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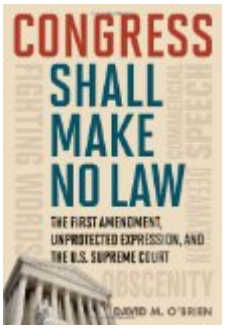
David M. O'Brien. *Congress Shall Make No Law: The First Amendment, Unprotected Expression, and the Supreme Court.* Lanham: Rowman & Littlefield, 2010. xiii + 136 pp. $29.95 (cloth), ISBN 978-1-4422-0510-9.



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The Jurisprudence of Forbidden Expression

Despite Justice Hugo Black's onetime admonition that the First Amendment phrase "Congress shall make no law … abridging the freedom of speech, or of the press" literally means "no law," American courts have always designated some kinds of expression as beyond constitutional protection and subject to congressional or state restriction. David O'Brien's compact new book explores the law governing those varieties of unprotected speech. In a succinct eighty-five pages and five chapters, he meticulously examines the history of expression that the United States Supreme Court has excluded from First Amendment safeguards. In doing so, he goes over much ground already covered by First Amendment scholars and Supreme Court historians, but his book is valuable for addressing unprotected expression in one place. More important, O'Brien's book raises an interesting legal question: If there is a jurisprudence of protected speech, is there also an analytical system defining unprotected expression?

O'Brien's approach to unprotected expression is doctrinal. His book focuses mainly on U.S. Supreme Court decisions since World War I, supplemented by an eleven-page time line prepared by Laura Brookover tracing cases, statutes, and controversies involving unprotected expression through American history. He contends, not surprisingly, that the Supreme Court's initial definition of unprotected speech emanated out of World War I-era decisions and the "clear and present danger" doctrine that utilized the common law "bad tendency" test to proscribe subversive, pernicious, and disruptive public expression. Subsequently, O'Brien argues, the Court gradually abandoned "clear and present danger" (though Cold War controversies briefly revived it), found techniques of simply balancing speech rights against social stability to be too ambiguous, and ultimately settled upon Justice Frank Murphy's famous maxim in *Chaplinsky v. New Hampshire* (1942) that there are "certain well-defined and narrowly limited classes of speech" that have never enjoyed legal protection, including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words' " (pp. 11-12).

Given his doctrinal approach, O'Brien stops short of exploring *Chaplinsky*'s potential reliance on nineteenth-century practices regarding nonprotected speech, such as those revealed in works by Michael Kent Curtis and David Rabban.[1] The appended Brookover time line documents the relevance of the nineteenth-century state heritage, at least, by citing the Pennsylvania obscenity case of *Commonwealth v. Sharpless* (1815) (p. 87). Nonetheless, O'Brien focuses on *Chaplinsky*'s analytical structure. It was a "two-level" approach which extended First Amendment protection automatically to politically and socially valuable speech, but excluded expression that caused harm without adding to civil discourse (p. 12). As O'Brien sees it, the Supreme Court never treated this scheme as a rigid test, but as a "baseline" for "principled or definitional balancing" (pp. 81, 11). That is, the Court adopted Murphy's categorical framework of non-

protected speech, but within each category, it proceeded in a "high contextualized" case-by-case fashion to weigh the value of open expression against its alleged harm, circumstances, and medium of communication (p. 78).

In a series of topical, rather than chronological, chapters on each of Murphy's categories, O'Brien finds that the Supreme Court's nuanced adjudication narrowed the range of unprotected expression over the course of the twentieth century, with notable exceptions. Consider the Court's handling of "lewd, obscene and profane" expression. According to O'Brien, after the Court led by Chief Justice Earl Warren repudiated the broad 1868 *Hicklin* definition of obscene material, the Court under Chief Justices Warren Burger and then William Rehnquist tightened criteria, but still virtually left only hardcore pornography, indecent expression on broadcast media, and especially child pornography in the unprotected classification. Indeed, the Burger and Rehnquist Courts had a soft spot for children. Those Courts upheld New York's ban on the distribution of child pornography, and sustained a federal law requiring public libraries to install Internet filters, though they struck down restraints on "virtual child pornography" as not actually harmful to children and annulled the Child Online Protection Act as too broad for Internet communications.

Or take defamation. It remains a category of unprotected expression, O'Brien maintains, but the Warren Court's *New York Times v. Sullivan* decision (1964) severely narrowed it and complicated its application. In place of the broad old concepts of seditious and civil libel, *Sullivan*'s "actual malice" test for libelous expression created a tough new national definition of unprotected defamatory speech that courts found very hard to implement. Fraught by internal disagreements and frequent dissents, O'Brien shows, the Supreme Court parsed the application of *Sullivan*'s "actual malice" criteria. The Court applied it to "public figures" as well as to "public officials" (but not private persons who had only to prove negligence), to fabricated quotations (but not parodies), to negative opinions (not just false facts), and sometimes to invasion of privacy.

Or then again, look at "fighting words." O'Brien contends that it has become "a virtually null category" of unprotected speech, but adds that certain related forms of expression remain exempt from First Amendment coverage, depending upon their circumstances (p. 61). The Supreme Court approved "hate speech" laws enhancing sentences for hate-induced crimes (but not laws banning hate speech on the basis of its content), anti-cross-burning statutes prohibiting "true threats" (but not those infringing on symbolic expression), punishment of illegal conduct like draft-card burning that included incidental speech elements (but not flag burning due to its symbolic political expression), and restrictions on demonstrations or solicitation in non-public forums (but not protests in public settings, subject to time, place, and manner regulations). One big exception, O'Brien stresses, was student speech in primary and secondary schools. Here, the Supreme Court has become "increasingly suppressive" to prevent disruption or educational policies or routines (p. 78).

