

The First Amendment and Cultural Creation

(Version Prepared for FESC II 2014, Yale)
Not for Circulation Beyond Conference Participants

Esteve Sanz,

Resident Fellow, Information Society Project, Yale Law School

Abstract

In this essay I propose an existentialist interpretation of the First Amendment's role in the United State's collective and individual process of cultural creation. To do so, I first give a theoretical account of how free speech constitutes the central existential motive of America's cyclical forms of cultural production. I then juxtapose the role of the First Amendment existential force with the legal mechanisms that are largely assumed creating culture in the United States, both big C culture (works of art or popular entertainment) and small c culture (the binary moral boundaries and meanings of suffering with which a community defines itself). Ultimately, this essay suggests that the freedoms protected by the First Amendment are the cultural-legal mechanism behind the extraordinary force of the cultural creation in the US, while the Progress Clause and the Constitution itself are legal instruments that shape the process of cultural creation in particular directions.

Introduction

This essay gives continuity to the incipient theoretical exploration of the First Amendment as a sociological force of cultural creation. Legal scholarship has of course addressed the relationship between the First Amendment and culture, but the preferred subject of such vast and interesting work is the potentially dysfunctional or functional relationship between the mechanisms derived from the Progress Clause, especially the ones relating to intellectual property (IP), and the Amendment. Is IP a form of censorship? Or are cultural works forms of “speech” protected by the First Amendment? These are certainly relevant questions, but they are directly limited by the need to establish conceptual boundaries and legal “scopes” that can be translated into reform.

On the other hand, the less normative and emergent sociology of the First Amendment has also presented a relatively narrow view of the potential effects of the Amendment and the legal texts that derived from it. Here, the classic variable under scrutiny is legal change in civil liberties, and the targeted analytical space is the one that separates State from society, and the potential perversions of such separation. What political, institutional and socio-economic factors shape the actual application of the principles underlying the First Amendment? Again, this is an extremely relevant question, but it is one that misses the plethora of unintended or indirect consequences that the First Amendment itself could express or even provoke.

For if the First Amendment is so rich in sociological implications it is precisely because it directly affects processes of meaning-making, which super-exist the existence of every social formation and conceptual discussion.

In fact, the First Amendment broader effects on culture have changed and become even more visible in the Digital Age. As Jack M. Balkin argued in a seminal paper (2004), Republican and liberal free speech almost exclusive concerns with rational democratic deliberation are

insufficient to both operationalize and understand the role of the First Amendment in shaping and expressing the US democratic culture. These traditional interpretations tend to leave aside, for example, the importance of nonpolitical expression, popular culture and individual liberty in the process of meaning-making. All these forms of expression must be in turn shaped by the First Amendment. The contingencies of the Digital Age offer in fact an ideal space to uncover further hidden aspects of American culture.

The First Amendment as an Existential Clause

Given me liberty, or give me death!

Patrick Henry, 1775

Analytically speaking, the First Amendment is a legal *Dasein*: it is the only section in the American legal system that does not presuppose a particular ontological meaning. It simply *exists* to intentionally reject the otherwise monopolistic role of the rationalized structures of the State in the creation of (unrealistic) meaning. Thus, the First Amendment offers both a pragmatic standpoint that justifies and promotes collective engagement in the cultural boundaries of social existence, and an analytical standpoint from which one can access deeper elements of the collective existence of the United States. This would of course not be the case if free speech would not have a central social significance, as it does, quite distinctly, in the USA.

Nietzsche, Heidegger and Sartre treated *Dasein* as the entity which is constantly engaged in the world. We could trace the political and cultural engagement of the First Amendment historically, in a progressive fashion, but then we would limit the second element that makes the analogy with *Dasein* interesting. Like *Dasein*, the First Amendment sociological role cannot be grasped except

by taking *time* into full consideration. The clause is in itself rooted in temporality, giving a socially respectable unity to the future, the past and the present of American society.

Since its very beginning, the First Amendment *is* the past, not only because “it was in operation” when this past was being socially constructed, but also because the very materials that we now have to directly account for the living time of such past are culturally constructed by the present First Amendment. Like *Dasein*, the First Amendment has “grown up both into and in a traditional way of interpreting itself: in terms of this it understands itself proximally, and within a certain range, constantly” (Heidegger, 1926: 41). Then, and also like *Dasein*, the First Amendment can “discover tradition, preserve it, and study it explicitly”. This is why the study of the First Amendment itself is always involved with an inquiry about the current meaning of the American collective existence: it is one of its most privileged access points.

