

David M. O'Brien *Congress Shall Make No Law: The First Amendment, Unprotected Expression, and the U.S. Supreme Court*. New York: Rowman & Littlefield Publishers, 2010. Pp. vii + 136. ISBN 978-1-4422-0510-9

When a rule becomes inundated by exceptions, it's useful to examine its significance within the context of cases to which it applies. We might expect that certain rules would cause more controversy than others based on their relative complexity; however, even the most seemingly straightforward rules raise questions about the point at which exceptions can and should occur. When I was in grade school, everyone was expected to adhere by a strict dress code, which was explicitly laid out in the school's handbook. All students were required to wear coat and tie (it was an all boys school) unless told otherwise by a teacher. Problems arose, though, on the warmer fall and spring days when students felt uncomfortable having to wear their sport coats at all times. As such, an exception to the rule was made on days during which it was determined by the headmaster to be too warm for sport coats. Although this example seems trivial, it points to complex issues about the point at which an exception should be granted, and under what specific circumstances. Not only do students have different levels of tolerance for warm temperatures, but they also wear different kinds of sport coats, shirts, and pants, meaning that they could certainly disagree over the appropriate or applicable "norm" to apply. Given that the traditions of the school were old and well respected, there were many faculty members who felt as though the exception need only be granted in the most extreme cases.

A case this minor provides some sense of how many factors need to be considered in determining what norms and exceptions are, and how to assess the viability of any criteria for assessing the applicability of a given exception. It's not surprising, therefore, that debates about the single most important document in the US's history, the Constitution, have spanned several centuries. In particular, the Free Speech Clause of the First Amendment, which declares that "Congress shall make no law... abridging the freedom of speech, or of the press," has resulted in countless landmark Supreme Court decisions that have gradually altered the standards for what constitutes protected speech in America. Its significance should not be understated, as it affects virtually every form of media production consumed within the United States. Despite the fact that the statement itself appears definitive and absolute, since it clearly states that "no law" should be made, the command itself possesses the potential to create controversy. Thus, numerous situations have occurred in the past where the resultant controversy has brought about perceived danger or harm to others.

Beginning with the Alien and Sedition Acts of 1798, which made it a crime to write anything false or scandalous against the government, there was a growing willingness amongst members of the Supreme Court to sacrifice the literal meaning of the First Amendment to a more interpretive reading. The journey of free speech policy in the United States has taken and continues to take a number of complex turns because interpretations evolve or shift over time, and with recent advancements in Internet communication, the First Amendment seems poised to remain a major focal point in the realm of free speech.

David M. O'Brien's *Congress Shall Make No Law: The First Amendment, Unprotected Expression, and the Supreme Court* serves as a significant contribution to the field of First Amendment Law by offering an overview of crucial issues and, moreover, by emphasizing the outlook for the future of free speech. O'Brien's credentials position him favorably for the task; he was a judicial fellow and research associate with the Supreme Court, he has written numerous articles and books on the Supreme Court, and he is currently the Leone Reaves and George W. Spicer Professor of Law at the University of Virginia. Considering the daunting task of compiling a succinct account and analysis of the history of free speech in the United States, Professor O'Brien does well to allow readers to better understand the complexities of free speech policy in the United States.

O'Brien's introductory chapter begins with a discussion about some of the primary differences in specific First Amendment interpretation methods. While recognizing the early relevance of Ad Hoc Balancing and First Amendment Absolutism, O'Brien shifts his focus toward the method that the Supreme Court gradually came to accept, known as Definitional Balancing. This technique, defined by the Supreme Court's grouping of unprotected speech into certain definitional categories, serves as the foundation and organizational structure of the book, allowing the reader to closely align his or her thinking with that of the Supreme Court by focusing one at a time on specific areas of controversy. The four categories of unprotected speech, -- the obscene, the defamatory, commercial, and fighting words or disruptive expression, -- serve as the subjects of the middle chapters, in which O'Brien examines the respective landmark Supreme Court rulings that apply to each and the issues at stake.

One of the valuable aspects of O'Brien's analysis is that he traces each category from its beginning up until the present, while ultimately making claims about how the Supreme Court now rules upon that category. When commenting upon obscenity, O'Brien points out that one of the only kinds of speech that now qualifies as obscene is child pornography. He notes that, "While the court has largely expanded First Amendment protection for obscenity by narrowing that category of unprotected speech to basically hard-core pornography, child pornography has been recognized as a special case because of the harmful effects on children in its production, possession, and distribution." Therefore, as O'Brien comments, there is a definite limiting factor that occurs over time as a result of definitional balancing. Likewise, the category of so-called "fighting words" has been rendered almost completely null. This suggests that over time definitional balancing can in fact reach a threshold at which there remains little room for change.

In the conclusion, O'Brien points out that the various categories now provide at best a guiding framework for the Supreme Court. There now exist a number of other content-based restrictions on free speech due to specific circumstances, which only complicates the technique of definitional balancing. The fact that O'Brien has structured his book around these categories, but is at the same time arguing against their future significance, suggests that he believes free speech policy will inevitably undergo changes. He hints at the importance of advancing technology, which makes a great deal of sense considering the role of technology in previous cases: "As technology advances and new First Amendment challenges arise, the Court may well find new categories of constitutionally unprotected expression or further content-based exceptions to its categorical approach to freedom of expression." Although it can be bold to try to predict the developmental strategies of the Supreme Court, O'Brien's ideas possess sound backing and thought with regards to where he sees the direction of Free Speech policy heading in the near future.

Throughout the book, O'Brien focuses his discussion and analysis of these categories of unprotected expression around the issues and questions regarding why freedom of expression matters. The question of the relevance of freedom of expression and its restriction acts as a guiding principle, providing the discussion and analysis of Supreme Court decisions with a practical undertone that comes in welcome contrast to the often technical and rebarbative nature of actual court cases. In so doing, O'Brien indirectly makes the point that freedom of speech policy affects everyone's lives, and discussions thereof should be accessible to readers beyond legal scholars.

The manner in which O'Brien reconnects his central focus question to his concluding argument ultimately strengthens his final analysis. When speaking about potential future Supreme Court philosophy, O'Brien recommends that the Supreme Court will and should continue to confront the question of why society values freedom of expression. He asks, "Why do we, as citizens no less than Congress and the Court, value freedom of expression?" By placing this question at the forefront, it will allow definitional balancing to garner less

weight, which it has already begun to do. The concluding argument proposes a number of the same questions from the introduction, granting his analysis another level of continuity and purpose. Aside from the past techniques of the Supreme Court, these questions about the relevance and value of freedom of expression are most useful when thinking about the future.

Overall, O'Brien's book deserves praise and is an excellent read for anyone looking for a succinct account and analysis of the history of the free speech clause of the First Amendment. The author succeeds most by providing a historical account and building his arguments to convey practicality and resonance for future generations. His passion for the subject is apparent, causing the reader to further understand the severity of the issues at stake within the this topic. There is no doubt that the restriction of free speech in the United States affects nearly every form of media that is consumed and every public action that occurs.

When thinking about the book in relation to the idea of exceptions, O'Brien's argument suggests that there are periods during which the number of exceptions increases, while there are also periods during which the number of exceptions decreases. Thus, it is crucial for the Supreme Court to be reevaluating its methods in order to determine the degree to which exceptions should be permitted based on the current climate. Even though past decisions bear tremendous weight upon the Supreme Court, it is more beneficial to consider the relevant circumstances and questions at work within the specific case.

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