The book clearly shows that *Chaplinsky* has been a benchmark for the Supreme Court's treatment of unprotected speech, but it is not fully convincing that the case has been the core or more than just a part of the Court's jurisprudence in that field. As the author forthrightly affirms, there are many other kinds of expression that have not received First Amendment coverage–perjury, plagiarism, fraud and false advertising, etc.–and some that have been subject to regulation–prisoners' communications, military secrets, speech targeted toward captive audiences, etc. How the Supreme Court went about exempting these other kinds of expression from First Amendment protection, whether they are part of some larger analytical system of unprotected speech, and how they relate to *Chaplinsky* remain unanswered questions.

O'Brien examines one category of expression outside of the *Chaplinsky* framework, commercial speech, whose partial constitutional recognition in recent years marks one of the most important developments in modern unprotected speech jurisprudence. Initially excluded by *Valentine v. Chrestensen* (1942), commercial speech got some protection during the Burger and Rehnquist years on the grounds that financial motives need not "negate all First Amendment guarantees" (p. 51). Subsequently, the Burger and the Rehnquist Courts went on to protect commercial speech involving contraceptives, electoral initiatives, real estate, lawyer advertising, and other matters, though these Courts remained divided as to whether commercial speech was still an unprotected category per se, or whether it was a less protected category and on what standards.

In the near future, O'Brien expects the Supreme Court to sustain its cautious approach to unprotected expression, despite temptations presented by new technology and controversies to enlarge its scope. In the case of *United States v. Stevens* (2010) that struck down the 1999 Depictions of Animal Cruelty Act, he points out,

Chief Justice John Roberts refused to use recent precedents for nonprotected expression as "freewheeling authority to declare new categories of speech outside of the scope of the First Amendment" (p. 84).

Overall, O'Brien's interpretation nicely dovetails with prevailing views of free speech law's general liberalization in the twentieth century, but his book's tight doctrinal focus on the *Chaplinsky* formula has limitations. For one thing, it overlooks developments implicating unprotected expression. Consider communications that courts historically did not define as "speech," but later reclassified as protected expression, such as motion pictures or more recently campaign financing (both cited in the Brookover time line at pp. 88-89 and 97). Or consider types of protected expression like speech in public forums that have eroded in practice. O'Brien discusses the development of the public forum doctrine as a source of protected expression, but stops short of examining the Supreme Court's recent abortion clinic protest decisions of the 1990s that allowed restraints on public demonstrations (again, cited in the Brookover time line on pp. 95-96). Timothy Zick has recently characterized these "buffer zone" cases as an ominous new trend abetted by modern architecture, security concerns, and privacy issues that may narrow speech rights in public places.[2]

In addition, the doctrinal approach does not fully illuminate the effect of changing judicial philosophy on unprotected expression. The book acknowledges that unprotected speech raises fundamental questions about the role of free speech in a democratic society–its instrumental value, its intrinsic value, its test of truth in "the marketplace of ideas," and its vulnerability to the "slippery slop" of government suppression (p. 13)–but the book does not go very far to explicate how these philosophical issues influenced individual decisions or the Supreme Court's unprotected speech jurisprudence. The book does not, for instance, evaluate the impact of Justice William Brennan's strong defense of "uninhibited, robust and wide open" speech in *New York Times v. Sullivan* or *Texas v. Johnson* (1989) on the boundaries of nonprotected expression.

Most important, the book's doctrinal and topical arrangement neglects the unfolding sociopolitical context of unprotected speech law. While the book acknowledges Cold War passions and certainly recognizes changes in Supreme Court personnel, it does not discuss the influence of electoral politics on the Court's membership and free speech outlook, particularly during the remaking of the Court from the liberal Kennedy-Johnson era to more conservative Nixon-Reagan years. Moreover, the influence of the 1960s civil rights campaign and antiwar movement on speech restrictions is absent from the book, as it the impact of the New Religious Right's 1980s crusade against pornography and indecency, developments richly described in Christopher Finan's recent book.[3]

Surely, a great challenge in analyzing nonprotected speech is to explain not only how, but also why it evolved as it did. The answer must reside party in the politics of the Supreme Court's changing membership and in the Court's interaction with its changing social context. O'Brien's book makes a fine contribution by delineating the Supreme Court's evolving doctrine regarding nonprotected speech during the twentieth century, but it leaves exploration of outside political, intellectual, and social influences on that doctrine's development to other scholars.

Notes

[1]. Michael Kent Curtis, *Free Speech, "The People's Darling Privilege"* (Durham: Duke University Press, 2000), 194-201; David M. Rabban, *Free Speech in Its Forgotten Years* (New York: Cambridge University Press, 1997), 23-44, 129-176.

[2]. Timothy Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places* (New York: Cambridge University Press, 2009), 83-95.

[3]. Christopher Finan, *From the Palmer Raids to the Patriot Act* (Boston: Beacon Press, 2007), 204-267.

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