Yet, one cannot understand the role of the First Amendment in the generation of culture without inquiring about its “future”. The First Amendment *is* at one level an essential part of the American political project. The subject of American liberalism *exists* by virtue of her free thought and free speech, ultimately amalgamated into collectively constructed narratives outside the scope of State censorship. But there is one major issue readily available to this interpretation: the doctrines promoting rational liberalism have never been in harmony with a strong sense of national identity- the opposite is in fact the case. How can one include the overwhelming American nationalism in a rationalist consideration of the First Amendment?

It cannot be included - the First Amendment cannot be the product of reason alone. Rather, it is both an expression and an agent of social proliferation of a pre-existing and broader emotional truth: “the Nation’s commitment to protect freedom of speech” (Post, 2011). Indeed, that the highly emotive and circumscribed “American Civil Sphere” (Alexander, 2006) is one of the most internalized discourses of America’s collective subject is already telling that there is an existential

dimension in the First Amendment that has gone largely unanalyzed.

This element, I would argue, is the possibility of not-being. Like *Dasein*, the First Amendment releases a way of “being-toward-death” - it places finitude at the center of American Society, not only by means of its reference to the inherent diversity of religious cosmologies (what is the “real” posterity?), but also, and more importantly, by the very sacralization of free speech.

Free speech, it is assumed, is untouchable and continues forever, but “political choice marks the moment that discourse stops and the action follows” (Kahn, 2005: 61). “Suffering”, like *Dasein*, is inherently outside discourse, but it is what discourse is about (Sanz, 2014). When the State *acts* over lives and bodies, it is invariably claiming for itself the monopoly of the meaning of suffering: it consolidates rationalized narratives of “security” (right) or “health” (left) which are not up for discussion anymore.

When the State acts “rationally” is when free speech dies, and the American society appears to be in danger. The ultimate recurrent American political action, war, is then not a celebration of the nation’s collective existence: it is precisely its termination by way of the termination of the First Amendment, which is in itself its agent of re-birth.

Indeed, the subjective individualism of the First Amendment makes American society an open society *a la Bergson*, never fully ready for battle, and thus open to regeneration through the creative emotions involved in “the Nation’s Commitment to protect freedom of speech”. Like *Dasein*, the First Amendment is constantly aware of the finalization of free speech (collective live) in the moment of State action (collective death), what creates a permanent anxiety towards the future existence of “American democracy”, but also the impulse to revive through speech and Culture precisely once the very circumscribed moment of State action appears to have passed.

We have here arrived at a definition of the underlying cultural-legal mechanism that, I argue, energizes the cultural production of American society: the First Amendment is an existential clause

that energizes itself in a cyclical way. There is nothing outside it in the collective self-understanding and self-construction of the United States. Yet, freedom of thought and freedom of speech die and resuscitate recurrently- they are protected and at the same time existentially threatened by political institutions. The sublimation of this contradictory process is how America creates culture.

Before embarking into a comparative exercise to further elucidate the role of the First Amendment in cultural creation, it is worth enumerating more concretely the ways in which the First Amendment is at the foundation of cultural production (broadly understood) in the United States, starting by the more stable existential points derived from a liberal doctrine, and gradually continuing with the more hidden and cyclical existential elements that I have previously described:

Being-There

1- Freedom of speech is one of the founding, if not the founding, principles of the liberal ideal, and from this we can already derive a very significant element related to cultural creation. The autonomous liberal agent speaks his mind and his way into existence. This process is not circumscribed to political discourse. Social meanings, artistic endeavours and even science are equally affected by such liberal ideal, which ideally decentralizes cultural production to everything and everyone that “exists” in the collective context. A basic awareness of existence framed within the terms of the liberal culture is then connected to self-expression and the social production of knowledge.

2- The First Amendment culture and doctrine tend to regard all ideas as deserving respect, ideally rejecting forms of centralized discrimination or censorship based on different view-points. This is the other side of the liberal ideal of the sacred autonomy of the subject,

but it is not entirely the same. That “speaking” becomes “existing” in the eyes of the other gives a particular social status to the act of speaking in itself. This is not necessarily an “irrational” process, but it is certainly an “anti-methodological” one. The anti-methodological character of free-speech in the US reduces, by definition, social intimidation, thus favoring an expansive-decentralized form of cultural production.

