SOME ASPECTS OF LEGAL REASONING CONCERNING CONSTITUTIONALLY PROTECTED RIGHTS

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Introduction

In this paper, I shall outline a conception of constitutionally protected rights in a democratic legal system and of legal reasoning about such rights. Though space does not permit full supporting argumentation, I shall indicate how this view can be constructed from aspects of the treatment of freedom of speech by the courts of the U.S. in applying the First Amendment of the Constitution of the U.S. There are three principal points which shall emerge from the discussion:

1. That legal reasoning concerning constitutionally protected rights in a democracy involves reference to general moral and political principles, policies, or goals, which embody significant moral and political values thought important to democracy. Thus, difficult cases are decidable not simply by appeal to previous cases, or the "meaning" of a statute or constitutional provision. The significance of previous cases, and the determination of the meaning of the constitution must be made by appeal to the point or purpose of having such rights, i.e., to the role of such rights in furthering the values of a constitutional democracy.

2. That constitutionally protected rights occupy a place of special priority in reasoning concerning what conduct is ultimately legal. Thus, when judges are faced with a conflict of an individual interest in a constitutional right, and other interests the state protects, constitutional rights must take precedence. The individual, then, who enjoys a constitutionally protected right is granted a measure of legal autonomy; his

choice to exercise a constitutional right invalidates contrary statutes, or invalidates their application against him.

3. When the behavior of individuals violates a statute, but also is done for, or involves in important ways, the moral and political values furthered by constitutional rights, the final determination of the legality of that activity depends less on the existence of that particular statute and more on the understanding of the values that activity exemplifies or furthers.

I

I would like now to outline some general considerations supporting the claims just mentioned. As I shall eventually illustrate these points through aspects of the treatment of the First Amendment of the U.S. Constitution, I shall concentrate on the right of free speech.

The foremost consideration is that particular kinds of government are understood to incorporate or safeguard certain kinds of values, for which they are thought desirable or not desirable. The abstract forms alone can have no attraction; rather, it is the moral and political ideals they instantiate and protect which constitutes their appeal. Where there is an operative concept of constitutionally protected rights, I would claim, there is also the idea that certain values and goals are so central to that form of government, are so constitutive of the ideals and policies which a government of that kind is held to implement and support, that they require special recognition and protection through the legal machinery. If monarchy is thought to have divine sanction, a legal system granting supreme rights to the king is the only kind consonant with the values involved in that conception. While the values of a democracy are not so simple, with respect to freedom of speech, at least the following seem to apply: (a) democracy has a commitment to maximizing citizen participation in government, and this is most desirably achieved through a fully enlightened citizenry, fully informed on the issues affecting the life of the

community; a prime guarantor of this is freedom of expression, which permits open debate and discussion; (b) democracy, in various ways, recognizes the fundamental equality of men as persons, and seeks to incorporate as a value respect for individuals as persons; and clearly, recognition of one another's right to express ourselves is a prime form of showing mutual respect for one another as rational individuals. By committing the legal system to protection of freedom of speech *via* the grant of a constitutional right, those values are given concrete recognition and protection.

The significance of this conception is first, that where the legal system is faced with difficult cases, e.g., cases of actions not clearly speech, but involving communication — as in certain forms of picketing — the controlling idea in decision-making should be the extent to which that activity exemplifies or furthers the values the right of free speech is meant to safeguard in a democracy.

Second, it will follow that since constitutionally protected rights are connected with values thought to have an *essential* connection with democracy, they must take priority over legislation incorporating other values. The acceptance of the concept of constitutionally protected rights implies that if the state wishes to pursue other values, it must do so in ways other than ones which impinge on activities constitutionally protected. The incorporation of constitutional rights in a legal system means that the state cannot say to individuals brought before it that: "your right to engage in this conduct is one interest among others which the state is committed to protect, and against which it must be balanced". And it is easy to see that constitutionally protected rights could not long survive if the rights of persons are to be balanced against so-called "rights of society". The person brought to the bar is only one among the many; how could his individual interest override those of all the others ? If constitutional rights are to be meaningful, they must be defeasible only by claims of other persons to protection of *fundamental* rights and values. This will mean, for example, that even if the state has a right to preserve itself, it cannot do this by cutting off advocacy of

revolution. Other means must be employed, e.g., persuasive speech or actions convincing people there is no need to revolt. Only when such advocacy occurs in a situation where it clearly poses an immediate and serious threat to order, by endangering the life and property of others, could interference be justified. In such cases, there are particular persons who are threatened; the "rights of society" in this case are manifested in the claims individuals could make to protection.

