

Because We Can

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When I first started studying the First Amendment — nearly a decade ago; yikes, this is a very overdue blog post — I read about the different theories trying to make sense of it. Some scholars argued the First Amendment’s goal was to create a robust marketplace of ideas: if everyone could share their opinion, the truth could come out through robust debate. Others concluded the First Amendment was a sort of logical safeguard: by protecting speech and assembly and petitions for redress of grievances, it guaranteed people the right to work against laws they disapprove of, kind of the way the Second Amendment is said to be a bulwark against totalitarianism.

These aren’t just theoretical debates; the theories have practical consequences for how one interprets that key amendment. If you believe it’s for a marketplace of ideas, then you will support regulation aimed at correcting market failures by suppressing certain kinds of problematic speech. If you believe it’s a political safeguard, then you will not be too worried about speech regulation aimed at clearly nonpolitical speech.

Now, I’m not quite sure why such a theory is needed. The First Amendment always struck me as perfectly clear: “Congress shall make no law.” No law meant no law (at least with regard to content; I’m more lenient when it comes to regulating other aspects). But if one has to have a theory, it struck me the right one was something completely different: Because We Can.

The Framers were very skeptical of government. The system they designed was full of checks and fetters, of which the First Amendment is probably the most extreme (unless you believe in a libertarian conception of the Tenth). They saw government as a necessary evil; they were willing to accept it, but they wanted to constrain it where they could.

And speech is a very obvious way to constrain it. A government needs to be able to stop violence and make war and so on or its people will get very badly hurt. But there’s no reason it has to stop speech. As the old saying goes, sticks and stones may break my bones but words will never hurt me. Words do hurt, of course, but theirs is a tolerable pain. People, and society, march on even in the face of grievous insults. And so the Framers decided to exclude this class of regulation from the government’s ambit. Not because speech is particularly good, but because it’s not particularly bad. Because it’s one thing they could safely exclude. Because we can.

The implications of this theory for interpretation are obvious: they lead to the most expansive conception of the First Amendment compatible with the other

goals of government: a stable democratic body to promote the general welfare, and so on. That's certainly further than any court heretofore has gone and probably a bit further than I'd personally prefer, but isn't that what fetters are for?