3- Under the First Amendment, the possibility of State censorship, especially in political but also and by extension in artistic speech, becomes significantly scrutinized. This in itself would appear as a strong liberal argument for the central role of the First Amendment in the production of culture. Limiting the possibility of censorship by the political authority generates an “incentive” for cultural production.

4- This could indeed be the case. Yet, State censorship, and State speech regulation, as we can easily observe in historical or current Western authoritarian States, can in fact also be powerful sources of cultural production, for they mark (and sometimes intensively fund) the lines for a more steady form of creation, both in continuity and “against” State discourses. Even authoritarian regimes need Cultural production to sustain and *argue* their meaning. Similarly, the very fact that transitions to democracy exist implies that there is cultural creation in strongly centralized States. The key difference of free speech political regimes in terms of cultural production is then not the possibility of institutional repression, but that the State (and thus the reasons of State) can completely cease to be a referential point, unconscious or not, of cultural production. It is not a coincidence that some of the most rupturing works of modern art have been produced by artists “living abroad” - the truth of State law does not interfere between the artist and the production of a new artistic/social

truth. The First Amendment creates similar conditions in a domestic context.

5- Cultural production has been linked to a metaphysical sentiment: there is a “leap of faith” when one decides to put autonomous speech, thought or expression “out there”. Even if there cannot be an initial audience, the metaphysically exalted creator believes, “God will see and value” my celebration of his existence. Freud gave us the tools for *one* (quite imposing) secular interpretation of this sentiment - the metaphysical creator is ultimately pleasing his father, or looking for him (1910). After Durkheim (1912), it is also not difficult to see how the Internet can become a secular and decentralized surrogate for such creative impulse - if God *is* society, the imaginary society of the “open” Internet *is* then a God-audience. The First Amendment separation and protection of autonomous religious practices, and promotion of the free-speech telos of the Internet, affect the metaphysical motive in an interestingly similar way: the cultural-legal protections decentralize the ultimate interlocutor who is going to value and purify our creative confessions. Through the First Amendment, the Founding Fathers were actually renouncing to their “demi-god” status: what the First Amendment culture rejects is the *existence* of an abstract authority who holds the exclusive right to hear and interpret.

Being-Toward-Death

6 (Life) - Yet, every collective soul has its collective abyss, and its own way of escaping it. In strong free-speech societies, being-there dies when State-action claims for itself the meaning of existence: Reason, One-Great-Natural-Truth-to-Be-Discovered-and-Applied, that is, the-greatest-way-ever-invented-to-be-out-there-and-not-there. This collective abyss

is simply more visible and easier to identify than in non-free-speech States, the endemic pretension of which is their promise of “Eternal Life” in exchange for citizen's individual humanity: everything is action (power-love-sacrifice) because everything is the State (past-present-future). Free-speech provides a central form of resistance to totalitarian mass-posterity by placing awareness of collective death at the center of society's collective life, which then gets translated into a particular form of individual choice, and thus a particular form of cultural production. Freedom of expression is an antidote against the universal validity of a future other than the individual's death: the only universal future *is* death. Not heaven, nor hell; nor national history, nor national forgiveness; not an artistic “masterpiece”, nor a family-future-audience under control: the only thing that is really not up for discussion is that we suffer, and that we will all become speechless bones inside a box - that's the ultimate equalizer, which is being constantly reminded, when its collective life is expanding, in a significant section of the the cultural production of the US.

7 (Death) - America's collective identity dies when the State acts, but it positively knows (it has abundant proof) that the State is going to act sooner or later. Is then American constantly digging its own grave? It is, yes. We should first ask - what's the State? The State, in itself, is the abstraction of the highly unrealistic idea of universality, reason and statistical truth. It acts over bodies because there *is* a “genetic truth”. It acts over lifes because there *is* a “balance of power”. It acts over minds because there *is* an “econometric model”. Without free speech, the State represses the ultimate technical question (is any of these actually work?) and completely ignores, in a permanent fashion, the only actual reality, which is the reality of the existence of the individual human psyche and its death, thus depriving the individual of the moral decision as to how she should live her life. America's

identity is a loud collective claim about the individual ownership of this decision (give me liberty, or give me death!). This is why it believes so strongly in the power of free speech and the autonomy of the individual, what generates a cultural production on its own - but this very same faith in free expression as a source of individual responsibility is what explains how America is so enthusiastically involved in generating the statistical models, Cultural products, and military technology that create and legitimate the truths that pave the way for State action, which are the truths that repress free speech and make American society die and revive in a cyclical fashion.