This conclusion has three important corollaries: First, that the mere existence of a constitution *saying* certain rights are protected does not suffice for the claim the system is one incorporating constitutionally protected rights. Legal reasoning in the system must, in addition, grant an actual priority to those freedoms. Second, *if* a legal system *does,* in adjudicating conflicting values, give precedence to certain values in the form of protecting individual freedoms, then it *does* incorporate, if only in a functional sense, constitutionally protected rights. And, third, it will follow that there is a difference between having a right under law, and having a constitutionally protected right. To have a right under law means that others cannot interfere with doing what one has a right to do. To have a constitutionally protected right means that even the government cannot interfere with acts of that kind, not even by passing laws against that kind of conduct, not even if the exercise of that right means the loss of other values.

II

The points I have been making are illustrated to a certain extent in the history of the interpretation of the First Amendment of the U.S. Constitution (from which it follows that, to that extent, the U.S. recognizes constitutionally protected rights).

A number of cases which reached the Supreme Court involved the claims that forms of behavior not clearly "speech" were nonetheless protected by the clause of the First Amendment guaranteeing freedom of speech. Such behavior included

picketing by labor unions, the handing out of brochures and pamphlets, wearing of badges, carrying of signs, and even sitting at a lunch counter knowing the claimants would be denied service, in order to demonstrate the existence and extent of racial discrimination in the southern portion of the country.

Though the last mentioned kind of case was not decided on the grounds of First Amendment protections, Mr. Justice Harlan reminded the court:

> We would surely have to be blind not to recognize that petitioners were sitting at these counters, where they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country.
>
> Such a demonstration, in the circumstances of these two cases, is as much a part of the "free trade in ideas" as is verbal expression, more commonly thought of as "speech." It, like speech, appeals to good sense and to "the power of reason as applied through public discussion" just as much as, if not more than, a public oration delivered from a soapbox at a street corner. ([1])

In other words, the court was being reminded that the activity involved instantiates and contributes to the values which freedom of speech is meant to secure — the free trade in ideas — as well as or better than clear cases of speech.

Similarly, when labor picketing was brought under First Amendment protection, in the famous case of *Thornhill* v. *Alabama,* the court remarked:

> Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. ([2])

Moreover, at various times in the history of the jurisprudence of the First Amendment, the courts have stated the doctrine

of "preferred position", i.e., the doctrine that constitutionally protected rights occupy a privileged, fundamental status in the legal system. The doctrine was stated by Mr. Justice Rutledge in *Thomas* v. *Collins:*

> The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation..., will not suffice. These rights rest on firmer foundation... Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation... where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indespensable democratic freedoms secured by the First Amendment... That priority gives these liberties a sanctity and sanction not permitting dubious intrusions. ([3])

Now, the Supreme Court, it is true, has not been consistent in asserting the "preferred position" doctrine. Indeed, the "balancing of interests" test has often come close to treating First Amendment rights as mere rights among others, i.e., rights which must be balanced by other interests, including "government interests". But, when this was done, there have been others on the Court who sensed that such a view, followed persistently, would undermine the status of First Amendment freedoms as constitutionally *protected* rights. A forceful spokesman for this position has been Mr. Justice Douglas, who dissented in *Beauharnais* v. *Illinois*:

> The First Amendment is couched in absolute terms — freedom of speech shall not be abridged. Speech has therefore a preferred position as contrasted to some other civil rights... Yet recently the Court in this and in other cases has engrafted the right of regulation onto the First Amendement by placing in the hands of the legislative branch the right to regulate "within reasonable limits" the right of free speech. This to me is an ominous and alarming trend. The free trade in ideas which the Framers of the Constitution visualized disappears. In its place there is substituted a new orthodoxy — an orthodoxy that changes with the whims of the age or the day, an orthodoxy which the majority by solemn judgment proclaims to be essential to the safety,

> welfare, security, morality, or health of society. Free speech in the constitutional sense disappears. Limits are drawn — limits dictated by expediency, political opinion, prejudices or some other desideratum of legislative action. (4)

The upshot of all this is that in a legal system which recognizes constitutionally protected rights on a broad scale, individuals having those rights enjoy a measure of legal autonomy — their choice to exercise those rights cannot be abridged merely through the erection of prohibitory statutes. Thus, where a statute exists prohibiting conduct which exemplifies, implements, or fosters values and goals which underly constitutional rights, the final determination of the legality or illegality of those actions depends less on the existence of that statute, and more on the role of that conduct in relation to the underlying policies and ideals the legal system is thought to incorporate. And, to the extent a legal system fails to reason in this way, to that extent it does *not* recognize constitutionally protected rights.

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NOTES

(1) *Garner* v. *Louisiana*, 368 U.S. 157 (1961).
(2) *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).
(3) *Thomas* v. *Collins*, 323 U.S. 516 (1945).