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Positive First Amendment

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The First Amendment to the U.S. Constitution guarantees five basic freedoms: (1) religion, (2) speech, (3) press, and the right to (4) assemble and to (5) petition the government for a redress of grievances. Those who advocate for a positive, or progressive, First Amendment are particularly interested in how the First Amendment affects media law and policy. A positive First Amendment approach insists that the government should have a more active role in promoting a better speech environment for citizens so that a healthier democracy can flourish. This entry first distinguishes between the positive and negative approaches to the First Amendment. It then discusses the positive First Amendment approach in practice, how the negative approach has generally prevailed in court rulings on the news media, and the application of the positive approach to media reform.

Undergirding the vision of a positive First Amendment is the belief that media should represent a diversity of voices and viewpoints—and that government, backed by the First Amendment, should mandate access and create infrastructure that allows for multiple voices. From this view, the First Amendment permits the government to enact policies that ensure public access to important information and to media systems. The view, in other words, holds that the First Amendment imposes obligations on media in addition to protecting media from government censorship.

The contrary view, grounded in what is commonly referred to as negative freedom or liberties, holds that the First Amendment exists primarily to restrain government action, not to promote it. This view holds that the Bill of Rights, of which the First Amendment is a part, is at core an antiauthoritarian document that protects citizens, and media, from government infringement or interference. In other words, this view contends that the First Amendment's purpose is to ensure that citizens, and media, have the right to express ideas openly without consequence or censorship from the government.

First Amendment scholar Ruth Walden once characterized the differences between the two views in terms of the questions they ask about the government's role in promoting or regulating speech. A positive First Amendment approach asks: What do we want the First Amendment to accomplish? Whereas an approach grounded in negative freedom asks: What do we want the First Amendment to prevent? Phrased differently, media scholar Victor Pickard has explained that negative freedom or liberties prioritize freedom from government intrusion, while a positive First Amendment approach prioritizes positive liberties such as freedom for or to a diverse media system. Most media law and policy in the United States traditionally has exemplified the negative freedom approach. But not always.

Positive First Amendment in Practice

Advocates of a positive First Amendment approach point to examples of progressive media policy in practice as well as court decisions that have seemingly defended positive rights. Pickard, for example, highlights the postal system as a classic example of the government building out a communication infrastructure or network and guaranteeing public access. Believing that Americans should have access to reliable and diverse information, the founders of the U.S. government significantly subsidized the development of the postal system and privileged the postal system's educational function rather than its ability to make a profit.

In terms of court decisions, one example of language supporting positive rights appeared in the 1945 U.S. Supreme Court case Associated Press v. United States. In that case, the news service the Associated Press argued that the First Amendment guaranteed the organization certain exemptions to federal antitrust law. The Supreme Court rejected the argument, however. "It would be strange indeed," Justice Hugo L. Black wrote in the majority opinion, "if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom." The ruling said that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." The Associated Press's business practices that were at issue in the case put newspapers without the news service at a competitive disadvantage. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests," Black wrote.

Perhaps the prime example of the Supreme Court championing a positive rights approach was its 1969 decision in Red Lion Broadcasting v. FCC. In the Red Lion case, the Supreme Court upheld what was known as the fairness doctrine. The doctrine, which was generated by the Federal Communications Commission (FCC) in the 1940s, stipulated that broadcasters (on terrestrial radio and over-the-air television) had a responsibility to provide coverage of important public issues that arose in their communities and to ensure in their coverage that they fairly represented all significant viewpoints on those issues. A related aspect of the fairness doctrine stipulated that when a broadcaster aired what amounted to a personal attack on an individual or group, the broadcaster also needed to notify the target of the attack and offer free time for the target to reply.

Ruling that the fairness doctrine and its accompanying provisions "enhance, rather than abridge, the freedoms of speech and press," the Supreme Court upheld the fairness doctrine against a broadcaster who challenged it on First Amendment grounds in Red Lion. In the decision written by Justice Byron R. White, the Court ruled that it "is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market." White wrote that the public has a right to "receive suitable access to social, political, esthetic, moral, and other ideas and experiences" and that one of the goals of the First Amendment is to produce "an informed public capable of conducting its own affairs." The fairness doctrine, the Court concluded, was consistent with that goal.

The Prevailing Negative Freedom Approach

Importantly, though, the Court acknowledged that its approach to broadcasters in Red Lion was different from its approach to print media generally—and that characteristics of the media forms justified the different First Amendment standards. Terrestrial radio and over-the-air television reach listeners and viewers by traveling on frequencies using the electromagnetic spectrum, which is a finite resource. The First Amendment right to broadcast thus isn't comparable to "the right of every individual to speak, write, or publish," the ruling in Red Lion noted, and the government (in the form of the FCC) consequently had the right to regulate the broadcast industry in ways such as assigning frequencies to stations and regulating content through mechanisms such as the fairness doctrine. The FCC later stopped enforcing the fairness doctrine in the late 1980s in the midst of a deregulatory push from the agency, however.

The Supreme Court has generally rejected extending the positive rights approach to other media contexts. The opposite view, holding that the First Amendment exists primarily to restrain government action against private speakers, is what has prevailed. Indeed, Pickard has referred to the American media system as corporate libertarianism, where the negative rights of media corporations are favored over the positive rights of consumers. A chief example to demonstrate the point is the Supreme Court's 1974 decision in Miami Herald Publishing Company v. Tornillo, where the Court ruled that the First Amendment did not give the government the right to force a newspaper to publish the views or ideas of a citizen. The Court said that the choice of content to go into a newspaper, including decisions about how to cover public issues and public officials, amounts to decisions that must be made by newspaper editors, not the government. "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution," the Court concluded.

Positive First Amendment and Media Reform

Advocates who push for reform of the U.S. media system argue that, as in Red Lion, the First Amendment should be viewed as a means for the government to create opportunities for speech and press freedoms. These advocates maintain that a more positive or progressive First Amendment recognizes that concentrated corporate media power—which defines the U.S. media system, with a small number of corporations controlling a large percentage of the content the media audiences consume—is harmful for democratic deliberation. While it is justifiable to protect against an oppressive government that censors opinions it finds disagreeable, positive First Amendment advocates argue that the lack of diversity and opportunities in the U.S. media system is likewise worrisome and should be addressed.

Scholars such as Pickard have proposed that the United States should encourage government efforts to support public service journalism, through mechanisms such as subsidies for an expanded public media system, tax incentives for media institutions struggling financially to transition into nonprofit status, and using public infrastructure to support producing local news content in communities. Others have suggested that embrace of a positive First Amendment would allow for some government regulation of social media platforms to ensure they promote healthy dialogue rather than facilitate the spread of misinformation.

In the 2017 decision Packingham v. North Carolina, the U.S. Supreme Court recognized the essential role the internet and social media platforms play in providing a modern-day public square. In striking down a state law that made it a crime for a registered sex offender simply to access a commercial social networking site, such as Facebook, the Supreme Court reflected a positive First Amendment approach as it articulated why the law barring such access violated the First Amendment. “A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more,” Justice Anthony M. Kennedy wrote in the majority opinion. “By prohibiting sex offenders from using [social media] websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”

See also Censorship; Fairness Doctrine; Federal Communications Commission (FCC); First Amendment; Access to Media; Media Monopoly; Media Ownership; Supreme Court and Journalism

Legal Citations

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