8- (Resurrection) - Precisely because it is engaged in the world, America knows it is digging its own grave, and that is why it has never been the same when it has resurrected from its central wars, the epitome of State action and the death of United States. It is constantly preparing itself not for Enlightened progress, but for re-birth. Speech, expression, free elections, re-visiting its cultural past through the sociological and legal truths of the First Amendment: these are the agents of re-birth that generate yet again another type of cultural creation. Not a single European Union State has ever had a president of colour - few can even envision such possibility. Blind faith in free speech is an enormous source of openness, collective imagination and cultural creation when it is in charge of resurrection - it fuses the fragmented elements of the social system in such a collectively effervescent process that new and powerful collective truths are immediately generated. Both the price and the benefit in terms of cultural production are the awareness that death will be invariably keep coming back.

The First Amendment, the Progress Clause and Culture (to be elaborated)

The United States' exceptional impetus in the production and global and national distribution of cultural works has received multiple economic interpretations, from political economic approaches that place the emphasis on the power relationships among industrial and State players, to liberal frameworks that stress the role of the English language and the size of the internal market and cultural industries. The central legal reference in both explanations is the Progress Clause of the U.S. Constitution ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.") at the basis of the U.S. copyright and patent laws. Little attention, however, has been placed on the role of the First Amendment in stimulating works that have an artistic or emotional tone. When considered within a bounded, literal framework, the First Amendment is seen as stimulating the rational political debate in the public sphere. The First Amendment's widely explored and operationalized interaction with copyright law is centered on the mutual constraints between the two, a framework that assumes little overlapping between their two objectives, and thus obscures the narratives about possible broader effects.

The symbolic character of the First Amendment as a reflection of the particularities of the culture of the United States is clearly acknowledged, but little has been said about its central role in the stimulation of artistic productions, which requires a reading that locates, in analytical terms, the First Amendment next to, and not simply in interaction with, copyright law. This section will elaborate such a reading, ultimately suggesting the hypothesis that the First Amendment is the legal mechanism behind the extraordinary force of the cultural creation in the US, while the Progress Clause basically affects the industrial-symbolic infrastructure with which certain products are canalized, both

nationally and globally.

The First Amendment, The Constitution and culture (to be elaborated)

The United States culture super-exists its Constitution, which is nonetheless generally taken as the democratic essence of the country: an object of intense popular and intellectual debate, the Constitution is the iconic text with which the United States imagines and defines itself, constantly testing and rehearsing its key moral boundaries and narratives of suffering. The production of the United States culture seems then bounded by the sacred character of the founding law, be this an original or lived law. Yet, what enables such reading is not the Constitution itself, but the culture that super-exists the Constitution. It is through the faith and the trust invested upon the Constitution that the document becomes the Truth of the Law in the United States, the source code from which all legal truths proliferate in broader social contexts.

The First Amendment is generally seen as one of such truths, but it can also be read as the opposite: as the build-in legal mechanisms that allows the Truth of the Law to be de-constructed, to see the Constitution not as an original or living text, but as no-text, a document with no-meaning and thus open to whatever meaning one wishes to attach to it. This, and not the Constitution itself, this essay will argue, is what ultimately better expresses the investment of the U.S. culture in the idea of democracy. The symbolic trust invested in people by the founding political authority is the trust that, despite of the freedom of expression and thinking embedded in the American legislation, some sort of meaning will be ultimately attached to the founding legal text. Such trust, which is never out of danger, is reciprocated with popular commitment to cultural creation.

Key References

Alexander, Jeffrey C. The Civil Sphere.

Balkin, Jack M., 2004. Digital Speech and Democratic Culture.

Bergson, Henry. 1935. The Two Sources of Morality and Religion.

Heidegger, Martin. 1926. Being and Time.

Jung, Carl G. 1957. The Undiscovered Self.

Kahn, Paul. 2005. Putting Liberalism in Its Place.

Post, Robert. 2011. Democracy, Expertise, Academic Freedom.