of 2002, indicate a marked move away from his previous view that regulations of political speech by corporations are not the First Amendment's concern.[9] And his majority opinion in *Boy Scouts of America v. Dale*,[10] which concluded that the Boy Scouts' First Amendment right of "expressive association" entitled it to fire an openly gay scoutmaster notwithstanding a state law prohibition on such discrimination, seems to embrace a notion of association-as-speech that is broader than Rehnquist might have been expected to believe. What's going on?

One explanation, of course, is that Rehnquist's relatively narrow understanding of the Free Speech Clause's content and reach always had more to do with bringing about his preferred policy outcomes than with a principled commitment to democratic government or a deep-seated concern about the distorting effects on civil society of judicial review. But this explanation is both uncharitable and unsatisfactory. Fortunately, a better one is available.

I suggested above that Rehnquist's free-speech decisions reflected his concern that as the civic, social, and political territory controlled by the Free Speech Clause grows, the amount shrinks that is governed democratically and experimentally by the people and their representatives, or that is left under the direction of private persons, groups, and institutions. In keeping with this concern, Rehnquist tended to resist constitutionalizing in free-speech terms disputes about economic policy or the management of public property and resources, a resistance that indicates a desire to protect the workings and structure of civil society from intrusive, and possibly distorting, First Amendment review.

In his ambitious "retrospective on the Rehnquist Court," Professor John McGinnis contended that, in a number of areas, the Chief Justice has developed a jurisprudence that "invigorates decentralization and the private ordering of social norms," in part by protecting the autonomy of mediating associations and institutions—like corporations, political parties, local governments, and the Boy Scouts—"from the encroachments of more centralized power."[11] If this is right, then Rehnquist's later decisions and votes in favor of Free Speech claimants can and perhaps should be seen not so much as a departure from his earlier rulings, but instead as an application of the same, overriding belief that

the First Amendment should be understood and applied in a way that protects and values localism, pluralism, and politics, and that "permits. . .debate to continue, as it should in a democratic society."[12]

We have all heard, read, and (probably) argued a good deal lately about the "judicial philosophy" of nominees to and Justices of the Supreme Court of the United States. Senate staffers, pundits, "big media" journalists, and bloggers have scoured the sources, including college research papers, job applications, appellate briefs, and opinions—even thank-you notes—looking for clues (or smoking guns). To understand William H. Rehnquist's understanding of the Free Speech Clause—and, more generally, his "judicial philosophy"—it is essential to understand his consistent goal was to insist and, to the extent possible, ensure that the people—"We the People," the "ultimate source of authority in this Nation"[13]—acting through their politically accountable representatives, retain the right to serve (or not) as the agents of and vehicles for that change. What animated Rehnquist's work and career on the Court was a clear-eyed appreciation for tension that can exist between the "antidemocratic and antimajoritarian facets" of judicial review—facets that, he reminded us, "require some justification in this Nation, which prides itself on being a self-governing representative democracy"—and the "political theory basic to democratic society."[14]

* Richard W. Garnett is the Lilly Endowment Associate Professor of Law at the University of Notre Dame.

Footnotes

[1] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (Rehnquist, J., dissenting).

[2] Texas v. Johnson, 491 U.S. 397 (1989) (Rehnquist, J., dissenting).

[3] Geoffrey R. Stone, *Justice Rehnquist and "The Freedom of Speech, or of the Press," in* Bradley, *supra*.

[4] Early in his career, then-Justice Rehnquist pressed this argument in the context of a general discussion of constitutional interpretation. *See* William H. Rehnquist, *The Notion of a Living Constitution,* 54 Tex. L. Rev. 693 (1976).

[5] Int'l Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

[6] Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories,* 1992 Sup. Ct. Rev. 79.

[7] Rehnquist, *supra.*

[8] *Id.*

[9] 540 U.S. 93 (2003).

[10] 530 U.S. 640 (2000).

[11] John O. McGinnis, *Reviving Tocqueville's America: The Supreme Court's New Jurisprudence of Social Discovery,* 90 Cal. L. Rev. 485 (2002).

[12] *Washington v. Glucksberg,* 521 U.S. 702 (1997).

[13] Rehnquist, *supra.*

[14] *Id.*